# SASKATCHEWAN

# OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

## REPORT F-2010–001

## Ministry of Health

**Summary:** The Applicant made two access to information requests to the former Department of Health, now the Ministry of Health (Health). With respect to the first application, after negotiating with Health to reduce a substantial fee estimate, the Applicant split his request into two. Health provided two revised fee estimates, one to find and reproduce paper records and the other for electronic records on the same topic. The Applicant disagreed with both estimates but paid the fees for paper records sought so Health would complete processing. The Applicant did not pay the deposit for the electronic records. With the second application, the Applicant disagreed with Health's decision to extend the response deadline and to withhold records or portions thereof from him. In that regard, Health relied on sections 13(2), 17(1)(a), 19(1)(b), 20(a), 22, 24(1) and 29 of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner undertook reviews of each of the issues raised by the Applicant. In his review of the fee estimates, the Commissioner found both to be excessive and recommended that Health reimburse fees paid by the Applicant for the first request and, to recalculate the second fee estimate. In terms of the second application, the Commissioner found the time extension was not warranted and that the exemptions cited for the most part did not apply to the withheld material. The Commissioner did uphold Health's application of: (a) section 22 of FOIP to the records identified in the Index of Records and (b) section 29(1) of FOIP to the personal information of private citizens (contact information only) who shared his/her personal views with Health as part of a consultation process. The Commissioner recommended release of all other withheld information.

**Statutes Cited:** *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 2(1)(d), 2(1)(j), 9, 12, 13(2), 17(1)(a), 19(1)(b), 20(a), 22, 24 and 29; *The Freedom of Information and Protection of Privacy Act Regulations*, c. F-22.01 Reg. 1, ss. 2(2), 6, and 7; *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1, ss. 2, 16(1)(a), and 23(2)(a); *The Local Authority Freedom of Information and Protection of Privacy Act Regulations*, S.S 1993, c. L-27.1 Reg. 1, Appendix Part II; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5., s. 2; *The Interpretation Act, 1995*, S.S. 1995, c.I-11.2, s. 10.

**Authorities Cited:** *Weidlich* v. *Saskatchewan Power Corporation*, (1998), 164 Sask. R. 204; *Stevens* v. *Canada (Prime Minister)* (T.D.), [1997] 2 F.C. 759; Saskatchewan Information and Privacy Commissioner Reports: File No. 2000/03, F-2004-003, F-2005-002, H-2005-002, F-2005-005, F-2006-001, F-2006-002, F-2006-005, F-2007-001, LA-2007-001, F-2007-002, LA-2009-001, Investigation Report H-2007-001; Alberta IPC Order F2008-008; Ontario IPC Orders: P-1465 (1997), PO-1943 (2001), PO-1993 (2002), PO-2028 (2002), PO-2310 (2004), PO-2420(2005), MO-1550-F (2002).

**Other Sources Cited:**

Saskatchewan Health, Policy and Planning Branch, *The Health Information Protection Act Regulations - DRAFT for Consultation*; Office of the Saskatchewan Information and Privacy Commissioner, *Privacy Impact Assessment*, December 2005; British Columbia, Ministry of Citizens' Services, *FOIP Act Policy and Procedures Manual, Section 75 – Fees;* Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices (2009)*; E. A. Driedger, *Construction of Statutes*, 2nd ed. (1983); McNairn and Woodbury, *Government Information: Access and Privacy* (2005, Thomson Carswell, Toronto); Saskatchewan FOIP FOLIO February 2007.

## I. BACKGROUND

[1] The Applicant submitted two access to information requests to the Saskatchewan Department of Health, now the Ministry of Health (Ministry or Health), on August 27, 2004. The first, HE-08/04-05G, was for information held by Health relating to the inclusion and interpretation of section 57 of *The Health Information Protection Act* (HIPA) and policy rationale along with information relating to the proposed HIPA Regulation #10 covering a time span of approximately 12 years (January 1, 1996 to present). The second application, HE-09/04-05G, was for information pertaining to the submissions Health received during its public consultation on the document *The Health Information Protection Act Regulations - DRAFT for Consultation*[1], which was posted on the Ministry's website at that time.

[2] With respect to the first request, HE-08/04-05G, the Applicant received a fee estimate of $120,294. As the Applicant was dissatisfied with the estimate, he submitted a Request for Review to our office though still in negotiations with Health to reframe. We opened File No. 092/2004. Subsequently, the Applicant reframed his request to focus on only two distinct portions (certain paper and electronic documents) of the original. The original estimate is therefore not subject to review. The first portion focused only on paper documents found in specific locations. Health estimated the fees at $1,020 to find and produce said records. Though he objected to the fee and requested we review the reasonableness of it, the Applicant paid 50% down so Health would complete processing his request. In the meanwhile, Health provided the Applicant with a second fee estimate of $3,018 to complete work with respect to his request for certain electronic documents. This time the Applicant did not agree to pay the deposit and instead opted for our office to review the reasonableness of the estimate first.

[3] With respect to the Applicant's second access to information request, HE-09/04-05G, though he received some documents, the Applicant was dissatisfied with the Ministry's decision to: (a) extend its response deadline by another 30 days; and (b) withhold certain

[1] Saskatchewan Health, Policy and Planning Branch, *The Health Information Protection Act Regulations - DRAFT for Consultation.*

documents (in whole or in part) relying on numerous exemptions: sections 13(2), 17(1)(a), 19(1)(b), 20(a), 22, 24(1), and 29 of *The Freedom of Information and Protection of Privacy Act* (FOIP or the Act).[2]

[4] The Applicant submitted two additional requests for our office to review these other matters as well. Our office subsequently opened Files 093/2004 & 003/2005. The only file to which Health withheld records applying various exemptions was File No. 003/2005. For the sake of efficiency, I will deal with all three matters in this Report.

## II. RECORDS AT ISSUE

[5] **Application No. HE-08/04-05G**; **File No. 092/2004** – I did not undertake a page by page review of the records responsive to the access request since the issue is the appropriateness of the two fee estimates produced by Health (to conduct separate searches for paper and electronic records on the topic noted).

[6] **Application No. HE-09/04-05G**; **File No. 003/2005 & File No. 093/2004** – The Index of Records lists 284 pages of a variety of documents including letters, reports, emails, memos, policies, sample contracts, a Privacy Impact Assessment (PIA), and faxes. Of the 284 pages, 139 were apparently released in full, 145 were withheld in full or in part.

| **Index of Records** | |
|---|---|
| **Exemptions** | **Page Numbers** |
| Section 17(1)(a) of FOIP | 40, 41, 42, 43, 44, 46-48, 71, 72, 73, 74, 100-101, 102, 103-104, 106, 107-108, 109, 110, 111-113, 114, 117, 118, 119, 120-121, 122-123, 143-147, 149-151, 152, 153, 154, 155, 156, 157-158, 159, 160-163, 165-167, 168-169, 175-180, 183-188, 190-191, 192, 193, 194, 195-196, 197-198, 199, 202, 204-209, 211-213, 218-220, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 261-262, 263-264, 265, 266, 267, 268, 269, 270, 271-272, 273, 274-277, 279-280, 282-283 |
| Section 13(2) of FOIP | 40, 41, 42, 43, 44, 143-147, 149-151, 152, 153, 154, 155, 156, 157-158, 159 |

[2] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01.

| | |
|---|---|
| Section 29(1) of FOIP | 38, 39, 40, 41, 42, 43, 44, 71, 73, 147, 148, 151, 152, 153, 154, 155, 156, 158, 159, 164, 165, 167, 169, 188, 189, 191, 192, 193, 194, 196, 198, 200, 217, 220, 221, 232, 235, 238, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271-272, 273, 277, 281, 283 |
| Section 19(1)(b) of FOIP | 221-229 (PIA) |
| Section 22 of FOIP | 100-101, 111-113 |
| Section 20(a) of FOIP | 221-229 (PIA) |
| No exemptions cited or stated in Index, "Released entirely" | 1, 2-37, 45, 49, 50-70, 75, 76, 77-78, 79-99, 105, 115-116, 124-142, 170-174, 181, 182, 201, 203, 210, 214-216, 230-231, 233-234, 236-237, 239-249, 278, 284 |

## III. ISSUES

1. **Does payment of the fee preclude reconsideration of the fee estimate?**

2. **Were the fee estimates furnished to the Applicant appropriate?**

3. **Are the fees estimated by Health reasonable in the circumstances?**

4. **Was Health's response with respect to extending its response deadline to the Applicant adequate in terms of what is required by section 12 of *The Freedom of Information and Protection of Privacy Act*?**

5. **Was Health's extension of the response deadline in accordance with the criteria set out in section 12(1)(a)(ii) of *The Freedom of Information and Protection of Privacy Act*?**

6. **Did Health meet the duty to assist with respect to both of the Applicant's applications?**

7. **Did Health properly apply section 13(2) of *The Freedom of Information and Protection of Privacy Act* to the records withheld?**

8. **Did Health properly apply section 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* to the records withheld?**

9. **Did Health properly apply section 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* to the records withheld?**

10. **Did Health properly apply section 20(a) of *The Freedom of Information and Protection of Privacy Act* to the records withheld?**

11. **Did Health properly apply section 22 of *The Freedom of Information and Protection of Privacy Act* to the records withheld?**

12. **Did Health properly apply sections 24 and 29 of *The Freedom of Information and Protection of Privacy Act* to the records withheld?**

## IV. DISCUSSION OF THE ISSUES

[7] Health is a "government institution" within the meaning of section 2(1)(d) of FOIP and therefore is subject to the Act.[3]

[8] The Applicant made application to Health on or about August 27, 2004 for the following:

> All documents, including but not limited to, all notes, minutes, submissions, briefing and policy documents, internal and external correspondence and e-mails in the custody or under the control of Saskatchewan, including the Minister's office:
>
> (a) related to the inclusion and interpretation of section 57 of the HIPA and the policy rationale therefore, and
>
> (b) related to the policy rationale and decision of Saskatchewan Health to propose Regulation #10, 'Preventing the disclosure of provider information by trustees (i.e. pharmacists)' under the HIPA. The time period covered by this request is from January 1, 1996 until the date of receipt of this request.

[9] By way of letter dated September 24, 2004, Health provided a fee estimate of $120,294 to the Applicant pertaining to this request, HE-08/04-05G.

[10] As already indicated, the Applicant advised Health and our office of his desire to focus his requests on two portions of the original in an attempt to reduce the above noted fee.

[3] See Saskatchewan OIPC Investigation Report H-2007-001 at [17], available at:http://www.oipc.sk.ca/reviews.htm.

[11] Even though the Applicant objected to the revised fee estimates, he proceeded to pay the deposit on the first so Health would proceed with processing that request.

### 1. Does payment of the fee preclude reconsideration of the fee estimate?

[12] On October 13, 2004, we received the Applicant's first Request for Review dated October 7, 2004. Usually, when an Applicant appeals a fee estimate, the agency will halt work on processing the request until the oversight body completes its review. In this case, Health instead continued to process the Applicant's request in accordance with his wishes. Nonetheless, we advised Health of our intentions to undertake a review of the fee estimate on or about November 25, 2004. The case file number assigned was File No. 092/2004.

[13] On this question, the Government of British Columbia's Ministry of Citizens' Services, *FOIP Act Policy and Procedures Manual, Section 75 – Fees,* provides the following advice:

> If an applicant wants to appeal the requirement to pay a fee, but also wants immediate access to the requested records, the applicant should pay the fee estimate first. If the Commissioner determines the fee was unjustified, the public body may be required to refund the fee, in whole or in part. [4]

[14] As I am of the same view, I proceeded to consider the appropriateness of the fees estimated.

### 2. Were the fee estimates furnished to the Applicant by Health appropriate?

[15] The Applicant requested that our office review both revised fee estimates provided by Health.

[4] British Columbia, Ministry of Citizens' Services, *FOIP Act Policy and Procedures Manual, Section 75 – Fees*, p. 4, available at: http://www.cio.gov.bc.ca/services/privacy/manual/sections/sec70_81/sec75.asp.

[16] Health provided the following fee estimate for the Applicant's first narrowed request:

| **Table 1** | | | |
|---|---|---|---|
| LOCATING RELEVANT RECORDS | | | |
| Location of Possible Records that may be Relevant to [the Applicant's] FOI Application | Paper Records | | Total Cost |
| | # of records to review & time to locate relevant records | Cost to locate possible records | |
| Minister's Office | • 2-3 file boxes of records<br>• 4 hours | 4 hrs x $30/hr = $120 | $120 |
| Deputy Minister's Office | • 2-3 file boxes of records<br>• 4 hours | 4 hrs x $30/hr = $120 | $120 |
| Policy and Planning Branch | • 14 file boxes of records<br>• 16 hours | 16 hrs x $30/hr = $480 | $480 |
| REVIEWING AND PREPARING RECORDS | | | |
| After locating relevant records related to the revised FOI application, it is estimated that approximately 2 file boxes of records may be found. It is estimated that it will take approximately 20 hours to review these records to determine whether all, some or parts of the record will be released to the applicant and then based on the decision of what information will be released prepare the records to send to the applicant. 12 hours x $30/hr = $360 | | | $360 |
| MINUS 2 HOURS PROVIDED FREE OF CHARGE | | | ($60) |
| TOTAL REVISED ESTIMATE OF COSTS | | | $1,020 |
| DEPOSIT REQUIRED | | | $510 |

[17] The second table breaks down the fees estimated by Health to find and produce responsive electronic records pursuant to the second part of the narrowed request as follows:

| **Table 2** | | | |
|---|---|---|---|
| LOCATING RELEVANT RECORDS | | | |
| Location of Possible Records that may be Relevant to [the Applicant's] FOI Application | Electronic Records | | Total Cost |
| | # of records to review & time to locate relevant records | Cost to locate possible records | |
| Minister's Office | Not applicable | Not applicable | --- |
| Deputy Minister's Office | Not applicable | Not applicable | --- |
| Policy & Planning Branch | Approx. 5736 records Estimate 96.6 hrs to locate | 96.6 hrs x $30/hr = $2898 | $2,898 |
| Drug Plan & Extended Benefits Branch | Estimate 4 hours to locate | 4 hours x $30/hr = $120 | $ 120 |
| Communications Branch | Not applicable | Not applicable | --- |
| Corporate Information & Technology Branch | Not applicable | Not applicable | --- |
| REVIEWING AND PREPARING RECORDS | | | |
| After locating relevant electronic records, it is estimated that very few records will be found. It is estimated that it will take approximately 1 hour to review these records to determine whether all or parts of the records will be released to the applicant and then approximately 1 hour to prepare the records for release to the applicant – 2 hours x $30/hr = $60 | | | $ 60 |
| MINUS 2 HOURS PROVIDED FREE OF CHARGE | | | ($ 60) |
| TOTAL REVISED ESTIMATE OF COSTS | | | $3,018 |
| DEPOSIT REQUIRED – 50% OF TOTAL ESTIMATE OF COSTS | | | $1,509 |

[18] In my Report F-2007-001, I commented on the purpose and required elements of a proper fee estimate at [51] to [56],[5] first introduced in my Report F-2005-005 at [74] and [75].[6]

[19] The fee estimates prepared by Health are, for the most part, inadequate as neither contained sufficient details including: (a) the number of people involved in the search, (b) the estimated number of records in every location, and (c) an interim notice. The exception is the second estimate where Health did estimate the number of records it may find in its Policy & Planning Branch.

[5] Saskatchewan OIPC Report F-2007-001, at [51] to [56], available at: http://www.oipc.sk.ca/reviews.htm.
[6] Saskatchewan OIPC Report F-2005-005, at [74] to [75], available at: http://www.oipc.sk.ca/reviews.htm.

### 3. Are the fees estimated by Health reasonable in the circumstances?

[20] The relevant sections of *The Freedom of Information and Protection of Privacy Regulations*[7] (FOIP Regulations) are as follows:

> **6**(2) Where time in excess of two hours is spent in searching for a record requested by an applicant or in preparing it for disclosure, a fee of $15 for each half-hour or portion of a half-hour of that excess time is payable at the time when access is given.
>
> …
>
> **7**(1) For the purposes of subsection 9(2) of the Act, $50 is prescribed as the amount of fees beyond which an estimate must be given by the head.
>
> (2) Where the amount of an estimate exceeds the actual amount of fees determined pursuant to section 6, the actual amount of fees is the amount payable by the applicant.

[21] In my Report F-2007-001 at [52], I observed that "the government institution bears the burden of proof to establish that a fee estimate is reasonable."[8] To meet the burden, I therefore look to the public body to further break down individual search and preparation activities included in the estimate as well as provide details as to how it calculated the time it would take to complete said tasks.

**Search efforts - first narrowed request (paper records only)**

[22] When developing a fee estimate, only activities that are compensable should be included in the calculations. In terms of what activities are compensable with respect to search efforts, the following excerpts from my Report F-2005-005 are helpful:

> Under the Act in Saskatchewan, there are 3 different kinds of fees: (1) fees for searching for a responsive record; (2) fees for preparing the record for disclosure and (3) fees for the reproduction of records. The cost of reproduction is not in issue in this review.
>
> …

[7] *The Freedom of Information and Protection of Privacy Regulations,* c. F-22.01 Reg. 1.
[8] Supra note 5 at [52].

(1) Searching for a Record

This relates to the personnel time involved in finding a responsive record. The type of work that can be covered in a fee estimate is addressed by two Ontario decisions that turned on the appropriateness of fees charged.

In Ontario IPC Order M-301, the local authority had charged a total of 63.5 hours of search time and preparation that included the time spent in total by 2 clerical staff and three senior level staff. The local authority had supplied the relevant time records for those different employees. The records requested spanned a ten year period. It was held that the nature of the request required the search to be done by various senior level employees. …

In Ontario IPC Order PO-2299, the searches were undertaken by branch employees who were familiar with the various record holdings in two different program areas. The question was whether the individuals who had done the search had undertaken the appropriate search activities. …

A useful document is *Processing Voluminous Requests - A Best Practice for Institutions*. This document states, in part, as follows:

> *Search time consists of every hour of manual search time required to locate and identify responsive records. This includes staff time involved in searching for records, examining file indices, file plans or listings of records either on paper or in a computer, pulling paper files/specific paper records out of files, and/or reading through files to determine whether the 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 the records or having someone review the results of the search.*[9]

[23] Further in formulating my views as to what is compensable in terms of search efforts, I found the following statement in Ontario's Information and Privacy Commissioner's (IPC) Order PO-1943 persuasive:

> In previous orders of this office dealing with the reasonableness of an institution's search for responsive records, it has been well established that the search which an institution undertakes must be conducted by knowledgeable staff in locations where the records in question might reasonably be located (see, for example, Order M-624). In other words, the *Act* contemplates that searches for responsive records will be conducted by reasonably informed staff. **Further, the *Act* contemplates that records will be maintained in accordance with some regularized and managed system so that a reasonably informed or knowledgeable staff member will be able, upon a reasonable effort, to locate those that are responsive to the request.**

[9] Supra note 6 at [37] to [42].

> **If an institution's reorganization results in staff not knowing where specific types of records might be located, then in my view, it would not be reasonable to expect that a requester should pay for the institution's staff to become informed**.[10]
>
> [emphasis added]

[24] In terms of calculating fees, I considered another Ontario IPC Order PO-2310 wherein the Assistant Commissioner noted the following:

> ***Search time***
>
> As far as search activities are concerned, the Ministry states:
>
> Facility #1: A total of 13 boxes of records would need to be retrieved from the Records Centre. A representative sample of 3 boxes was retrieved, and although no responsive records were identified, the person who conducted the search expressed confidence that responsive records would be located in some of the other boxes. The actual time taken to review the 3 boxes was 100 minutes, and on that basis the Ministry estimates it would take 6.5 hours to review all 13 boxes (i.e. 33.3 minutes per box).[11]
>
> …
>
> The Ministry's representations on search time are clear and comprehensive. In calculating the search time estimate, the Ministry relies on staff in the two program areas who have experience and expertise in dealing with the type of record holdings responsive to the request. Estimates are based either on a representative sample of records or the advice of expert staff and, in my view, are carefully considered and reasonable in the circumstances.[12]

[25] Health calculated time spent for search activities at 24 hours or 1440 minutes at an estimated cost of $720. If applying the reasoning from the above Ontario case to the present utilizing 33.3 minutes/box, even on the high end, 20 boxes translates only to 666 minutes or 11.1 hours, not 24. 11.1 hours x $30 = $333, not $720.00; or on the low end of the estimate (18 boxes), 599.4 minutes or approximately 10 hours x $30 = $300.

[10] Ontario IPC Order PO-1943 (2001), p. 7, available at: www.ipc.on.ca/english/advanced-search.
[11] Ontario IPC Order PO-2310 (2004), p. 5, available at: www.ipc.on.ca/english/advanced-search.
[12] Ibid, p. 7.

[26] In a letter to the Applicant accompanying Table 1, Health provided the following explanation with respect to its search efforts (i.e. time estimated):

> Based on the above modifications to your initial FOI request, I have prepared a revised cost estimate pursuant to Section 9 of *The Freedom of Information and Protection of Privacy Act*. In order to comply with your revised request we estimate 36 hours of preparation time (first two hours are free) at $30 per hour (34 hrs x $30/hr = $1,020) in order to locate, review and prepare any relevant records. The total cost estimate is $1, 020.

[27] The above statement raises many questions. Would each box searched be full? How much time did Health estimate it would take to search one box? If it takes 4 hours to get through 2-3 boxes, then why would it take 16 hours to get through 14? In the end, under reviewing and preparation, Health suggests that it may find only 2 file boxes of responsive records. Why isn't there a file index or other tool that could be utilized to reduce the search time? Would random boxes need to be searched? If so, why? Are the boxes properly labelled with contents clearly itemized?

[28] Health has not provided evidence as to the manner in which the requested records are maintained and what actions were necessary to locate and retrieve the records. Health also did not explain why the search would take this much effort nor did it clarify how it calculated this portion of the fee. Recently however, Health advised us that it had and continues to utilize file keys when searching for responsive records. Nonetheless, this was not presented at the material time so I was unable to take it into consideration when completing my assessment. It will however impact my recommendations.

[29] Due to the unusual circumstances, rather than provide further representation with respect to the estimate, Health instead opted to report on actual time spent processing the Applicant's request as follows:

> With respect to the work that we are undertaking for [the Applicant] in relation to the search, review and preparation of the paper records related to his FOI application, I would advise that we have completed the process of searching through the Minister's, Deputy Minister's and Policy and Planning's records. We are now nearing the completion of our review of the documents. The next step to be taken will be to prepare the records for disclosure to [the Applicant]. **The time required to search for the records came to 57 hours which is 33 hours more than the time quoted in**

> **the cost estimate provided to** [the Applicant]. To date the time required to review the records has been 26.5 hours. This is 14.5 hours more than the quoted estimate provided to [the Applicant] and **this number does not yet include the time that it will take us to prepare the records for disclosure**. As you can see we had considerably underestimated the actual time needed to search, review and prepare these records for disclosure.
>
> …
>
> The Department is not prepared to waive the fee as outlined in the Estimate of Costs provided to [the Applicant] by way of letter dated October 5, 2004, nor are we prepared to return the 50% deposit fee already submitted by [the Applicant].
>
> [emphasis added]

[30] Health indicated that it took more time than originally estimated. I am unclear as to why. As my review is of the estimate not actual time taken, my assessment must be based on: (a) representations provided; (b) what I accept as compensable activities; and (c) consideration of how costs have been calculated in other jurisdictions.

[31] Health has provided little evidence that it utilized a systematic search strategy and that it only included activities in its search estimate that are compensable.

[32] Accordingly, my view is that Health may only charge $300 for search activities. As the Applicant has already paid $720 in search fees, I recommend that Health reimburse the Applicant $420.

**Preparation efforts - first narrowed request (paper records only)**

[33] As noted in Health's first revised fee estimate, Health estimated $360 in preparation costs for the following reasons:

> After locating relevant records related to the revised FOI application, it is estimated that approximately 2 file boxes of records may be found. It is estimated that it will take approximately 20 hours to review these records to determine whether all, some or parts of the record will be released to the applicant and then based on the decision of what information will be released prepare the record to send to the applicant. 12 hours x $30/hr = $360.

[34] In the later stages of the review, Health provided some insight into what search and preparation activities it considered compensable as follows:

> Lastly, after reviewing the following report: *2005-005 Sask Energy Incorporated* Saskatchewan Health has decided not to revisit part(s) of our submission regarding this file. However, Saskatchewan Health is in the process of revising and standardizing the current method of assessing fees. Discussions have occurred between Saskatchewan Justice and Saskatchewan Health regarding fees charged for the collection, compilation, and severing of information. As a result of these discussions and recommendations from your office, Saskatchewan Health will implement the following guidelines to assess fees for information requests, which originated on October 10, 2006 and beyond:
>
> Charges for copies:
> These types of fees are assessed according to section 6(1) of *The Freedom of Information and Protection of Privacy Regulations*. The fee assessment includes a set cost per item copied. For instance, $0.25 copied page for a paper record.
>
> **The following will not be included in the fee assessment: 1) Additional copies made to assist in processing the request (i.e. back up copies, copies for internal review); and 2) Staff time spent copying information**.
>
> Charges for time spent searching for records and preparing the record for disclosure:
> These types of fees are assessed according to section 6(2) of *The Freedom of Information and Protection of Privacy Regulations*. The fee assessment includes time spent searching for records (e.g. searching through electronic indexes or file cabinets) and **preparing the records for disclosure (e.g. search for personal information that must be severed, searching for sentences or paragraphs to which exemptions will be applied** and then physically removing these portions of the record). The charge for these activities is $15 per half hour with the first two hours provided free of charge. **Several jurisdictions have adopted the standard of two minutes per page to calculate the time needed for severing, however, complex severing may take more than two minutes per page**. Wherever possible, a sample of records will be examined in order to assess whether or not the two-minute standard is likely to be an under or over estimate. The findings will be applied to the total number of pages responsive to the request.
>
> **The following will not be included in this fee assessment: 1) Internal consultations or discussions to determine issues such as: how should *The Freedom of Information and Protection of Privacy Act* be applied, what parts of the records should be severed, or how should the records be prepared; and 2) Routine activities that would be necessary for responding to any type of inquiry (i.e. packaging the records for shipment, calling a courier).**

> Electronic records:
>
> These types of fees are assessed according to section 6(3) of *The Freedom of Information and Protection of Privacy Regulations*. Saskatchewan Justice has concluded that this clause was intended to apply to costs charged by an information technology firm.
>
> Searching for email or folders on hard drives or networks will not be included in this fee assessment. Instead, this time would be more properly addressed under section 6(2) of *The Freedom of Information and Protection of Privacy Regulations*.
>
> When issuing a fee estimate to an applicant, Saskatchewan Health will indicate:
>
> 1) The time required to search for records (both electronic and paper);
> 2) The time required to prepare records for disclosure (both electronic and paper); and
> 3) Photocopying charges per page.
>
> In responding to complex requests, additional information may be provided to the applicant (e.g. number of persons involved in the search or preparation of disclosure activities).
>
> [emphasis added]

[35] I view the above as a positive development. What Health is agreeing to do, for the most part, is what I had recommended in my Reports[13] on the topic. However, in its above noted representation, Health made no mention of whether it intends to provide interim notices in the future as I recommended. Health advised us on January 5, 2010 of the following: "The Ministry of Health's current practice is that we will notify the applicant through an interim notice if we are denying access to all of the records requested."

[36] Also, I note that Health's view as to what time is compensable for preparing records for disclosure is not fully in alignment with my views as articulated. For instance, in my Report F-2005-005 at [51], I offered the following:

[13] See Saskatchewan OIPC Reports F-2005-005 & F-2007-001, available at: http://www.oipc.sk.ca/reviews.htm.

> I find that the FOIP Regulation contemplates a charge for actually severing a record. **I find that it would not contemplate time for**:
>
> - **Deciding whether or not to claim an exemption**
> - **Identifying records requiring severing**[14]
>
> [emphasis added]

[37] Only time taken for physically severing records is compensable as preparation costs under the FOIP Regulations, though Health appears to have incorporated 'reviewing' time also into its estimates. 'Reviewing' or 'thinking' time is not compensable under FOIP. Due to Health's apparent inclusion of activities in its preparation costs that are not compensable and as it did not provide an estimate of the number of pages requiring severance, I disallow the fees estimated in this category altogether. I recommend that Health refund the Applicant the $360 already paid.

[38] I note that on January 5, 2010, Health advised us that it does not currently charge for 'reviewing' records, "but only for searching for and severing records" and allows "for two minutes per page that require severing."

**Search and Preparation Efforts - second narrowed request (electronic records only)**

[39] In terms of the Applicant's request for certain electronic documents, after clarifying the scope of that request, on or about May 16, 2005, Health provided a second fee estimate to the Applicant:

> With respect to a cost estimate as it relates to the Department locating, reviewing and preparing the electronic records pertaining to [the Applicant's] FOI application, enclosed please find a table [Table 2] containing the cost estimate prepared pursuant to Section 9 of [FOIP]. This cost estimate is based on 108.6 hours of searching and preparation time (first two hours are free) at $30 per hour (106.6 hrs x $30/hr = $3,018). The total cost estimate is **$3,018**.

[14] Supra note 6 at [51].

> The cost estimate pertains only to electronic records which could include such documents as word processed, spreadsheet, power point presentations, and documents that were once email messages but which have been stored electronically in another format on the hard drive. Please note that the cost estimate for the initial search of any relevant electronic records related to the FOI application has not changed from the original cost estimate provided to [the Applicant] on September 24, 2004.

[40] For guidance on calculating fees for an estimate, I looked to the Orders of Commissioners in other jurisdictions on the topic. In Order P-1465, the Inquiry Officer with the Ontario IPC Office offered the following on estimating time for searching and preparing electronic records:

> **Electronic files**
>
> Search time for this activity is estimated at 333 hours, 20 minutes, or approximately 46 working days (over nine weeks).
>
> …
>
> I have difficulty understanding how the Ministry can estimate that it can locate responsive records contained in an entire file drawer of paper in just over 5 minutes, but in the same space of time would only be able to search through 60 electronic files, averaging two pages each. The Ministry also has not provided me with submissions regarding the applicability of electronic search tools, such as "sort" and "find" widely available in common office software programs, which would likely significantly decrease the amount of search time required.
>
> In my view, the Ministry's estimate of one minute per two page electronic memorandum is excessive. **I find that such even without the commonly available electronic search tools, it is reasonable to expect that an experienced employee would be able to scan approximately six two-page electronic messages for responsive information in one minute**.
>
> …

**PREPARATION**

I find that the Ministry's **estimate of 2 minutes per page to prepare the records** requiring severance for disclosure is reasonable.[15]

[emphasis added]

[41] I referenced the above in my Report F-2005-005 at [46].[16] I will continue to rely on this approach as a standard for estimating time for sifting through electronic records. Health estimated the number of records in one location to be 5736. By utilizing the above formula, reviewing 12 pages every minute would take approximately eight hours. Eight hours x $30 = $240, not $2,898 as estimated by Health.

[42] A number of factors may have contributed to why Health's search for responsive electronic records would take the time estimated: lack of dedicated resources, a poor information management system, and/or failure to use appropriate electronic search tools.

[43] What does seem apparent is that Health may have added time to its estimate for 'reviewing' responsive records which I have already indicated is not a compensable activity.

[44] On August 25, 2006, we offered Health another opportunity to further supplement its submission after directing their attention to a Report, F-2005-005, I issued on July 20, 2005 on the topic of fee estimates. Health advised us on December 4, 2006 that it did not intend to revisit or supplement its submission further.

[45] Accordingly, my view is that the fees estimated by Health are excessive for both search and preparation activities for the reasons noted. I recommend that, in the circumstances, Health recalculate its fee estimate by applying the above noted standards and only include time spent on those activities that I have already indicated are compensable, if the Applicant is still interested in pursuing.

[15] Ontario IPC Order PO-1465 (1997), p. 3-4, available at: www.ipc.on.ca/english/advanced-search.
[16] Supra note 6 at [46].

**4. Was Health's response with respect to extending its response deadline to the Applicant adequate in terms of what is required by section 12 of *The Freedom of Information and Protection of Privacy Act*?**

[46] This issue applies only to File No. 093/2004 which dealt with the extension of the response deadline.

[47] The Applicant's second access to information request, HE-09/04-05G, was received by Health on August 27, 2004 as noted below.

[48] On September 24, 2004, although dated in error "September 24, 2003", Health's response letter to the Applicant advised as follows:

> **Your Freedom of Information (FOI) application was received at this office on August 27, 2004**.
>
> …
>
> We wish to inform you that the response time of **30 days has been extended another 30 days to October 26, 2004** 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 unreasonable (sic) interfere with the operations of the government institution**.
>
> [emphasis added]

[49] In his October 7, 2004 letter to our office, the Applicant requested a review of Health's decision to extend its response deadline. We subsequently opened File No. 093/2004 to address this issue providing notice to Health on or about November 25, 2004.

[50] The applicable provision in the Act is 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:
>
> …
>
> (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 (l) 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.

[51] In order to meet the requirements of section 12 of FOIP, Health must have provided the following to the Applicant within the statutorily imposed timelines as stipulated in my Report F-2006-005:

> 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.[17]

[52] The notice provided to the Applicant by Health included the reason why it was extending the response deadline. The notice was also provided within the required timeline as required by section 12(2) of FOIP. Finally, in its above noted notice, Health advised the Applicant of its new deadline October 26, 2004 and provided him with a further response

[17] Saskatchewan OIPC Report F-2006-005, at [33] available at: http://www.oipc.sk.ca/reviews.htm.

within that deadline as required by section 12(3) of FOIP. Therefore, in all respects, it appears that the notice from Health met the requirements of section 12 of the Act.

**5. Was Health's extension of the response deadline in accordance with the criteria set out in section 12(1)(a)(ii) of *The Freedom of Information and Protection of Privacy Act*?**

[53] The applicable provision of the Act is 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:
>
> …
>
> (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;

[54] Health provided its rationale for requiring the extension as follows:

> While we strive to process FOI applications within the first 30 days of receiving them, there are times when demand for FOI requests must be balanced with other priorities. During the month of September 2004 this office received or was processing eight separate FOI applications including this one received from [the Applicant]. There are two Senior Policy Analysts who share responsibility for processing the FOI applications received by Saskatchewan Health. Of the eight FOI applications being processed during the month of September 2004, there were four FOI applications that required considerable time to be spent by the two Senior Policy Analysts to locate, review and/or prepare the records. In addition to their responsibility for processing FOI applications, the two Policy Analysts also have a number of other responsibilities, including:
>
> …
>
> The month of September 2004 was particularly busy for all staff within the Policy and Planning Branch of Saskatchewan Health. Attempting to complete this FOI access request within the initial 30-day period would have unreasonably interfered with the priorities of the branch. In addition, both Policy Analysts had vacation booked at different times during this time period.

> With respect to [the Applicant's] FOI Application specifically, during the first 30 days after receipt of his request we continued to receive trustee/stakeholder submissions related to the proposed HIPA regulations throughout the month of September and up until the middle of October. In total we received approximately 70 submissions with approximately 70% of the submissions being received after September 20, 2004 and approximately 30% of the submission being received after September 30, 2004. The cut off date for submissions was September 30, 2004.
>
> Due to the other duties and priorities that both Policy Analysts were engaged in at the time, neither were able to process even the few submissions that the Department had received and provide [the Applicant] with a response within the first 30 days of receipt of his application. We, therefore informed [the Applicant] of the extension of 30 days to respond to his FOI application. Within that next 30 day period we reviewed and processed all the submissions received related to [the Applicant's] request and on October 26, 2004 we sent [the Applicant] a letter (copy enclosed) along with a copy of the records that we were prepared to release. In this letter we also advised [the Applicant] that there were two records related to his request that had not been included because these records related to third party records which we had reason to believe might contain information that would affect the interest of the third parties. We told [the Applicant] that we had written to these third parties (copies of letters to third parties enclosed) asking for their representation and that as soon as we heard from these third parties we would get back to him with respect to whether we could release these records to him. Subsequently we heard from both of the third parties and on November 16, 2004 we wrote (copy of letter enclosed) to [the Applicant] releasing the records of the third parties in whole or in part.

[55] In terms of its argument that both Policy Analysts "had vacation booked at different times during this time period", in my Report F-2006-005, I commented "that annual vacation and statutory holidays should be anticipated and planned for."[18] Also, Health has offered no specifics as to how long each Policy Analyst was away on vacation (number of days/hours, etc).

[56] Health has also not provided any particulars as to the complexity of the requests received other than providing a number, eight. There is nothing in the submission of Health that reveals an unusual or inordinate strain on its resources caused by these access requests. Instead, the Analysts appear to have been overwhelmed by other job demands. In a similar case to the present one, my Report F-2006-005, Health offered an almost identical argument as to why it required an extension (i.e. other job duties interfere with processing access requests). I considered whether or not that explanation was adequate in [50] to

[18] Ibid at [67].

[65].[19] I did not accept that explanation as I found that Health did not have adequate dedicated resourcing in place to process access requests. In the present case, I am of the same view although I acknowledge there has been a significant increase in recent years in resources for the processing of access requests.

[57] 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 failed to satisfy section 12.

### 6. Did Health meet the duty to assist in each of the two cases?

[58] In my Report F-2004-003, I concluded that there is an implicit duty on the part of a government institution to make every reasonable effort to assist an applicant and to respond without delay to each applicant openly, accurately and completely.[20] This also means that the government institution must make an adequate search for all records responsive to the access request.

#### a) Applicant's first request, HE-08/04-05G

[59] On October 13, 2004, Health acknowledged receiving the deposit from the Applicant. By way of letter dated July 22, 2005, Health advised the Applicant as follows:

> **On October 13, 2004, we received half of the Estimate of Costs from you** in the form of a cheque in the amount of $510.
>
> **We have now finished reviewing and preparing** (i.e. photocopying and severing the records in whole or in part) the records that were identified related to your FOI request. **Once you have provided the remaining $510, we will disclose the records to you**.
>
> [emphasis added]

[19] Ibid at [50] to [65].
[20] Saskatchewan OIPC Report F-2004-003, at [5] to [15], available at: http://www.oipc.sk.ca/reviews.htm.

[60] In its subsequent letter to the Applicant dated August 16, 2005, Health acknowledged receipt of the outstanding balance as follows:

> Your cheque of $510, **which is the remaining portion of the cost estimate**, was **received at this office on August 15, 2005**. In response to your request you will find enclosed those paper records that were identified pertaining to your request.
>
> …
>
> Please note that with respect to some of the records certain information has been severed.
>
> [emphasis added]

[61] Though the Applicant paid the deposit on October 13, 2004, Health did not complete reviewing and preparing the record nor ask the Applicant for remittance of the outstanding balance until July 22, 2005.

[62] In this regard, the Ministry did not meet the duty to assist. However, the Ministry made a significant effort to cooperate with our office and at an early stage discussed other options with the Applicant in an attempt to provide at least some responsive records at a reduced cost.

**b) Applicant's second request, HE-09/04-05G**

[63] With respect to the Applicant's second application, I have already determined that Health did not have sufficient reason to extend the response deadline. In that respect, Health did not meet the duty to assist.

**7. Did Health properly apply section 13(2) of *The Freedom of Information and Protection of Privacy Act* to the records withheld?**

[64] In terms of File No. 003/2005, Health withheld records or portions thereof citing a number of exemptions. The first to consider is section 13(2) of FOIP.

[65] The above section reads as follows:

> **13**(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from a local authority as defined in the regulations.

[66] As required by section 2(2) of the FOIP Regulations, for the provision to apply, each contributing agency must constitute a "local authority" as defined by *The Local Authority Freedom of Information and Protection of Privacy Act*[21] (LA FOIP), section 2(f). Health applied section 13(2) of FOIP only to those submissions provided by local authorities (regional health authorities[22] and the Saskatchewan Cancer Agency[23]). To this extent, it appears that the provision would apply.

[67] The second consideration is whether or not Health is able to demonstrate that the information in question was "obtained" from local authorities. In my Report F-2006-002, I defined "obtained".[24] As it appears that Health received these submissions from local authorities, therefore obtained, I must next consider if those submissions were obtained "in confidence, implicitly or explicitly." From the above referenced Report, I extracted the "in confidence" test and applied it in the present case.[25]

[68] In its May 25, 2005 submission, Health offered the following in terms of why it believes the information in question was "obtained in confidence" from local authorities:

> Subsection 13(2) of the FOI Act gives a head the legislative authority to refuse access to information contained in a record that was obtained in confidence, implicitly or explicitly, from a local authority as defined in the regulations. A number of the records identified in the application were obtained from local authorities, i.e. regional health authorities and the Saskatchewan Cancer Agency.

---

[21] *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1 [hereinafter LA FOIP]
[22] Section 2(f)(xiii) of LA FOIP establishes that a regional health authority is a local authority.
[23] The Saskatchewan Cancer Agency is a local authority as per Appendix Part II of *The Local Authority Freedom of Information and Protection of Privacy Act Regulations*, S.S 1993, c. L-27.1 Reg 1. See also Saskatchewan OIPC Investigation Report H-2005-002, p. 22 & Report H-2007-001 at [13], available at: http://www.oipc.sk.ca/reviews.htm.
[24] Saskatchewan OIPC Report F-2006-002, at [37] to [39], available at: http://www.oipc.sk.ca/reviews.htm.
[25] Ibid at [53] to [55].

> These are local authorities within the meaning of subsection 2(2) of *The Freedom of Information and Protection of Privacy Regulations*. Based on past practice and in order to foster a climate of full information sharing with regional health authorities in particular, information in the nature of advice, options, recommendations, analyses, etc. provided by local authorities to the government is considered confidential and private. It has not been necessary to explicitly say so because this has been the long-standing implicit understanding.
>
> In an effort to gleam (sic) a more definitive view of whether each local authority considered their submission as confidential, the Department contacted the seven local authorities. (These included six Regional Health Authorities and the Saskatchewan Cancer Agency). Out of the seven local authorities, six indicated that their submissions had been provided in confidence with the expectation that the information provided was for the Department only and requested that the Department not release their comments. The seventh local authority, the Saskatchewan Cancer Agency, indicated that it did not object to their information being released; however, the Department still chose to sever information pursuant to subsection 13(2) of the Act and based on section 17(1)(a) of the Act.

[69] For this exemption to apply there must be evidence that the expectation of confidentiality was in place at the time the submissions were made. Health did not offer copies of the above noted responses from the seven local authorities nor provide any evidence that supported its assertion that the submissions in question were obtained implicitly or explicitly in confidence from those bodies. Rather than provide evidence that it had at the time an expectation of confidentiality of the suppliers of the information, it appears Health instead only canvassed this issue with the local authorities after this review was underway. I note that though one party did not object to releasing its submission, Health continued to withhold portions citing yet another exemption, 17(1)(a) of FOIP.

[70] Further, in response to Health's above referenced representation, the Applicant offered the following:

> In particular, the Ministry has a very one-sided interpretation of what public consultations are. The Ministry both wants public views but to broadly protect public views. Thee [sic] was nothing announced in those consultations that said the process was confidential.
>
> They erroneously believe their relationship, for instance, with regional health authorities during a public consultation process are an exception and protected. When one of the seven local authorities wanted to release data, the Health Ministry

> took upon itself to insist in severing such data rendering it secret. … Section 13 (2) is being misused.

[71] In considering whether or not the information in question was obtained "implicitly" or "explicitly" in confidence, I rely on the criteria previously offered in my Report F-2006-002.[26]

[72] During Health's consultation process, on its website Health posted a copy of *The Health Information Protection Act Regulations - DRAFT for Consultation* document. Health also provided a copy in the package of materials supplied to us (pages 79-99). The document contains the following introduction:

> Over the past number of months, Saskatchewan Health has been working on the development of a set of proposed regulations under the Act. Saskatchewan Health now wants to provide trustees, other key stakeholders and the public with the opportunity to review the regulations being proposed under HIPA and to provide comments regarding the proposed regulations.
>
> In the following pages you will find the proposed regulations under HIPA. Please provide any comments on the proposed regulations that you may have by **September 30, 2004**. Comments may be forwarded to;
>
> HIPA Regulations
> Policy and Planning Branch
> Saskatchewan Health
> 3475 Albert Street
> Regina, SK S4S 6X6
> Fax: (306) 787-2974
> Email: HIPAFOIhelp@health.gov.sk.ca[27]

[73] There is nothing contained in the document that states that the submissions will be treated as confidential.

[26] Ibid at [56] to [57].
[27] Supra note 1, p. 3.

[74] I am not persuaded that section 13(2) of FOIP applies in the circumstances. As in many cases Health also applied section 17(1)(a) of FOIP to the same documents or portions thereof (see Index of Records), I must consider its application before deciding whether to recommend release of the documents to which section 13(2) of FOIP was applied.

### 8. Did Health properly apply section 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* to the records withheld?

[75] The next section I must consider is 17(1)(a) of FOIP which reads as follows:

> **17**(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:
>
> (a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

[76] Health applied section 17(1)(a) of FOIP to the records as noted in its Index of Records.

[77] With respect to the application of section 17(1)(a) of FOIP to withheld portions of the record, Health offered the following in its May 25, 2005 submission:

> Stakeholders often provide advice on the government's proposed policy direction based on their own experience and may in turn share information which it would not otherwise have done. This is done to provide a 'real life' context to the application of the proposed policy on that particular stakeholder. A stakeholder may also have conducted some analyses of how the proposed policy direction may affect them personally or their organizational operations. The stakeholder may also provide a modified policy option for the government to consider, or make recommendations or proposals for new policy options that the government should or may wish to consider. Such was the information contained in these records and this information was then used by the Department to formulate recommendations to the Minister with regard to the regulations.
>
> It is our opinion that the information contained in the severed portion of the records is clearly recommendations, advice, analyses and policy options as described in clause 17(1)(a) of the FOI Act thereby giving the Department the legislative authority to refuse access to that information.

The Department's position was and is buttressed by the following case authority. In *Weidlich v. Saskatchewan Power Corp.* [1998] S.J. No 133, Geatros J. assessed the section 17(1)(a) grounds in the context of the views, attitudes and opinions of some focus group participants. His conclusion on this point couldn't be clearer:

> *"Accepting that the right of access should be the paramount consideration under access legislation generally, there are exceptions put in place by the Legislature that must, of course, be given effect to. In the present case, disclosure of the Reports is clearly exempted under s. 17(1)(a) of the Act, and not being affected by either s. 17(2)(d) or (c), to deny access to them does not, in my judgment offend the democratic process. There is a kind of information to which bodies, SaskPower in the instance case, should be privy without interference in the decision making process to the formation of policy."* (par. 22)

In *Fuller v. Nova Scotia* (2003), N.S.J. No. 93, in reference to an earlier Nova Scotia decision, Pickup J., made these comments about the meaning to be given to the word 'advice':

> *"The Chambers Judge concluded that 'advice is part of the deliberative process', and accepted the views of Commissioner Linden…that 'advice' generally pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process."* (par. 28)
>
> Furthermore, the text *Government Information: Access and Privacy* has this to say at page 3-27 and 3-28 with regard to this discretionary exemption:
>
> *"When officials receive representation from, or consult, with, members of the public about laws and government policies, they may properly claim that the resulting records are exempt from disclosure."*

[78] Subsequent to the date of the submission in question, I issued my Report LA-2007-001[28] in which I considered the Weidlich decision[29]. In that Report, I determined that certain comments of Justice Geatros are obiter and in any event, subsequent court decisions and the decisions of the Supreme Court of Canada to refuse leave to appeal from two landmark Ontario decisions[30] on a similar issue need to be taken into account.

[28] Saskatchewan OIPC Report LA-2007-001, at [60] to [64], available at: http://www.oipc.sk.ca/reviews.htm.
[29] *Weidlich* v. *Saskatchewan Power Corporation*, (1998), 164 Sask. R. 204.
[30] See Ontario IPC Order PO-1993 (2002) and Ontario IPC Order PO-2028 (2002), available at: www.ipc.on.ca/english/advanced-search.

[79] Specifically from the Weidlich decision, I find the following excerpts to be informative:

> [3] **The applicant's request relates to two focus group analyses mainly concerning SaskPower rate adjustments.** One may be identified as "the July Report," dated July, 1995, and the other "the October Report," dated October, 1995 (the "Reports"). **Both Reports were commissioned by SaskPower from Cooper Quine and Fraser Inc.**
>
> [4] In denying the appellant's request …
>
> [9] SaskPower fairly identifies a "focus group" as consisting of approximately ten persons who are led through the discussion of a topic by a moderator. **A report is then prepared by the moderator summarizing his or her impressions of the views, attitudes and opinions of the focus group participants on a variety of issues, including rate structures**. I agree with SaskPower that they cannot logically be categorized as being other than "advice" and "analyses" in the context of s. 17(1)(a).[31]
>
> [emphasis added]

[80] The Weidlich case and the present one are dissimilar. In Weidlich, the record at issue was prepared by SaskPower's contractor, Cooper Quine and Fraser Inc; in the present case, submissions were provided directly to Health by individuals and organizations external to Health, not through an intermediary. In the result, I find the Weidlich decision cited by Health can be distinguished.

[81] What is helpful is Alberta IPC Order F2008-008 that considers in depth the application of its similarly worded provision, 24(1) of its FOIP, as follows:

> [para 14] The provisions of section 24 of the Act that are relevant to this inquiry are as follows:
>
> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> …

[31] Supra note 29.

[para 34] I first need to consider the extent to which a general stakeholder or member of the public can provide advice, etc. to a public body within the meaning of section 24(1)(a). The Applicant submits that the information from a public opinion survey does not fall under the section, as a public body's solicitation of opinions from the public is not with the same intent or purpose as the solicitation of advice from a staff member, outside expert or consultant. The Applicant argues that these latter persons are asked for their opinion due to their knowledge, authority, position or expertise, and that an opinion from a member of the public does not require any of these qualities.

…

[para 41] Under other sections of the Act, it has been concluded that, for a record to be created "by or for" a person, the record must be created "by or on behalf" of that person [Order 97-007 at para. 15, discussing what is now section 4(1)(q); Order 2000-003 at para. 66, discussing what is now section 4(1)(j)]. I adopt the same conclusion in respect of section 24(1)(a). I further note that section 24(1)(c) refers to information developed "by or on behalf" of a public body. While I acknowledge that different wording is used in subsections 24(1)(a) and (c), I believe that the intent behind both subsections is to allow a public body to withhold information developed by or on behalf of it. In other words, I equate "by or for" in subsection 24(1)(a) with "by or on behalf" in subsection 24(1)(c). As a result, it is not sufficient under section 24(1)(a) for an organization or individual to simply have provided information *to* a public body.

[para 42] In my view, for information to be developed by or on behalf of a public body under section 24(1)(a) of the Act, the person developing the information should be an official, officer or employee of the public body, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the public body. I do not believe that general feedback or input from stakeholders or members of the public normally meets the first requirement of the test under section 24(1)(a), as the stakeholders or members of the public do not provide the information by virtue of any advisory "position". This is even if the public body has sought or expected the information from them.

[para 43] To put the point another way, the position of the party providing information under section 24(1)(a) – or the relationship between that party and the public body – should be such that the public body has specifically sought or expected, or it is the responsibility of the informing party to provide, more than merely thoughts, views, comments or opinions on a topic. General stakeholders and members of the public responding to a survey or poll are not engaged by the public body in a sufficient advisory role. They have simply been asked to provide their own comments, and have developed nothing on behalf of the public body.[32]

[32] Alberta OIPC Order F2008-008, available at: http://www.oipc.ab.ca/pages/OIP/Orders.aspx.

[82] In applying the above logic, I do not agree that section 17(1)(a) of FOIP applies to any of the submissions to which it is applied.

[83] With respect to what type of information is captured by this provision, I reference my Report LA-2007-001. In that Report, I discussed the application of section 16(1)(a) of LA FOIP, which is the counterpart to 17(1)(a) of FOIP. The relevant portion is as follows:

> In this Report I have not addressed in any significant way the words "… *proposals, recommendations, analyses or policy options*" in section 16(1)(a) of the Act. I take the view that each of these words also require more than mere information. To qualify for purposes of section 16(1)(a), the information in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Furthermore, information that would permit the drawing of accurate inferences as to the nature of the actual proposals, recommendations, analyses or policy options would also qualify for the exemption in section 16(1)(a) of the Act.[33]

[84] For definitions of the terms "advice", "recommendations", "proposals and analyses" or "policy options', I reference the Alberta Government publication, *FOIP Guidelines and Practices*[34]. In applying these definitions and considering my earlier findings, for the most part, the severed information in the present case appears to constitute advice in its various forms. However, I do not agree that the submissions were developed "by or for a government institution". Accordingly, I recommend release of the withheld material to which the exemption was applied.

### 9. Did Health properly apply section 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* to the records withheld?

[85] The next applicable provisions of the Act are as follows:

> **19**(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:
>
> …

[33] Supra note 28 at [91].
[34] Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices* (2009), p. 179, available at: http://foip.alberta.ca/resources/guidelinespractices.

> (b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;
>
> **20** A head may refuse to give access to a record that contains information relating to:
>
> (a) testing or auditing procedures or techniques; or
>
> …
>
> if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

[86] With respect to these next two exemptions, Health offered the following representation:

> There was one record, a Draft Privacy Impact Assessment [Indexed Records, pages 221-229] received from the Hospital of Regina Foundation that Saskatchewan Health severed in its entirety in reliance on section 19(1)(b) and 20(a) of the FOI Act. The Department denied access to this record based on the fact that it was a draft document received from a third party. It contained information that could change and which could have an impact on the operations of the third party since it may not accurately or completely reflect business policies and practices and therefore could be misconstrued by others. In this case, the record contained technical information about the operations of their business. The nature of the information captured in such a document is considered to be a form of testing or auditing as it relates to the privacy risk analysis that was being documented. The fact that the document was marked "Draft" indicated that the analysis was not yet complete and therefore, the record should remain confidential. The Department, therefore, treated this record as confidential and severed it accordingly.

[87] Section 2(1)(j) of FOIP defines "third party" as: "a person, including an unincorporated entity, other than an applicant or a government institution." Similarly section 2(k) of LA FOIP defines "third party" as "a person, including an unincorporated entity, other than an applicant or a local authority".

[88] Health applied section 19(1)(b) of FOIP to pages 221-229 of the record, a draft Privacy Impact Assessment (PIA) that it claimed was provided by the Hospitals of Regina Foundation (Foundation). However, contained within the PIA is evidence that the program discussed is a joint one involving the regional health authority and the Foundation and that the document was prepared by a regional health authority employee.

[89] Health asserted that a regional health authority can be a third party. A literal interpretation of section 2(1)(j) of FOIP appears to support that assertion. However, my office is that of an ombudsman with a mandate to apply and interpret FOIP and LA FOIP in a way that meets section 10 of *The Interpretation Act*[35] and the modern principle of interpretation.[36]

[90] If Saskatchewan had a single access law that applied to both government institutions as well as local authorities such as every other jurisdiction in Canada other than Ontario, it would be reasonable to conclude that a regional health authority could not be viewed as a "third party".

[91] The purpose of the legislation (both FOIP and LA FOIP) is to require public bodies to operate more transparently and thus to serve the end of greater accountability to the Saskatchewan public. I think the purpose of achieving meaningful transparency and accountability requires that I consider both FOIP and LA FOIP and their common purpose in interpreting sections 2(1)(j) and 2(k) respectively.

[92] Further in a recent Report, LA-2009-001, I offered the following on what types of information qualifies as third party information:

> A helpful resource, *Government Information Access and Privacy* by McNairn and Woodbury (McNairn), offers the following general description of what constitutes "third party information":
>
> > All of the access statutes provide exemptions for various kinds of information provided to the government by other, non-governmental persons, **or affecting such persons in specified ways**. This type of information is known as third party information.[37]
>
> [emphasis in original]

[35] *The Interpretation Act, 1995*, S.S. 1995, c.I-11.2, section 10: "Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects."

[36] This requires that the words of the legislation be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes*, 2nd ed. (1983) at 87. See also Saskatchewan FOIP FOLIO February 2007, p. 2, available at: http://www.oipc.sk.ca/newsletters.htm.

[37] Saskatchewan OIPC Report LA-2009-001, at [21], available at: http://www.oipc.sk.ca/reviews.htm.

[93] It is disappointing that Health adopted an interpretation of section 2(1)(j) of FOIP that serves to extend the shroud of secrecy over the records of a regional health authority that is, by law, as accountable to the public as the Ministry must be. This decision by Health provides a compelling reason for the Legislative Assembly to take immediate action to clarify that a regional health authority or Ministry cannot take advantage of what appears to be a drafting omission in the legislation.

[94] I therefore find that section 19(1)(b) of FOIP cannot apply to any of the information contained in the PIA pertaining to the regional health authority. What is left to consider is information concerning the Foundation.

[95] In order for me to find that section 19 of FOIP applies, the information must also constitute "technical information" as was Health's contention. In my Report F-2006-002, I defined technical information in the context of section 19(1)(b) of FOIP.[38] I do not see how the information contained in the PIA would constitute "technical information" as defined in that Report. Also, Health has provided no evidence that the PIA was supplied in confidence by a third party. In summary, even though the PIA does contain some third party information pertaining to the Foundation, as I do not agree that the information in question is "technical information" and I see no evidence that it was supplied in confidence, I do not agree that section 19(1)(b) of FOIP applies. However, Health has exempted the same document from release pursuant to section 20(a) of FOIP.

### 10. Did Health properly apply section 20(a) of *The Freedom of Information and Protection of Privacy Act* to the records withheld?

[96] With respect to section 20(a) of FOIP, Health argues that this discretionary exemption applies to a draft PIA as "the nature of the information captured in such a document is considered to be a form of testing or auditing as it relates to the privacy risk analysis that was being documented."

[38] Supra note 24 at [85] to[87].

[97] An audit is a systematic identification, evaluation, and assessment of an organization's policies, procedures, acts, and practices against pre-defined standards. We describe what a PIA is on our website as follows:

> A Privacy Impact Assessment ("PIA") is a diagnostic tool designed to help organizations assess their compliance with the privacy requirements of Saskatchewan legislation.
>
> …
>
> The PIA can also be used by any organization that is developing or revising a program or practice that involves or affects personal information. As well, the PIA could be utilized when an organization reviews an existing program.[39]

[98] As such, a PIA appears to constitute a form of an audit.

[99] I note that the exemption only applies if the disclosure "could reasonably be expected" to prejudice the use or results of a particular tests or audit. Alberta's *FOIP Guidelines and Practices* referenced earlier clarified that:

> The exception may be applied where disclosure of a specific test to be given or audit to be conducted, or one that is currently in process, would invalidate the results. This applies even if there is no intention to use the test or audit again in the future.
>
> The exception may also apply where there is an intention to use the testing or auditing procedure in the future, and disclosure would result in unreliable results being obtained and the test or the audit having to be abandoned as a result. Test questions that are regularly used – for example, in making staffing decisions – may be excepted from disclosure.[40]

[100] I have not considered this section in any of my Reports, but one past Commissioner, Gerrand, did consider this provision in his Report 2000/003. The Report does not deal specifically with auditing procedures or techniques but does deal with an access request for a final exam.

[39] Office of the Saskatchewan Information and Privacy Commissioner, *Privacy Impact Assessment*, December 2005, available at: http://www.oipc.sk.ca/Resources/PIAIntro-December2005.pdf.
[40] Supra note 34, p. 195.

Gerrand found in the circumstances that:

> The providing of copies of previous exam papers simply furnishes members of the public with questions that have been asked; there is no revealing of any standard answers or optimum answers to the questions that are posed, which answers may be the criteria upon which marks are based by those that assess the answers given to the questions asked.[41]

[101] As such, he recommended release of the examination papers in question.

[102] A PIA is a fact finding exercise to determine if present or proposed practices are or would be compliant with the applicable privacy legislation. The questions should remain constant as they are fairly standard; it is the responses that change with the circumstances. This exemption appears to primarily protect procedures and techniques: the testing mechanism, not the content.

[103] Further, Health has not demonstrated that release of the PIA "could reasonably be expected" to "prejudice the use or results", as its argument was instead that doing so "could have an impact on the operations of the third party since it may not accurately or completely reflect business policies and practices and therefore could be misconstrued by others."

[104] Therefore in the circumstances, I do not find that section 20(a) of FOIP applies. Accordingly, I recommend release of the PIA to the Applicant.

**11. Did Health properly apply section 22 of *The Freedom of Information and Protection of Privacy Act* to the records withheld?**

[105] Section 22 of FOIP provides as follows:

> **22** A head may refuse to give access to a record that:
>
> (a) contains information that is subject to solicitor-client privilege;

[41] Saskatchewan OIPC Report 2000/003, p. 7.

> (b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel; or
>
> (c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.

[106] Health applied section 22 of FOIP to the following withheld pages or line items of the record: part of a memo from the Public Service Commission (PSC) to Health with the wording for the "Proposed HIPA Regulation" attached (pages 100 and 101); and a 3 page email discussion thread, pages 111, 112, and 113.

[107] In my Report F-2007-002, I observed that "simply claiming that a discretionary exemption applies without any explanation as to how or why it applies is insufficient to meet the burden of proof imposed by the Act."[42] As section 22 is discretionary, clear, direct evidence is required to make a finding that this section applies.

[108] Health's argument amounts to the following:

> Solicitor client privilege is a well recognized principle both at common law and under section 22 of the FOI Act. Information shared between a solicitor and his/her client is privileged information in so far as that information will remain between the solicitor and client unless the client waives the privilege.
>
> Some of the records provided to [the Applicant] contained information shared between Saskatchewan Health or the Saskatchewan Public Service Commission and their respective Crown Counsels (i.e. Saskatchewan Justice). In our view, section 22 clearly applies to the parts of the information flagged for this ground. The Department does not wish to waive this privilege.
>
> There was a memorandum [Indexed Records, page 170-181] providing legal advice to the Saskatchewan Registered Nurses' Association (SRNA) from their legal counsel. Although the Department did not apply section 22 to this record, we were given permission from the SRNA to release this document to a third party. You will note, however, that we chose to sever some of the information contained in the record pursuant to clause 17(1)(a) of the FOI Act.

[42] Saskatchewan OIPC Report F-2007-002, at [18], available at: http://www.oipc.sk.ca/reviews.htm.

[109] In response to Health's argument, the Applicant observed that "[s]ection 22 on solicitor-client privileges refers to instances of legal advice. Simply because a lawyer writes a public consultation brief does not give licence to misuse the exemption solicitor-client privileges."

[110] In my Report F-2005-002, the application of solicitor client privilege is considered at [26] to [37], but I have not reproduced as it is not on point.[43] What is relevant though is that the solicitor-client privilege exemption incorporates the common law doctrine of solicitor-client privilege as noted by Health. However, our section has broader application due to the language contained in clauses 22(b) and (c) of FOIP. In that regard, I found the following excerpt taken from *Government Information: Access and Privacy* by Woodbury and McNairn (McNairn) helpful:

> The expanded exemption in the Saskatchewan Act covers information prepared by or for an agent of the Attorney General or legal counsel for an institution in relation to any matter involving the provision of advice or services – not necessarily of a legal nature – by the agent or counsel. This information includes correspondence between any such agent or counsel and a third party. [44]

[111] As the records to which section 22 of FOIP is applied involve one government institution sharing with a second, the following also from McNairn is germane:

> A client institution may waive solicitor-client privilege, either explicitly or by such conduct as would indicate an intention to abandon the privilege. In that event, the protection of the disclosure exemption will be lost. The release of privileged information by one institution to another would not normally constitute a waiver as this action is internal to the government, the ultimate beneficiary of the privilege. The Federal Court has held, however, that the voluntary disclosure, by an institution, of a privileged report to the Auditor General, with full knowledge that the report will be used in carrying out the Auditor General's statutory mandate, amounts to a waiver of privilege.[45]

[43] Saskatchewan OIPC Report F-2005-002, available at: http://www.oipc.sk.ca/reviews.htm.
[44] McNairn and Woodbury, *Government Information: Access and Privacy* (2005, Thomson Carswell, Toronto) p. 3-47.
[45] Ibid at p. 3-45.

[112] Further *Stevens* v. *Canada (Prime Minister)* offers the following advice in terms of what does and does not constitute a waiver of privilege:

> In essence, where the client authorizes the solicitor to reveal a solicitor-client communication, either it was never made with the intention of confidentiality or the client has waived the right to confidentiality. In either case, there is no intention of confidentiality and no privilege attaches. For example, it has been held that documents prepared with the intention that they would be communicated to a third party, or where on their face they are addressed to a third party, are not privileged.
>
> …
>
> The respondent claims that the Privy Council Office is not a third party on the basis that the Parker Commission and the Privy Council Office are both government departments, and such disclosure between them is not disclosure to a third party.
>
> …
>
> In general, with respect to solicitor-client privilege as between government institutions, "[t]he release of privileged information by one institution to another would not normally constitute a waiver as this action is internal to the government, the ultimate beneficiary of the privilege" see: McNairn and Woodbury, *Government Information: Access and Privacy* (Scarborough, Ont.: Carswell, 1992) at page 3-36.[46]

[113] In applying the above logic from McNairn, it would appear that solicitor-client privilege applies to pages 100 and 101 (the draft regulation offered by PSC's legal counsel).

[114] As stated earlier, Health also withheld portions of an email discussion thread in which PSC shared its concerns with its legal counsel; which in turn was shared with Health, who in turn asked the same legal counsel advice as to how to proceed further. In applying the above again, it appears that section 22 of FOIP applies to the remaining withheld material.

[46] *Stevens* v. *Canada (Prime Minister)* (T.D.), [1997] 2 F.C. 759, p. 8-9.

**12. Did Health properly apply sections 24 and 29 of *The Freedom of Information and Protection of Privacy Act* to the records withheld?**

[115] Section 29(1) of FOIP reads as follows:

> **29**(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[116] Health applied section 29 of FOIP also citing section 24 to the following records or line items therein: 38-44; 71-72; 73-74; 143-147; 152; 153; 155; 156; 157-158; 159; 160-164; 165-167; 182-188; 189; 192; 193; 194; 197-198; 199; 200-217; 218-220; 221-229; 230-232; 233-235; 236-249; 250; 251; 252; 254; 255; 256; 258; 259; 260; 261-262; 263-264; 265; 266; 267; 268; 269; 270; 271-272; 273; 274-277; 278-281; and 282-284.

[117] Health submitted the following in terms of its application of sections 24 (definition section only) and 29(1) of FOIP:

> Some information was severed because it contained personal information within the meaning of section 24 of the Act. Specifically clauses 24(1)(b), (e), (g), and (k) of the FOI Act were used to identify the types of personal information that was contained in the records. The basic rule with regard to disclosure of personal information is set out in section 29(1):
>
> …
>
> A government institution may disclose personal information with the consent of the person to whom it relates. Because of the overwhelming number of submissions, consent was not sought. Disclosure may also lawfully be made if the documents and nature of the access request fit within one of the exceptions listed under section 29(2). Before turning to that subsection, we wish to point out that nothing in section 29 legally requires the government institution to disclose personal information; rather it simply provides a discretionary ground to permit disclosure of personal information, the release of which is otherwise prohibited.

> In our review of [the Applicant's] access request, we assessed the records against the possible grounds for disclosure under section 29(2) in the context of the personal information and concluded that none of the enumerated grounds applied to his specific request. Therefore, Saskatchewan Health is prohibited from making disclosure and advised [the Applicant] accordingly. This was not a matter of discretion. Absent the consent of the individual to whom the information relates, the Department is not prepared, and in fact cannot disclose those portions of the records.

[118] In order for section 29(1) of FOIP to apply, the information in question must constitute personal information of someone other than the Applicant pursuant to section 24.

[119] The applicable clauses of section 24 of FOIP are reproduced below:

> **24**(1) Subject to subsections (1.1) and (2), "**personal information**" means personal information about an identifiable individual that is recorded in any form, and includes:
>
> …
>
> (b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
>
> …
>
> (e) the home or business address, home or business telephone number or fingerprints of the individual;
>
> (f) the personal opinions or views of the individual except where they are about another individual;
>
> (g) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;
>
> …

> (k) the name of the individual where:
>
> (i) it appears with other personal information that relates to the individual; or
>
> (ii) the disclosure of the name itself would reveal personal information about the individual.
>
> ...
>
> (2) "**Personal information**" does not include information that discloses:
>
> (a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a government institution or a member of the staff of a member of the Executive Council;
>
> …
>
> (c) the personal opinions or views of an individual employed by a government institution given in the course of employment, other than personal opinions or views with respect to another individual;

[120] I note that only eight submissions appear to have been provided by private citizens; the others to which Health applied section 29(1) of FOIP to certain line items (mostly signature lines, email addresses, etc) were provided by individuals representing different types of organizations (i.e. local authorities, non-profits, etc). The only signature lines not severed are those contained in submissions provided by various government officials.

[121] Health severed authors and in some case job titles of individuals. As well, Health severed business/organization phone numbers and email addresses even in cases where those individuals clearly represented local authorities with a similar exception in terms of what is not considered personal information.[47]

[47] Section 23(2)(a) of LA FOIP: "Personal information" does not include information that discloses: (a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a local authority". This is the same application as FOIP's section 24(2)(a) but to employees of a government institution instead.

[122] Health provided further explanation as to why it applied section 29(1) of FOIP as follows:

> The records requested by [the Applicant] pertained to responses that individuals (either representing themselves or the organization that they work for) submitted to Saskatchewan Health in response to a consultation process undertaken by the Department on proposed regulations pursuant to [HIPA].

[123] In my Report F-2006-001, I determined that general contact information for employees is releasable for the following reasons:

> In determining which information should be severed as "personal information", we have considered the following:
>
> (1) **Personal information subject to the Act does not include information that can be described as "work product".**
>
> The information in the record that shows the opinion or comments of a fire fighter who completes a report about a particular fire intended to be furnished to the OFC would be "work product" information and therefore not "personal information" of that public sector employee.
>
> (2) **Although the definition of what is or is not to be considered "personal information" in section 24 (2) of the Act mirrors section 23(2) of the LA FOIP Act, each section refers only to an employee of a government institution or an employee of a local authority but not to both. I do not expect that the Legislative Assembly would have intended to create a loophole that meant by transferring records from one level of government to another that the character of the records would change from non-personal information to personal information and therefore exempt from an access request. I find that the intention of the Assembly would have been that if the record of an opinion or view of a local authority employee given in the course of employment is transferred from a local authority to a government institution, the character of that record would not change to be "personal information"**.[48]
>
> [emphasis added]

[48] Saskatchewan OIPC Report F-2006-001, at [113], available at: http://www.oipc.sk.ca/reviews.htm.

[124] In keeping with the above finding, I recommend release of the severed business card information of local authority employees/officials contained within the record. If public body employee names, job titles, phone, and fax numbers (i.e. business card information) is not considered personal information under FOIP or LA FOIP, then is the same kind of information of employees or volunteers of other types of businesses/organizations also releasable? On the face of it, the answer would appear to be no.[49] My analysis however does not end here.

[125] The *Personal Information Protection and Electronic Documents Act* (PIPEDA) defines "personal information" as information about an identifiable individual, but *does not* include the name, title, or business address or telephone number of an employee of an organization.[50] PIPEDA is an incomplete answer since it would have no application to most of the organizations that offered submissions.

[126] Further on this question, I found Ontario IPC Order PO-2420 of assistance in this regard:

> **To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual** [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].[51]
>
> [emphasis added]

[127] Also helpful on the question is another Ontario IPC Order MO-1550-F as follows:

> Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about" the individual within the meaning of the section 2(1) definition of "personal information" (see, for example, Orders P-257, P-427, P-1412 and P-1621).

[49] Pursuant to section 24(1)(e) of FOIP.
[50] See section 2 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5.
[51] Ontario IPC Order PO-2420 (2005) p. 3, available at: www.ipc.on.ca/english/advanced-search.

The Commissioner's orders dealing with non-government employees, professional or corporate officers treat the issue of "personal information" in much the same way as those dealing with government employees. The seminal order in this respect is Order 80. In that case, the Ministry of Health had invoked the personal privacy exemption to withhold the names of officers of the Council on Mind Abuse (COMA) appearing on correspondence with the Ministry concerning COMA funding procedures. Former Commissioner Sidney B. Linden rejected the institution's submission:

> …In my view, the names of these officers should properly be categorized as "corporate information" rather than "personal information" under the circumstances.

In Reconsideration Order R-980015, Adjudicator Donald Hale reviewed the history of the Commissioner's approach to this issue and the rationale for taking such an approach. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 on the approach which this office has taken to the definition of personal information. In applying the principles that he described in that order, Adjudicator Hale came to the following conclusions:

> **I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not about these individuals and, therefore, does not qualify as their "personal information" within the meaning of the opening words of the definition.**
>
> In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the Act. **Nor is the information "about" the individual, for the reasons described above.** In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message.
>
> …

> This distinction between personal and non-personal information has been extended to situations involving groupings of individuals that are less formal and structured than, for example, a corporation, partnership or government agency.[52]
>
> [emphasis added]

[128] For these reasons, the names of individuals and views represented do not constitute his/her personal information because it is not information *about* him/her. Therefore, I recommend release of all business card information regardless of the type of agency the individual represents. The exception is in respect to submissions of private citizens to which Health has properly withheld email addresses and names of said. Though the personal opinions of the authors[53], Health should nonetheless release the content of the emails as without names and email address, no individuals are identifiable.

## V. FINDINGS

[129] I find that I may review the adequacy of fee estimates even after an Applicant has paid the fees requested.

[130] I find that Health did not meet the duty to assist in both cases though some noteworthy effort was taken to work with the Applicant to restructure his access to information requests.

[131] I find that the notice furnished by Health to the Applicant of the time extension met the requirements of section 12 of the Act.

[132] I find that the extension of the response deadline failed to satisfy section 12 of FOIP.

[133] I find that the form to which the fee estimates were furnished to the Applicant was inadequate as it did not include enough detail.

[52] Ontario IPC Order MO-1550-F (2002) p. 3-5, available at: www.ipc.on.ca/english/advanced-search.
[53] See section 24(1)(f) of FOIP.

[134] I find that the fee estimate for searching and preparing paper records to be excessive.

[135] I find that the second fee estimate for searching and preparing electronic records to be excessive.

[136] I find that Health had inadequate resourcing to process access to information requests at the material time.

[137] I find that sections 13(2), 17(1)(a), 19(1)(b), and 20(a) of FOIP do not apply to any of the withheld records or portions therein.

[138] I find that local authorities do not qualify as third parties for purposes of FOIP.

[139] I find that Health properly applied section 22 of FOIP to pages 100-101 and 111-113.

[140] I find that Health did not properly apply section 29(1) of the Act to the material provided by individuals representing various agencies including local authorities.

[141] I find that in applying section 29(1) of the Act to the submissions of private citizens that Health properly withheld the contact information of those individuals, but erred in withholding the content of their submissions.

## VI. RECOMMENDATIONS

[142] I recommend that Health provide the Applicant with a refund of $780.

[143] I recommend that Health contact the Applicant to determine if he has an ongoing interest in his second narrowed access request and if so, recalculate the fees based on the findings herein.

[144] I recommend Health release the records or portions thereof to which it applied sections 13(2), 17(1)(a), 19(1)(b), and 20(a) of FOIP to the Applicant.

[145] I recommend that Health continue to deny access to pages 100-101 and 111-113 to which section 22 of FOIP was applied.

[146] I recommend that Health continue to withhold contact information (names and email addresses) for the eight individuals identified on pages 265, 266, 268, 267, 269, 270, 271-272 (2 page email), and 273, but to release the remaining content to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 9th day of March, 2010.

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