

SASKATCHEWAN
OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

REVIEW REPORT LA-2014-001

Village of Killaly

Summary:

The Applicant made a request to the Village of Killaly (the Village) for records relating to a non-compliant septic tank. The Village did not respond to the request within the 30 day timeframe specified by section 7 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Applicant was not satisfied with the response he finally did receive from the Village and requested a review by the Office of the Saskatchewan Information and Privacy Commissioner (OIPC). The Village was requested to provide a new compliant section 7 response to the Applicant and failed to do so. The matter was treated as an expedited review, as per the OIPC's procedure, and the matter was escalated to the Commissioner's attention. He again requested that the Village provide the Applicant with a compliant section 7 response. Again, the Village failed to do so. The Commissioner recommended that the Village issue a compliant section 7 response to the Applicant within 30 days of issuance of this Review Report. He also recommended that the Minister of Justice and Attorney-General consider prosecution pursuant to section 56(3) of LA FOIP in respect to the refusal of the Village to comply with a lawful requirement of the Commissioner.

Statutes Cited:

The Local Authority Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. L-27.1, ss. 2(f)(i), 7, 7(2), 7(3), 12, 50, 56(3).

Authorities Cited:

Saskatchewan OIPC, Review Reports LA-2013-004, LA-2012-003, LA-2012-002, LA-2009-002/H-2009-001, F-2013-004, F-2013-002, F-2013-001, F-2012-001/LA-2012-001, F-2012-002 F-2010-001, F-2008-001, F-2007-001, F-2006-002, F-2006-004, F-2005-005, F-2004-007, F-2004-005, F-2004-003.

Other Sources

Cited: Saskatchewan OIPC, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review.*

I BACKGROUND

[1] On or about March 21, 2013, the Applicant made a request to the Village of Killaly (the Village) for the following:

Name and location of non-compliant septic tank as referred to in council's letter dated Mar 14, 2013. Any information on the problem with the septic tank.

[2] The Applicant apparently received no response to his request. On or about April 18, 2013, the Applicant wrote the following to the Village Council:

In the letter dated March 14, 2013 council expressed concern regarding a non-compliant septic tank. Because no information was included in the letter I contacted both councilors [sic] and the administrator who had all been at the meeting. I asked what septic tank council wanted checked. Nobody could give me any information why council wanted the tank checked or the location of the tank.

In order to check the septic system that council wanted me to look into I require the following information in writing-

- 1- The location of the tank in question.
- 2- Any reasons why they feel this tank may be non-compliant.
- 3- Any information council has that may be relevant to their concern.
- 4- Any instance of raw sewage leaking which must be reported To Sask Environment.

Please supply me with the requested information in writing as soon as possible.

[3] The Applicant had also made a second unrelated request to the Village and provided the prescribed \$20 application fee for each of the requests. The Village responded in a letter dated June 19, 2013 which stated:

I am returning herewith your \$40.00 as it pertains to your request regarding the enclosed notices you served on the Village Council.

- Council has consulted their lawyer and the conclusion was that they have done all they can. There is no more council is required to do.
- [4] On June 24, 2013, my office received a request for review from the Applicant. By letters dated July 4, 2013, my office advised both the Village and the Applicant of our intention to undertake a review.
- [5] In my office's letter to the Village, we highlighted the duties imposed upon the Village when an access to information request is received pursuant to section 7 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).¹ We also advised of our expedited process when a section 7 procedural defect is at issue. As such, my office requested that the Village provide a compliant section 7 response to the Applicant, with a copy to my office, no later than July 18, 2013 or else the matter would be escalated to my attention.
- [6] Two telephone calls between the Administrator for the Village and my office's Director of Operations occurred on July 11, 2013 and July 23, 2013. My office counseled the Village on what was required by section 7 of LA FOIP in response to an access request. As such, we extended the deadline to July 30, 2013.
- [7] On or about July 26, 2013, the Applicant received a letter from the Village that dealt with both this access request and a second unrelated access request.
- [8] On July 30, 2013, the Applicant called my office and indicated that he was not satisfied with the Village's letter dated July 26, 2013. A review of that letter by my office revealed it still did not comply with section 7 of LA FOIP.
- [9] My office again attempted to assist the Village in meeting its section 7 requirements in relation to this access request in a letter dated August 7, 2013.
- [10] In reply, my office received a letter from the Village dated August 16, 2013 which stated:

¹*The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.

Council reviewed your letter and they are of the opinion there is nothing more they can do with [the Applicant]. He has been given access to everything he requested, including all municipal records.

Council wishes this matter to come to conclusion.

[11] As per our expedited review process for procedural defects,² this matter was brought to my attention. I wrote to the Mayor, who is the “head” of the Village, to again ask that it comply with section 7 of LA FOIP on August 21, 2013, and November 15, 2013 and to the Administrator on September 11, 2013.

[12] It is my understanding that a compliant section 7 response has never been provided to the Applicant.

II RECORDS AT ISSUE

[13] No record has been provided to my office by the Village.

[14] The immediate issue is the preliminary matter that the Village has not provided a proper section 7 response to the Applicant. Furthermore, after this was brought to the attention of both the Mayor and the Administrator, to my knowledge, the defects have not been remedied.

III ISSUES

- 1. Did the Village of Killaly fail to provide a proper section 7 response to the Applicant?**
- 2. Did the Village of Killaly fail to comply with a lawful requirement of the Commissioner?**

²My office’s expedited review process for procedural defects is described in our resource *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* at p. 4 and 5, available at: www.oipc.sk.ca/resources.htm. I have also discussed this in my Review Reports LA-2013-004 at [29] and LA-2012-003 at [13] and [14], both available at: www.oipc.sk.ca/reviews.htm.

IV DISCUSSION OF THE ISSUES

[15] As the Village is a municipality, it is a “local authority” for purposes of section 2(f)(i) of LA FOIP as follows:

2 In this Act:

...

(f) “**local authority**” means:

(i) a municipality;

1. Did the Village of Killaly fail to provide a proper section 7 response to the Applicant?

[16] Sections 7 and 12 of LA FOIP provide 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

(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.

...

12(1) The head of a local authority may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

(i) the application is for access to a large number of records or necessitates a search through a large number of records; or

(ii) there is a large number of requests;

and completing the work within the original period would unreasonably interfere with the operations of the local authority;

(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or

(c) where a third party notice is required to be given pursuant to subsection 33(1).

(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.

(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

[17] The Applicant made the request in question on the prescribed form to the Village on or about March 21, 2013. When no response was received, he repeated his request on or about April 18, 2013.

[18] The Village only replied to the Applicant in a letter dated June 19, 2013 which stated:

Council has consulted their lawyer and the conclusion was that they have done all they can. There is no more council is required to do.

[19] This written response was not provided within 30 days of receipt of an access application, as required by section 7(2) of LA FOIP. In fact, the non-compliant response was provided about 90 days from the time the first access request was made and over 60 days from when it was made a second time. The Village provided no evidence that it extended the response period pursuant to section 12 of LA FOIP.

[20] I have previously commented on such delays in my Review Report LA-2013-004 as follows:

[13] It is often said that information delayed is information denied. One of the major problems with access to information regimes across Canada is delay in providing applicants with access to public records. The time limits set out in LA FOIP have not changed since it was proclaimed in 1993 and continue to be 30 days from the date the local authority receives the request for access. There is provision in limited circumstances for extending that 30 day period for an additional 30 days but that requires notification to the Applicant of the extension within the first 30 days after the request is received.

[21] Further, the Village's response to the Applicant dated June 19, 2013 did not contain the other elements required by section 7 of LA FOIP. This would include, indicating if a responsive record exists, providing information on how access is available or if it is denied and on what grounds, or advising the applicant that he may request a review by the Commissioner within one year after the notice is given.

[22] In my office's notification letter to the Village of July 4, 2013, we advised the Village of the duties imposed by section 7 of LA FOIP. We suggested resources to assist the Village as follows:

For further details on this procedure, we refer you to our January and June 2007, and January 2009 FOIP FOLIOs and pages 4 and 5 of our *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* document. Both are accessible via our website, www.oipc.sk.ca, under the *Newsletters* and the *Resources* tabs respectively.

[23] My office took further steps to counsel the Village on its obligations during telephone calls on July 11, 2013 and July 23, 2013. Following the conversation on July 23, 2013, our office advised the Village administrator by e-mail of where it could receive further support for LA FOIP compliance as follows:

The Ministry of Justice, Access and Privacy branch is mandated to train and assist government institutions and local authorities with instructions on how to process access to information requests. You may contact them at:

Ministry of Justice
Access and Privacy Branch
1020 - 1874 Scarth Street,
Regina, SK
S4P 4B3

Phone: 306-787-5473
Website: <http://www.justice.gov.sk.ca/accessandprivacy>
Email: accessprivacyjustice@gov.sk.ca

I stated to you during our telephone conversation that I would forward you some helpful information that assist you in completing a section 7 response to the applicant. For your information, I am including links to the following:

Helpful Tips: Best Practices for Public Bodies/Trustees for the Processing of Access Requests – [web address]

Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review - [web address]

Model (template) Letters under LA FOIP (Ministry of Justice, Access and Privacy Branch) - [web address]

In the Door, Out the Door (presentation by the Ministry of Justice, Access and Privacy Branch) - [web address]

[24] On or about July 26, 2013, the Applicant received another response from the Village as follows:

With regard to the request of the name of the person with the non-compliant septic tank, [the Applicant] admitted that it was his tank and council was satisfied with the explanation he gave. He claimed that he had spoken with [name of Ministry of Environment employee], Environment Officer for the region and that the tank was compliant.

Council has become increasingly frustrated with this situation. They believe they have acted in good faith and have done all they can.

That is the reason that [the Applicant] was advised to proceed as advised in the letter that was sent to him.

I trust this letter will sufficiently clear up the situation.

[25] Again, this letter did not comply with section 7 of LA FOIP. The Village did not acknowledge any records related to the Applicant's request and it was apparent that no search for records had taken place. None of the elements listed in section 7 were addressed by this response.

[26] My office attempted yet again to coach the Village with respect to the duties required by section 7 of LA FOIP in a letter dated August 7, 2013. It refused to comply and the matter was escalated to my attention. I wrote to the Mayor on August 21, 2013 asking once more for a compliant section 7 response.

[27] On or about September 13, 2013, the Applicant received a letter from the Village which stated the following:

Since you did not attend the meeting on Sept. 12, 2013, here is a response to some of your requests and some directives from council.

Enclosed find your receipt for the information you requested. **Council discussed the matter and they have no records that you request.**

If you are not satisfied you may call the Privacy Commissioner Office within 30 days.

[emphasis added]

[28] I have discussed a public body's duty to assist in several of my past Review Reports.³ In Review Report LA-2009-002/H-2009-001, I commented as follows:

³SK OIPC Review Reports F-2013-004 at [49] and [50], F-2013-002 at [26] to [28], F-2013-001 at [25] to [49], F-2012-002 at [50] and [51], F-2012-001/LA-2012-001 at [78] to [81], F-2010-001 at [58] to [63], F-2008-001 at [41] to [67], F-2007-001 at [59] to [61], F-2006-004 at [13] to [22], F-2006-002 at [20], F-2005-005 at [15] to [17], F-2004-007 at [13] to [19], F-2004-005 at [19] to [26], F-2004-003 at [5] to [29], LA-2012-002 at [104], LA-2009-002/H-2009-001 at [40] to [44], all available at: www.oipc.sk.ca/reviews.htm.

[40] In my Report F-2004-003, I concluded that under FOIP there is an implicit duty on the part of a government institution to make every reasonable effort to assist an applicant and to respond without delay to each applicant openly, accurately and completely. **This also means that the government institution must undertake an adequate search for all records responsive to the access request.**

[41] This position was confirmed in my Reports F-2006-001; F-2006-002; F-2005-005, F-2004-007 and F-2004-005.

[42] The duty to assist applies in similar fashion to local authorities. As I stated in my Report H-2008-001:

Though the duty on the part of the local authority to make every reasonable effort to assist an applicant and to respond without delay to each applicant openly, accurately and completely is implicit in LA FOIP, when HIPA applies, the duty to assist is explicit.

[43] It is important to note that LA FOIP is clear that access rights relate to “records that are in the possession or under the control” of a local authority. In HIPA, the test is whether the records are “in the custody or under the control” of a trustee. These rights of access apply regardless of whether those records are on or off site.

[44] When a request for access to information is received, **the public body has a duty to search for, identify and consider all responsive records in its possession/custody or control** regardless of location. If the records do not exist or are not within its possession or control, the requested records cannot be provided.

[emphasis added]

[29] In my view, it is not possible to meet the duty to assist by simply discussing the possibility of responsive records at a council meeting. There is no evidence that the Village searched for the records in a manner in which it could respond to the Applicant openly, accurately and completely.

[30] It also appears that the Village is labouring under the misapprehension that it is the Village Council that is vested with responsibility for LA FOIP compliance. As noted in my Review Report LA-2013-004, the Mayor is the designated “head” for all purposes of LA FOIP unless there was evidence of a section 50 delegation.⁴

⁴SK OIPC Review Report LA-2013-004 at [16].

[31] Further, section 7(3) of LA FOIP requires that a local authority give notice that an applicant may request a review by the Commissioner within one year after the notice is given. The Village's letter states that the request must be made within 30 days. While I acknowledge that in this case a review had already been undertaken, an inaccurate statement such as this can only serve to confuse and frustrate the access rights of an applicant.

[32] I made one last attempt to elicit a proper response from the Village in a letter to the Mayor dated November 15, 2013. No compliant section 7 response has been received. As such, I find that the Village is in contravention of LA FOIP as it failed to provide a proper section 7 response to the Applicant.

2. Did the Village of Killaly fail to comply with a lawful requirement of the Commissioner?

[33] In my Review Report LA-2013-004, I considered a similar case involving a different municipality. I commented as follows:

[21] The facts raise the question of legal obligations by the Village. I recognize the apparent unfamiliarity with LA FOIP on the part of the Village, Mayor and Administrator. I however, note that even after my office provided information about those legal obligations and referred the Village to a number of resources to assist them in their compliance efforts, there was still non-compliance...

[34] In this present case, my office provided the same information to this Village, provided several chances for it to comply with the legislation, yet it still has failed to provide a proper section 7 response to the Applicant.

[35] Section 56(3) of LA FOIP provides an offence provision 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;

(b) without lawful justification or excuse, refuses or wilfully fails to comply with any lawful requirement of the commissioner or any other person pursuant to this Act; or

(c) wilfully makes any false statement to, or misleads or attempts to mislead, the commissioner or any other person in the exercise of the powers, performance of the duties or 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.

[36] As outlined earlier in this Review Report, the Village made three separate failed attempts to provide a compliant section 7 response to the Applicant. Two of them were made after my office intervened and provided guidance on the requirements of the legislation and resources to assist it. Moreover, our office has also met significant resistance in dealing with the Village.

[37] After receiving the Village's second attempt to respond to the Applicant's access request, its letter dated July 26, 2013, my office wrote to the Village a letter dated August 7, 2013 indicating that its response to the Applicant was not compliant with section 7 of LA FOIP. Again, we provided specific instructions and explained that LA FOIP entitled the Applicant a right to access records.

[38] In reply, my office received a letter from the Village dated August 16, 2013 which stated:

Council reviewed your letter and they are of the opinion there is nothing more they can do with [the Applicant]. He has been given access to everything he requested, including all municipal records.

Council wishes this matter to come to conclusion.

[39] I note that in this mid-August letter, the Village claimed that the Applicant had "been given access to everything he requested, including all municipal records." Yet, a month later in its response of September 13, 2013 to the Applicant, it claimed that it had no responsive records.

[40] After the Village provided its third attempt to respond to the Applicant dated September 13, 2013, it wrote a letter to me dated September 25, 2013, stating the following:

[The Applicant] has been given all the information that is available. A thorough search was made and [the Applicant] has all minutes of all council meetings over the last 2 years plus any other correspondence.

Council has no more comments or records to produce on this issue.

[41] On November 15, 2013, I wrote to the Village as follows:

Since we have been attempting to get your cooperation since [the beginning of my office's involvement] and have [sic] met with very limited success, the next step would be for our office to issue a formal, public report that describes the problems encountered by first the Applicant and secondly by our office. The Village will be specifically named in the report but the Applicant will be referred to as "the Applicant". The report will be posted to our website, www.oipc.sk.ca and a news release issued at the same time.

Although we have received a number of letters from the Village, you have not complied with *The Local Authority Freedom of Information and Protection of Privacy Act* in a number of respects which have been particularized in both our correspondence to you and telephone conversation with [name removed], our Director of Operations. The fact that you apparently took some legal advice is no excuse for refusing to comply with our lawful requests.

As a result of past communication with you and the Village what appears to be outstanding is the request for (a) the location of the septic tank referred to in the March 14, 2013 letter to the Applicant from the Village and (b) any information on the problem with the septic tank.

This public report could still be avoided if the following could happen within 14 days:

- By reference to the request for two items of information particularized above and each of those items, you must explain whether there are any records (including memos, correspondence, emails, notes, post-it notes, audio recordings, photographs, reports) that were in the possession or under the control of the Village on the date that you received the formal access to information application. You cannot just keep asserting that you have answered the questions posed by the Applicant and that "there is nothing more" that you can do.
- If you advise there are no such records, you need to advise when you searched for responsive records, including how you searched, who was involved in the

search and why you searched in those places and whether there is any other place in which such records might be located.

- Such information must be provided over the signature of the Mayor since there has apparently been no delegation of authority by the Mayor pursuant to section 50 of LA FOIP.
- You provide the Mayor's undertaking in writing to ensure that the Mayor and the Administrator will take training on the obligations of the Village under LA FOIP within the next six months. This can be arranged through the office of the Access and Privacy Branch (Saskatchewan Justice).

Of course, if you are unwilling to take the foregoing steps, please advise immediately so we can proceed to issue our formal report without delay.

[42] The Village responded in a letter dated November 26, 2013 which stated:

Regarding the information on the septic Tank. You are asking us to search for and produce records that don't exist. There never were any records. Everything was verbal. We can't search for something that does not exist. We have answered all of your requests to the best of our ability. I don't know why this is so hard to comprehend.

We are a small Village. All three members of council have important full time jobs. Council is a volunteer position. We are not salaried. We have a small budget and can't afford waste Village Funds. We welcome you to come meet with us and hear our side of the situation. Our next Council Meeting is Wednesday, December 11, 2013 at 8:00pm. We seek final resolution to this matter so we can tend to Village matters as a whole, instead of [the Applicant's] one man crusade to waste our time and yours on something we have stated over and over as being resolved to the best of our ability.

We have two homes for sale in Killaly, that have been on the market for over a year. We don't need any negative publicity.

[43] I find that the Village refused to comply with a lawful requirement of the Commissioner, namely the failure to provide a proper section 7 response to the Applicant.

V FINDINGS

[44] I find that the Village of Killaly has failed to respond appropriately to the request for access to information in question. Specifically, there was no proper section 7 response in accordance with *The Local Authority Freedom of Information and Protection of Privacy Act*.

[45] I find that the Village of Killaly has failed to respond appropriately to the Office of the Saskatchewan Information and Privacy Commissioner when it was notified that a formal review was underway pursuant to Part VI of *The Local Authority Freedom of Information and Protection of Privacy Act*.

[46] I find that the failures described in the previous findings were without lawful excuse and with knowledge on the part of the Mayor and the Administrator that such actions constituted a violation of *The Local Authority Freedom of Information and Protection of Privacy Act*.

VI RECOMMENDATIONS

[47] I recommend that, within 15 days, the Village of Killaly clarify if the Mayor will retain responsibility for *The Local Authority Freedom of Information and Protection of Privacy Act* or if some or all responsibility will be formally delegated to other officers of the Village of Killaly pursuant to section 50.

[48] I recommend that the Village of Killaly issue a compliant section 7 response to the Applicant and my office within 30 days of issuance of this Review Report in consultation with the Ministry of Justice, that has administrative responsibility for *The Local Authority Freedom of Information and Protection of Privacy Act*.

[49] I recommend that the Village of Killaly ensure that those individuals with responsibility for *The Local Authority Freedom of Information and Protection of Privacy Act* receive a clear job description and appropriate training.

[50] I recommend that the Village of Killaly ensure that appropriate policies and procedures are implemented for compliance with *The Local Authority Freedom of Information and Protection of Privacy Act*.

[51] I recommend that the Minister of Justice and Attorney-General consider prosecution pursuant to section 56(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* in respect to the refusal of the Village of Killaly to comply with a lawful requirement of the Commissioner.

Dated at Regina, in the Province of Saskatchewan, this 10th day of January, 2014.

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