

New Amendments (FOIP & LA FOIP)

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Outline

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- FOIP and LA FOIP
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Disclaimer

- Materials prepared are by the IPC to assist persons in understanding the laws discussed
- Only offered as non-binding, general advice, as we cannot give advanced rulings or prejudge any situation
- Unable to discuss specific past or present cases, unless Report issued or details otherwise publicly known



Amendments to FOIP & LA FOIP

- The need for legislative amendment
- Proposed amendments offered by IPC
- Bill 30 and Bill 31 include some of the proposed amendments made by the IPC; others added
- Bills passed spring 2017
- Proclaimed effective January 1, 2018
- FOIP and LA FOIP Regulations also amended
- Interpreting the amendments
 - Preliminary views today – must test in practice once law
 - Amendments in both Bills similar in both Acts
 - Some unique only to Bill 30



Employee Defined

FOIP

- Subsection 2(1) of FOIP is amended:
“(b.1) **‘employee of a government institution’** means an individual employed by a government institution and includes an individual retained under a contract to perform services for the government institution”;

LA FOIP

- LA FOIP section 2(b.1) **‘employee’**



Applying FOIP in Part (FOIP Only)

- Clause 2(2)(b) is repealed and substituted:
“(b) the Legislative Assembly Service or, subject to subsections 3(3) and (4), offices of members of the Assembly or members of the Executive Council”
- Following subsections added after subsection 3(2):
“(3) Subject to the regulations, the following sections apply, with any necessary modification, to offices of members of the Assembly and their employees as if the members and their offices were government institutions:
 - (a) sections 24 to 30;
 - (b) section 33.“(4) Subject to the regulations, the following sections apply, with any necessary modification, to offices of members of the Executive Council and their employees as if the members and their offices were part of the government institution for which the member of the Executive Council serves as the head:
 - (a) sections 24 and 24.1;
 - (b) sections 25 to 30;
 - (c) section 33”.



Police Services Under LA FOIP (LA FOIP only)

- The following is added to clause 2(e) of LA FOIP:
“(i.1) in the case of a police service, the chief as defined in *The Police Act, 1990*; or”;
- Added the following after subclause 2(f)(viii) of LA FOIP:
“(viii.1) a police service or regional police service as defined in *The Police Act, 1990*”.



IMSP Defined

FOIP

- Subsection 2(1) of FOIP is amended:
 - (e.1) ‘**information management service provider**’ means a person who or body that:
 - (i) processes, stores, archives or destroys records of a government institution containing personal information; or
 - (ii) provides information management or information technology services to a government institution with respect to records of the government institution containing personal information”.
- Also see new section 24.2 (role of an IMSP)

LA FOIP

- LA FOIP amended section 2(e.1)(i) and (ii) and new section 23.2



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Duty to Assist

FOIP

- The following section is added after section 5 of FOIP:
 - 5.1(1) Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.
 - (2) On the request of an applicant, the government institution shall:
 - (a) provide an explanation of any term, code or abbreviation used in the information; or
 - (b) if the government institution is unable to provide an explanation in accordance with clause (a), endeavour to refer the applicant to a government institution that is able to provide an explanation”.

LA FOIP

- LA FOIP new section 5.1



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Disregarding a Request

FOIP

- Subsection 7(2) of FOIP is amended:
“(g) stating that the request has been disregarded pursuant to section 45.1, and setting out the reason for which the request was disregarded”.

LA FOIP

- LA FOIP added subsection 7(2)(g) referencing section 43.1



Refuse to Confirm or Deny Limited

FOIP

- Subsection 7(4) of FOIP is repealed and the following substituted:
“(4) If an application is made with respect to a record that is exempt from access pursuant to section 15, 16, 21 or 22 or subsection 29(1), the head may refuse to confirm or deny that the record exists or ever did exist”.

LA FOIP

- LA FOIP amended subsection 7(4)
- The new subsection lists sections 14, 20, 21 and subsection 28(1)



Application Deemed Abandoned

FOIP

- The following section is added after section 7 of FOIP:
 - 7.1(1)** If the head has invited the applicant to supply additional details pursuant to subsection 6(3) or has given the applicant notice pursuant to clause 7(2)(a) and the applicant does not respond within 30 days after receiving the invitation or notice, the application is deemed to be abandoned.
 - (2) The head shall provide the applicant with a notice advising that the application is deemed to be abandoned.
 - (3) A notice provided 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”.

LA FOIP

- LA FOIP new section 7.1



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Manner of Access

FOIP

- Section 10 of FOIP is repealed and replaced, but the major change is as follows:
 - (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 government institution;
 - (b) producing it would not interfere unreasonably with the operations of the government institution; and
 - (c) it is reasonably practicable to do so.

LA FOIP

- LA FOIP amended section 10.



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Law Enforcement & Investigations Exemption Expanded

FOIP

- The following clauses are added after clause 15(1)(k) of FOIP:
 - “(k.1) endanger the life or physical safety of a law enforcement officer or any other person;
 - “(k.2) reveal any information relating to or used in the exercise of prosecutorial discretion;
 - “(k.3) reveal a record that has been seized by a law enforcement officer in accordance with an Act or Act of Parliament”.

LA FOIP

- LA FOIP amended, added clauses 14(1)(k.1), (k.2) (k.3)



Other Forms of Privilege

FOIP

- Clause 22(a) of FOIP is repealed and the following substituted:
“(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege or parliamentary privilege”.

LA FOIP

- LA FOIP amended Clause 21(a) (no reference to parliamentary privilege)



Duty to Protect

FOIP

- The following new section is added after section 24 of FOIP:
24.1 Subject to the regulations, a government institution shall establish policies and procedures to maintain administrative, technical and physical safeguards that:
 - (a) protect the integrity, accuracy and confidentiality of the personal information in its possession or under its control;
 - (b) protect against any reasonably anticipated:
 - (i) threat or hazard to the security or integrity of the personal information in its possession or under its control;
 - (ii) loss of the personal information in its possession or under its control; or
 - (iii) unauthorized access to or use, disclosure or modification of the personal information in its possession or under its control; and
 - (c) otherwise ensure compliance with this Act by its employees.

LA FOIP

- HIPA already has this provision – section 16
- LA FOIP new section 23.1



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Role of an IMSP

FOIP

- The following section is added after section 24 of FOIP:
24.2(1) A government institution may provide personal information to an information management service provider for the purposes of:
 - (a) having the information management service provider process, store, archive or destroy the personal information for the government institution;
 - (b) enabling the information management service provider to provide the government institution with information management or information technology services;
 - (c) having the information management service provider take possession or control of the personal information;
 - (d) combining records containing personal information; or
 - (e) providing consulting services.

LA FOIP

- LA FOIP new section 23.2(1)



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Role of an IMSP (cont'd)

FOIP

24.2(2) Before disclosing personal information to an information management service provider, a government institution shall enter into a written agreement with the information management service provider that:

- (a) governs the access to and use, disclosure, storage, archiving, modification and destruction of the personal information;
- (b) provides for the protection of the personal information; and
- (c) meets the requirements of this Act and the regulations.

(3) An information management service provider shall not obtain access to, use, disclose, process, store, archive, modify or destroy personal information received from a government institution except for the purposes set out in subsection (1).

(4) An information management service provider shall comply with the terms and conditions of the agreement entered into pursuant to subsection (2)".

LA FOIP

- LA FOIP new section 23.2(2) to (4)



Prescribed Publicly Available PI

FOIP

- Clause 29(2)(p) of FOIP is repealed and the following substituted:
“(p) if the information is publicly available, including information that is prescribed as publicly available”.

LA FOIP

- LA FOIP clause added to 28(2)(p)



Notification

FOIP

- The following section is added after section 29:
“**29.1** A government institution shall take all reasonable steps to notify an individual of an unauthorized use or disclosure of that individual’s personal information by the government institution if it is reasonable in the circumstances to believe that the incident creates a real risk of significant harm to the individual”.

LA FOIP

- LA FOIP new section 28.1



Reasons for Disregarding Correction Request

FOIP

- Subsection 32(1) is amended:
Added “(c) if the request has been disregarded, to be advised of the reason for which it has been disregarded.”
- Subsection 32(2) is amended:
Added “(c) the request has been disregarded, setting out the reason for which the request was disregarded pursuant to section 45.1”

LA FOIP

- LA FOIP amended subsection 31, pursuant to section 43.1



Commissioner may Disregard Applications or Requests

FOIP

- Section 45 of FOIP is repealed and the following substituted:

45.1(1) The head may apply to the commissioner to disregard one or more applications pursuant to section 6 or requests pursuant to section 32.

(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 government institution 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 32(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 32(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 subsection 32(2) resumes”.

LA FOIP

- See draft Rules of Procedure – OIPC website
- LA FOIP added section 43.1



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Additional Grounds to Review

FOIP

- New clauses after clause 49(1)(a):
 - “(a.1) an applicant is not satisfied that a reasonable fee was estimated pursuant to subsection 9(2);
 - “(a.2) an applicant believes that all or part of the fee estimated should be waived pursuant to subsection 9(5);
 - “(a.3) an applicant believes that an application was transferred to another government institution pursuant to subsection 11(1) and that government institution did not have a greater interest;
 - “(a.4) an individual believes that his or her personal information has not been collected, used or disclosed in accordance with this Act or the regulations”; **and**
 - (b) in the portion following clause (c) by adding “or individual” after “applicant”.**

LA FOIP

- LA FOIP amended section 38(1)



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Refusal to Review

FOIP

- The following clauses are added after clause 50(2)(a) of FOIP:
 - “(a.1) does not affect the applicant or individual personally;
 - “(a.2) has not moved forward as the applicant or individual has failed to respond to the requests of the commissioner;
 - “(a.3) concerns a government institution that has an internal review process that has not been used;
 - “(a.4) concerns a professional who is governed by a professional body that regulates its members pursuant to an Act, and a complaints procedure available through the professional body has not been used;
 - “(a.5) may be considered pursuant to another Act that provides a review or other mechanism to challenge a government institution’s decision with respect to the collection, amendment, use or disclosure of personal information and that review or mechanism has not been used;
 - “(a.6) does not contain sufficient evidence;
 - “(a.7) has already been the subject of a report pursuant to section 55 by the commissioner”.

LA FOIP

- LA FOIP added clauses 39(2)(a.1) to (a.7)



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Appeal to Court

FOIP

- Subsection 57(1) of FOIP is repealed and the following substituted:
“(1) Within 30 days after receiving a decision of the head pursuant to section 56, an applicant or individual or a third party may appeal that decision to the court”.
- Subsection 57(4) is amended by adding “or individual” after “an applicant”.

LA FOIP

- LA FOIP amended subsections 46(1) and 46(4)



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Appeal to Court (cont'd)

FOIP

- The following subsections are added after subsection 58(6):
 - “(7) If, with respect to an appeal of a decision of the head regarding the matters mentioned in clauses 49(1)(a.1) to (a.4), the court determines that the decision of the head was not authorized pursuant to this Act, the court may:
 - (a) order the head to reconsider the decision and proceed in accordance with this Act, subject to any conditions that the court considers appropriate; or
 - (b) make any other order that the court considers appropriate.
 - “(8) If, with respect to an appeal mentioned in subsection (7), the court finds that the head had authority pursuant to this Act to make the decision that is the subject of the appeal, the court shall not order the head to reconsider the decision”.

LA FOIP

- LA FOIP subsections added to section 47



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Head May Delegate

FOIP

- Subsection 60(1) is amended by adding “or employees” after “officers”.

LA FOIP

- LA FOIP amended subsection 50(1)



Access to Manuals

FOIP

- Section 65 of FOIP is repealed and substituted as follows:
65(1) Every government institution shall take reasonable steps to:
 - (a) make available on its website all manuals, policies, guidelines or procedures that are used in decision-making processes that affect the public by employees of the government institution in administering or carrying out programs or activities of the government institution; or
 - (b) provide those documents when requested in electronic or paper form.
- (2) Any information in a record that a head would be authorized to refuse to give access to pursuant to this Act or the regulations may be excluded from manuals, policies, guidelines or procedures that are made available or provided pursuant to subsection (1).

LA FOIP

- LA FOIP new section, 53.1



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Records Available Without an Application

FOIP

- Adds a new section to FOIP

65.1(1) Subject to subsection (2), the head may establish categories of records that are in the possession or under the control of the government institution and that are available to the public within a reasonable time without an application for access pursuant to this Act.

(2) The head shall not establish a category of records that contain personal information or third party information unless that information may be disclosed pursuant to this Act or the regulations”.

LA FOIP

- LA FOIP new section 53.2



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Offence Provision

FOIP

- Subsection 68(1) is amended by striking out “\$1,000, to imprisonment for not more than three months or to both fine and imprisonment” and substituting “\$50,000, to imprisonment for not more than one year or to both”.
- Subsection 68(3) is amended:
 - “(d) wilfully destroys any record that is governed by this Act with the intent to evade a request for access to the record”; and
- (d) in the portion following clause (d) by striking out “\$1,000, to imprisonment for not more than three months or to both fine and imprisonment” and substituting “\$50,000, to imprisonment for not more than one year or to both”.

LA FOIP

- LA FOIP subsection 56



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Offence Provisions (cont'd)

FOIP

- The following subsections are added after subsection 68(3):
 - “(4) No employee of a government institution or of an information management service provider shall knowingly disclose or direct another person to disclose personal information in circumstances that would constitute an offence by the government institution or an information management service provider pursuant to this Act.
 - (5) Every employee of a government institution or of an information management service provider who contravenes subsection (4) is guilty of an offence and is liable on summary conviction to a fine of not more than \$50,000, to imprisonment for not more than one year or to both, whether or not the government institution or information management service provider has been prosecuted or convicted.
 - (6) No employee of a government institution shall wilfully access or use or direct another person to access or use personal information that is not reasonably required by that individual to carry out a purpose authorized pursuant to this Act.”

LA FOIP

- LA FOIP amended subsection 56(4) to (7)



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Offence Provisions (cont'd)

FOIP

“(7) Every employee of a government institution who contravenes subsection (6) is guilty of an offence and is liable on summary conviction to a fine of not more than \$50,000, to imprisonment for not more than one year or to both, whether or not the government institution has been prosecuted or convicted.

(8) No employee of an information management service provider shall wilfully access or use or direct another person to access or use personal information for a purpose that is not authorized by subsection 24.2(1).

(9) Every employee of an information management service provider who contravenes subsection (8) is guilty of an offence and is liable on summary conviction to a fine of not more than \$50,000, to imprisonment for not more than one year or to both, whether or not the information management service provider has been prosecuted or convicted.

(10) No prosecution shall be commenced pursuant to this section after the expiration of two years from the date of the discovery of the alleged offence”.

LA FOIP

- LA FOIP added subsections 56(7) to (10)



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FOIP Regs - Fees

- **6(1)** Where access to a record or part of a record is given by providing the applicant with a copy of the record, the following fees are payable at the time when access is given:
 - (a) for a photocopy, \$0.25 per page;
 - (b) for a computer printout, \$0.25 per page;
 - (b.1) for electronic copies, the actual cost of the portable storage device provided to the applicant;
 - (c) **Repealed.** 15 Dec 2017 SR 124/2017 s3.
 - (d) **Repealed.** 15 Dec 2017 SR 124/2017 s3.
 - (e) **Repealed.** 15 Dec 2017 SR 124/2017 s3.
 - (f) **Repealed.** 15 Dec 2017 SR 124/2017 s3.
 - (g) **Repealed.** 15 Dec 2017 SR 124/2017 s3.;
 - (h) **Repealed.** 15 Dec 2017 SR 124/2017 s3.
 - (i) **Repealed.** 15 Dec 2017 SR 124/2017 s3.
 - (j) **Repealed.** 15 Dec 2017 SR 124/2017 s3.
 - (k) **Repealed.** 15 Dec 2017 SR 124/2017 s3.
 - (l) for a form of record not mentioned in clauses (a) to (b.1), the actual cost of copying the record.
- LAFOIP amended section 5(2)



FOIP Regs - Fees (con't)

- 6(3) Where a search and retrieval of electronic data is required to give access to a record requested by an applicant, a fee equal to the actual cost of the search and retrieval, including machinery and operator costs, is payable at the time when access is given.
- LA FOIP amended section 5(4)



FOIP Regs – Fee Estimates

- **7(1)** For the purposes of subsection 9(2) of the Act, \$100 is prescribed as the amount of fees beyond which an estimate must be given by the head.
- LA FOIP amended section 6



FOIP Regs – Waiver of Fees

- **9(1)** For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:
 - (a) if payment of the prescribed fees will cause a substantial financial hardship for the applicant and, in the opinion of the head, giving access to the record is in the public interest;
 - (b) if the application involves the personal information of the applicant;
 - (c) if the prescribed fee or actual cost for the service is \$100 or less.
- FOIP Regs 9(2) defines “substantial financial hardship”.
- LA FOIP amended section 8



FOIP Regs – IMSP Agreements

- **13.1** For the purposes of clause 24.2(2)(c) of the Act, a written agreement that is entered into between a government institution and an information management service provider must include:
 - (a) a description of the specific service the information management service provider will deliver;
 - (b) provisions setting out the obligations of the information management service provider respecting the security and safeguarding of personal information; and
 - (c) provisions for the destruction of the personal information, if applicable.
- LA FOIP new section 8.2



FOIP Regs - Consent

- **18(1)** If consent is required by the Act for the collection, use or disclosure of personal information, the consent:
 - (a) must relate to the purpose for which the information is required;
 - (b) must be informed;
 - (c) must be given voluntarily; and
 - (d) must not be obtained through misrepresentation, fraud or coercion.
- (2) A consent to the collection, use or disclosure of personal information is informed if the individual who gives the consent is provided with the information that a reasonable person in the same circumstances would require in order to make a decision about the collection, use or disclosure of personal information.
- HIPA Regulations section 6
- LA FOIP amended section 11



FOIP Regs – Consent (con't)

- (3) A consent may be given that is effective for a limited period.
 - (4) A consent may be express or implied unless otherwise provided.
 - (5) An express consent need not be in writing.
 - (6) A government institution, other than the government institution that obtained the consent, may act in accordance with an express consent in writing or a record of an express consent having been given without verifying that the consent meets the requirements of subsection (1) unless the government institution that intends to act has reason to believe that the consent does not meet those requirements.
- HIPA Regulations section 6
 - LA FOIP amended section 11



FOIP Regs – Other Amendments

- Section 12 adds Acts or parts of Acts that are exempt.
- Section 14 adds “investigative bodies”.
- Section 16 adds situations where personal information can be disclosed.
- Appendix, Part I amended to add and delete government institutions.
- Appendix, Part II, Forms A and B updated.
- LA FOIP similar types of amendments



What You Can Do?

- Study amended provisions to Acts and Regs
- Check new and updated resources – IPC Website
 - *IPC Guide to Exemptions*
 - *Understanding the Duty to Assist*
 - *Blog – Real Risk of Significant Harm*
 - *Application to Disregard an Access to Information Request or Request for Correction*
- Review practices (i.e. collection, use, disclosure)
- Review existing or enter into new contracts to ensure privacy considerations are being met
- Develop policies and procedures (i.e. privacy breach investigations, processing access requests, proactive disclosure)
- Conduct training sessions to bring employees up-to-speed



Questions?

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