SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT F-2006–005

Saskatchewan Government Insurance
Saskatchewan Telecommunications
Saskatchewan Health
Saskatchewan Power Corporation
Saskatchewan Energy Incorporated

Summary: Each of five government institutions invoked section 12 of *The Freedom of Information and Protection of Privacy Act* (the Act) to extend the time to respond to an access for information request for up to a further 30 days in addition to the original prescribed time period of 30 days. The Commissioner identified the information that should be included in a notice to any applicant that the time for response has been extended. He also discussed the criteria to determine whether a response beyond 30 days is appropriate under both section 12(1)(a) and 12(1)(b) of the Act and the kind of evidence that should be provided by a government institution to meet its burden of proof. The Commissioner commented on the claim by a government institution that responding to an access request within the 30 day period would unreasonably interfere with the operations of the government institution and determined this could not be invoked if the institution had failed to make adequate provision for meeting its statutory responsibilities.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act* [S.S. 1990-91, c. F-22.01 as am], ss. 2(1)(d), 7, 12(1)(a)(ii), 12(1)(b), 12(2), 12(3), 49(1)(a)
Access to Information Act, R.S., 1985, c. A-1

Authorities Cited: SK OIPC Reports F-2006-003 & F-2006-004; British Columbia IPC Decision on a Section 43 Application by the Vancouver Police Board; Ontario IPC Order PO-2168, Order PO-2151, Order M-850, Order MO-1488; *Canada (Information Commissioner)* v. *Canada (Minister of External Affairs)* [1990] 3 F.C. 514 (F.C.T.D.); *Canada (Information Commissioner)* v. *Canada (Minister of External Affairs)*, [1989] 1 F.C. 3 (F.C.T.D.)

Other Resources Cited: SK OIPC Annual Reports 2003-2004 and 2004-2005 at www.oipc.sk.ca/annual_reports.htm; Saskatchewan Justice Annual Report on Freedom of Information and Protection of Privacy Act 2005-2006 at www.saskjustice.gov.sk.ca/overview/annual/annualreport.shtml; Saskatchewan Health Annual Report 2003-2004 at www.health.gov.sk.ca/mc_publications_ar_archive.html; Colonel Michel W. Drapeau and Marc-Aurèle Racicot; *Federal Access to Information and Privacy Legislation Annotated 2006*, (Toronto: Thompson Canada Limited, 2004) at 1-116, 1-117, 1-130 & 1-131

I BACKGROUND

1. Time Extension by Four Crown Corporations

[1] An identical Request for Access was submitted to the following government institutions under *The Freedom of Information and Protection of Privacy Act* (the Act):

> Saskatchewan Government Insurance (SGI),
> Saskatchewan Telecommunications (SaskTel)
> Saskatchewan Power Corporation (SaskPower)
> Saskatchewan Energy Incorporated (SaskEnergy)

[2] In each case, the Request for Access was described as follows:

> *Please provide complete details of payments for the year ended Dec. 31, 2003 referenced in "Section G." of the crown corporations payee disclosures, that is: [notwithstanding any direction from any committee] please identify the payees for each payment referenced and provide any other information excluded from your public reporting.*

[3] In each case, the relevant government institution invoked section 12 of the Act to extend the time period to respond to the access request from the 30 days prescribed in section 7 of the Act to an additional period of up to 30 days.

[4] The decision of the four different government institutions to extend the time to respond was communicated as follows:

(a) SaskPower

[5] SaskPower received the Request for Access on November 15, 2004.

[6] On December 15, 2004 SaskPower wrote to the Applicant to advise:

> *Pursuant to section 12 of the Freedom of Information and Protection of Privacy Act, SaskPower hereby gives you notice of its intention to extend the time for reply for an additional 30 days as permitted under that Act. The consultations necessary to comply with your access request will require an extension. We plan to have a reply to your access request within the 30 day extension period.*

[7] By a letter dated January 10, 2005 SaskPower wrote to the Applicant advising that access would be denied on the basis of certain mandatory and discretionary exemptions in the Act.

(b) SaskTel

[8] SaskTel received the Request for Access on or about November 17, 2004.

[9] SaskTel wrote to the Applicant on December 13, 2004 to advise:

> *Pursuant to Section 12(1) of The Freedom of Information and Protection of Privacy Act, the period for response is hereby extended to December 31, 2004.*

[10] By a letter dated December 31, 2004 SaskTel advised the Applicant that access would be denied on the basis of a mandatory exemption and a discretionary exemption in the Act.

(c) Saskatchewan Government Insurance (SGI)

[11] SGI received the Request for Access on or about November 10, 2004.

[12] SGI responded by letter dated December 13, 2004 as follows:

> *In your request you have asked for information relating to the payee disclosure list.*
>
> *Please be advised that pursuant to section 12 of the Act SGI will be extending the time for a response by a further thirty days.*

[13] By a letter dated January 12, 2005 SGI responded to the access request.

(d) SaskEnergy

[14] SaskEnergy received the Request for Access on or about November 10, 2004.

[15] SaskEnergy responded by letter December 14, 2004 as follows:

> *In accordance with Section 12 of The Freedom of Information and Protection of Privacy Act, I hereby provide you notice that we will extend the period required to provide you with a response to your request for a reasonable period not exceeding 30 days. It is our anticipation that our response will be provided well within the maximum 30-day extension.*

[16] By a letter dated January 10, 2005 SaskEnergy responded to the access request.

[17] The Applicant in each of the foregoing cases subsequently submitted to our office a Request for Review of the time extension pursuant to Part VII of the Act.

2. Time Extension by Saskatchewan Health (SaskHealth)

[18] A Request for Access from the Applicant was received by SaskHealth on February 9, 2005. The request was for:

> *Please provide all briefing materials prepared by or for Sask. Health, for the minister of the health and/or the deputy minister of health, that provide updates and/or background information on tobacco [smoking in public places] enforcement and awareness activities – known or reported to Sask. Health -- in Saskatchewan for the month of January, 2005*

[19] SaskHealth responded by letter dated March 10, 2005 as follows:

> *We wish to inform you that the response time of 30 days has been extended another 30 days to April 10, 2005 in accordance with subsection 12(1)(a)(ii) of The Freedom of Information and Protection of Privacy Act. Section 12(1)(a)(ii) states:*
>
> ***12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:***
>
> ***(a) where:***
>
> ***(ii) there is a large number of requests:***
>
> ***and completing the work within the original period would unreasonably interfere with the operations of the government institution;***

[20] On March 29, 2005 SaskHealth provided the Applicant with the responsive records.

II. ISSUES

1. Was the initial written response of each of the five government institutions to the Applicant adequate in terms of what is required by section 12 of the Act?

2. Was the extension of the response deadline in each of the five cases in accordance with the criteria set out in section 12 of the Act?

III. DISCUSSION OF THE ISSUES

[21] These five reviews all focus on an extension of time claimed by the five different government institutions in order to respond to five requests for access. Four of the five involve an identical request. There is a different request for access in the case involving SaskHealth. I have determined that it would be appropriate to address all five reviews in a single report.

OIPC Jurisdiction

[22] The authority for our office to deal with these Requests for Review is found in section 49 of the Act. That provides, in part, as follows:

> *49(1) Where:*
>
> *(a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12…*
>
> *the applicant may apply in the prescribed form and manner to the commissioner for a review of the matter.*
>
> **…**

[23] Each of the organizations in question qualify as a "government institution" within the meaning of section 2(1)(d) of the Act.

Statutory Authority for an Extension of Time to Respond to an Access Request

[24] An extension of time to respond to a Request for Access necessarily involves consideration of sections 7 and 12 of the Act.

[25] Section 7 of the Act sets out a specific period for a government institution to respond to a request for access as follows:

7*(1) Where an application is made pursuant to this Act for access to a record, the head of the government institution 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 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.

[26] Section 12 of the Act provides as follows:

12*(1) The head of a government institution 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 government institution;*
>
> *(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 34(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.*

[27] I determined in Report F-2006-003 that to invoke section 12 of the Act, the burden of proof of establishing an appropriate basis to extend the time to respond to an applicant under the Act should be borne by the government institution[1].

1. Was the initial written response of each of the five government institutions to the Applicant adequate in terms of what is required by section 12 of the Act?

[28] With respect to section 12(3), all five government institutions responded within the period of extension.

A. Four Crown Corporations

(i) SaskPower

[29] SaskPower has submitted to our office that there is a preliminary problem with the Request for Access:

> *As SaskPower has now replied to the access request made by the applicant (copy enclosed for your reference), the issue of any extension of time for reply is now moot.*
>
> *SaskPower takes its obligations under FOIPP* [sic] *seriously and has always replied to access requests by this applicant within the time permitted under the legislation and in our view this request is clearly frivolous and/or vexatious in nature.*

[1] SK OIPC Report F-2006-003, [31] to [36].

[30] I have no hesitation in finding that the suggestion that this Request for Review is frivolous and/or vexatious is baseless. Furthermore, I find that it is important for this office to provide advice to government institutions on procedural matters particularly given the absence of clear and detailed written information produced by the Saskatchewan Government on how to deal with an extension of time.

[31] I note that a similar argument was raised by a federal government institution before the Federal Court when the Information Commissioner sought a judicial determination on a number of questions under the federal *Access to Information Act* (ATIA). In the Court's order Mr. Justice Muldoon responded to that argument in the 1990 decision[2] as follows:

> *These are not cases for declining to exercise the salutary powers of review conferred on the Court by Parliament. Confession that such requests ought to be processed as expeditiously as possible may be good for an individual's soul, but it has no didactic energy in gaining the attention of government departments. It has no effect in actually providing legally that less than expeditious processing of requests for information is breaking the law, as it surely is. The purpose of the review is not just to make the particular respondent acknowledge unreasonable tardiness. It is, also, to let all the other potential respondents know where they stand in these matters. The Court is quite conscious that responding to such requests is truly "extra work" which is extraneous to the line responsibilities and very raison d'être of government departments and other information-holding organizations of government. But when, as in the Access to Information Act, Parliament lays down these pertinent additional responsibilities, then one must comply*.[3]

[32] The federal ATIA has many structural similarities to our Act. Associate Chief Justice Jerome of the Federal Court Trial Division considered an application that time extensions were excessive and unjustified. In the course of his decision he observed as follows:

> *By the terms of the Access to Information Act there is an on-going relationship between the Information Commissioner and every government institution. That is evidenced by the presence in most departments of an Access to Information coordinator whose job is to facilitate requests for information to that department and to handle inquiries from the Commissioner's office. The two parties to this application have therefore a real interest in obtaining guidelines to assist their future relations. Any taking of an extension may be the subject of a complaint to the Commissioner and a subsequent investigation. A declaration as to the*

[2] *Canada (Information Commissioner)* v. *Canada (Minister of External Affairs)* [1990] 3 F.C. 514 (F.C.T.D.)
[3] *Ibid*., at 10

> *requirements for an authorized extension would assist both parties in determining their proper course under the Act.*[4]

[33] The government institution should include in its notice to an applicant the specific reason why it is invoking section 12. There are four acceptable reasons to extend time and an applicant should be provided with clear notice as to which of those four acceptable reasons is the basis for the government institution's decision. A best practice for any government institution would be to offer that reason in the following language:

> The reason for the time extension is that, pursuant to section 12(1)(b) of the Act, consultations necessary to comply with your application cannot reasonably be completed within the original 30 day period (revised as necessary if the reason is section 12(1)(a)(i) or (ii) or 12(1)(c) of the Act).

[34] SaskPower did indicate that consultations necessary to comply with the access request will require an extension.

[35] I find that the notice from SaskPower was adequate and met the requirements of section 12(2) of the Act.

(ii) SaskTel

[36] For the reasons noted above, the explanation offered to the Applicant was inadequate to inform the Applicant as to which of the four possible reasons was relied upon by the government institution in extending the time for response.

(iii) SGI

[37] For the reasons noted above, the explanation offered to the Applicant was inadequate to inform the Applicant as to which of the four possible reasons was relied upon by the government institution in extending the time for response.

[4] *Canada (Information Commissioner)* v. *Canada (Minister of External Affairs)*, [1989] 1 F.C. 3 (F.C.T.D.) 10.

(iv) SaskEnergy

[38] For the reasons noted above, the explanation offered to the Applicant was inadequate to inform the Applicant as to which of the four possible reasons was relied upon by the government institution in extending the time for response.

B. SaskHealth

[39] The response of SaskHealth does clearly communicate to the Applicant both the specific subsection in play (section 12(1)(a)(ii)) and the reason (large number of requests and unreasonable interference with operations of the government institution).

[40] I find that this response meets the requirements of section 12(2) in terms of notice to the Applicant.

2. Was the extension of the response deadline in each of the five cases in accordance with the criteria set out in section 12 of the Act?

[41] I am mindful that the four Requests for Review from decisions of Crown corporations originated in 2004. The notice from these government institutions to the Applicant was provided in December 2004.

[42] In December 2004, government institutions would have been handicapped in several significant ways. At the time I started as Saskatchewan's first full-time Information and Privacy Commissioner in November 2003, there was very little Saskatchewan resource material available to government institutions to assist them in responding to the requirements of the Act. Although Saskatchewan Justice (Justice) has been responsible for the administration of the Act since it was proclaimed in 1992, there has never been any comprehensive manual produced. There was a skeletal piece that this office has seen entitled *The Freedom of Information and Protection of Privacy Act – Administrative Procedures Summary* but this is concerned almost exclusively with the kind of reporting Justice requires from government institutions that receive and process access requests. At the same time, a careful review of past reports and recommendations by the previous

three part-time Commissioners in this province reveals very little guidance or direction on matters of procedure and process.

[43] This lack of resource material for Saskatchewan government institutions was discussed in my 2003-2004 Annual Report at pages 8-9. That discussion included the following passage:

> *Justice should consider producing a guide for government institutions in meeting their obligations under the FOIP Act. This would explain and clarify the technical requirements of the FOIP Act by use of examples, formal reports of our office and Saskatchewan court decisions that interpret the Act and regulations. Such a guide has proven an essential resource in other Canadian jurisdictions.*
>
> *We note in the Deloitte Touche Privacy Assessment of 2003, reference to a paucity of written materials for Justice employees. "Justice does not rely on codified policies and procedures, but rather make use of informal arrangements and cultural norms to employees FOI requirements re the handling of personal information" [p.131] and "For the most part, Divisions orally communicate policies and expectations with respect to the handling of personal information to new employees as part of their orientation process." [p. 131] and "Although high level policy and procedures are set out in Justice manuals, most Divisions candidly admit they are lacking in specific policy and training with respect to privacy issues" and "Steps have been taken to ensure that employees are cognizant of the requirements of FOI, however, little policy is in evidence to which an employee may refer for guidance" [page 132] and "A wide range of professional and program staff deal with requests for access to personal information. Regular employee supervision is the sole means utilized to monitor compliance with the principles of FOI [p. 133].*

[44] I revisited this need in my 2004-2005 Annual Report at pages 22-24. I understand that there have been discussions involving the Access and Privacy Branch and plans to develop a comprehensive manual. I encourage Justice to proceed to do so as quickly as possible and to ensure that it specifically includes information about section 12 of the Act and what will be required to comply.

[45] This Report may be useful in ensuring that going forward all public bodies in Saskatchewan are clear on the requirements for an authorized extension of the time to respond to an access request.

[46] I note that according to the *2005-2006 Annual Report, Saskatchewan Justice, The Freedom of Information and Protection of Privacy Act*[5] there has been a significant increase from 2001-2002 to 2005-2006 in the number of access requests that involved an extension of time. The percentage of all general information requests in which the response was provided between 31 and 60 days was as follows:

2001-2002	9%
2002-2003	12%
2003-2004	9.6%
2004-2005	15.8%
2005-2006	15%

[47] It may be an appropriate time for Executive Council to revisit this issue and determine what needs to be done to prevent the percentage of responses longer than 30 days from increasing. Ideally, the number of extensions should be reduced.

[48] There is also an excellent discussion of this issue in the *Federal Access to Information and Privacy Legislation Annotated 2006* [Annotated ATIA].[6] The authors observe that,

> *[d]elays in responding to access requests have an insidious effect on departments. They lead to distrust on the part of requesters and this distrust leads to more requests and more complaints to the commissioner. Of course, the result is even more work for the department and a blow to the organization's morale due to the frustration of having too much work and too little appreciation.*[7]

[49] This publication also includes 39 specific recommendations[8] for administering the access law in an efficient and effective manner and to minimize the need to extend the response time.

Section 12(1)(a) Unreasonable interference with operations

[50] This was explicitly identified by SaskHealth in its initial response to the Applicant. This was not the case in any of the decisions communicated to the applicant by the four Crown corporations.

[5] Available at www.saskjustice.gov.sk.ca/overview/annual/annualreport.shtml
[6] Colonel Michel W. Drapeau & Marc-Aurèle Racicot, (Toronto: Thomson Carswell, 2006) at 1-116
[7] *Ibid*., at 1-116
[8] *Ibid*., at 1-117

[51] At the time of our review, SaskHealth offered the following additional explanation:

> *I note that on March 29, 2005 Saskatchewan Health responded to* [the Applicant's] *initial FOI request, providing him copies of relevant records.*
>
> *Saskatchewan Health works very hard to process FOI applications within the first 30 days of receiving them, and in the majority of times we are able to do this. However there are times when demands from FOI requests must be balanced with other priorities. During the time in question, the two Senior Policy Analysts who handle FOI requests were also involved in the following:*
>
> - *preparing and finalizing a department Public Performance Plan, which was released on budget day (all government departments were required to do this);*
> - *coordinating a variety of intergovernmental activity for the Department, and providing advice to the Minister and senior officials as required;*
> - *providing research, analysis and direction on a variety of policy issues;*
> - *preparing responses for other FOI requests;*
> - *preparing briefing packages for the Minister for the upcoming legislative session; and*
> - *supporting other priorities for the Department.*
>
> *Attempting to complete this FOI request within the initial 30-day period would have unreasonably interfered with the priorities of the branch. It is our view that the workload and activities of the Department during the month of February 2005 were such to warrant the extension of the response time of 30 days to* [the Applicant's] *FOI Application pursuant to subsection 12(1)(a)(ii) of the FOI Act.*

[52] In assessing whether an extension is appropriate under section 12(1)(a) of the Act in the case of SaskHealth I am focusing on the following two criteria:

[53] I am guided by the commentary in the Annotated ATIA as follows:

> *In deciding what is a reasonable period of time for an extension, the institution should calculate the time needed to process the request using the available resources in ATIP and in the relevant OPI(s)*[9]*. Extensions are not appropriate, however, to compensate for inadequate resourcing to meet the institution's ordinary ATI workload.*[10] (Emphasis added)

i. Is there a "large" number of records or requests?

[54] There is no evidence of "a large number of requests" in February 2004 as required by section 12(1)(a)(ii) of the Act. Although SaskHealth has referenced "other requests" in

[9] Not footnoted in original. An OPI is the Office of Primary Interest (i.e. the office that holds the information requested), available online at http://www.tbs-sct.gc.ca/pubs_pol/gospubs/tbm_121/atip2_e.asp, at 1
[10] *Supra*, note 6 at 1-130

its submission, there are no particulars as to the number or complexity of such other requests.

[55] There is no evidence that the number of records in issue is large either. In this regard, I considered a case that involved approximately 200 pages in Report F-2006-003 and concluded that this number would not constitute a large number of records.[11]

[56] I note that former Ontario Information and Privacy Commissioner Sidney Linden observed:

> *The* [Ontario FOIP Act] *provides institutions with a clear and relatively short time limit for responding to requests. This time limit can be extended only in the circumstances set out in* [counterpart to our section 12]. *Further, in my view, in invoking* [counterpart to our section 12], *the head must address him or herself to whether* ***any particular request*** *involves a large number of records or consultations that cannot reasonably be completed within the 30 day time limit. I do not believe that* [counterpart to section 12] *lends itself to the interpretation that, where the response to a number of separate requests by the same individual, which collectively involve a large number of records or necessitate consultation,* [counterpart to section 12] *is properly triggered.*
>
> *In coming to this conclusion, I am fully aware of certain of the problems created for institutions by the* [Ontario FOIP Act]. *Institutions are faced with a "requester driven" system. There appears to be no way that the institution can accurately predict when a large number of requests will come in, whether or not that large number is from the same individual. Therefore, it is difficult to plan for adequate staff and resources.*
>
> *On the other hand, if I were to take the view that a large number of requests coming from one individual has a legitimate impact on the interpretation of* [counterpart to section 12], *it seems to me that such an approach would be open to potential abuse. Absent statutory amendment, I can suggest two legitimate courses of action that an institution might consider when compliance with the time limits set out in the* [Ontario FOIP Act] *places an inordinate strain on resources. They are as follows:*
>
> 1. *Negotiate with the individual requester who sends in numerous requests as to whether the requester would consent to waive the 30 day limit for each of the requests in favour of a response within 30 days in respect of certain "priority" requests and a longer time for response in respect of others.*

[11] SK OIPC Report F-2006-003, [40] to [42]

2. *Allocate its resources in such a way that it can import, on an emergency basis, additional staff to assist those routinely working on Freedom of Information requests in situations in which there is a sudden influx of requests.*[12]

ii. Would compliance within the 30 day period unreasonably interfere with the operations of the government institution?

[57] I note that in the Annotated ATIA, the following commentary deals with 'unreasonable interference' with operations:

> *For the purposes of* [counterpart to section 12 of the Act], *the processing of an access request may be considered to unreasonably interfere with the institution's operations if processing the request within 30 days would require:*
>
> *a. transferring resources to ATIP from other operational areas;*
>
> *b. diverting OPI subject matter expertise to the detriment of the OPI's core functions; or*
>
> *c. devoting such a high proportion of ATIP resources to responding that the processing of other requests is negatively affected.*[13]

[58] The British Columbia Information and Privacy Commissioner found in one Decision[14] that the public body had failed to establish that the access request would unreasonably interfere with the operations of the public body. He observed that,

> *[t]here is no evidence before me, in this case, about any of the following things:*
>
> - *the extent of the* [public body's] *access to information resources;*
> - *the amount of time expended by the* [public body's] *access to information staff or* [related public body] s*taff in responding to the respondent's access requests;*
> - *any interference by the respondent's access requests with the processing of other access requests;*
> - *any interference by the respondent's access requests with the* [public body]*'s operations of* [sic] *those of the* [related public body].

[12] Ont. IPC Order PO-2168, at 3-4
[13] *Supra*, note 6 at 1-131
[14] B.C. IPC Decision on a Section 43 Application by the Vancouver Police Board, available online at http://www.oipcbc.org/orders/section 43/dec-22-1999.html, at 6

[59] I find there is no evidence from SaskHealth with respect to the first two bullets above and very little evidence that addresses the final two bullets above beyond a simple assertion by that Department.

[60] I note there are Ontario Orders[15] that deal with "unreasonable interference with the operations of an institution" in the context of claims that a request is frivolous or vexatious or disputes over a fee estimate. Even though the context may be different, I find that they are nonetheless of some assistance in this case.

[61] There is Ontario authority that in order to establish "interference" an institution must, at a minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities." (Order M-850)

[62] Where an institution has allocated insufficient resources to the freedom of information process, it may not be able to rely on limited resources as a basis for claiming interference. (Order MO-1488) In that case, since the institution had allocated very limited resources to freedom of information it could not shift responsibility for this to the applicant.

[63] In another Ontario Order[16], the Assistant Commissioner made the following observation:

> *The Concise Oxford Dictionary (8th ed.) offers the following definitions:*
>
> > ***interfere:*** *meddle, obstruct a process etc.; be a hindrance, get in the way*
> >
> > ***operation:*** *the action or process or method of working;… the scope or range of effectiveness of a thing's activity*
>
> *Therefore, in my view, a pattern of conduct that would interfere with the operations of an institution is one that would obstruct or hinder the range of effectiveness of the institution's activities.*
>
> *It is not possible to establish a finite set of criteria that will demonstrate "interference with the operations as used in section 5.1(a). It is important to bear in mind that interference is a relative concept which must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality*

[15] Ont. IPC Orders PO-2151, PO-2168, M-850
[16] Ont. IPC Order M-850, Appeal M_9600149, Town of Midland, available online at http://www.ipc.on.ca

than with the operations of a large provincial government Ministry, and the evidentiary onus on the institution would vary accordingly.

[64] Despite being one of the largest departments in the Saskatchewan Government with a budget in 2003-2004 of $2.5 billion[17], it appears that there were only two Senior Policy Analysts who handled formal access requests in 2004 and this was apparently done only on a part-time basis. From the submission of SaskHealth, we note that those same Senior Policy Analysts had many other non-FOIP responsibilities including: providing research, analysis and direction on a variety of policy issues; coordinating a variety of intergovernmental activity for the Department and providing advice to the Minister and senior officials as required; as well as supporting other priorities for the Department. These activities appear to have been routine and not in any way extraordinary. Preparing briefing packages for the Minister for the upcoming legislative session and preparing and finalizing a department Public Performance Plan which was released on budget day also would not be extraordinary matters and could have been anticipated well in advance of the deadlines. There is nothing in the submission of SaskHealth that reveals an unusual inordinate strain on its resources caused by this single access request.

[65] Most telling perhaps is the assertion of SaskHealth that: "Attempting to complete this FOI request within the initial 30 day period would have unreasonably interfered with the priorities of the branch."[Emphasis added] That assertion reflects a failure to recognize the importance of the transparency responsibilities under the Act. The Legislative Assembly has directed, through the structure and deadlines in the Act, that responding to access requests should be a priority for a government institution. The Courts in this country have reinforced that requirement by describing access and privacy laws as a special kind of law and one that is 'quasi-constitutional.[18]

[17] Saskatchewan Health Annual Report 2003-2004, www.health.gov.sk.ca/mc_publications_ar_archive.html, at 65

[18] See *Nautical Data International Inc.* v. *Canada (Minister of Fisheries and Oceans)*, 2005 FC 407 at para.8; *Canada (Attorney General)* v. *Canada (Information Commissioner)*, [2004] 4 F.C.R. 181 at para. 20, 255 F.T.R. 56, 15 Admin. L.R. (4th) 58, 32, C.P.R. (4th) 464, 117 C.P.R. (2d) 85, 2004 FC 431, rev'd (2005), 253 D.R.R. (4th) 590, 335 N.R. 8, 40 C.P.R. (4th) 97, 2005 FCA 199, leave to appeal to S.C.C. requested; *Canada (Attorney General)* v. *Canada (Information Commissioner)*, [2002] 3 F.C. 630 at para. 20, 216 F.T.R. 247, 41 Admin. L.R. (3d) 237, 2002 FCT 128, 2430901; *Canada Inc.* v. *Canada (Minister of Industry)*, [2002] 1 F.C. 421 at para. 102, (2001), 282 N.R. 284, 45 Admin L.R. (3d) 182, (2001) 14 C.P.R. (4th) 449, 2001 FCA 254, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No 537 (Q.L.); *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, (2002) SCC 53 at para 25; *R.* v. *Dyment*, [1988] 2 S.C.R. 417; *R.* v. *Mills*, [1999] 3 S.C.R. 668; *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 402; *R.* v. *Plant*, [1993] 3 S.C.R. 281; *R.* v. *Duarte*, [1990] 1 S.C.R.

What is the relevance of the fact that Christmas occurred during the prescribed 30 day period?

[66] In IPC Order PO-2168[19], the Ontario Acting Adjudicator concluded as follows:

> *I feel that the views expressed above* [above quote from Commissioner Linden at paragraph 56] *regarding the planning of adequate staff and resources are applicable in the circumstances of this appeal given that the reason for the time extension is due to staff vacations. The OHRC has not provided any information with respect to any efforts made in relation to the two courses of action described above in processing the three requests. Furthermore, I find that the explanation for the time extension provided by the OHRC is not sufficient to convince me that meeting the time limit would unreasonably interfere with the operations of the institution. For the future, I urge the OHRC to give consideration to the two suggested courses of action described above when processing requests.*

[67] Given my finding that there were inadequate resources committed by SaskHealth to meet its statutory responsibilities under the Act, and the fact that annual vacation and statutory holidays should be anticipated and planned for, I find there is no need to address this question.

[68] After a careful review of the above noted authorities, I find that the problems with responding to the access request within 30 days are primarily attributable to a failure by SaskHealth to recognize that its compliance with this Act must be a priority. Further, I find that SaskHealth at the times material to this review had failed to commit adequate resources to manage its access to information responsibilities under the Act. SaskHealth also failed to meet its burden of proof in establishing that responding to the request for access would "unreasonably interfere with the operations of [SaskHealth]."

[69] Having established neither of the two essential elements of section 12(1)(a)(ii), I find that the extension of the response deadline in this case fails to satisfy section 12.

30; *R.* v. *Edward*, [1996] 1 S.C.R. 128; *Canada (Information Commissioner)* v. *Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66, 2003 SCC 8.

[19] Ont. IPC Order PO-2168, at 4

Section 12(1)(b) Need for consultation

[70] This was explicitly raised by SaskPower in its initial response to the Applicant. As noted earlier, this was not raised by the other three Crown corporations in their initial response to the Applicant but was raised for the first time in each of their submissions to our office after the formal review commenced. This provision was not raised by SaskHealth in its initial response to the Applicant or in later submissions to our office during the formal review.

[71] I considered an extension of time to respond to an access request pursuant to section 12(1)(b) in Report F-2006-003 [30] to [66]. That case dealt specifically with an extension of time pursuant to section 12(1)(b) of the Act. I adopt and incorporate herein by reference that discussion and analysis. That includes my determination that for purposes of section 12(1)(b) of the Act, activities that constitute "consultations" should be those outside of intrinsic and routine obligations of any government institution.

[72] In assessing whether an extension is appropriate under section 12(1)(b) of the Act I am focusing on the following criteria:

a) Were the consultations external to the organization or in the nature of intrinisic and routine obligations of any government institution?

b) Are the consultations necessary to comply with the request for access?

c) Can those consultations not reasonably be completed within the original 30 day timeline?

(a) SaskPower

[73] On the merits of the extension, SaskPower argued as follows:

> *The extension was necessary to permit SaskPower to complete the necessary consultations on what is an extremely complex issue touching on not only the relevant legislation but also on legislative privilege. The consultation process took place in December and during the Christmas season personnel were unavailable due to holidays.*

[74] I have no particulars of the "consultations" alluded to in its submission. Were these internal or external consultations? What form did those consultations take? What

personnel necessary to the consultation were unavailable and for what period of time? None of these questions have been addressed by SaskPower. Consequently, I find that SaskPower has not discharged the burden of proof.

(b) SaskTel

[75] In its submission to our office on the review, SaskTel contended that:

> *With respect to the matters at issue on this review, I made my determination to extend the 30 day response period under Section 12(1)(b), as there were consultations that were necessary to respond to the application and these could not, in my opinion, reasonably be completed by December 17, 2005.*

[76] In his submission, the Applicant asserted that:

> *…Sask-Tel has already examined all of its records in preparing information for release pursuant to directions from the crown corporations committee of the legislature [this release took place earlier this fall, and is contained in binders called "Crown Corporations Payee Disclosure 2003, available at CIC]. As such, section 12(1)(a) cannot apply.*

[77] A statement of the decision made by the government institution and paraphrasing the statutory provision is insufficient for me to assess the appropriateness of that decision. I find that asserting an opinion by the head of SaskTel or designate without particularizing the reasons for such an opinion fails to discharge the burden of proof.

(c) SGI

[78] By letter dated March 22, 2006, SGI submitted the following arguments:

> *Much consultation and research was required in formulating a response to* [the Applicant's] *request. This involved consultation with CIC and other Crown Corporations. The response also required legal research on legislative privilege, an issue with many complex nuances. Further research was also required on the portions of the Act concerning the release of third party economic information. These issues are touched upon in our response to* [the Applicant] *of January 12, 2005, a copy of which is enclosed for your reference.*

[79] SGI provided somewhat more detail and did attempt to support its decision with information upon which the decision was based. It was somewhat skeletal and could have been bolstered considerably with additional information particularizing the additional work necessitated by the access request.

[80] I find that SGI failed to meet the burden of proof with respect to section 12(1)(b) of the Act.

(d) SaskEnergy

[81] In a March 8, 2005 submission to our office, SaskEnergy asserted as follows:

> *The Corporation had provided with* [sic] [the Applicant] *with notice that an extension of the 30-day reply time was required in order to address his request. As indicated in the enclosed letter to* [the Applicant], *the information requested by him was such that some research was required in order to address the issue of whether access would be granted to the record. Furthermore, in order to complete the research and comply with SaskEnergy's internal approval process for any responses, there was not sufficient time to complete the same within the required 30 day period. In addition, the extension was commenced in mid-December 2004, and therefore, it was difficult for the Corporation to have the same completed before year-end. The process was completed and the reply letter was sent on January 10, 2005.*

[82] SaskEnergy did provide a more detailed response compared with that received from the other three Crown corporations involved in this Review. This included an outline of the steps involved, the process followed and the nature of the unusual legal issues that required additional research and study. Legislative privilege is something out of the ordinary and would not normally be encountered by a Crown corporation in routine activities under the Act.

[83] Nonetheless, the submission was lacking sufficient particulars to enable me to make the determination that section 12(1)(b) of the Act had been properly involved. I find that SaskEnergy failed to meet the burden of proof with respect to section 12(1)(b) of the Act.

Routine External Consultation

[84] In the course of this review it came to our attention that in 2004, there appears to have been a practice common to at least one of the major Crown corporations that entailed a draft response to an access request being forwarded to the General Counsel at Crown Investments Corporation and the Communications Branch of Executive Council for review and approval prior to releasing the reply to the Applicant.

[85] Such a practice today would be troubling for several reasons:

- Accountability is fundamental to any modern access and privacy regime. The person accountable for compliance with the Act is prescribed for each government institution in the Act as the Minister or Chief Executive Officer.[20] There can be further delegation to "one or more officers of the government institution…."[21] There is no provision for one government institution making a different government institution accountable for compliance with the Act.

- If the draft response includes the identity of the applicant, this would be a disclosure of personal information of the applicant that is not necessary for the purpose of responding to the access request. This would offend the privacy provisions in the Act, notably section 29.

- It is unclear what value is added to the process of responding to an access request by consulting with the Communications Branch. Presumably the purpose is to enable the political sensitivity of the request to be assessed by the Communications Branch. Since the decision has not yet been made by the relevant government institution, there must be a substantial risk that the Communications Branch may suggest or require that disclosure of certain records be declined or delayed not because of legitimate statutory exemptions in the Act but because of wholly extraneous considerations.

- It would not be a proper exercise of a decision to invoke a discretionary exemption if that decision appears to be based on advice from the Communications officials in the Executive Council office.

- It seems likely that this extra vetting process will add delay in responding to the request for access.

[86] I appreciate the submissions and cooperation received from all five government institutions and the Applicant involved in these reviews.

[20] SK FOIP Act, s. 2(1)(e)
[21] *Ibid*., s. 60(1)

IV RECOMMENDATIONS

[87] That SaskTel, SGI and SaskEnergy revise their internal procedures to ensure that any notice to an Applicant of an extension of the time to respond to an access request provides adequate particulars of the statutory authority and the reason(s).

[88] That SaskPower, SaskTel, SGI and SaskEnergy ensure that any future consultation with outside agencies should ensure that the name of the Applicant is not disclosed unless there is proper statutory authority.

[89] That SaskPower, SaskTel, SGI and SaskEnergy ensure that, in the future, there is no delegation of the decision making power of the head on the invocation of any exemption under the Act to an external body.

[90] That SaskPower, SaskTel, SGI and SaskEnergy reconsider any past policy that requires vetting of access requests and proposed responses with the Communications Branch of Executive Council.

[91] That SaskHealth ensures that there are adequate resources assigned to meet, on an ongoing basis, its requirements under the Act for processing and responding to Access Requests.

[92] Dated at Regina, in the Province of Saskatchewan, this 15th day of December, 2006.

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