SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REVIEW REPORT F-2012-006

Ministry of Justice

Summary: The Applicant made an access to information request to the Ministry of Justice (Justice) requesting information pertaining to himself. Justice withheld in full or in part 75 pages pursuant to sections 13(1)(a), 15(1)(k), 22(b) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Justice also applied *The Health Information Protection Act* (HIPA) denying the Applicant access to his own personal health information but not until December 2012 when the review was all but concluded. The Commissioner found that Justice had not met the burden of proof in applying section 13(1)(a) and 29(1) of FOIP. Further, he found that Justice had not appropriately applied section 15(1)(k) to the records in question. The Commissioner recommended that Justice release those records withheld under section 13(1)(a). He agreed with the exemption claimed pursuant to section 22(b) and he recommended those records not be released. Further, he recommended release of those records withheld under section 29(1), except for the Victim Impact Statement. Lastly, the Commissioner recommended release of the Applicant's personal health information. The Commissioner also recommended that Justice review its records management practices with regards to prosecutorial records to ensure it is compliant with *The Archives Act, 2004* of Saskatchewan and to revisit the issue of control over records that are in the possession of the Royal Canadian Mounted Police for purposes of a prosecution under the *Criminal Code* of Canada.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 8, 13(1)(a), 15(1)(c), 15(1)(k), 22(b), 24, 24(1.1), 29(1), 29(2)(i), 29(2)(i)(ii), 29(2)(o), 29(2)(u), 61; *The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01 Reg 1, ss. 14(a), 16(g)(i); *The Local Authority Freedom of Information and Protection of*

Privacy Act, S.S. 1990-91, c. L-27.1, s. 28(2)(i), 28(2)(n), 28(2)(s); *The Local Authority Freedom of Information and Protection of Privacy Regulations*, S.S. 1993, c. L-27.1 Reg 1, s. 10(g)(i); *The Health Information Protection Act*, S.S. 1999, c. H-0.021, ss. 2(m), 2(t)(i), 12, 32, 38; *The Police Act, 1990*, S.S. 1990-91, c. P-15.01, s. 21(1); *The Archives Act, 2004*, S.S. 2004, c. A-26.1; Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 c. F-25, Canada's *Access to Information Act,* R.S., 1985, c. A-1, s. 16(1)(a), (b), 16(4); *Privacy Act*, R.S. 1985, c. P-21, s. 3; *Personal Information Protection and Electronic Documents Act* S.C.2000, c.5, s. 2(m), (t)(i); *Criminal Code*, R.S.C., 1985, c. C-46; Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, ss. 2(i), 22(1)(a).

Authorities Cited: Saskatchewan OIPC Review Reports: 93/021, 2002/039, 2003/014, F-2004-006, F-2004-007, F-2005-006, F-2006-001, F-2006-002, F-2006-003, F-2006-004, F-2008-001, F-2008-002, F-2010-001, LA-2007-002, LA-2010-001, LA-2012-002, H-2007-001, H-2008-001, H-2008-002, H-2009-001; Alberta IPC Order F2009-027; Ontario IPC Order PO-3016; *Griffiths v. Nova Scotia (Education*), [2007] NSSC 178; *Evenson v. Kelsey Trail Regional Health Authority*, [2012] SKQB 382; *R. v. Stinchcombe*, [1991] 3 SCR 326.

Other Sources Cited: Saskatchewan OIPC Resource, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*, *Report on Management of Access Requests from Patients to Saskatchewan Regional Health Authorities*; Saskatchewan Archives Board, Government Records Branch, *Saskatchewan Records Management Guidelines;* Ministry of Justice and Attorney General, *Public Prosecutions Division*; Privacy Commissioner of Canada, *Legal information related to PIPEDA, Interpretations, Commercial Activity*; Ministry of Justice and Attorney General, *11-12 Annual Report*; Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, *Access to Information and Protection of Privacy in Canadian Democracy*, May 5, 2009.

I BACKGROUND

[1] The Applicant submitted an access to information request to the Ministry of Justice, formerly known as Saskatchewan Justice (Justice) on March 22, 2007 requesting: "Any and all information relating to myself. On May 4, 2005 I was arrested for s. 264. On July 18, 2006 I was found not guilty…".

[2] On April 18, 2007, Justice provided its section 7 response to the Applicant. The section 7 response stated the following:

> Access to any materials we hold regarding this case is denied in its entirety based upon the need to prevent an offence, to maintain lawful enforcement and to meet investigation requirements pursuant to clauses 15(1)(a), and 15(1)(k) of *The Freedom of Information and Protection of Privacy Act*…
> …
>
> Further, the material also contains information that could threaten the safety of an individual and is therefore denied pursuant to section 21…
> …
>
> Finally, the prosecution file contains material that was received from the R.C.M.P. [Royal Canadian Mounted Police] by an agent of the Attorney General for the purpose of obtaining legal advice or services and is therefore denied pursuant to subsection 22(b)…

[3] The Applicant submitted a Request for Review to our office on April 24, 2007.

[4] On May 7, 2007 my office advised both parties of its intention to undertake a review. In the letter to Justice, my office requested a copy of the record and Justice's submission supporting the exemptions cited in the section 7 response to the Applicant.

[5] On July 4, 2007 Justice provided its submission and the record to our office. The original Index of Records (Index) listed the following exemptions under *The Freedom of Information and Protection of Privacy Act* (FOIP):[1] 15(1)(a) – on some of the records; 15(1)(k) – on some of the records; 21 – on some of the records; and 22(b) – on some of the records. The record contained approximately 125 pages of responsive material.

[6] In the submission received in our office on July 4, 2007 Justice requested that the submission be held *in camera* stating:

> It is the position of Saskatchewan Justice that the applicant should not be made aware of this analysis or the material in the prosecution's file to guarantee that there is no escalation of action against the lady in question, and to ensure that the applicant does not change his patterns to thwart detection.

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

[7] On December 8, 2008 my office emailed Justice to advise the following:

> …you request that your submission be held *in camera*, and not be shared with the Applicant, contrary to our customary practice in light of principles of procedural justice and the right to know the case against oneself.
>
> The Applicant would appear to be requesting records regarding an old court case in which he was acquitted of the charge against him. You state that there is, however, an *ongoing* investigation with regard to the Applicant's allegedly stalking and harassing a woman who was a witness in the case against him. Your argument would seem to be that you want the submission to be held *in camera* to "guarantee that there is no escalation of action against the lady in question, and to ensure that the applicant does not change his patters [sic] to thwart detection." You also state that your position is supported by sections 15(1)(a), 15(1)(c) and 15(1)(k) of FOIP, all of which relate to detection of offences and lawful investigations.
>
> It is currently not clear to us how the submission itself would incite the Applicant to escalate his actions against the woman in question, or encourage him to hide his behaviors. It is also not clear to us how the submission would interfere with the detection of an offence or the proceedings of a lawful investigation. I also wonder if the investigation you cited in your letter is in fact still ongoing given the time that has elapsed since then.
>
> Given that you are requesting an exception to a fundamental right of natural justice, we are asking that you reconsider your request altogether, provide further evidence to support your position, or consider an alternative such as severing certain segments of your submission and allowing access to the rest. For example, there would seem to be no reason for withholding most of the text in your submission, or the index of records and the relevant exemptions you claim for withholding them.

[8] On January 22, 2009 my office requested that Justice clarify its position in light of our earlier email.

[9] On March 17, 2009, given no response from Justice, my office followed up and again requested advice as to the position of Justice and the issue of its submission being held *in camera*. Justice replied on the same date indicating it would try to get an answer for our office.

[10] On April 14, 2009 my office followed up again requesting a response to the issue of the submission being held *in camera*. My office also asked if the investigation referenced in its response to the Applicant was ongoing or had been concluded.

[11] On July 15, 2009 my office received an email from Justice stating the following: "Could you please contact the complainants for these two reviews and see if they are still interested in continuing with the review. Both of these reviews are old…".

[12] Further on that day, my office replied to the email from Justice stating the following:

> In these two files [this file and another unrelated file number listed], our office will be proceeding with the review.
>
> For your information, our office will not contact applicants and ask them if they wish to have the file closed unless there is a specific reason or circumstance that would support us doing so – and a file being, as you state, "old" would not be a sufficient reason for our office to contact an applicant and ask them to withdraw his or her review.

[13] On October 7, 2009 my office sent a letter to Justice advising that its July 4, 2007 submission lacked sufficient detail to support the exemptions cited. Justice was invited to provide a supplemental submission. Further, my office reiterated that we still awaited clarification on its request to hold the first submission *in camera*. In the letter we stated the following:

> …in accordance with procedural fairness, our next step would generally be to share the submission with the Applicant so that he has the opportunity to make a rebuttal.
> …
>
> …Therefore, the Ministry must provide persuasive argument to support its *in camera* request. We also remind you that pursuant to section 46(3), it is the Commissioner's discretion to share submissions in order to facilitate a review…

[14] On November 9, 2009, December 11, 2009 and January 14, 2010 my office sent reminder letters to Justice.

[15] On January 29, 2010 Justice advised that it was working on a response for our office.

[16] On June 16, 2010 and August 17, 2010 my office sent further reminders to Justice.

[17] On September 22, 2010 Justice advised my office that it would be releasing more records to the Applicant. Justice asked if we would follow up with the Applicant once the records were released to see if the Applicant was satisfied or not. If not, Justice would submit a submission on the remaining items. We agreed to do so.

[18] On October 6, 2010 my office emailed Justice to see if it had released the additional records to the Applicant or not. On October 7, 2010 Justice advised that a draft letter to the Applicant was complete but was waiting for approval before sending.

[19] On October 20, 2010 my office received an email from Justice advising that it had reviewed the file, were releasing further records and were working on a response in this regard for the Applicant.

[20] On December 3, 2010 Justice provided my office with a copy of the letter sent to the Applicant releasing additional records. The letter to the Applicant stated:

> As a result of the ongoing Review by the Commissioner, we have reconsidered your request for access and are now prepared to grant you access to a portion of the records. Specifically, please find attached, 39 pages of documents provided to us by your defense counsel for purpose of the trial.
> …
>
> The Ministry continues to refuse access to the remainder of the records you requested, in accordance with the following provisions of the Act:
>
> - 15(1)(k) of the Act, protects the disclosure of information that could "interfere with a law enforcement matter or disclose information respecting a law enforcement matter."
>
> - 22(b) of the Act, protects records "prepared by or for an agent of the Attorney General for Saskatchewan…in relation to a matter involving the provision of advice or other services by the agent or legal counsel."
>
> - 22(c) of the Act, protects records that contain "correspondence between an agent of the Attorney General…and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel." Specifically, this exemption applies to correspondence received by Public Prosecutions from the defense counsel. Although this exemption was not previously noted due to an oversight, we believe it is, in fact, applicable

and should therefore be mentioned at this time to ensure all the correct exemptions are noted.

- Finally, a significant portion of the records are protected by clause 13(1)(a) of the Act, which prevents the Ministry from disclosing records that were received in confidence from an agency of the Government of Canada. Specifically, the exemption applies to material received from the RCMP by Public Prosecutions. Although clause 13(1)(a) of the Act was not noted in our April 18, 2007 response, it is a mandatory exemption that, in fact, prevents us from disclosing those records without the consent of the RCMP.

Please also note that in our April 18, 2007, letter, clause 15(1)(a) of the Act and section 21 of the Act had been applied to refuse access to the records. We are of the opinion that those exemptions no longer apply.

[emphasis added]

[21] On December 16, 2010 my office requested that Justice clarify if it had provided a general description to the Applicant of what records had been withheld.

[22] On February 8, 2011 Justice advised that it provided a general description of the records and which exemptions were applied in its section 7 response to the Applicant on April 18, 2007.

[23] On February 9, 2011 my office advised Justice that it had reviewed Justice's response to the Applicant and noted there was no general description of the records. We also advised that it would be very difficult, if not impossible, for most applicants to be able to conclude whether they were satisfied or not if they had been given no idea of what has still being withheld. We advised that providing the Index to the Applicant could assist in this regard and once again requested that Justice provide clarification on its request to hold the first submission *in camera*.

[24] On February 16, 2011 Justice provided a second Index and advised that it could be shared with the Applicant.

[25] On February 24, 2011 Justice advised that in creating the second Index it had reviewed the whole file and that the record it had provided on July 4, 2007 may not have been complete.

[26] The second Index could not be matched to the record. The total number of pages also did not correspond. The first Index and record received on July 4, 2007 totaled 125 pages of documents. The second Index received on February 16, 2011 totaled 133 pages of documents. Further, the descriptions of the documents did not match the pages. We requested that Justice clarify the confusion with the two Indexes and the record.

[27] The Applicant advised that the additional documents provided to him by Justice on December 3, 2010 were documents he already had. On March 4, 2011 my office advised Justice of this and requested that in addition to Justice sorting out the Index it should prepare its supplemental submission we had first requested on October 7, 2009 to support the exemptions cited.

[28] On March 15, 2011 my office met with Justice. Justice took back the record which had been provided to our office on July 4, 2007 in order to reconcile it with the two Indexes.

[29] On March 28, 2011 Justice provided a third Index indicating that the Index provided "reconciles the 2007 Index of Records with the 2010 Index of Records." On March 30, 2011 my office requested a copy of the responsive record that matched up with the third Index provided. We reminded Justice that we still needed a supplemental submission because the first one received on July 4, 2007 was not sufficient. We received a copy of the responsive record later that same day.

[30] On March 31, 2011 my office provided a copy of the third Index to the Applicant with permission from Justice.

[31] On April 7, 2011 Justice advised that it had provided our office with a supplemental submission on September 23, 2010. We responded the same day indicating that we had not received such a submission. Justice later advised that one had been developed in the

fall of 2010 but had not been sent to our office. Justice advised it would have its legal department review it one last time before sending it to us.

[32] On June 28, 2011 Justice advised the following in a letter to my office:

- The Ministry has reassessed its position to withhold a portion of the documents and has reworked its submission. Further review of the file shows no record of any attempt to request third party consent for the release of records from the RCMP. Such consent has recently been requested.
- The Ministry anticipates completing the submission by the end of September, assuming a timely response from the RCMP.

[33] We requested a progress report from Justice on October 11, 2011, November 3, 2011 and November 30, 2011.

[34] On December 14, 2011 my office received a supplemental submission, a new copy of the responsive record and a fourth Index from Justice.

[35] In the submission from Justice dated December 14, 2011 the following exemptions under FOIP were applied by Justice and will be considered in this Review Report: 15(1)(k) – on some of the records; 22(b) – on some of the records; and 29(1) – on some of the records. It appeared that Justice had abandoned its reliance on sections 15(1)(a), 13(1)(a) and 21 of FOIP. With regards to section 13(1)(a) the submission stated as follows:

> The documents in Parts A and B are records received in confidence from the Royal Canadian Mounted Police (RCMP). Access to these records had previously been denied using clause 13(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP). However, given the age of the records in question, we have recently contacted the RCMP to determine if the expectation of confidentiality still exists. The RCMP has responded to us indicating they are comfortable with the release of the records with the condition that "the names and addresses of all third party individuals should be vetted from all documents." **Given this consent from the RCMP, we feel we are no longer obligated by clause 13(1)(a) of FOIP which prevents disclosure of information received in confidence from an agency of the Government of Canada.** We have, therefore, again reviewed the documents in Parts A and B and have prepared them for release to the applicant. Please note that in accordance with the RCMP's expectation and, more importantly, because of the obligations placed upon us by Part IV of FOIP, we have redacted information that is

> personal information about identifiable individuals other than the applicant. All instances of such redaction are indentified in the documents themselves, which are enclosed with this letter.
>
> The detailed arguments for application of section 29 of FOIP to certain content of the records is found below.
> …
>
> The Ministry does not object to the release of the submission or Index of Records to the applicant.
>
> [emphasis added]

[36] The fourth Index received on December 14, 2011 listed sections 15(1)(k), 22(b) and 29(1). The submission contained arguments supporting these three sections.

[37] It should be noted that upon closer examination of the record received December 14, 2011, ten pages appeared to have also been released in full to the Applicant despite being listed in the Index submitted by Justice on December 14, 2011 as having been severed under section 29(1). We requested that Justice clarify for our office whether this was the case or not. However, clarification was not provided. In total it appears that 47 pages (not 57) were remaining which were considered under section 29(1). These pages appeared to be the following types of records:

- Letters between the Royal Canadian Mounted Police (RCMP) and the Crown Prosecutors office at Justice;
- Letters between the Crown Prosecutors office and the Applicant's Defence Counsel;
- Letters between the RCMP and the Applicant's Defence Counsel;
- RCMP Prosecutors Information Sheet, Supplementary Occurrence Reports; and
- Witness statements (six in total).

[38] There were 28 pages of the record in respect to which Justice cited both sections 15(1)(k) and 22(b).

[39] There have been significant delays experienced during this review. The following have caused delays:

- Justice requested its initial submission be held *in camera* but did not provide the requisite arguments to support such a request by my office. It later withdrew this request;

- Justice presented an inadequate initial submission in 2007 and was provided the opportunity to supplement it. This was not received until December 2011;

- Over the course of this review, Justice raised additional exemptions, at different times dropped others and then later re-introduced one;

- Justice indicated that on at least three occasions it intended to release further records to the Applicant. The first occasion in September 2010 took almost four months and resulted in the release of only 38 full pages and one partial page which were "documents provided to [Justice] by [the Applicant's] defense counsel". The Applicant indicated he already had these records. The second occasion in December 2011 resulted in 16 full records released, 39 partial pages and seven completely blank pages. Finally, for the third time in September 2012, Justice indicated it would review the records again to consider additional disclosure. On December 7, 2012 Justice released the names of three RCMP officers on 14 previously released pages, one RCMP officer's work email address and the first name and initial of an unknown individual. The remainder of the content of the 14 pages continued to be withheld. In this latest release, Justice severed portions of the 14 pages which it had previously released to the Applicant in December 2011 (i.e. pages B1, B10, B11, B13, B15, B16 and B17). Curiously, this included full paragraphs of text which it now appears Justice intends to withhold.

- The Applicant raised the issue of missing records which was not concluded to my satisfaction due to the inability of Justice to satisfactorily account for the records.

- Justice apparently sought consent from the RCMP to release records on multiple occasions. The first time this was brought to our attention was June 28, 2011 and appears to have taken until December 2011 to conclude. It was again raised in April 2012 and took until September 2012 to conclude. Finally, Justice again sought consent from the RCMP in October 2012. We understand from a letter to the Applicant dated December 7, 2012 that Justice recently received that consent from the RCMP only resulting in the release of the data elements noted above.

II RECORDS AT ISSUE

[40] At the time of this Review Report, the following records are at issue:

Page No.	Document Title	Sections
A2	Request for Crown Counsel	29(1) of FOIP
B1	Prosecutors Information Sheet	29(1) of FOIP
B3-4	Letters from RCMP to Prosecutions	29(1) of FOIP
B5-8	Letters from RCMP to Defense Counsel	29(1) of FOIP
B9	Victim Impact Statement	29(1) of FOIP
B10-17	Supplementary Occurrence Report	29(1) of FOIP
B18-19	Witness Statement	29(1) of FOIP
B20-26	Witness Statement	29(1) of FOIP
B-27-29	Witness Statement	29(1) of FOIP
B30-31 and B34	Witness Statement	29(1) of FOIP
B35-39 and B41	Witness Statement	29(1) of FOIP
B42-47	Witness Statement	29(1) of FOIP
C1	Voice Mail Message to Crown Prosecutor (handwritten)	15(1)(k) and 22(b) of FOIP
C2, C4, C6	Action Memo's to Justice from Witness' and Defence Counsel	15(1)(k) and 22(b) of FOIP
C7-15	Prosecutors Court Notes	15(1)(k) and 22(b) of FOIP
C17	Memo of Crown Prosecutor to Crown	15(1)(k) and 22(b) of FOIP
C18	Complaints Questions	15(1)(k) and 22(b) of FOIP
C19-21	Prosecutors Court Notes	15(1)(k) and 22(b) of FOIP
C22-29	Prosecutors Direct Examination	15(1)(k) and 22(b) of FOIP
C30	Prosecutors Note to Self/File	15(1)(k) and 22(b) of FOIP
C31	Memo from phone call April 10, 2006	15(1)(k) and 22(b) of FOIP

D4	Letter from Crown Prosecutor to Defense Counsel	29(1) of FOIP
D8	Letter from Crown Prosecutor to Defense Counsel	29(1) of FOIP
D11	Fax to Crown Prosecutor	29(1) of FOIP

[41] In total, Justice applied section 29(1) to 47 pages of the record and both sections 15(1)(k) and 22(b) to 28 pages. The record involved in this review totaled 75 pages.

[42] We note however that on December 11, 2012, Justice released some limited information contained on 14 pages and cited section 13(1)(a) alongside with section 29(1) of FOIP to withhold other information. The pages involved in this release are B1, B3, B4, B5, B6, B7, B8, B10, B11, B13, B15, B16, B17, and D8.

III ISSUES

1. Did the Ministry of Justice conduct an adequate search for the responsive record?

2. Can the Ministry of Justice continue to rely on section 13(1)(a) of *The Freedom of Information and Protection of Privacy Act*?

3. Did the Ministry of Justice appropriately apply section 15(1)(k) of *The Freedom of Information and Protection of Privacy Act?*

4. Did the Ministry of Justice appropriately apply section 22(b) of *The Freedom of Information and Protection of Privacy Act?*

5. Did the Ministry of Justice appropriately apply section 29(1) of *The Freedom of Information and Protection of Privacy Act?*

6. Is *The Health Information Protection Act* engaged?

IV DISCUSSION OF THE ISSUES

1. Did the Ministry of Justice conduct an adequate search for responsive records?

[43] Justice is a "government institution" for purposes of FOIP as previously found in my Review Report F-2008-002.[2]

[44] On January 25, 2012 my office provided a copy of the submission from Justice to the Applicant with its consent. This was the first submission the Applicant had been provided since the review file was opened. A copy of the fourth Index was also provided at this time. The Applicant was given the opportunity to provide a submission to my office.

[45] The Applicant provided a submission to our office on April 12, 2012. Included with the arguments was a 400 page court transcript from March 6th to June 13th 2006 detailing the court proceeding involving the responsive records in question. The Applicant asserted that a seventh witness statement was referenced in the court transcript but was missing from the Index provided by Justice.

[46] On April 13, 2012 my office requested that Justice provide the missing seventh witness statement. Justice subsequently advised that there was no intentional removal or destruction of this missing document. It detailed its further search for the missing document and explained that Justice did not have a copy of the witness statement at the time the access request was received and it did not therefore form part of the responsive record.

[47] The Applicant outlined his belief that the following additional records were missing from the Index:

1. Handwritten notes from the seventh witness statement provided on May 4, 2005;

[2]Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Review Report F-2008-002 at [6], available at www.oipc.sk.ca.

2. Video/Audio tapes from the May 4, 2005 RCMP interrogation;
3. An RCMP Occurrence Summary (including "Flags");
4. A second Supplementary Occurrence Report from May 16, 2005; and
5. RCMP Officers notes from May 4, 2005.

[48] After reviewing the materials and information provided by the Applicant, I concluded that there may well have been additional materials not captured by the Index from Justice. In response, Justice advised on May 10, 2012 that it could not confirm that the listed materials were not on file but it presumed that "[p]rosecutions simply never received them from the RCMP."

[49] Since there was reference to "video tapes/audio tapes" in a letter from Justice's Crown Prosecutor to the Applicant's Defence Counsel dated October 14, 2005 and this appeared on a list of attachments, we requested that Justice search again for the missing records.

[50] On May 24, 2012 Justice provided a further response stating:

> As you know from previous emails, Public Prosecutions Head Office has been working with the Prosecutions Office in Melfort to locate the audio / video tapes referenced in the responsive record, or to determine why they were not provided as part of the responsive record. They have concluded the following:
>
> > Typically the police will provide the Crown with two copies of all videotaped statements and audio taped statements taken in the course of the investigation. **The purpose of providing two is to enable the Crown to disclose one copy to defence and retain the other copy for prosecution purposes.**
> >
> > **At the time of [the Applicant's] prosecution, the Melfort office was struggling to meet storage needs. As a result, the lead prosecutor developed a practice that whenever defence counsel, at the conclusion of proceedings, returned a videotape or audio tape statement to the Crown, it would be sent back to the RCMP. The Crown copy was to be maintained on file**. The Melfort office staff has searched its office and has not found the videotape and audiotape. As mentioned before, it is not on our original trial file which is here in Regina. The Melfort office contacted the RCMP and they do have a videotape and audiotape on their file (of [the Applicant's] warned statement dated May 5, 2005) but they cannot tell whether it was the defence copy or the Crown copy.

> **The best I can do is to surmise that the copy(ies) the Crown had on file was returned to the RCMP.**
>
> **I'm told the practice of sending a copy back to the RCMP has stopped with the rise in use of DVDs and CDs.**
>
> So, in short, we have concluded that we do not have the record in our possession. While we cannot be certain of what transpired six or seven years ago in regard to the tapes, we can surmise that **they were possibly returned to the RCMP** and therefore were not in our possession when the original access request was received.
>
> [emphasis added]

[51] On June 11, 2012 my office responded to Justice stating:

> As you would be aware, Justice had responsibility for the records under the *Archives Act* (2004) – specifically sections 19, 20 and 21. It appears from the search efforts detailed below that the records went missing while under the possession or control of Justice. It would seem appropriate then that Justice seek to retrieve a copy of these records from the RCMP. A copy could then be provided to the applicant. If you feel you cannot retrieve the record, please explain how you arrive at that conclusion (i.e. control).

[52] On September 21, 2012 Justice advised as follows:

> Regarding the issue of control, when we received the access to information request, to the best of our knowledge, all records then in the possession or control of the Ministry were assembled as responsive to the applicant. The tape was not identified at that time and we have concluded – as outlined in other correspondence, that **it may have been returned to the RCMP – placing it outside our possession or control.** As the email also notes, it is not clear if the tape in the possession and control of the RCMP was provided to them by the Crown Prosecutor or by Defence Counsel. In either case, the RCMP – who has control of the record, is not prepared to provide a copy to us.
>
> We would also note that the practice of sending tapes back to the RCMP has been discontinued. This will help ensure continued possession and control of the records by Prosecutions, which, in turn, will help avoid a similar situation in the future.
>
> [emphasis added]

[53] The assertion by Justice cannot be conclusive given the analysis I have completed on section 13(1)(a) of FOIP which is described later in this Review Report.

[54] The Saskatchewan Archives Board provides the following in its resource entitled, *Saskatchewan Records Management Guidelines*:

> Government records are those that are required by a public body to control, support or document the delivery of programs, to carry out operations, to make decisions or to account for activities of government. **All government records are considered to be either "official" or "additional" and should be managed in accordance with *The Archives Act, 2004*. As such, official and additional records should be filed, retained and disposed of according to ARMS 2006 or ORS and approved institutional policy**…[3]
>
> [emphasis added]

[55] If the records in question were used in the decision making process by Justice it is unclear as to how the records could be returned to the RCMP in spite of a requirement under *The Archives Act, 2004*[4] to retain them.

[56] Due to the inappropriate practice of sending records back to the RCMP, the records were apparently not in the possession of Justice at the time of the access request on March 22, 2007. I note Justice has undertaken to change this practice; however, this does not resolve the question of control.

2. Can the Ministry of Justice continue to rely on section 13(1)(a) of *The Freedom of Information and Protection of Privacy Act*?

[57] Section 13 of FOIP states as follows:

> **13**(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:
>
> (a) the Government of Canada or its agencies, Crown corporations or other institutions;
>
> (b) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

[3]Saskatchewan Archives Board, Government Records Branch, *Saskatchewan Records Management Guidelines* at p. 6, available at www.saskarchives.com/sites/default/files/records-management-guidelines_apr_03_06.pdf.
[4]*The Archives Act, 2004*, S.S. 2004, c. A-26.1.

> (c) the government of a foreign jurisdiction or its institutions; or
>
> (d) an international organization of states or its institutions;
>
> unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.[5]

[58] Section 13(1)(a) of FOIP is a mandatory exemption. My office's approach has been that a mandatory exemption will be considered even if the public body fails to raise it either in its section 7 response to the applicant or in the course of our review. Section 13(1)(a) was clearly raised by Justice in its letter to the Applicant dated December 3, 2010. Then in its submission to our office dated December 14, 2011 it stated:

> The documents in Parts A and B are records received in confidence from the Royal Canadian Mounted Police (RCMP). Access to these records had previously been denied using clause 13(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP). However, given the age of the records in question, we have recently contacted the RCMP to determine if the exception of confidentiality still exists. **The RCMP has responded to us indicating they are comfortable with the release of the records with the condition that "the names and addresses of all third party individuals should be vetted from all documents." Given this consent from the RCMP, we feel we are no longer obligated by clause 13(1)(a) of FOIP which prevents disclosure of information received in confidence from an agency of the Government of Canada.** We have, therefore, again reviewed the documents in Parts A and B and have prepared them for release to the applicant. Please note that in accordance with the RCMP's expectation and, more importantly, because of the obligations placed upon us by Part IV of FOIP, we have redacted information that is personal information about identifiable individuals other than the applicant. All instances of such redaction are identified in the documents themselves, which are enclosed with this letter.
>
> **The detailed arguments for application of section 29 of FOIP to certain content of the records is found below**.
>
> [emphasis added]

[59] I view this as a conditional consent from the RCMP to release of the record to the Applicant. The condition of the consent was for masking "the names and addresses of all third party individuals".

[5] *Supra* note 1.

[60] On March 15, 2012 my office completed its analysis of the exemptions cited by Justice in its December 14, 2011 submission and Index. This included sections 15(1)(k), 22(b) and 29(1) of FOIP.

[61] On September 11, 2012 my office received a response from Justice to the analysis and recommendations. It stated as follows:

> The bulk of the records fall under parts A and B. You will recall from our submission to you of December 14, 2011 that we had sought and received consent from the RCMP to disclose a portion of the record following appropriate severing. Following receipt of your analysis, we once again reviewed these records to determine if we could release more of the record and we once again sought consent from the RCMP to disclose additional information. We have now received a response from the RCMP. They have indicated they would be prepared to disclose some additional information, but not all. **We continue to be obligated by clause 13(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP) in regard to these particular records,** so will provide access to the additional records which the RCMP would disclose, but will continue to deny access to records they would not disclose. The additional records are enclosed.
>
> [emphasis added]

[62] Even though section 29 is involved in this matter and sections 13(1)(a) and 29(1) appear to overlap, they do not. Each section requires separate analysis.

[63] The difficulty in this case is that section 13(1)(a) of FOIP has been something of a moving target. A number of factors have led to a lack of clarity as to which exemptions were being relied upon. For example, there have been four Indexes provided and two separate copies of the responsive record. The first Index did not cite section 13(1)(a). The second Index cited section 13 but no subsection or clause. As well, the Index did not correspond with the original record provided to our office. The third Index cited section 13 but no subsection or clause and again it did not line up with the responsive record. The fourth and final Index did not list any part of section 13.

[64] I have been unable to determine which withheld records Justice believed were subject to section 13(1)(a) of FOIP. For example, in the third Index provided by Justice, page 114 of the original responsive record from July 4, 2007 was withheld under section 13 (no

subsection or clause). However, a page that appears similar but numbered differently in the fourth Index of December 14, 2011 and second responsive record lists the same page as having been disclosed in full.

[65] Justice has not provided any arguments to support the application of section 13(1)(a) of FOIP. Justice stated the following in its third Index: "The Ministry's position is that these records were obtained in confidence, implicitly or explicitly from the Government of Canada or its agency."

[66] It is the job of the public body to make the case when citing an exemption under which it has withheld records subject to a review and to link the exemption with specific portions of the record. There may have been some merit to the application of section 13(1)(a), but I am left to speculate which portions of the record are in play.

[67] Therefore, for these reasons I find that the burden of proof has not been met by Justice for the application of section 13(1)(a) of FOIP to the records in question. My office advised Justice that it could not rely on section 13(1)(a) in a letter dated December 13, 2012. This will be discussed later in this Review Report.

[68] However, I offer the following analysis with regards to the general application of this section to assist public bodies reading this Review Report.

[69] What would need to be determined in a case such as this is if the RCMP can qualify for purposes of section 13 of FOIP when it involves conducting policing services in the province on behalf of the Attorney General for Saskatchewan for the purposes of prosecution under the *Criminal Code*.[6]

[70] In my Review Report F-2006-002, I considered section 13(1)(a) and stated the following:

> [23] For the exemption in section 13(1)(a) to apply, the agencies in question must qualify as either "*Government of Canada or its agencies, Crown corporations or*

[6] *Criminal Code*, R.S.C., 1985, c. C-46.

> *other institutions*". Because of the possessive pronoun in this clause, "agencies" and "other institutions" should be understood as federal agencies and federal institutions.
>
> [24] I note that the Department of the Environment (also known as Environment Canada) is already designated as a "government institution" under the federal *Access to Information Act* (ATIA). The definition is *"any department or ministry of state of the Government of Canada listed in Schedule 1 or any body or office listed in Schedule 1"*. Since the Department of Environment appears on Schedule 1 I have no hesitation in concluding that the Department is caught by section 13(1)(a) of the Act.
> …
>
> [32] I take the reference in section 13(1)(a) of the Act to "other institutions' to refer to those institutions that are either federal "government institutions" for purposes of ATIA or institutions controlled by the federal government.[7]

[71] The RCMP is listed in Schedule 1 of the federal *Access to Information Act* (ATIA)[8], so it would constitute a federal government institution. It is necessary however, to consider whether the RCMP is a unique organization different than Environment Canada and most other federal government institutions.

[72] Alberta Information and Privacy Commissioner's (IPC) Order F2009-027 refers to section 21(1)(b) of the Alberta *Freedom of Information and Protection of Privacy Act*[9] and is relevant in this regard:

> [para 31] The Public Body applied section 21(1)(b) of the Act to records 35 – 102, 129, and 132 - 155 on the basis that they were provided by an RCMP detachment to the Crown in confidence. The heading of section 21 indicates that it creates an exception to disclosure for information that could harm intergovernmental relations. It states, in part:
>
> > *21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
> >
> > *(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:*
> >
> > *(i) the Government of Canada or a province or territory of Canada,*
> >
> > *(ii) a local government body,*

[7]SK OIPC Review Report F-2006-002, available at www.oipc.sk.ca.
[8]*Access to Information Act,* R.S., 1985, c. A-1.
[9]British Columbia, *Freedom of Information and Protection of Privacy Act,* R.S.A., 2000, c. F-25.

(iii) an aboriginal organization that exercises government functions, including

(A) the council of a band as defined in the Indian Act(Canada), and

(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,

(iv) the government of a foreign state, or

(v) an international organization of states,

or

(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.

[para 32] In Order F2004-018, the Commissioner stated that four criteria must be met before section 21(1)(b) applies to information:

There are four criteria under section 21(1)(b) (see Order 2001-037):

a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;

b) the information must be supplied explicitly or implicitly in confidence;

c) the disclosure of the information must reasonably be expected to reveal the information; and

d) the information must have been in existence in a record for less than 15 years.

I will therefore consider whether the information in the records at issue meet these criteria.

[para 33] The Public Body argues that the RCMP is an agency of the Government of Canada and is subject to federal access and privacy legislation. It reasons that information supplied by the St. Albert RCMP detachment to Alberta Justice therefore meets the requirements of "supplied… by a government, local government body or an organization listed in clause (a) or its agencies".

[para 34] I find section 21(1)(b) does not apply to the information in the records at issue as it was not supplied by a government, local government body or an

organization listed in clause (a) or its agencies. I make this finding for the following reasons.

[para 35] Section 21 of the *Police Act* R.S.A. 2000, c. P-17 states:

> *21(1) The Lieutenant Governor in Council may, from time to time, authorize the Minister on behalf of the Government of Alberta to enter into an agreement with the Government of Canada for the Royal Canadian Mounted Police to provide a provincial police service.*
>
> *(2) When an agreement referred to in subsection (1) is in force, the Royal Canadian Mounted Police are responsible for the policing of all or any part of Alberta as provided for in the agreement.*
>
> *(3) The Royal Canadian Mounted Police with respect to their duties as the provincial police service shall, subject to the terms of the agreement referred to in subsection (1), be under the general direction of the Minister in matters respecting the operations, policies and functions of the provincial police service other than those matters referred to in section 2(2).*

[para 36] Section 2 of the *Police Act* establishes the responsibilities and jurisdiction of the Solicitor General and the Minister of Justice and Attorney General.

> *2(1) The Minister is charged with the administration of this Act.*
>
> *(2) Notwithstanding anything in this Act, all police services and peace officers shall act under the direction of the Minister of Justice and Attorney General in respect of matters concerning the administration of justice.*

[para 37] A member of the RCMP is by definition, a police officer under the *Police Act*. The RCMP detachment in this case is a provincial police service within the meaning of the *Police Act*, and is responsible for policing the City of St. Albert, through the terms of the Provincial Police Services Agreement. Further, under the *Police Act*, the RCMP is under the direction of the Solicitor General when it carries out the operations, policies and functions of a provincial police service, and is under the direction of the Minister of Justice and Attorney General in matters concerning the administration of justice.

[para 38] I reject the idea that it follows from the fact that an RCMP officer's employer has a federal aspect that the information created or provided by an RCMP officer to the Minister of Justice and Attorney General has a federal aspect.

[para 39] I note that in *L'Heureux v. Unum Life Insurance Company of America*, 1998 ABQB 549, Murray J. found that when RCMP officers act under the authority of provincial legislation, they act as agents of the provincial government…

[para 40] I also note that in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, [2008] 1 S.C.R. 383, the Supreme Court of Canada determined that the RCMP must comply with provincial language laws when acting as a provincial police force. The Court said [in part]:

> ...
>
> The RCMP does not act as a separate federal institution in administering justice in New Brunswick; it assumes, by way of contract, obligations related to the policing function. The content of this function is set out in provincial legislation. Thus, in New Brunswick, the RCMP exercises a statutory power — which flows not only from federal legislation but also from New Brunswick legislation — through its members, who work under the authority of the New Brunswick government.

I understand the Court to say that the Minister of Justice in that case controlled the policing activities of the RCMP. Further, legislative and constitutional obligations of the Minister of Justice are shared by the RCMP as the agents of the Minister of Justice when they carry policing duties under provincial legislation and under the direction of the province.

[para 41] In Order F2008-027, I determined that section 21(1)(b) applies to protect "intergovernmental" relations of the Government of Alberta, as opposed to "intragovermental" relations, or intergovernmental relations of an entity other than the Government of Alberta. I said:

> For the reasons set out below, I find that the purpose of section 21 is to enable public bodies to withhold information harmful to the intergovernmental relations of the Government of Alberta with other governments and that clause (b) also serves this purpose. In my view, clause (b) presumes harm to the intergovernmental relations of the Government of Alberta if information supplied in confidence by an entity listed in clause (a) to a public body representing the Government of Alberta, is disclosed. I also find that the Government of Alberta, or an entity representing the Government of Alberta, cannot supply information for the purposes of clause (b) because it is not an entity listed in clause (a). In determining the purpose of section 21, I have considered standard drafting conventions, the heading, and the language and context of the provision

[para 42] In this case, the information in the records at issue was created by RCMP officers, acting as police officers within the meaning of section 1(k)(ii) of the *Police Act*, employed by a police service as defined under section 1(l)(iv) of the *Police Act*. The authority to collect and exchange this information is provided by the *Police Act* and not by federal legislation. Further, under section 2 of the *Police Act*, a police service acts under the direction of either the Solicitor General and Public Safety or the Minister of Justice and Attorney General when carrying out official duties. Consequently, the exchange of information between an RCMP detachment and the Minister of Justice and Attorney General under the *Police Act* is intragovernmental in nature, rather than intergovernmental. I find that when the RCMP supplied

> information to the Public Body, it acted as an entity representing the Government of Alberta, and acted under the direction of the Government of Alberta.
> …
>
> In determining that information supplied by the RCMP was information supplied in confidence by an agency of the federal government, the former British Columbia commissioner held that British Columbia's *Police Act* did not "turn the RCMP into a provincial agency." However, this case was decided before *Société des Acadiens,* which is clear that the RCMP act under the direction of the province when they act under provincial legislation. I draw from this case that while the RCMP maintains its status as a federal institution, and is in one sense an "agency" of the Government of Canada, the more important point to be drawn from the case is that when it is acting under provincial legislation as the provincial police service, it is policing for and under the control of the province. Thus the transfers of information between the RCMP detachment and the Public Body, are intra-governmental. Had the Commissioner had the benefit of *Société des Acadiens* when Order F2004-018 was decided, in which the Supreme Court of Canada found that an RCMP officer acting under provincial policing legislation acts as "institution of the legislature or government", the outcome may have been different.[10]

[73] I reviewed Saskatchewan's *The Police Act, 1990* to determine if the Act was similar to Alberta, New Brunswick and British Columbia noted above and found the following:

> **21**(1) Subject to the approval of the Lieutenant Governor in Council, the minister, on behalf of the Government of Saskatchewan, may enter into an agreement with the Government of Canada **to employ the Royal Canadian Mounted Police to aid in the administration of justice and the enforcement of the laws in force in Saskatchewan.**
>
> (2) Where an agreement has been entered into pursuant to subsection (1), the **Royal Canadian Mounted Police are responsible for policing all or any portion of Saskatchewan that may be directed by the minister.**
>
> (3) Notwithstanding subsection (2), the Royal Canadian Mounted Police are not responsible for policing a municipality unless there is an agreement made pursuant to section 22, 22.1 or 23 respecting that municipality.
>
> (4) During the period of an agreement entered into pursuant to subsection (1), members of the Royal Canadian Mounted Police:
>
> (a) are peace officers; and

[10] Alberta Information and Privacy Commissioner Order F2009-027.

> (b) shall fulfil the duties and may exercise the powers conferred by any Act or law on peace officers or constables with respect to the preservation of peace, the prevention of crime and the enforcement of laws in force in Saskatchewan.[11]
>
> [emphasis added]

[74] I find the analysis of the Alberta Commissioner persuasive and intend to follow it. When conducting police work in the province of Saskatchewan, the RCMP do so under the direction of the Minister of Justice in Saskatchewan and therefore its records cannot be considered records exempt from disclosure under section 13(1)(a) of FOIP.

3. Did the Ministry of Justice appropriately apply section 15(1)(k) of *The Freedom of Information and Protection of Privacy Act?*

[75] Section 15 of FOIP reads as follows:

> 15(1) A head may refuse to give access to a record, the release of which could:
> (a) prejudice, interfere with or adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;
>
> (a.1) prejudice, interfere with or adversely affect the detection, investigation or prevention of an act or omission that might constitute a terrorist activity as defined in the *Criminal Code*;
>
> (b) be injurious to the enforcement of:
>
> (i) an Act or a regulation; or
>
> (ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada;
>
> **(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;**
>
> (d) be injurious to the Government of Saskatchewan or a government institution in the conduct of existing or anticipated legal proceedings;
>
> (e) reveal investigative techniques or procedures currently in use or likely to be used;

[11] *The Police Act, 1990*, S.S. 1990-91, c. P-15.01.

> (f) disclose the identity of a confidential source of information or disclose information furnished by that source with respect to a lawful investigation or a law enforcement matter;
>
> (g) deprive a person of a fair trial or impartial adjudication;
> (h) facilitate the escape from custody of an individual who is under lawful detention;
>
> (i) reveal law enforcement intelligence information;
>
> (j) facilitate the commission of an offence or tend to impede the detection of an offence;
>
> **(k) interfere with a law enforcement matter or disclose information respecting a law enforcement matter;**
>
> (l) reveal technical information relating to weapons or potential weapons; or
>
> (m) reveal the security arrangements of particular vehicles, buildings or other structures or systems, including computer or communication systems, or methods employed to protect those vehicles, buildings, structures or systems.
>
> (2) Subsection (1) does not apply to a record that:
>
> (a) provides a general outline of the structure or programs of a law enforcement agency; or
>
> (b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.[12]
>
> [emphasis added]

[76] I have considered section 15(1)(c) of FOIP in previous Review Reports.[13]

[77] In considering section 15(1)(c) I determined that the interpretation required analysis of three distinct questions:

1. Was this a lawful investigation?
2. Would the release of the record interfere with a lawful investigation?

[12] *Supra* note 1.
[13] SK OIPC Review Reports F-2004-006 at [23] to [61], F-2006-001 at [16] to [43] and F-2006-004 at [23] to [28], all available at www.oipc.sk.ca.

3. Would the release of the record disclose information with respect to a lawful investigation?

[78] Based on these previous Review Reports on section 15(1)(c), I have concluded that for section 15(1)(c) to apply the following is needed:

1. The lawful investigation must be authorized or required and permitted by law;

2. There must be an active investigation in order to claim both parts of the section (ie. interfere and disclose information); and

3. Records that can be captured by this section can include records involving an investigation undertaken by a body other than the public body subject to the access request provided the records are in the possession or under the control of the public body.

[79] I have not previously formally considered section 15(1)(k). However, given the similar wording and parallel structure of 15(1)(c) and 15(1)(k), the approach to the analysis of this section should be similar.

[80] Justice stated in its submission dated December 14, 2011 that:

> Records in Part C were all created by the Public Prosecutions Division in relation to the investigation and prosecution of a criminal case. These records continue to be withheld under clauses 22(b) and 15(1)(k) of FOIP.
> …
>
> For purposes of the argument that follows, we note the similarity between clauses 15(1)(c) and 15(1)(k), in that both use the disjunctive "or" to separate two concepts in the same clause, we conclude, giving separate meaning to the two separate portions of the clause.
> …
>
> We acknowledge that in the Commissioner's Report F-2006-001, the Commissioner concluded that for clause 15(1)(c) of FOIP to apply, an investigation would have to be ongoing. However, we agree with the analysis in Report F-2004-006 that the matter does not need to be ongoing for clause 15(1)(c) or (k) to apply. In fact, we believe that the second portion of both clauses 15(1)(c) and (k) describe a class of records to which the exemption applies and is not subject to a harm's test.

[81] Justice included in its submission reference to subsections 16(1)(a) and (b) of the federal ATIA asserting it was similar to FOIP's 15(1)(k). In its submission of December 14, 2011 Justice stated that:

> The federal Access to Information Commissioner's *Investigators Guide to Interpreting the ATIA* [web address] describes clauses 16(1)(a) and (b) as "class exemptions" – one not dependent upon a harm being caused to a lawful investigation or a law enforcement matter. If the information meets the tests outlined in the law (e.g. obtained or prepared by any government institution that is an investigative body), then the provision can be applied at the discretion of the head. In the 2002-2003 Annual Report of the Information Commissioner of Canada [web address], (Chapter I: 20th Anniversary Year in Review, D. Anti-terrorism), the Information Commissioner states the following:
>
> > *Only investigative bodies may avail themselves of the exemption set out in paragraph 16(1)(a) of the Act, which authorizes such bodies to keep their records secret for twenty years, without the necessity of demonstrating that an injury to law enforcement or investigations could result from disclosure.*
>
> Treasury Board of Canada offers the following in its *Treasury Board Policy Suite, Access to Information - Policies and Publications, Specific Exemptions, 4. Law enforcement, Investigations and Security of Penal Institutions (Section 16)* [web address]:
>
> > *[Paragraph 16(1)(a)] is a discretionary class test exemption which protects the law enforcement records of police forces and investigative bodies akin to police forces, listed in Schedule 1 of the Access to Information Regulations (see Chapter 4-2). This information is protected with a class test because of the difficulty in applying an injury test exemption to law enforcement records where virtually all information is of a sensitive nature.*
>
> **We assert that both clauses 15(1)(c) and (k) of FOIP are similar to clauses 16(1)(a) and (b) of the federal Act**. The first portion of the FOIP provisions may be dependent upon a harm's test, but the second portion in each is better described as a class test, such as exists in the federal *Access to Information Act*. Provided the information contained within the record satisfies the class test – and in this case it does, then the head has the discretion to deny access to the record.
>
> [emphasis added]

[82] Justice added as support the following in its submission:

> In support of this, we would also contend that, especially in the case of a criminal investigation or law enforcement matter, there may be times when one cannot determine that no harm could result from disclosure simply because a particular

> investigation or law enforcement matter is complete. The simple fact is it may be difficult to conclude when a law enforcement matter is complete. Hence, the need for a provision that is not dependent upon an investigation or law enforcement matter being ongoing.

[83] Subsections 16. (1)(a) and (b) of ATIA state as follows:

> **16.** (1) The head of a government institution may refuse to disclose any record requested under this Act that contains
>
> (*a*) information obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to
>
> (i) the detection, prevention or suppression of crime,
>
> (ii) the enforcement of any law of Canada or a province, or
>
> (iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*,
>
> if the record came into existence less than twenty years prior to the request;
>
> (*b*) information relating to investigative techniques or plans for specific lawful investigations;[14]

[84] I find that the federal clause cited by Justice is not helpful in interpreting the different wording in FOIP's section 15(1)(k).

[85] Justice asserts that my Review Report F-2004-006 determined that a matter does not need to be ongoing for clause 15(1)(c) or (k) to apply. However, this is in fact not an accurate reflection of what is said. Review Report F-2004-006 indicates that an investigation needs to be ongoing and this has been how my office has consistently dealt with section 15(1)(c).

[86] I note the Applicant was acquitted in 2006 of the harassment charge laid against him.

[87] In considering section 15(1)(k), analysis is required of three distinct questions:

[14] *Supra* note 8.

1. Was this a law enforcement matter?

2. Would the release of the record interfere with a law enforcement matter?

3. Would the release of the record disclose information with respect to a law enforcement matter?

Was this a law enforcement matter?

[88] I must now determine what constitutes a law enforcement matter. Saskatchewan's FOIP Act does not define a "law enforcement matter". However, in Review Report 93/021, former Saskatchewan Commissioner Gerald McLeod, Q.C. defined the term 'law enforcement' as follows:

> **So, also, the expression "law enforcement" must, in my view, be considered to pertain to enforcement of laws of general or particular application by appropriate law enforcement agencies, and not to the determination of private issues or rights between parties to a contract as appears to be the case here.**
> …
>
> **Regulations made pursuant to the Act provide that the prescribed law enforcement agencies or investigative bodies are the RCMP, CSIS, local police forces and the Department of Parks and Renewable Resources and the Department of Highways**…[15]
>
> [emphasis added]

[89] Further, *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations)[16] states the following:

> **14** For the purposes of clause 29(2)(g) of the Act, the following law enforcement agencies and investigative bodies are prescribed as law enforcement agencies or investigative bodies to which personal information may be disclosed:
>
> (a) the Royal Canadian Mounted Police;[17]

[90] Commissioner McLeod and the FOIP Regulations assist in this analysis by clarifying what constitutes law enforcement.

[15]SK OIPC Review Report 93/021 at p. 7.
[16]*The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01 Reg 1.
[17]*Ibid.*

[91] Newfoundland and Labrador has a similar provision in its *Access to Information and Protection of Privacy Act* (ATIPPA) at section 22. (1)(a):

> 22. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to
>
> (a) interfere with or harm a law enforcement matter;[18]

[92] Section 2(i) of Newfoundland and Labrador's ATIPPA defines law enforcement as follows:

> 2. In this Act
> …
>
> (i) "law enforcement" means
>
> (i) policing, including criminal intelligence operations, or
>
> (ii) investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment;[19]

[93] In the case before us, the Melfort RCMP detachment appears to have conducted an investigation involving the Applicant and proceeded with charges against him. The RCMP provided information to the Public Prosecutions Division at Justice.

[94] The Public Prosecution Division of Justice went forward with a prosecution which may have resulted in a sanction. The case was heard and concluded in the Melfort Provincial Court several years ago when the Applicant was acquitted.

[95] Therefore, I find that in this case, the RCMP would be an appropriate law enforcement agency and the resulting prosecution constitutes a law enforcement matter for the purposes of section 15(1)(k).

Would the release of the record interfere with a law enforcement matter?

[18] Newfoundland and Labrador, *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1.
[19] *Ibid.*

[96] In my Review Report F-2006-001, I determined that an ongoing investigation is necessary for section 15(1)(c) to apply:

> [29] In Report 2004-006 at para [32] and [50], **we determined that in order for a disclosure to "*interfere with a lawful investigation*", the "lawful investigation" would have to be ongoing. This followed previous consistent findings of my predecessors in Reports 93- 021 and 2002-039**.
>
> [30] **What has not yet been resolved by this office is whether to "*disclose information with respect to a lawful investigation*" must relate to an active or ongoing investigation**.
>
> [31] CPS [Saskatchewan Corrections and Public Safety] contends that I should interpret section 15(1)(c) so that it would apply to records relating to a lawful investigation including an investigation that has already been concluded.
> …
>
> [40] The jurisprudence is clear that Canadian courts have consistently interpreted the exemptions to the right of access narrowly.
> ...
>
> [42] **The submissions of both parties are clear that there is no active or pending investigation at this time. I therefore find section 15(1)(c) does not apply to the records in question.**[20]
>
> [emphasis added]

[97] This conclusion was consistent with that of my predecessors. In Review Report 2002/039 former Commissioner Richard Rendek, Q.C. concluded that in order for section 15(1)(c) to apply the lawful investigation must be specific, ongoing or about to be undertaken. The relevant portions of the Review Report are as follows:

> [31] The applicant in this case sought an airplane accident safety report but was denied access by the Minister of Transport on the ground that it was obtained or prepared in the course of an investigation and its disclosure might prejudice future investigations. The court found that the exemption related solely to a specific, ongoing investigation and not to a general investigative process. **Therefore, any harm contemplated in future investigations by release of the report was irrelevant**...
> …

[20] SK OIPC Review Report F-2006-001, available at www.oipc.sk.ca.

> [33] **The court also found that where there is ambiguity within a section, the court must choose the interpretation that infringes on the public's stated right to access to information the least.** The federal legislation includes a specific purpose of the Act in section 2 which closely reflects the general philosophy of the Saskatchewan Act of promoting full disclosure as stated by Mr. Justice Tallis in *General Motors Acceptance Corp. v. SGI*, supra.
>
> [34] Using this purpose as a guide, the Federal Court of Appeal found that section 16(1)(c) was wide enough to include past information obtained in the course of an investigation **but the exclusion should only extend to protect past information that will have an effect on an investigation currently underway. That affected investigation must be specific, ongoing or about to be undertaken.**
>
> [35] **The wording of the Saskatchewan exemption in section 15(1)(c) is clearly broader than the federal statute because it relates to "information with respect to a lawful investigation" and does not include any reference to the disclosure being "injurious" to "the conduct" of the investigation contained in the federal legislation. But nevertheless, the same principles apply. The Saskatchewan section only has meaning if it relates to information relating to a present, specific investigation**. To interpret otherwise would be against the general philosophy of the Act to allow access whenever possible as enunciated in the *General Motors* case.[21]
>
> [emphasis added]

[98] Although Commissioner Rendek was focused on section 15(1)(c) I can apply similar logic to section 15(1)(k). Section 15(1)(k) could protect information already collected if it could affect a current law enforcement matter but not some future speculative matter.

[99] Justice has not provided any evidence to indicate that the law enforcement matter in this case is active, ongoing or about to be undertaken. In fact, the case has been concluded for some time as indicated previously.

[100] Therefore, I am not satisfied that the release of the records would interfere with a law enforcement matter within the meaning of section 15(1)(k).

Would the release of the record disclose information with respect to a law enforcement matter?

[21] SK OIPC Review Report 2002/039.

[101] Is it possible to disclose information with respect to a law enforcement matter without interfering with a law enforcement matter?

[102] Again I reference my previous Review Report F-2006-001 where I found that both parts of section 15(1)(c) require an ongoing investigation:

> [41] **We view both parts of section 15(1)(c) of the Act to denote the same meaning of lawful investigations. If the legislature had intended a different meaning, then different words would have been used. The two parts of the subsection will only apply if there is an active investigation underway.**
>
> [42] The submissions of both parties are clear that there is no active or pending investigation at this time. I therefore find section 15(1)(c) does not apply to the records in question.[22]
>
> [emphasis added]

[103] As noted already, Justice has not provided any evidence to indicate that the law enforcement matter in this case is active, ongoing or about to be undertaken.

[104] Therefore, the 28 pages of the record cited for exemption under section 15(1)(k) do not qualify for the exemption.

[105] Justice also cited section 22(b) on the same 28 pages therefore, the records will be considered under that section next.

4. Did the Ministry of Justice appropriately apply section 22(b) of *The Freedom of Information and Protection of Privacy Act?*

[106] Subsection 22(b) of FOIP is a discretionary exemption. It states the following:

> **22** A head may refuse to give access to a record that:
> …

[22] *Supra* note 20.

> (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;[23]

[107] I have not previously fully considered subsection 22(b). However, in considering subsection 22(b), analysis is required of two distinct questions:

1. Were the records "prepared by or for" an agent or legal counsel for a government institution?

2. Were the records provided in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

Were the records "prepared by or for" an agent of the Attorney General or legal counsel for a government institution?

[108] In its submission Justice stated that:

> The remaining responsive records are described in Part C and are **records prepared by or for the Crown Prosecutor**. We continue to deny access to these records using clause 22(b) of FOIP. An argument is made below…
> …
>
> …– in this case the records were prepared by or for the Public Prosecutions Division, primarily in the office of the Crown Prosecutor, Gary Parker, "in relation to a matter involving the provision of advice or other services by the agent or legal counsel" – in this case, the investigation and prosecution of a criminal charge.
>
> [emphasis added]

[109] In my Review Report LA-2010-001, I considered the term "by or for" as it related to section 16 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP):[24]

> [30] I have not previously offered a clear interpretation of "by or for". The Alberta IPC did however in its Order F2008-008. The relevant portions are reproduced as follows:

[23] *Supra* note 1.
[24] *The Local Authority Freedom of Information and Protection of Privacy Act* (hereinafter LA FOIP), S.S. 1990-91, c. L-27.1.

> [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,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of 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.[25]

[110] Upon examination of the record and according to the Index provided by Justice on December 14, 2011, all 28 pages under which section 22(b) was cited appear to have been created **by** Public Prosecutions.

[111] Justice states the following on its website with regards to its Public Prosecutions Division:

> **Prosecutors are Agents of the Attorney General** and represent the interests of the general public in the criminal justice system. Prosecutors are responsible for the prosecution of *Criminal Code* offences and Provincial Statute offences.[26]
>
> [emphasis added]

[25]SK OIPC Review Report LA-2010-001, available at www.oipc.sk.ca.
[26]Ministry of Justice and Attorney General, Public Prosecutions Division, available at: www.justice.gov.sk.ca/publicprosecutionsdivision.

[112] Therefore, I am satisfied that the records were prepared by an agent of the Attorney General within the meaning of section 22(b).

Were the records provided in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

[113] The matter before us concerns the provision of legal advice.

[114] In this case, the Crown Prosecutor was providing advice (of a legal nature) on behalf of the Attorney General for Saskatchewan. This included legal opinions to the RCMP on whether the matter would be able to be prosecuted, gathering of material and evidence through collaboration with the RCMP and representing the Crown during the prosecution of the offence.

[115] I am satisfied that the records were provided in relation to the provision of advice.

[116] Therefore, I find that all 28 pages meet the criteria outlined above and therefore qualified for exemption under section 22(b) and should be withheld from the Applicant.

[117] On March 15, 2012 my office provided its preliminary analysis recommending that Justice continue to withhold the 28 pages cited for exemption by Justice under section 22(b).

[118] On September 11, 2012 my office received a response from Justice indicating it intended to continue to withhold the 28 pages.

5. **Did the Ministry of Justice appropriately apply section 29(1) of *The Freedom of Information and Protection of Privacy Act?***

[119] The condition imposed by the RCMP and discussed in the section 13(1)(a) analysis is substantially related to this discussion of personal information but in effect is a collateral matter.

[120] Section 29(1) of FOIP states the following:

> **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.[27]

[121] 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(1).

[122] Section 24 of FOIP defines what is "personal information" as follows:

> **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:
>
> (a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;
>
> (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;
>
> (c) **Repealed.** 1999, c.H-0.021, s.66.
>
> (d) any identifying number, symbol or other particular assigned to the individual, other than the individual's health services number as defined in *The Health Information Protection Act*;
>
> (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;
>
> (h) the views or opinions of another individual with respect to the individual;

[27] *Supra* note 1.

(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;

(j) information that describes an individual's finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or

(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.

(1.1) "Personal information" does not include information that constitutes personal health information as defined in *The Health Information Protection Act*.

(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;

(b) the salary or benefits of a legislative secretary or 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;

(d) financial or other details of a contract for personal services;

(e) details of a licence, permit or other similar discretionary benefit granted to an individual by a government institution;

(f) details of a discretionary benefit of a financial nature granted to an individual by a government institution;

(g) expenses incurred by an individual travelling at the expense of a government institution.

(3) Notwithstanding clauses (2)(e) and (f), "**personal information**" includes information that:

(a) is supplied by an individual to support an application for a discretionary benefit; and

(b) is personal information within the meaning of subsection (1).[28]

[123] Justice cited section 29(1) on the remaining 47 pages of the record. Justice severed what it determined to be exempt under section 29(1) and released the remainder to the Applicant in December 2011.

[124] Upon closer examination of the remaining 47 pages, it is apparent that Justice severed pieces of information inconsistently. For example, Justice severed certain words or collections of words in some places and then released them in others.

[125] FOIP states the following at section 8:

> **8** Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.[29]

[126] The appropriate way to sever documents has been described previously in my Review Report F-2006-003 also involving Justice:

> [18] This office reviewed the record and is able to confirm that the record provided contained the number of pages claimed by Justice.
>
> [19] However, in reviewing the record, I note that, though severing of line items is apparent, each severed item lacks a notation indicating which exemption(s) applies in each instance. Justice has only submitted in a global fashion that some severing was required citing sections 22 and 29 of the Act.
>
> [20] This office offered some guidance on how to prepare records for release to applicants by means of a resource entitled *Helpful Tips* and available on our website: www.oipc.sk.ca under the tab, *Resources*. This office drew attention to the document both in the April 2004 FOIP FOLIO and on page 3 of our Annual Report for 2003-2004. Both the FOIP FOLIO issue and the Annual Report are available on the above noted website. In these documents, **this office offered the following advice to government institutions and local authorities on how to submit a copy of the record to this office during a review:**
>
> > ***If any information has been withheld, the institution or authority could submit the record in one of two ways:***

[28] *Supra* note 1.
[29] *Supra* note 1.

> ***1. Reproducing the withheld portion of the record in red ink, leaving the disclosed portion in black ink, and clearly indicating, beside or near the withheld portion, the applicable section (s) of the relevant Act; or***
>
> ***2. Alternatively, by providing a copy of the record with:***
>
> ***a. The withheld information outlined or highlighted, and***
>
> ***b. The relevant section number(s) of the Act clearly indicated beside or near that withheld information.***
>
> [21] If the exemptions are clearly marked beside severed line items/sections, it will be clear upon review which of the multiple exemptions applies to the severed items in question. The same procedure should be utilized when providing severed records to an Applicant even though the Applicant is not provided with the information that has been severed. This would remove any doubt as to which exemption applies to which line item.[30]
>
> [emphasis added]

[127] From an examination of the 47 pages, it appears that Justice severed the following types of information (non-exhaustive list):

- Names of RCMP constables (including one work email address of an RCMP constable);
- Names of a Regional Health Authority's employees;
- The name of one individual working for a [private business];
- Home phone numbers and home addresses of different individuals;
- First name and last name initial of an individual – it is not clear what the name is associated with as it is written in handwriting and circled on the page;
- Opinions and views about the Applicant made by other individuals; and
- A Victim Impact Statement.

[128] In its submission, Justice described three categories of the types of personal information severed from the pages as follows:

[30]SK OIPC Review Report F-2006-003, available at www.oipc.sk.ca.

1. **Category 1:** Personal information clearly about another person has been removed…
   …

2. **Category 2:** Personal information, where it is about both the applicant and about another individual:
   …

3. **Category 3:** Business card information about and work product information of employees of organizations other than government institutions subject to FOIP:
   …

[129] Though Justice offered the above categories of personal information in its submission, it did not indicate in the Index, or on the record provided to our office on December 14, 2011 which severed information fell within each category.

[130] The Index stated the following for all 47 pages which section 29(1) is cited: "Disclosed with personal information about an identifiable individual other than the applicant removed."

[131] It is important to remember that section 61 of FOIP clearly places the burden of justifying the exemption on the government institution. Section 61 of FOIP states the following:

> **61** In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.[31]

[132] Our resource, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* provides the following guidance regarding the burden of proof when dealing with the personal information exemption:

> Where the personal information or personal health information exemption is claimed:
>
> - Have you identified which information in the record constitutes personal information or personal health information, why it should be considered such and to whom it relates?
>
> - Have you considered whether the record contains the requestor's personal information or personal health information? If this is so, did you consider the

[31] *Supra* note 1.

specific provisions of the applicable Act granting access to one's own personal information (section 31 of FOIP; 30 of LA FOIP; and 38 of HIPA)?

- Have you contacted the third party to see if there is any objection to the release of their information?[32]

[133] Justice provided substantial argument in its submission regarding the three categories of personal information it severed. However, it did not identify which information was severed from the record pursuant to each category. Where it was clear and straight-forward (i.e. Category 1 and 3) my office was able to make a determination as to whether section 29(1) was appropriately applied by Justice. However, for Category 2 it was unclear what was severed. Furthermore, Justice provided no supporting evidence as to why it was necessary to sever. This made it impossible for me to effectively review the severed pages and make a determination if section 29(1) was applied appropriately. Further, it appears that some of the severed information constitutes the personal information of the Applicant and not of another individual.

[134] As noted earlier, on March 15, 2012 my office provided our preliminary analysis to Justice. With regards to Justice's application of section 29(1) of FOIP, we advised them of the above conclusion and recommended that Justice consider the analysis provided and return to the record to review what it has severed under section 29(1) and consider releasing further records which contain information that would not constitute personal information under section 29(1) of FOIP.

[135] Further, as noted earlier in this Review Report Justice appears to have reviewed the record as recommended; however, it appears that Justice has only released some of the information that I determined would not constitute personal information but continued to withhold the rest. For example, Justice released the names of three RCMP officers but not the names of the employees of a Regional Health Authority.

[32]SK OIPC, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* at p. 11, available at www.oipc.sk.ca.

[136] Therefore, I find that Justice failed to meet the burden of proof with respect to the records in question. Let me particularize the reasons that lead me to that conclusion.

[137] I have considered section 29(1) in previous Reports and have determined a number of things that qualify as personal information and those that do not.

[138] In my Review Report F-2010-001 I found that the names, job titles, business phone numbers and email addressed of individuals working for local authorities did not constitute personal information as follows:

> [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.**
> …
>
> [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. My analysis however does not end here.[33]
>
> [emphasis added]

[139] I have also found this to apply to employees of 'government institutions' as this type of information is considered business card information unless there is a linkage of the employees name to other details of a personal nature contained within the record.[34]

[140] I have in the past applied the same approach to defining personal information under FOIP and LA FOIP. In my Review Report LA-2012-002 I found that the names of Kelsey Trail Regional Health Authority (KTRHA) employees were not personal information under LA FOIP and I recommended release of the names of the those employees:

[33]SK OIPC Review Report F-2010-001, available at www.oipc.sk.ca.
[34]SK OIPC Review Report F-2008-001, available at www.oipc.sk.ca.

> [26] Therefore it appears that the names of the nurses and the shifts they worked on August 18, 2004 would not be personal information pursuant to section 23(1)(b).[35]

[141] The refusal of KTRHA to accept my recommendation was later appealed to the Court of Queen's Bench. The Honourable Mr. Justice Zarzeczny upheld the appeal and incorporated my recommendation to release the records containing the names of the employees of KTRHA into a binding order:

> [9] The facts, circumstances, analysis and conclusions which the Commissioner reached in his Report are the same as those that I have reached in my review of this matter *de novo*. I am in complete agreement with the Commissioner's Report.[36]

[142] The federal *Privacy Act*[37] has similarly carved out such information as it pertains to federal employees as follows:

> "personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,
> …
>
> but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, **does not include**
>
> **(*j*) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,**
>
> **(i) the fact that the individual is or was an officer or employee of the government institution,**
>
> **(ii) the title, business address and telephone number of the individual,**
>
> (iii) the classification, salary range and responsibilities of the position held by the individual,
>
> **(iv) the name of the individual on a document prepared by the individual in the course of employment**, and
>
> (v) the personal opinions or views of the individual given in the course of employment,[38]

[35] SK OIPC Review Report LA-2012-002, available at www.oipc.sk.ca.
[36] *Evenson v. Kelsey Trail Regional Health Authority*, [2012] SKQB 382.
[37] *Privacy Act*, R.S. 1985, c. P-21 at section 3.
[38] *Ibid.* at section 3.

[emphasis added]

[143] Further, the *Personal Information Protection and Electronic Documents Act* (PIPEDA)[39] applies to every organization that collects, uses or discloses personal information in the course of "commercial activities". However, the federal government may exempt organizations and/or activities in provinces that are deemed to have adopted substantially similar privacy legislation. This is not the case in Saskatchewan. The presence of commercial activity is the most important consideration in determining whether or not an organization is subject to PIPEDA.[40] PIPEDA defines "commercial activity" as:

> **2.** (1) The definitions in this subsection apply in this Part.
> …
>
> "commercial activity" means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.[41]

[144] PIPEDA has similarly carved out such information as it pertains to employees of private businesses subject to section 2 as follows:

> "personal information" means information about an identifiable individual, **but does not include the name, title or business address or telephone number of an employee of an organization.**[42]
>
> [emphasis added]

[145] PIPEDA has a similar purpose as Part IV of FOIP. The name of an employee is not personal information under PIPEDA. It would then be an absurd result to ignore that treatment under PIPEDA by considering it personal information under FOIP. Section 29(2)(i)(ii) of FOIP[43] effectively incorporates by reference provisions in federal statutes. Surely in a nation with a federal system of government, and both federal and provincial

[39] *Personal Information Protection and Electronic Documents Act* S.C. 2000, c. 5.
[40] Privacy Commissioner of Canada, *Legal information related to PIPEDA, Interpretations, Commercial Activity*, available at www.priv.gc.ca/leg_c/interpretations_03_ca_e.asp
[41] *Supra* note 39.
[42] *Ibid.*
[43] Section 29(2)(i)(ii) of FOIP states: "(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:… (i) for the purpose of complying with:… (ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada".

laws dealing with similar areas and rights of citizens for similar purposes, there must be a genuine effort made to harmonize the interpretation of the rules to minimize inconvenience and confusion for citizens.

[146] In previous Commissioner Rendek's Review Report 2003/014, he stated that:

> [26] The remaining deletions involved names of third parties who either correspond with the government or provided input to the government in the decision-making process. Pursuant to section 24(1)(k), **the name by itself is not personal information.** Where a name appeared in these documents and was deleted, it was done so incorrectly. These names should have been disclosed. The information with the names, other than the addresses and telephone numbers, is not personal information under section 24 nor would disclosure of the names reveal personal information about the individual…[44]
>
> [emphasis added]

[147] This is consistent with other jurisdictions. In *Griffiths v. Nova Scotia (Education*), [2007] NSSC 178, it was found that releasing the names by itself did not constitute personal information unless release of the name revealed personal information about the individuals:

> [24] The appellant refers to *Noel v. Great Lakes Pilotage Authority Ltd.,* [1988] 2 F.C. 77 (T.D.), where the Federal Court ordered disclosure of a list of names of individuals who held certificates to operate ships. The appellant was seeking the names of masters and watch officers who were not subject to compulsory pilotage. **The Court determined that releasing only the names did not constitute the release of personal information unless the disclosure of the name itself would reveal information about the individual.** The disclosure of the names would not of themselves reveal any employment history. The respondent maintains that the Court in *Noel* did not decide that the federal provisions are similar to s. 20(4); rather, the list was released because the Court found that the names in question were not personal information. **In fact, the Court concluded that, pursuant to the Federal *Privacy Act*, an individual's name did not constitute personal information unless disclosure of the name itself would reveal personal information about the individual.** It was open to the authority to provide the names with no further detail, which would indicate that the individuals named met the requirements of the relevant provision.[45]
>
> [emphasis added]

[44] SK OIPC Review Report 2003/014.
[45] *Griffiths v. Nova Scotia (Education*), [2007] NSSC 178.

[148] For example, the name combined with the home address, home phone number and/or ages of the individuals would constitute personal information under sections 24(1)(a), (d), (e) and (k) of FOIP.

[149] The information in question needs to be information of a personal nature in order to qualify as personal information under section 24(1).

[150] This is consistent with the Ontario Commissioner's view in her Order PO-3016:

> [13] Though the information contained in the records about the appellant relates to an incident which arose in the course of his employment as a paramedic**, I find that it qualifies as his personal information because the information reveals something of a personal nature about the appellant [Orders P-1409, R-980015, PO-2225 and MO-2344].** The records relate to an incident involving the appellant and a patient which resulted in a complaint being made by the patient against the appellant. Previous orders from this office have held that information about an individual in his or her professional or employment capacity does not constitute that individual's personal information where the information relates to their employment responsibilities or position, unless the information about the individual involves an evaluation of his or her performance as an employee or an investigation into his or her conduct (see Order MO-2197).
>
> [14] **Accordingly, I find that the views, opinions and observations of other individuals about the appellant contained in the records constitute the appellant's personal information as defined in paragraph (g) of the definition of that term in section 2(1). This information is found in the patient's and police's emails (Records 1c, 1f, 1g and 1h), interview notes (Record 2), investigation notes (Record 3) and audio statement (Record 8). I also find that the 911 and dispatch calls (Record 11) contain the appellant's personal information as the appellant is identified by name [paragraph (h)] or by the identifying number assigned to him [paragraph (c)]. In addition, the calls include the appellant's personal views and opinions [paragraph (e)].**[46]
>
> [emphasis added]

[151] Section 24(1)(h) of FOIP provides that views or opinions about another individual with respect to that individual are his or her personal information.

[152] In my Review Report F-2006-004 I refer to this section of FOIP:

[46]Ontario Information and Privacy Commissioner Order PO-3016.

> [44] The phrasing "views or opinions" appears in different parts of section 24 of the Act [24(1)(f), 24(1)(h) & 24(2)(c)]. Clauses 24(1)(f) "*the personal opinions or views of the individual except where they are about another individual*", (h) "*the views or opinions of another individual with respect to the individual*" and 24(2)(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*" differ in meaning as follows:
>
> a. **Whether or not you work for a public body, if you have an opinion or view about another person, that view or opinion material is the personal information of the data subject, not the author**; and
>
> b. **If you are not an employee of a public body, your personal opinion or view (not involving another individual) is your own personal information.** However, as per subsection 24(2)(c), if offered by a government employee in the course of employment, these will not be considered the employee's personal information. **This is due to the fact that the individual is only offering his/her opinion or view as part of his/her employment responsibilities, not in a personal capacity**.[47]
>
> [emphasis added]

[153] Therefore, any opinion offered about the Applicant constitutes his personal information and should be released to him.

[154] Page B9 is a Victim Impact Statement. Justice severed all of the information contained except for the title at the top of the page which reads "Victim Impact Statement". Upon review of page B9 it is clear that the statement contains very detailed information of a personal nature about the individual who made the statement, including how the individual's life has been impacted by events. Therefore, this page constitutes personal information belonging to an individual who is not the Applicant. Justice has appropriately applied section 29(1) to this page and the severed information should remain withheld.

[155] It is important for government institutions subject to FOIP and local authorities subject to LA FOIP to recognize that there is an ability to release information even when it is

[47] SK OIPC Review Report F-2006-004, available at www.oipc.sk.ca.

deemed to be personal information under section 24(1) of FOIP and section 23(1) of LA FOIP.

[156] Independent of the right of access in Parts II and III of FOIP, section 29(2)(i), (o) and (u) of FOIP allow for the head to consider disclosure even where the information constitutes personal information pursuant to section 24(1):

> 29(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:
>
> …
>
> **(i) for the purpose of complying with:**
>
> **(i) an Act or a regulation;**
>
> (ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; or
>
> …
>
> **(o) for any purpose where, in the opinion of the head:**
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or
>
> **(ii) disclosure would clearly benefit the individual to whom the information relates;**
>
> …
>
> **(u) as prescribed in the regulations.**[48]
>
> [emphasis added]

[157] The FOIP Regulations state the following at section 16:

> **16** For the purposes of clause 29(2)(u) of the Act, personal information may be disclosed:
>
> …
>
> (g) to any person where the information pertains to:

[48] *Supra* note 1.

> (i) the performance of any function or duty or the carrying out of any responsibility by an officer or employee of a government institution... [49]

[158] Section 28(2) of LA FOIP has a similar provision allowing for the head to consider disclosure even where the information is personal information under section 23 of LA FOIP:

> 28(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:
>
> …
>
> **(i) for the purpose of complying with:**
>
> **(i) an Act or a regulation;**
>
> (ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; or
>
> …
>
> **(n) for any purpose where, in the opinion of the head:**
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or
>
> **(ii) disclosure would clearly benefit the individual to whom the information relates;**
>
> …
>
> **(s) as prescribed in the regulations.** [50]
>
> **[**emphasis added]

[159] *The Local Authority Freedom of Information and Protection of Privacy Regulations* (LA FOIP Regulations) states the following at section 10:

> **10** For the purposes of clause 28(2)(s) of the Act, personal information may be disclosed:
>
> …
>
> **(g) to any person where the information pertains to:**

[49] *Supra* note 16.
[50] *Supra* note 24.

> **(i) the performance of any function or duty or the carrying out of any responsibility by an officer or employee of a local authority**...[51]
>
> [emphasis added]

[160] Clearly there is the ability for the head to exercise its discretion and release personal information of another individual when the head deems it is appropriate to do so.

[161] I will now address personal health information contained within the record.

6. Is *The Health Information Protection Act* engaged?

[162] The case before us involves the Applicant's receipt of services from a physiotherapy clinic. Prior to receiving our preliminary analysis on March 15, 2012, Justice had made no reference to the "personal health information" of the Applicant contained within the record or *The Health Information Protection Act* (HIPA).

[163] Therefore, it is necessary to determine if any of the records contain the personal health information of the Applicant and whether HIPA is engaged.

[164] HIPA applies to the following:

> **2** In this Act:
> …
>
> (t) "**trustee**" means any of the following that have custody or control of personal health information:
>
> (i) a government institution;[52]

[165] Therefore, Justice is subject to HIPA where there is personal health information involved.

[166] As well, FOIP states at 24(1.1) that:

[51] *The Local Authority Freedom of Information and Protection of Privacy Regulations*, S.S. 1993, c. L-27.1 Reg 1.
[52] *The Health Information Protection Act*, S.S. 1999, c. H-0.021.

> 24(1.1) "Personal information" does not include information that constitutes personal health information as defined in *The Health Information Protection Act*.[53]

[167] HIPA also defines "personal health information" in section 2 as follows:

> **2** In this Act:
>
> …
>
> (m) "**personal health information**" means, with respect to an individual, whether living or deceased:
>
> (i) information with respect to the physical or mental health of the individual;
>
> (ii) information with respect to any health service provided to the individual;
>
> (iii) information with respect to the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;
>
> (iv) information that is collected:
>
> (A) in the course of providing health services to the individual; or
>
> (B) incidentally to the provision of health services to the individual; or
>
> (v) registration information;[54]

[168] Upon examination of some of the records there appears to be personal health information of the Applicant pursuant to section 2(m)(i) of HIPA which has been withheld.

[169] However, of most significance in this matter before us are sections 12, 32 and 38 of HIPA which state:

> **12** In accordance with Part V, an individual has the right to request access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.
>
> …
>
> **32** Subject to this Part, on making a written request for access, an individual has the right to obtain access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.

[53] *Supra* note 1.
[54] *Supra* note 52.

…

38(1) Subject to subsection (2), a trustee may refuse to grant an applicant access to his or her personal health information if:

(a) in the opinion of the trustee, knowledge of the information could reasonably be expected to endanger the mental or physical health or the safety of the applicant or another person;

(b) disclosure of the information would reveal personal health information about another person who has not expressly consented to the disclosure;

(c) disclosure of the information could reasonably be expected to identify a third party, other than another trustee, who supplied the information in confidence under circumstances in which confidentiality was reasonably expected;

(d) subject to subsection (3), the information was collected and is used solely:

(i) for the purpose of peer review by health professionals, including joint professional review committees within the meaning of *The Saskatchewan Medical Care Insurance Act*;

(ii) for the purpose of review by a standards or quality of care committee established to study or evaluate health services practice in a health services facility or health services agency, including a committee as defined in section 10 of *The Evidence Act*; or

(iii) for the purposes of a body with statutory responsibility for the discipline of health professionals or for the quality or standards of professional services provided by health professionals;

(e) the information was collected principally in anticipation of, or for use in, a civil, criminal or quasi-judicial proceeding; or

(f) disclosure of the information could interfere with a lawful investigation or be injurious to the enforcement of an Act or regulation.

(2) Where a record contains information to which an applicant is refused access, the trustee shall grant access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

(3) Where access to personal health information is refused pursuant to clause (1)(d), a trustee must refer the applicant to the trustees from which the personal health information was collected.[55]

[55] *Ibid.*

[170] I have addressed an individual's right of access to their personal health information in a number of Review Reports.[56]

[171] As noted earlier, we provided Justice with our preliminary analysis on March 15, 2012. We recommended that Justice release to the Applicant all personal health information belonging to him.

[172] On December 11, 2012 our office received a letter from Justice dated December 7, 2012. This letter appears to have been the first acknowledgement that HIPA is engaged and offers for the very first time a statutory exemption upon which Justice relies. As noted above, this has never been communicated to the Applicant and certainly not provided to the Applicant as it should have been when Justice responded to the original access request five years and eight months ago.

[173] The position of Justice, as of December 7, 2012 is described as follows:

> What personal health information there is was entirely collected as part of a criminal investigation and is contained within the records provided to us by the RCMP. Clause 13(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP) was initially claimed for the records in question and, in fact, still applies to the records within which the personal health information is contained.
>
> The Ministry is denying access to these portions of the records based on clause 38(1)(e) of HIPA, which states:
>
> > *38(1) Subject to subsection (2), a trustee may refuse to grant an applicant access to his or her personal health information if:*
> >
> > *(e) the information was collected principally in anticipation of, or for use in, a civil, criminal or quasi-judicial proceeding*

[174] There are two arguments raised by Justice. The first is that the personal health information "was created and gathered by the RCMP as part of a criminal investigation and in anticipation of criminal proceedings".[57] The second is that the personal health

[56]SK OIPC Review Reports H-2009-001, H-2008-002, H-2008-001, H-2007-001, F-2004-006 and *Report on Management of Access Requests from Patients to Saskatchewan Regional Health Authorities*.
[57] Letter from Justice dated December 7, 2012.

information was part of the Crown's disclosure to counsel for the Applicant and that disclosure was provided subject to trust conditions, "specifically that witness statements, in any form would not be copied or be in the possession of anyone other than defence counsel or a member of his firm without the consent of the Crown."[58]

[175] Section 38(1)(e) of HIPA is a discretionary exemption and not a mandatory one. Our consistent approach with FOIP, LA FOIP and HIPA has been not to consider new discretionary exemptions that were not raised in the original response to an applicant. The exception would be if the public body or trustee could demonstrate that there would be no prejudice to the applicant for us to consider the late exemption. Justice did not address the issue of prejudice to the Applicant in this case. For all the reasons that have been discussed in previous Review Reports,[59] I will not consider the new discretionary exemption raised by Justice for the first time more than 2000 days after this review commenced.

[176] In the event that a court might disagree with my approach, I find that, as important as trust conditions on defence counsel may be, a practice associated with the Stinchcombe production[60] cannot trump a right to access by the patient or data subject described in section 32 of HIPA.

[177] Justice also argued that the records containing personal health information are subject to clause 13(1)(a) of FOIP but I have already dealt with that exemption claim finding it did not apply.

[178] Therefore, all personal health information of the Applicant should be released to him.

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[58] *Ibid.*

[59] SK OIPC Review Reports F-2004-007 at [16], F-2005-006 at [6], F-2006-004 at [18], LA-2007-002 at [16] and [22] and LA-2011-003; *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* states at p. 8 "Our practice is that we will not normally consider a new discretionary exemption once we commence our review unless the public body/trustee can demonstrate that this will not prejudice the applicant." All available at www.oipc.sk.ca/.

[60] *R. v. Stinchcombe*, [1991] 3 SCR 326.

V FINDINGS

[179] I find that the Ministry of Justice did not meet the burden of proof with regards to the application of section 13(1)(a) of *The Freedom of Information and Protection of Privacy Act*.

[180] I find that section 15(1)(k) of *The Freedom of Information and Protection of Privacy Act* does not apply to any of the records in question.

[181] I find that the Ministry of Justice properly applied section 22(b) of *The Freedom of Information and Protection of Privacy Act*.

[182] I find that the Ministry of Justice did not meet the burden of proof with regards to section 29(1) of *The Freedom of Information and Protection of Privacy Act* to all of the records except the Victim Impact Statement.

[183] I find that the Ministry of Justice did not apply *The Health Information Protection Act* appropriately to the records.

VI RECOMMENDATIONS

[184] I recommend that the Ministry of Justice review its records management practices with regards to prosecutorial records to ensure it is compliant with *The Archives Act, 2004* of Saskatchewan.

[185] I recommend that the Ministry of Justice continue to withhold the records cited for exemption under section 22(b) of *The Freedom of Information and Protection of Privacy Act.*

[186] I recommend that the Ministry of Justice release those records withheld under section 13(1)(a) of *The Freedom of Information and Protection of Privacy Act*.

[187] I recommend that the Ministry of Justice release those records withheld under section 29(1) of *The Freedom of Information and Protection of Privacy Act*, except for the Victim Impact Statement.

[188] I recommend that the Ministry of Justice release to the Applicant his personal health information pursuant to section 32 of *The Health Information Protection Act*.

[189] I recommend that the Ministry of Justice revisit the issue of control insofar as it might apply to records that are in the possession of the Royal Canadian Mounted Police for purposes of a prosecution under the *Criminal Code* of Canada.

Dated at Regina, in the Province of Saskatchewan, this 27th day of December, 2012.

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

POSTSCRIPT

In reviewing the developments on the file that culminates in Review Report F-2012-006, I am struck by the profound lack of respect shown for the Applicant and his right to access records that are fundamentally about him. One has to admire the doggedness and persistence of someone who has to navigate all of these hoops and hurdles just to get a recommendation from the Saskatchewan Information and Privacy Commissioner (OIPC) which may or may not be accepted by the Ministry of Justice (Justice).

One must however consider why it has taken five years and nine months to get to this point. The Review Report details the actions by both my office and Justice but it does not contain a root-cause analysis which might help Saskatchewan residents understand what can only be described as an unconscionable delay.

My belief is that the Review Report details accurately the attempts by my oversight office to move this matter along and the countless delays encountered in dealing with Justice. In terms of trying to understand the delay, one can identify some obvious problems in the way that Justice handled this request for access and then the request for review. These include:

- Lack of familiarity with *The Freedom of Information and Protection of Privacy Act* (FOIP) and *The Health Information Protection Act* (HIPA);
- Lack of diligence and rigor in searching for responsive records;
- Failure to consider the application of HIPA until raised by my office although clearly the record included personal health information;
- Failure to assess the relationship between the Royal Canadian Mounted Police (RCMP) and Justice in a *Criminal Code* prosecution insofar as FOIP is concerned;
- Inability to assemble the record and properly link exemptions to portions of the record;
- Confusion over exemptions; and

- Suggestions that delay might result in more voluntary release of records by Justice when in fact the additional records released voluntarily were copies of records already provided to the Applicant.

Each of the above listed factors contributed to protracted delays at almost every step of our review process.

None of the foregoing items however explain why there were so many breakdowns in managing this file. My recommendation to Justice is that it immediately undertake a thorough examination of its process to determine how it can better meet the letter and spirit of FOIP.

Prior to a review by my office, it would be important for Justice to:

1. Ensure a thorough search for responsive records and properly document that search for future reference; and

2. Pay more attention to its section 7 response to the applicant to reduce the need for different exemptions/exclusion claims during the course of a review.

Once an OIPC review has commenced, it would be important for Justice to:

1. Ensure that the record and Index of Records responsive to the request is prepared and provided to our office within 30 days of receiving my office's notification letter; and

2. Ensure that the written submission is provided within 60 days of receiving my office's notification letter.

I must also acknowledge that I share responsibility for the delay in that we attempted to work with Justice to achieve an informal resolution. Given that I can only issue recommendations and have no order making power, I believed that if we could achieve an informal resolution that would actually see the Applicant obtain all or most of the records in dispute that would be a preferable result. I take responsibility for acceding to multiple requests for extensions of time which in hindsight was a mistake.

In the future, all public bodies and trustees can expect that if they suggest during a review that they would like additional time to consider releasing additional documents to an applicant, we

will be unlikely to extend time for that purpose. We will instead strongly encourage those public bodies and trustees to make that assessment an integral part of its process when first presented with the request for access and only through an OIPC review if it does not stall the process.

In the Annual Report for Justice for 2011-2012 the following description appears:

> The Access and Privacy Branch provides internal access to information and privacy services for the Ministry and provides leadership and advice on access and privacy issues to Government and local authorities, works with and provides support to access and privacy officials across the Government to help with specific issues, develops training programs, and assists with education of public sector employees.[1]

This mandate is very broad and yet Justice has allocated only four Full Time Equivalents (FTEs) and a term consultant to do it all. We need to keep in mind that this office was only created in 2005 and is still in the early stages of support and education for all public sector employees.

As is apparent from the quote above, Justice has, on at least a temporary basis, effectively cannibalized the Government's Access and Privacy Branch (the Branch) by requiring those staff to process Justice's access requests instead of focusing on the Branch's much broader mandate for education and support of FOIP Coordinators in all provincial government institutions and local authorities.

I'd suggest that Justice, with over 900 FTEs and a budget of more than $162 million[2] surely can do better than a tiny Branch of four FTEs which must try and manage Justice's own access requests and privacy complaints and then coordinate FOIP and *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) compliance among all of the many government institutions and local authorities. This is likely a contributing factor to the problems catalogued in this Review Report.

[1]Ministry of Justice and Attorney General, *11-12 Annual Report*, at p. 9, available at www.justice.gov.sk.ca/JusticeAnnualReport2011-2012-Final.pdf.
[2]*Ibid.* at p. 27.

It is perhaps significant that the limited commentary on the Branch is found in the section entitled *Regulatory Services Division*[3] of the Annual Report. In the section **Government Goal: Promises – Keep Government's promises and fulfill the commitments of the election, operating with integrity, transparency and accountability to the people of Saskatchewan** there is a strategy headed: *Ensure that the administration of public affairs is within the rule of law*. The relevant bullet states that:

> The Ministry continued to offer administrative and policy advice to ministries, agencies and local authorities to improve compliance with access and privacy laws. It also continued efforts to raise awareness of access and privacy issues in preparation of Privacy and Security Awareness Month in May 2012, followed by a major conference in June 2012. The Ministry led a corporate Lean initiative aimed at improving the processing of access requests for government records.[4]

Surely the most effective way to teach those in government how to improve compliance with access and privacy laws would be for Justice to model best practices in the way it responds to access requests made to its own ministry. If Justice can do no better than what is documented in the Review Report that accompanies this commentary, perhaps it is time to consider relocating the Branch to a different ministry.

In most other Canadian jurisdictions, responsibility for what the Branch does is under a ministry other than Justice:

- Department of Government Services in Alberta;
- Treasury Board at the federal level;
- Ministry of Citizen Services and Open Government in British Columbia;
- Ministry of Culture, Heritage and Tourism in Manitoba;
- Ministry of Government Services in Ontario;
- Ministry of Government Services in New Brunswick;
- Yukon Highways and Public Works; and

[3] *Ibid.* at p. 9.
[4] *Ibid.* at p. 25.

- Most recently, Ministry Responsible for Public Engagement in Newfoundland and Labrador.[5]

In each of these eight jurisdictions, Justice continues to provide legal advice to public bodies and may well be involved on occasion in representing public bodies in reviews by the Commissioner. In these jurisdictions, the responsibility for training staff, developing tools and resources, organizing workshops and conferences however has been hived away from Justice and assigned to a different ministry that is mandated to provide a range of services to the public.

In Saskatchewan, there also may be a significant advantage in de-linking the role of Justice in providing legal advice to public bodies from the role of promoting compliance with access and privacy requirements across the entire public sector in this province. In a different ministry with a more obvious focus on providing direct service to the public, it may be much easier to promote a culture focused on enhanced transparency and accountability to the public. Unlike most provincial laws, FOIP has a special significance the Supreme Court has described as "quasi-constitutional" since it codifies fundamental democratic rights of the individual.[6] Also, uniquely, FOIP was intended to change the pre-1992 culture that would suggest that government 'owned' the records in its possession or under its control and that it would be in government's sole discretion whether they would be released to the public. Canada's 30 year experience with access to information laws tell us that this significant change in attitude and in culture however cannot be effected by legal prescription alone. It requires strong leadership within government, knowledgeable FOIP Coordinators in each public body and trustee organization who are well-trained to deal with and assist the public, readily available resources and a detailed manual to assist both the public and public servants and an adequately resourced independent oversight body.

A significant handicap in this province is the fact that Justice has, after twenty years, failed to produce a comprehensive manual to assist public bodies and the public to understand and utilize

[5]Government of Newfoundland and Labrador, *"Premier Announces Changes to Cabinet and New Office of Public Engagement"*, October 19, 2012, available at www.releases.gov.nl.ca/releases/2012/exec/1019n08.htm.
[6]Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, *Access to Information and Protection of Privacy in Canadian Democracy*, May 5, 2009, available at www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm2009-05-05-eng.asp.

these quasi-constitutional laws. I am unaware of another jurisdiction in Canada that has failed to produce such a manual that discusses both the process and the exemptions in FOIP.

A mechanistic approach to interpreting FOIP in the most restrictive way may be the natural inclination of some in government but this can perhaps best be overcome by differentiating Justice's role in providing legal advice and a different ministry's role in providing education and awareness and supporting the public's 'right to know'.

To meet the standards noted above, a number of things need to be in place in Justice and indeed in all public bodies subject to either FOIP or LA FOIP. These include:

1. Appoint and support a properly trained FOIP Coordinator with a full job description.

2. Plan for coverage for vacations, long term leaves and transition periods when there is a change in personnel to ensure continuity in meeting legislated requirements for dealing with access requests and reviews by my office. Too often we encounter a complete breakdown in processing access requests and significant delays in our reviews when a single individual in a large organization leaves for any extended time.

3. Plan for how to manage access and privacy responsibilities when there is a reorganization of ministries to ensure there are no unnecessary delays in managing requests and participating in OIPC reviews.

4. Ensure that the organization has carefully reviewed all of its record holdings and its record/information collection, use and disclosure practices and policies to ensure timely retrieval of information requested as part of a modern records management system.

5. Ensure that the Deputy Minister or an Assistant Deputy Minister is tracking performance of that Ministry in responding to requests and resolving reviews with the OIPC under FOIP/LA FOIP or HIPA.

6. Ensure that the Ministry's published business plan includes objectives for meeting all access and privacy legislated requirements in a timely and fulsome fashion.

7. Require that the FOIP Coordinator or a substitute attends the annual access and privacy conference undertaken by the Branch.
8. Ensure that the written delegation mandated by section 60 of FOIP (section 50 of LA FOIP) is clear. Much of the delay we experience in reviews can be attributed to an ostensible need to consult with "someone higher" in that organization. If the

> "head" has delegated all or most of his or her authority to a properly trained FOIP Coordinator there should be no need to require months of additional time to "consult with others".

Unlike the Annual Report of Justice noted earlier, I do not see access and privacy as much about the "rule of law" as they are about enhanced transparency and accountability. These goals will not likely be satisfied by legal analysis alone since they engage broader public interests and expectations. At least as important as the actual legislation is the machinery in place to achieve the aims of the legislation. In other words, access and privacy laws set a kind of floor but do not define the ceiling. As we survey rapidly changing developments in access and privacy throughout Canada and internationally, what is unmistakable is a move to address in a meaningful way public attitudes and expectations. Given the circumstances detailed in the appended Review Report, I think we are at risk of setting our sights much too low and creating an uncomfortable dissonance between the attitude and actions of the governors and the expectations of the governed.

Maybe it takes a review that is only concluded 68 months after the access request was made to realize how far we are falling short of the promise of greater transparency – greater accountability.