

BEST PRACTICES FOR RESPONDING TO ACCESS REQUESTS

The Freedom of Information and Protection of Privacy Act (FOIP) and The Local Authority Freedom of Information and Protection of Privacy Act (LA FOIP) grant individuals to access records within public bodies (government institutions and local authorities). Although this is not a complete step by step guide to respond to access requests, it is meant to provide public bodies with best practices to enhance the access rights of individuals and efficiencies in the process.

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and Privacy Commissioner

Best Practices for Responding to Access Requests

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Contact the Access and Privacy Branch of the Ministry of Justice for other tools, resources and training materials for responding to Access requests.

WHAT IS A RECORD?

For the purposes of FOIP and LA FOIP, a record is the package of documents that would be responsive to the applicant's access request that are in the public body's possession or control. Records can be in any form or format. Records could be documents, letters, database spread sheets, e-mails, photos, drawings, voice-mail, videos, text messages etc.

A summary, condensation, or secondary document, should not be substituted for source documents. In other words, an Applicant is entitled to original records, unless exemptions apply.

There have been instances where instead of providing the applicant with responsive records, public bodies offer summaries of the information requested, thus creating new records. This may be in fact what the applicant is looking for. However, a formal access request under either the FOIP or LA FOIP entitles the applicant to documents in their original form. FOIP and LA FOIP are clear that access rights under these laws is to "*records that are in the possession or under the control*" of that public body. In other words, the access provisions in both Acts are "record-driven" and not "information-driven." There is no responsibility under either Act to create records that do not otherwise exist.



BEST PRACTICES: APPLICANTS

Duty to Assist

An amendment was to FOIP and LA FOIP in 2017 that added a duty to assist. Section 5.1 of FOIP/LA FOIP requires that a public body respond to a written request for access openly, accurately and completely.

The duty to assist requires a public body to make every reasonable effort to not only identify and seek out records responsive to an applicant's access to information request, but to explain the steps in the process and seek any necessary clarification on the nature or scope of the request within legislative timeframes. If the access to information request received seems overly broad, it may be because the individual does not have a sophisticated understanding of the public body's mandate and record holdings. Communicating with the applicant at an early stage and throughout the process, will not only help to clarify the request, but also hopefully streamline the search and preparation of records for release. Most importantly, meeting the duty to assist may result in a more satisfactory experience for all involved and perhaps, results in less complaints to this office.

For more information about what the duty to assist means, check out our resource [*Understanding the Duty to Assist*](#).

Subsection 5.1(2) of FOIP/LA FOIP also requires a public body to provide explanations of the record if requested by the Applicant.

Identity of the Applicant

Some public bodies have asked whether there are any rules around the identity of someone who has made an access request. You will have noticed that in our reports, we refer to the 'applicant' and do not identify that person.

Our view is that a public body should not disclose the identity of the applicant to anyone who does not have a legitimate 'need to know'. A legitimate need to know relates to the specific knowledge an individual requires in order to process the access request.

For example, if the applicant is making an access request for their own personal information then their identity is clearly relevant when searching for records. On the other hand, if the applicant is requesting access to general information, their identity would almost always be irrelevant, and no one other than FOIP Coordinator would have a need to know their identity.

It is improper to treat applicants differently depending on who they are or what organization they may represent. It would also be improper to broadcast the identity of an applicant throughout a public body or to disclose the identity outside of the organization.

This approach is consistent with direction from the Federal Court of Canada and practices in other provinces.



Does it Matter Why an Applicant Wants Access?

Generally speaking, public bodies are not entitled to require an applicant to explain why records/information are requested. Further, the reasons should not be a factor in the decision to release or deny access to records.

However, there are reasons that a public body may want to ask the applicant to share his/her reasons. For example, it may help refine and/or narrow the request. This may lead to the efficient identification of responsive records with less search effort by the public body and less cost to the applicant.

Also, when deciding to waive fees, a public body may ask the applicant for information relating to whether the release of the records is in the public interest. See the [IPC Guide to Exemptions](#) for more detail.

Clarifying or Narrowing the Request

If an applicant makes a broad request or the request will result in a large fee because of the volume of records, it is best practice for a public body to contact the applicant and work together to clarify or narrow the scope of the request. This may have the result in getting the applicant the information they are seeking with less work for the public body. This is part of the duty to assist.

Note that if a public body's efforts to clarify or narrow a request are not successful; its ability to abandon a request is not automatically triggered. Section 7.1 of FOIP/LA FOIP allows a public body to abandon an access to information request if it invites the applicant to provide additional details about the request and the applicant does not respond within 30 days. However, the invitation to provide details must be in accordance with subsection 6(3) of FOIP/LA FOIP which provides that the public body must not be able to identify the records requested.

If a public body is just trying to narrow or clarify a request to produce fewer records, and the applicant is not responding promptly, the public body should keep working to process the request in order to meet legislated timelines.

Application to Disregard an Access to Information Request or Request for Correction to Personal Information

In 2017, the Saskatchewan Legislative Assembly passed amendments to *The Freedom of Information and Protection of Privacy Act* (FOIP) and *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). These amendments are in force as of January 1, 2018. One of the changes to these Acts gives a government institution or local authority (public body) the ability to apply to the Information and Privacy Commissioner (the Commissioner) to disregard an application made pursuant to section 6 of FOIP/ LA FOIP) access to information



request) or a request for a correction to personal information made pursuant to subsection 32(1) of FOIP/31(1) of LA FOIP (request for correction).

An application to disregard is a serious matter as it could have the effect of removing an applicant's express right to seek access to information in a particular case. For more information, see sections 45.1 of FOIP/ 43.1 of LA FOIP or the IPC resource [Application to Disregard an Access to Information Request or a Request for Correction](#).

BEST PRACTICES: SEARCH

Document the Search

When a public body responds to an access request, it is best practice to document every step of the search for records. When a public body intends to charge fees, this documentation is essential to calculate the fees and explain them to the applicant and the IPC in the event of a review.

However, it is best practice to document the search for records for every access request. This helps ensure consistent, thorough searches. Also, if the applicant believes that more records exist than have been identified, he/she can request a review by the IPC. In that case, the IPC will ask the public body for specific details about the search. This includes the following:

- For personal information requests – explain how the individual is involved with the public body (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search:
 - Describe how records are classified within the records management system. For example, are the records classified by alphabet, year, function, subject, etc.
 - Consider providing a copy of your organizations record schedule and screen shots of the electronic directory (folders & subfolders).
- If the record has been destroyed, provide copies of record schedules and/or destruction certificates.
- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the public body's control have been searched such as a contractor or information service provider. For more on this, see the OIPC resource, *A Contractor's Guide to Access and Privacy in Saskatchewan* available on our website.



- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
- For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of each employee’s search?

The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested. For more information, see the [IPC Guide to Exemptions](#).

BEST PRACTICES MANNER OF ACCESS

The amendments to FOIP and LA FOIP in force January 2018 sets out new provisions regarding how public bodies should provide records to applicants.

Subsection 10(2) of FOIP and LA FOIP address records in electronic form. FOIP and LA FOIP specifically indicate that if is possible and reasonably practicable to do so, a public body can give an applicant copies of the record in electronic form. To compliment this, the FOIP and LA FOIP Regulations specifically allow a public body to charge the actual cost of a portable storage device which would provide the copy of the electronic record.

Subsection 10(3) of FOIP and LA FOIP addresses a microfilm, film, sound or video recording or machine-readable record. The public body has the option of providing a transcript or allowing the applicant to examine a transcript. The public body may also provide a copy of audio or video recordings, or permit the applicant to view or hear the recording. The fees in the regulations for providing copies of these types of records are the actual cost of reproduction.

Subsection 10(4) indicates a head can provide an applicant with any type of record by providing a copy or allowing the applicant to examine it. See the [IPC Guide to Exemptions](#) for more information on how our office has interpreted this section in the past.

BEST PRACTICES: FEES

FOIP and LA FOIP provide for reasonable cost recovery associated with providing individuals access to records. Fees encourage responsible use of the right of access by applicants. However, fees should not present an unreasonable barrier to access. Therefore, fees should be reasonable, fair and at a level that does not discourage any resident from exercising their access rights.



A **reasonable** fee estimate is one that is proportionate to the work required on the part of the public body to respond efficiently and effectively to an applicant's request. The public body should be able to detail how it arrived at its fee estimate amounts for each of the types of fees that can be charged.

Public bodies should ensure that in keeping with best practices it:

- Treats all applicants the same (fairness); and
- Calculates its fees the same (consistency).

This is best achieved through establishment of internal guidelines that set out when and how fees will be applied and/or waived.

Types of fees

Application Fee

Subsection 5(1) of the LA FOIP Regulations provides local authorities with an opportunity to charge a \$20 application fee which is payable upon receipt of the access request.

Search Fee

Pursuant to subsection 6(2) of the FOIP Regulations, a government institution may charge \$15 per half hour of search time if in excess of two hours.

Pursuant to subsection 5(3) of the LA FOIP Regulations, a local authority may charge \$15 per half hour of search time if in excess of one hour.

Search time consists of every half hour of manual search time required to locate and identify responsive records. For example:

- staff time involved with searching for records;
- examining file indices, file plans or listings of records either on paper or electronic;
- pulling paper files/specific paper records out of files; and
- reading through files to determine whether records are responsive.

Search time does not include:

- time spent to copy the records;
- time spent going from office to office or off-site storage to look for records; or
- having someone review the results of the search.

The tests related to a reasonable search are:

- Generally, it should take an experienced employee 1 minute to visually scan 12 pages of paper or electronic records to determine responsiveness;



- Generally, it should take an experienced employee 5 minutes to search 1 regular file drawer for responsive file folders.
- Generally it should take an employee 3 minutes to search an e-mail account using keywords and copy the results in to another folder.

For more information, see the [IPC Guide to Exemptions, Fee Estimate – Quick Calculation Guide](#) and [Steps to Charging Fees](#).

Preparation Fees

Pursuant to subsection 6(2) of the FOIP Regulations, a government institution may charge \$15 per half hour of preparation time if in excess of two hours.

Pursuant to subsection 5(3) of the LA FOIP Regulations, a local authority may charge \$15 per half hour of preparation time if in excess of one hours.

Preparation includes time spent preparing the record for disclosure including time anticipated to be spent physically severing exempt information from records.

Preparation time does not include:

- Deciding whether or not to claim an exemption;
- Identifying records requiring severing;
- Identifying and preparing records requiring third party notice;
- Packaging records for shipment;
- Transporting records to the mailroom or arranging for courier service;
- Time spent by a computer compiling and printing information;
- Assembling information and proofing data;
- Photocopying; and
- Preparing an index of records.

The test related to reasonable time spent on preparation is:

- Generally, it should take an experienced employee 2 minutes per page to physically sever only.

For more information, see the [IPC Guide to Exemptions, Fee Estimate – Quick Calculation Guide](#) and [Steps to Charging Fees](#).

Reproduction Fees

Public bodies can also charge fees for reproducing records. Subsection 6(1) of the FOIP Regulations and 5(2) of the LA FOIP Regulations outline these fees in detail. Please note that amendments to the regulations were made in January 2018 and changes have been made to these subsections.

The IPC also encourages public bodies to grant access to records electronically if it is the applicant's wish.



Steps for charging fees

It is best practice that public bodies take the approach that fee estimates occur early in the process. Some initial work will be required in order to make a determination that a fee estimate is warranted. However, completing the entire search before the applicant has agreed to pay fees or has had an opportunity to narrow the request is a potential waste of time. Any work searching for records that a public body does before an applicant agrees to pay fees is done at the risk of the public body as an applicant may or may not agree to pay the fees. To charge fees after the work is completed is unreasonable.

For more information on the steps to charging fees, see the [IPC Guide to Exemptions](#) and [Steps to Charging Fees](#).

Fee Estimates

Subsection 9(2) of FOIP and LA FOIP require that a public body provide a fee estimate to the Applicant. Both the FOIP and LA FOIP Regulations indicate that a fee estimate should be provided if the fee will be greater than \$100.

- An appropriate written fee estimate notice to an applicant should include the following information:
 - Time required to search electronic and paper records;
 - Time to prepare records for disclosure;
 - Estimated reproduction costs; and
 - An interim notice which would assist the applicant to determine whether he/she wishes to proceed with the entire request. An interim notice should include:
 - An indication of whether access is likely to be granted in whole or in part; and
 - What exemptions are likely to apply to the records.

An interim notice would not be a decision that could be the subject of a request for review by this office.

The “Documenting the Search” portion of this document can also be used as a template for estimating fees.

If a fee is going to be high, public bodies should contact applicants to see if the applicant is willing to clarify or narrow the scope of the request in order to reduce the fees. These efforts should be documented. If an applicant is unwilling to work constructively with the public body to narrow or clarify the scope of their request, or advance a compromise solution which would reduce cost, this could be taken into consideration in determining whether the fee is reasonable in the event of a review by the OIPC.

For the public body, the 30 day period to respond to an access request is suspended once the fee estimate is sent and remains suspended until the applicant notifies the public body that the



applicant wishes to proceed with the application. The public body can require the applicant to pay a 50% deposit on the fee estimate. Alternatively, the applicant could request a review of the fee estimate.

Applicants are not required to pay any fees beyond what was originally estimated by the public body. If the actual fee ends up being less, the public body should refund the applicant accordingly (see subsections 7(2) of the FOIP Regulations and 6(2) of the LA FOIP Regulations).

Where a decision is made to withhold records, applicants do not pay a fee for records withheld. The public body should refund the applicant any deposit paid for these records (see subsections 8(1) and (2) of the FOIP Regulations and subsections 7(1) and (2) of the LA FOIP Regulations).

In November 2014, the IPC posted a guest blog on its website from Sun Country Health Region titled, *Using an Index to Clarify an Access Request and Reduce the Cost*. The blog provides great advice on how to handle fees and provides an example of a template that can be used to break down a fee estimate.

Fee Waiver

Subsections 9(5) of FOIP and 8(5) of LA FOIP provide that where a prescribed circumstance exists, the head can waive payment of all or any part of the fees.

In 2018, amendments to the FOIP and LA FOIP Regulations were made. Now, the prescribed circumstances for waiving a fee under FOIP are:

- If the fee would cause substantial financial hardship to the applicant and if disclosure of the record is in the public interest;
- If the record involves the applicant's personal information; or
- If the fee is less than \$100.

The prescribed circumstances for waiving a fee under LA FOIP are:

- If the record involves the applicant's personal information (application fee only);
- If the fee would cause substantial financial hardship to the applicant and if disclosure of the record is in the public interest (search, preparation and reproduction fees only); or
- If the fee is less than \$100 (search, preparation and reproduction fees only).

The 2018 amendments to the FOIP and LA FOIP regulations provides guidance on the meaning of "substantial financial hardship".

Public bodies should have a policy or process for dealing with fee waivers and not make decisions arbitrarily. A public body should be able to explain in detail how it arrived at its decision to deny a fee waiver.

A review of a fee waiver denied considers the criteria or process used by the public body to deny a fee waiver and whether it was consistent with FOIP and LA FOIP.



BEST PRACTICES: THIRD PARTIES

The public body must make an early assessment whether there is a third party that needs to be notified that an access request has been made for records with third party information. FOIP and LA FOIP require that third parties be notified if a public body intends to give access to records which may contain third party information. See section 19 and Part V of FOIP and 18 and Part V of LA FOIP.

However, it is best practice for a public body to provide notice to the third party any time a third party exemption is claimed to refuse access. If the third party consents to the release of the records, there would be no reason to deny access and it may avoid a review.

In the event of a review, third parties have the right to make representations to the Commissioner. Section 52 of FOIP and 41 of LA FOIP require that the public body provide written notice to the third party when there is a review by the IPC. This notice is independent of any previous third party notices given during the access process prior to the review. Providing notice to third parties allows them the opportunity to make representations on whether or not access should be allowed to records that contain their information.

When third party exemptions are an issue in a review, the IPC will ask the public body for contact information for the third party. The IPC will also provide notice to the third party. The IPC will refer the third party back to the public body to identify the record at issue. The IPC will not release records to third parties without permission.

It is important to note again that the identity of the applicant is personal information. Public bodies should not disclose the identity of the applicant to third parties.

CONTACT INFORMATION

If you have any questions or concerns about responding to access requests, please contact us:

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