

SASKATCHEWAN
OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

REVIEW REPORT F-2013-006

Saskatchewan Government Insurance

Summary:

The Applicant made an access to information request to Saskatchewan Government Insurance (SGI) requesting information pertaining to himself. SGI withheld portions of one page identified by SGI as the responsive record pursuant to section 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). During the course the review, SGI discovered approximately 825 additional pages of responsive records and applied six new discretionary exemptions not previously identified to the Applicant. The Commissioner found that SGI did not meet its obligations under section 7(2) of FOIP. The Commissioner recommended that SGI release those records withheld under the late raised discretionary exemptions. Finally, the Commissioner found that SGI properly applied section 29(1) to some portions of the record that constituted personal information of individuals who were not the Applicant and he recommended that this information continue to be withheld. Finally, the Commissioner found that SGI did not properly apply section 29(1) of FOIP to a portion of the record as it did not constitute personal information pursuant to section 24(1) of FOIP. He recommended this information be released to the Applicant.

Statutes Cited:

The Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. F-22.01, ss. 2(1)(d)(ii), 7(1), 7(2), 17(1)(b)(i), 17(1)(c), 17(1)(d), 18(1)(f), 21, 22(a), 24(1)(b), 24(1)(e), 24(1)(j), 24(1)(h), 24(1)(k)(i), 24(1)(k)(ii), 29(1), 46(3)(a), 46(3)(b), and 61.

Authorities Cited:

Saskatchewan OIPC Review Reports F-2012-006, F-2012-004, F-2012-002, F-2012-001/LA-2012-001, F-2010-001, F-2008-001, F-2007-001, F-2006-004, F-2006-002, F-2004-007, F-2004-005, F-2004-003, LA-2012-002 and LA-2011-003, Saskatchewan OIPC Investigation Report F-2012-004.

Other Sources

Cited: Saskatchewan OIPC: *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*; Department of Justice Canada, *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues, Report of the Special Advisor to the Minister of Justice* by Gérard V. La Forest (November 15, 2005).

I BACKGROUND

[1] The Applicant submitted an access to information request to Saskatchewan Government Insurance (SGI) on March 15, 2011 requesting his “complete Employment file” from November 1, 1988 to September 30, 2009.

[2] On or about March 21, 2011, SGI provided its section 7 response to the Applicant. The section 7 response stated the following:

Your request has been partially granted. Section 29(1) of the Act states that SGI shall not disclose personal information in its possession or under its control without the consent of the individual to whom the information relates. To that end, the following information has been severed from the record:

1. Third party information from [name] Employee Statistics, run date: 04/03/2009

[3] The Applicant submitted a Request for Review to my office on April 8, 2011.

[4] On or about May 6, 2011, my office provided notification to both parties of its intention to undertake a review. In the letter to SGI, my office requested a copy of the record and SGI’s submission supporting the exemption cited in its section 7 response to the Applicant.

[5] From SGI’s section 7 response to the Applicant on March 21, 2011, it appeared that SGI was relying on section 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP)¹ to withhold portions of the record. The record in question appeared to be one page titled, *Employee Statistics – Detail*. SGI apparently severed what it determined to

¹*The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 (hereinafter FOIP).

be third party personal information on that page and released the remainder to the Applicant.

[6] On December 6, 2011, my office received the first of three submissions from SGI. Along with the first submission was a copy of the entire responsive record containing approximately 600 pages. To explain the large volume of records, SGI stated the following in its submission:

The Applicant advised you that he did not receive his entire SGI personnel file in response to his information request of March 15, 2011. Upon investigation, I discovered that there had been an oversight and that he had not, in fact, received all the disclosable documentation that he was entitled to.

By way of explanation, it was my belief that the file I received from Human Resources (HR) initially was the file in its entirety, but as I determined later, it was not. The more sensitive portions of the file are safeguarded in different areas of the HR department – for example, Employee Relations holds employee disciplinary documentation, Employee Health and Wellness holds personal health information regarding WCB claims, disability claims, etc. When I requested the personnel file, I received the administrative documents relating to his position only, and believed that to be the entire file. There was no indication that the Applicant also had files with Employee Relations and Employee Health and Wellness, so I did not request them. **When we received notice of the Request for Review, I contacted HR and obtained the further portions of the file that I had not been provided previously.**

...

The consequence of subsection 29(1) is that absent a statutory basis for disclosure, SGI cannot release the personal information of a third party to the Applicant. In the original response to the Applicant, two portions of a document entitled “Employee Statistics Detail” for the [SGI] Yorkton Salvage Department has been withheld under this subsection. This document lists all [SGI] Yorkton Salvage employees by name, position, start date, etc. Pursuant to s. 29(1), all third party information has been severed from this document. This was the only information severed from the response to the Applicant of March 21, 2011.

In response to the Request for Review, please find enclosed the following:

...

3. A copy of the redactions relating to the “Employee Statistics Details” for the [SGI] Yorkton Salvage Department. This was severed from the responsive record in relation to the original Freedom of Information Request of March 15, 2011;

4. **Copies of the further disclosable documentation that has been provided to the Applicant from the balance of the Human Resources files on December 6, 2011.**

[emphasis added]

[7] No Index of Records (Index) was provided to my office with the box of 600 records. Further, SGI did not indicate which of the 600 pages had been released to the Applicant and which were being withheld in full or in part.

[8] My office manually went through the 600 pages and pulled out those pages that appeared to have blacked out sections indicating information had been severed and withheld. This totaled 39 pages.

[9] On these 39 pages, it appeared SGI had cited new discretionary exemptions not previously noted in either the section 7 response to the Applicant nor the submission to our office which accompanied the records. These new discretionary exemptions included sections 17(1)(b)(i), 17(1)(c), 17(1)(d), 18(1)(f) and 21 of FOIP.

[10] On June 7, 2012, we advised SGI by way of email that we required the following:

1. SGI requested in its submission that it be kept in camera and not be shared with the Applicant. However, it provided no arguments to support such a request;
2. There was no Index included with the record; and
3. A non-redacted version of the severed pages was missing so it was not possible to determine what was severed under section 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[11] On August 14, 2012, September 21, 2012, October 3, 2012, October 12, 2012, December 6, 2012 and January 24, 2013 my office sent email reminders to SGI requesting the above items.

[12] On January 25, 2013 my office received another submission from SGI. It contained another copy of the same 600 pages received earlier from SGI on December 6, 2011. Included in this second copy was a separately clipped package of records (approx. 200

additional pages) that did not have a cover letter. These pages appeared to be new and not seen before by my office. There was a post-it note on top of the separate package of records stating the following:

I am not sure why this bundle has no page numbers at the bottom like the rest of the documents do. There was only one redaction in this bundle.

[13] An Index was also included for the first time with the above.

[14] The letter accompanying the records from SGI stated the following:

Further to your email of January 24, 2013, please find enclosed a copy of the unredacted documents and index. My apologies for the delay in getting these to you. Please note that due to a page numbering error, there is no page P407 or P408; the pages go from page P406 to P409. The person applying the page numbers to the file material simply forgot to use P407 and P408.

I note that in [Applicant's] Request for Review in April 2011 he indicates that "I have been refused access to all or part of the record...". This stems from the original Access to Information Request, which was received by our office on March 15, 2011. **As I have previously indicated, I was not provided his entire file by our HR department so in turn, I did not provide him with all the records that he was entitled to, only the portion that I had been given ("Package 1"). Once the Request for Review was received, this error was rectified and on December 6, 2011, [Applicant] was provided with all the disclosable documents that he was entitled to ("Package 2"). Would we not be satisfying the Request for Review simply by providing Package 2 to him? Has he ever indicated that he did not agree with the exemptions applied to the documents in Package 2? He had not seen Package 2 when he requested the review, so we have no information on what he is objecting to, if anything, in this bundle. Please clarify exactly what concerns [Applicant] has at this time with the documents provided to him.**

[emphasis added]

[15] In response to SGI's question regarding the need for my office to conduct a review, we responded by way of email on January 25, 2013 stating:

As you will recall, the applicant requested his "complete employment file from Nov. 1988 to Sept 30 2009" in his access request of March 15, 2011. It appears from SGI's submissions that he was denied access to roughly 38 pages.

On December 6, 2012 you found more records responsive to his original access request so you provided more [to the Applicant]....

All of the records in package 1 & 2 are responsive to his original access request so any records withheld under both packages are captured by this review.

Further, we followed up with the applicant in April 2012 to see if he was satisfied with the additional records provided to him. On May 28, 2012 he responded to say he was not satisfied and wished for the review to continue. We advised SGI [employee name] of this on May 30, 2012....

[16] Again, my office reviewed the 600 pages of responsive records (plus the additional 200) provided the second time by SGI. My office removed the un-redacted pages which corresponded with the redacted 39 pages from the first box of records provided from SGI.

[17] On January 28, 2013, my office received yet a third submission from SGI. The submission included 26 additional new pages not seen before by my office. The letter attached stated the following:

...please find enclosed the pages in our file showing redactions #1-76. I have double-checked them against the Appendix "A", and they are all accounted for.

[18] The letter from SGI did not account for the extra 26 pages. These additional records raised the total withheld records in full or in part to 65.

[19] Also, SGI raised for the first time, some 20 months after the review commenced, another new discretionary exemption: section 22(a) of FOIP.

[20] In total, SGI raised six late discretionary exemptions during the course of the review. These included sections 17(1)(b)(i), 17(1)(c), 17(1)(d), 18(1)(f), 21 and 22(a) of FOIP.

[21] My office advised SGI by way of email on January 24, 2013 that it would be prejudicial to the Applicant to allow SGI to introduce new discretionary exemptions this late into a review and that these late discretionary exemptions would not be considered in our review. As a result, only section 29(1) of FOIP would be considered.

[22] On or about April 2, 2013, my office provided its preliminary analysis to SGI. One of the recommendations made was that SGI release to the Applicant records withheld under the late raised discretionary exemptions. This included sections 17(1)(b)(i), 17(1)(c), 17(1)(d), 18(1)(f), 21 and 22(a) of FOIP.

[23] In a letter dated May 22, 2013, SGI provided a response to my office's preliminary analysis of April 2, 2013 indicating it would continue to withhold some of those records withheld under the late discretionary exemptions noted above.

[24] However, SGI also indicated in its response of May 22, 2013 that it was prepared to release 24 records in full to the Applicant in response to my office's recommendations in the preliminary analysis. It also advised it was prepared to release the portion of the record titled, *Employee Statistics - Detail* that my office found did not qualify as personal information. SGI proceeded to release these records to the Applicant on or about May 22, 2013.

[25] In summary, the following caused significant delays during this review:

- SGI requested its initial submission be held in camera but did not at any time during the review provide the requisite arguments to support such a request by my office or provide a version that could be shared with the Applicant;
- SGI presented an inadequate initial submission to our office in 2011 containing almost 600 additional pages of responsive records not previously identified in its section 7 response to the Applicant;
- Over the course of the review, SGI raised six new additional exemptions at different times throughout the review; and
- SGI presented additional responsive records three times during the course of the review totalling more than 800 pages (600 + additional 200 + additional 26).

II RECORDS AT ISSUE

[26] At the time my office sent SGI its preliminary analysis, 65 pages were being withheld in full or in part by SGI. Following the recommendations in my office's preliminary

analysis, SGI agreed to release 24 pages in full and continued to partially withhold 17. However, contrary to my office’s recommendation, SGI refused to release 25 pages which it had been withholding under the six late discretionary exemptions which my office had indicated it would not consider.

[27] The Applicant indicated to my office by way of letter dated June 14, 2013 that he was not satisfied with the outcome of the review and requested that I issue a Review Report pursuant to section 55 of FOIP. As such, I have proceeded to do so.

[28] Therefore, at the time of this Review Report, 42 pages remained withheld in full or in part from the Applicant:

Page Number	Redaction Number	Record Description	Exemption
No page #	35	Employee Statistics - Detail	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.
P3	1 & 2	Portion of email	17(1)(b)(i), 17(1)(c) and 17(1)(d) – My office recommended release. SGI withheld.
P19	10	Handwritten file notes	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.
P55-P65	12	Two emails	22(a) – My office recommended release. SGI withheld.
P103	14	Invoice dated August 13, 2009	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.
P104	15	Portion of handwritten notes	21 – My office recommended release. SGI withheld.
P107	16	Handwritten file notes	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.

Page Number	Redaction Number	Record Description	Exemption
P108	17	Handwritten file notes	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.
P110	18	Handwritten file notes	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.
P111	19 & 20	Portion of Handwritten notes	21 – My office recommended release. SGI withheld.
P119	22A, 22B, 23, 24, 25, 25A & 26	Two portions of file notes	21 – My office recommended release. SGI withheld.
P120	27	Portion of file notes	17(1)(b)(i) and 21 – My office recommended release. SGI withheld.
P123	37 & 38	Two portions of statement	21 – My office recommended release. SGI withheld.
P124	39	Portion of Schedule of Loss	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.
P125	39A, 40 & 41	Portions of email	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.
P129–P136	42	Two portions of file notes	22(a) – My office recommended release. SGI withheld.
P151	43 & 44	Two portions of file notes	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.
P246 & P247	47 & 48	Portions of email	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.

Page Number	Redaction Number	Record Description	Exemption
P299	59	File notes	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.
P309	60, 61 & 62	Portions of email	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. It is not clear if SGI followed this recommendation.
P328	63	Portion of handwritten file notes	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.
P338	65	Handwritten file notes	29(1) on entire page - My office recommended personal information be withheld. SGI followed this recommendation.
P372	66	Portion of handwritten file notes	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.
P389	67, 68 & 69	Portions of email	29(1) on a portion of the page - My office recommended personal information be withheld and remainder be released. SGI followed this recommendation.

[29] As noted earlier in this Review Report, I will not consider the late raised discretionary exemptions put forward by SGI during the course of this review. This includes sections 17(1)(b)(i), 17(1)(c), 17(1)(d), 18(1)(f), 21 and 22(a) of FOIP. Therefore, I recommend release of the following 25 pages: P3, P55-P65, P104, P111, P119, P120, P123 and P129-P136. Therefore, the only exemption I will consider in this Review Report is the applicability of section 29(1) of FOIP to the remaining 17 pages.

III ISSUES

1. **Did Saskatchewan Government Insurance meet its obligations under section 7 of *The Freedom of Information and Protection of Privacy Act*?**
2. **Should Saskatchewan Government Insurance's submissions be held in camera?**
3. **Did Saskatchewan Government Insurance appropriately apply section 29(1) of *The Freedom of Information and Protection of Privacy Act* to the record in question?**

IV DISCUSSION OF THE ISSUES

[30] SGI is a "government institution" as defined in section 2(1)(d)(ii) of FOIP.²

1. **Did Saskatchewan Government Insurance meet its obligations under section 7 of *The Freedom of Information and Protection of Privacy Act*?**

[31] Sections 7(1) and 7(2) of FOIP provide as follows:

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

(a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or

(b) transfer the application to another government institution in accordance with section 11.

(2) The head shall give written notice to the applicant within 30 days after the application is made:

(a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;

²This has also been determined in previous Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Review Reports F-2007-002 and F-2006-005 and Investigation Reports F-2013-002, F-2012-005, F-2010-001 and H-2004-001, all available at www.oipc.sk.ca/reviews.htm.

- (b) if the record requested is published, referring the applicant to the publication;
- (c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;
- (d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;
- (e) stating that access is refused for the reason that the record does not exist; or
- (f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4).

[32] During the course of the review, there were a number of issues arising out of SGI's processing of the Applicant's access request and subsequent responses to my office during the review.

[33] As noted earlier, SGI discovered additional responsive records three times during the course of the review.

[34] Finding further records only upon an applicant requesting a review by my office indicates that SGI is not meeting its statutory obligations under section 7(2) of FOIP. Further, failing to identify for the Applicant all of the exemptions relied on by SGI, also indicates SGI is failing to meet its statutory obligations.

[35] In the postscript of my Review Report F-2012-006, I offered the following guidelines:

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.**³

[emphasis added]

[36] Also, on page six of my office's resource, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* the following guidelines are offered to public bodies:

If any information has been withheld from the applicant, the public body/trustee must provide a copy of the record to the OIPC with:

- a. The withheld information outlined or highlighted, and
- b. The relevant section number(s) of the applicable Act clearly indicated beside or near the withheld information.

In preparing for the review, the public body/trustee should prepare an Index of the Record(s) in table form. That index should include the following:

1. All the pages should be numbered in sequence. However, this may not always be practical. For example, with two binders of documents, each one may already have pages numbered in sequence. In that case, if the Record is identified, the pages need no further numbering; identification as "Record A, page 2" is sufficient. A loose collection of documents should be numbered in sequence.
2. For each page upon which information has been withheld, identification of the section numbers of the applicable Act under which any information has been withheld is required.
3. A description of the document in which information has been withheld or disclosed, and
4. The page number(s) on which information has been withheld or disclosed. The index should account for every single page of the record.⁴

³SK OIPC Review Report F-2012-006 at p. 2 of "Postscript", available at www.oipc.sk.ca/reviews.htm.

⁴SK OIPC *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* at p. 6, available at www.oipc.sk.ca/resources.htm.

[37] The access request in this case was from an SGI employee who appears to have been employed with SGI for at least 20 years based on the records he was requesting. It seems reasonable that upon receiving an access request from an employee a public body would look in the human resources department of its organization. It is not clear how SGI could not have found it odd that its section 7 response to the Applicant only identified one record for an employee of 20 plus years. This suggests that the implicit duty to assist the Applicant was neglected in this case.

[38] In my Review Report F-2004-003, I stated the following about the implicit duty to assist⁵ in FOIP:

[12] There is no explicit duty to assist applicants in the Saskatchewan *Freedom of Information and Protection of Privacy Act*. Such an explicit duty exists in certain other provinces. For example, in the British Columbia *Freedom of Information and Protection of Privacy Act* the head of a public body “must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely”. [section 6(1)] A similar provision appears in the Alberta *Freedom of Information and Protection of Privacy Act* [section 10(1)].

[13] The right of access under the Act is described in section 5 as follows:

“Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a government institution.”

[14] I am mindful that most citizens will not have a detailed knowledge of the types and description of records that a government institution maintains. A requirement for government institutions to take reasonable steps to search for responsive records is an important feature to address the knowledge imbalance between the institution and the applicant. If there is no duty to assist, the right of access may be more illusory than real.

[15] My view is that to realize and respect the “right” guaranteed to Saskatchewan residents by the Act, there is an implicit requirement for government institutions to assist applicants and to respond openly, accurately and completely to an access request.

Although the duty to assist is only an implicit requirement we want to clearly signal to government institutions, local authorities and health trustees that this

⁵The duty to assist is also discussed in SK OIPC Review Reports F-2012-002, F-2012-001/LA-2012-001, F-2010-001, F-2008-001, F-2007-001, F-2006-004, F-2006-002, F-2004-007 and F-2004-005, all available at www.oipc.sk.ca/reviews.htm.

office views it as an important duty. It is intended to complement those objectives articulated by the Saskatchewan Court of Appeal.

[emphasis added]

[39] In addition, as noted earlier, SGI introduced six late discretionary exemptions during the course of the review and after the section 7 response had already been provided to the Applicant.

[40] On page eight of my office's resource, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*, we stated:

CLAIMING AN EXEMPTION

It is important that public bodies/trustees cite all of the relevant mandatory and/or discretionary exemptions they intend to rely on at the time they respond to an applicant's access request. The OIPC has encountered a number of cases where the public body/trustee decides to raise a number of new exemptions once our office provides notice that it is undertaking a formal review of a public bodies/trustees decision to withhold a record. This is unfair to the applicant.

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.

[emphasis added]

[41] This has been a consistent approach by my office to public bodies raising new discretionary exemptions during the course of a review.

[42] In my Review Report LA-2011-003, I considered the issue of raising discretionary exemptions after a section 7 response has been provided to an Applicant:

[16] In the November 2005 issue of the *FOIP FOLIO*, we provided the following advice to our readers:

Just a reminder that if you are a FOIP Coordinator for a Saskatchewan public body, **it is important when you first respond to someone seeking access to records you should claim all of the discretionary exemptions that you believe should apply.** In a Federal Court of Appeal decision, the court stated

“I recognize that the case law suggests that a government institution ought to claim the relevant exemptions at the initial stage; at least insofar as nonmandatory exemptions are concerned (see *Davidson v. Canada* [1989] 2 F.C. 341 and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [1999] F.C.J. No. 522 (Q.L.))”

[17] In my Reports F-2004-007, F-2005-006, F-2006-004 and LA-2007-002 as well as in my office’s publication *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review*, I reiterated the above noted position.

[emphasis added]

[43] As I noted earlier, raising six late discretionary exemptions after the section 7 response has already been provided to the Applicant indicates that SGI is not meeting its statutory obligations under section 7(2)(d) of FOIP.

[44] Therefore, I find that SGI did not meet its statutory obligations under section 7 of FOIP as a result of:

- Failing to properly identify all of the records that were responsive to the Applicant’s access request; and
- Failing to properly identify all of the exemptions under which SGI was relying to withhold the records within the statutory deadline.

[45] On or about April 2, 2013, my office provided its preliminary analysis to SGI. My office recommended that SGI review how it processes access requests and prepares for reviews to ensure it is meeting its obligations under FOIP. Responsive records should be properly identified by a public body within the first 30 days of receiving an access to information request. The Applicant in this case may never have become aware of the additional 800 plus pages responsive to his access request had he not requested a review by my office.

[46] On or about May 22, 2013, SGI provided a response to my office’s preliminary analysis of April 2, 2013, indicating it had amended its process for preparation of access requests to ensure it meets with my office’s guidelines which are based on statutory requirements.

2. Should Saskatchewan Government Insurance's submissions be held in camera?

[47] As noted earlier, SGI indicated in its submission to my office on December 6, 2011 that it wished to have its submission held in camera. However, it provided no arguments to support such a request.

[48] In an email reminder sent to SGI on January 24, 2013, my office advised SGI of the following:

No arguments or clarification on 'in camera'

We note that SGI has not indicated in its submission of December 6, 2011 that it wishes to keep its submission 'in camera'. We requested clarification on this matter in our October 3, 2012 letter. At this point, given that we have requested clarification but received no clarification from SGI the Commissioner will now make a determination as to whether we will summarize your arguments for the Applicant or share the submission partially or in full. We will advise you of our decision shortly....

[49] On March 11, 2013 my office advised SGI via email of the following:

Following several requests for arguments or a version of the submission and index our office could share with the Applicant nothing was received from SGI. We have proceeded as indicated in our January 24, 2013 [email] to share a severed version of the Index and submission provided to us by SGI on December 6, 2011 (submission) and January 25, 2013 (Index)....

[50] The sharing of submissions is normally part of my office's process during a review. The objective of this sharing is to facilitate an informal resolution to the review and to keep in line with procedural fairness. Section 46(3)(a) of FOIP clearly confers discretion on the Commissioner to disclose "any matter that the commissioner considers necessary to disclose to facilitate the review."⁶ A parallel discretion is conferred in terms of what the

⁶Section 46(3)(a) of FOIP states: "Notwithstanding subsection (1), the commissioner may disclose: (a) in the course of a review pursuant to section 49, any matter that the commissioner considers necessary to disclose to facilitate the review;"

Commissioner “considers necessary to disclose to establish grounds for the findings and recommendations in the report.”⁷

[51] My office’s experience, and indeed the experience of similar offices across the nation, is that providing the individual with some information about the nature of the exemption claims invoked by the public body actually facilitates and encourages some meaningful negotiation. It also contributes to the citizen having a higher measure of satisfaction even when they may ultimately be denied access to the records they seek. They will have a better understanding of why they are not getting access to certain records. Having applicants operate in the dark further disempowers and frustrates applicants which could hardly have been the purpose of FOIP.

[52] In exercising this discretion, I consider a number of factors. The point of an access and privacy oversight office is not simply to conduct formal reviews and issue Reports. In this respect, I might point out that every province and territory in the nation has a law similar to FOIP and an oversight office similar to Saskatchewan’s. In five of the offices, the Commissioner has order making power. In most of the offices, the Commissioner has the powers only of an ombudsman and is not an administrative tribunal. This later group includes my office. The experience of these offices collectively is that issuing Reports is the exception and not the rule. Most case files are solved informally by means of mediation. That is true in Saskatchewan as well. My office has opened more than 1,400 case files since 2003 but only been required to issue Reports in about 90 cases. This practice and focus on informal resolution has been favourably commented on by superior courts for much of the 30 years of Canadian experience with access and privacy laws. I am reminded here of the comments made by former Justice La Forest:

It can be seen, then, that while the primary role of the Information and Privacy Commissioners continues to be that of an ombudsman – investigating complaints and issuing advisory findings – their functions are in fact multifaceted. As Colin J. Bennett has said of the Privacy Commissioner, she is “expected at some point to perform seven interrelated roles: ombudsman, auditor, consultant, educator, policy advisor, negotiator and enforcer.” Many of these roles, I would add, are also

⁷Section 46(3)(b) of FOIP states: “Notwithstanding subsection (1), the commissioner may disclose: ... (b) in a report prepared pursuant to this Act, any matter that the commissioner considers necessary to disclose to establish grounds for the findings and recommendations in the report.”

performed by the Information Commissioner. And each of these roles, and the increasingly strenuous demands they place on the offices of the two commissioners, must be considered in assessing the wisdom of any form of merger.

...

Finally, Information and Privacy Commissioners in Canada, whether empowered to issue orders or not, attempt to resolve complaints informally through conciliation, mediation and other types of dispute resolution. Experience has shown that these mechanisms can be very effective in reducing backlogs and achieving settlements that are acceptable to all parties.⁸

[emphasis added]

[53] It would be difficult to engage in conciliation, mediation or dispute resolution by excluding the applicant who initiated the entire process.

[54] In order to accomplish the objective of informal resolution, when a public body does not wish to share its submission, my office invites the public body to prepare a summary or a severed version of the submission that can be shared with the applicant. If the public body wants the entire submission held in camera it must be prepared to provide sufficient supporting arguments to support such a request.

[55] SGI advised my office in an email dated January 24, 2013 that "... I have continued to indicate **all** SGI submissions will be in camera..." [emphasis added]. How could an informal resolution ever be achieved if the Applicant is consistently denied knowledge of the basis upon which access is denied by SGI? This is particularly relevant as SGI, in this case, failed to advise the Applicant of six late discretionary exemptions.

[56] In this case, after receiving insufficient argument from SGI to support its request to hold its submission in camera, I proceeded to exercise my discretion and shared an edited version of SGI's submission with the Applicant.

⁸Department of Justice Canada, *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues, Report of the Special Advisor to the Minister of Justice* by Gérard V. La Forest (November 15, 2005) at pp. 18 and 53, available at www.justice.gc.ca/eng/rp-pr/csj-sjc/atip-aipr/ip/rep-rap.pdf.

[57] SGI's blanket approach is antithetical to ever achieving informal resolution wherever possible. Both public bodies and my office need to look at each submission and the ability to share on a case by case basis.

3. Did Saskatchewan Government Insurance appropriately apply section 29(1) of *The Freedom of Information and Protection of Privacy Act* to the record in question?

[58] 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) of FOIP.

[59] Section 24 of FOIP defines what personal information is 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;

(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).

[emphasis added]

[60] 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.

[61] In the submission received from SGI on December 6, 2011 it stated the following:

The consequence of subsection 29(1) is that absent a statutory basis for disclosure, SGI cannot release the personal information of a third party to the Applicant. In the original response to the Applicant, two portions of a document entitled “Employee Statistics Detail” for the [SGI] Yorkton Salvage Department has been withheld under this subsection. This document lists all [SGI] Yorkton Salvage employees by name, position, start date, etc. Pursuant to s. 29(1), all third party information has been severed from this document. This was the only information severed from the response to the Applicant of March 21, 2011.

[62] The submission only spoke to one page (*Employee Statistics – Detail*) of the 17 pages in which SGI cited section 29(1) of FOIP. Nothing further was received from SGI to support its application of section 29(1) of FOIP to the other 16 pages of the record.

[63] 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.

[64] Therefore, I find that SGI failed to meet the burden of proof with respect to the records in question. I will particularize the reasons that lead to this conclusion.

[65] From an examination of the 17 pages it appears that SGI applied section 29(1) and severed the following types of information:

- Names of individuals (pages P19, P124, P125, P299, P372 and redaction #35);

- Address of an individual (page P103);
- The opinions and statements of people other than the Applicant (pages P107, P108, P110, P151, P328); and
- Employment information regarding another employee – not the Applicant (P246, P247, P309, P338, P389).

[66] I will first address the severing of the names of individuals. Almost all of the names severed appear to be employees of SGI.

[67] In my Review Report F-2012-006 I considered the names of employees and whether they could be considered personal information pursuant to section 24(1) of FOIP:

[138] In my Review Report F-2010-001 I found that the names, job titles, business phone numbers and email addresses [sic] 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.

[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.

[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 [sic] those employees:

[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).

[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.

...

[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...

[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.

[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).

[emphasis added]

[68] Upon review of the record, it appears that SGI severed the names of SGI employees on a number of pages. As noted above, the employee's name by itself would not be personal information unless there is a linkage of the employee's name to details of a personal nature contained within the record.⁹

[69] I have considered information related to disciplinary action before. My Review Report LA-2012-002 states the following:

[21] The British Columbia IPC Order 01-15 stated the following:

[41] Section 22(3)(d), in relevant part, protects information related to the "employment history" of a third party. **In my view, someone's "employment history" includes information about her or his work record and reasons for leaving a job** (see, for example, Order 00-53). **It also includes information about disciplinary action taken against an employee** (see, for example, Order No. 62-1995, [1995] B.C.I.P.C.D. No. 35; and Order 00-13, [2000] B.C.I.P.C.D. No. 16). I see nothing in the withheld portions of records 5 and 7 that could even remotely be construed as information "that relates to employment ... history" of any third party.

...

[22] The Newfoundland and Labrador IPC Report 2007-013 stated that:

[24] I will apply the interpretation of the term "employment history" that has been given by the Commissioners of Ontario, British Columbia, and Alberta. Therefore, in order for information to be about an individual's "employment history" within the meaning of section 2(o)(vii) of the *ATIPPA* that information must relate to an individual's work history and must be the type of information that would be found in an employee's personnel file... **the type of information that would be found in a personnel file such as performance reviews or evaluations, disciplinary actions taken, reasons for leaving a job, or leave transactions...**

⁹Pursuant to section 24(1)(k)(i) of FOIP.

[23] Upon examination of the quotations above, it appears to be the consensus of other Commissioners that information that would be found in a personnel file, such as details of disciplinary action, would constitute employment history which is personal information. I am of the same view.

[emphasis in original]

[70] Where release of the name itself reveals something personal about the individual it could constitute personal information.¹⁰

[71] Further, employment history of an individual includes what would normally be found on a personnel file including disciplinary records which would also constitute personal information pursuant to section 24(1)(b) of FOIP.

[72] Redaction #35 for the page titled, *Employee Statistics – Detail* appears to list a number of SGI employees including the Applicant. The following information was severed by SGI: employee name, employee number, hire date, employee class, employee status, job title and supervisor’s name of all the individuals except the Applicant.

[73] In my Review Report LA-2012-002, I considered this type of information:

[25] Further, the Supreme Court of Canada considered whether work hours were personal information in *Dagg v. Canada (Minister of Finance)*. The majority ruled that hours of work pertain more to the job description of an individual than personal information. The majority agreed with Justice La Forest’s description as follows:

Generally speaking, **information relating to the position, function or responsibilities of an individual will consist of the kind of information disclosed in a job description.** ...

It will comprise the **terms and conditions associated with a particular position, including such information as qualifications, duties, responsibilities, hours of work and salary range.**

...

[29] Section 23(1)(d) states that “any identifying number, symbol or other particular assigned to the individual” constitutes personal information.

¹⁰Pursuant to section 24(1)(k)(ii) of FOIP.

[30] Furthermore, in my Report F-2005-001, **I found that an employee number, when linked with a name also constitutes the individual's personal information.**

[emphasis added]

[74] Further, in my Investigation Report F-2012-004, I clarified that the date an employee was hired would constitute personal information:

[35] **Hire date**, last day worked, re-hire date and action to be taken regarding Individual #2's employment status **would all qualify as work history** and therefore personal information pursuant to section 24(1)(b) of FOIP. I have also previously found that an employee number would constitute employment history as well.

[emphasis added]

[75] Therefore, employment history would constitute personal information under section 24(1)(b) of FOIP. If the names were released to the Applicant, he would be able to know the employment history of those individuals.

[76] Therefore, I find that SGI appropriately applied section 29(1) of FOIP to the information on the following pages because the information qualifies as third party personal information pursuant to section 24(1)(b) of FOIP: pages P19, P110, P151, P246, P247, P299, P309, P338, P372 and P389. This information should continue to be withheld.

[77] Further, I find that SGI also appropriately applied section 29(1) of FOIP to the severed employee numbers and hire dates on redaction #35 on the "*Employee Statistics – Detail*" page. This information should continue to be withheld.

[78] However, I also find that the remaining information on redaction #35 (*Employee Statistics – Detail*) should be released as it does not qualify as personal information. This includes the names of SGI employees, their employment status, the job codes and titles, position number and name of supervisor.

[79] Section 24(1)(e) of FOIP states that personal information includes the home address of an individual.

[80] Further, as noted earlier, in my Review Report F-2012-006:

[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.**

[emphasis added]

[81] SGI appropriately severed the home address of an individual on page P103. This information should continue to be withheld.

[82] Pages P124 and P125 appear to contain the assets lost and the value of those assets. The name of an individual other than the Applicant was severed from the page. SGI released all but the name of the individual. If the name were released, the Applicant could put the pieces of information together and determine the assets owned and lost by the individual.

[83] Information that describes an individual's financial assets could constitute personal information under section 24(1)(j) of FOIP.

[84] Therefore, SGI properly applied section 29(1) to the severed information on pages P124 and P125 as it would constitute personal information of someone other than the Applicant. This information should continue to be withheld.

[85] The only remaining pages not yet addressed under section 29(1) of FOIP are pages P107, P108 and P328.

[86] The severed information on these pages appear to be the opinions of SGI employees. The information does not appear to be about the Applicant. It appears to be an opinion of one employee about another.

[87] Section 24(1)(h) of FOIP provides that views or opinions of another individual are that subject individual's personal information.

[88] In my Review Report F-2012-006, I considered this type of information:

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

...

[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). ...

[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.

[emphasis in original]

[89] Therefore, SGI appropriately applied section 29(1) of FOIP to pages P107, P108 and P328.

[90] The findings in this section of my Review Report were shared with SGI in my office's preliminary analysis of April 2, 2013. SGI agreed to release the information in the record found not to be personal information (*Employee Statistics – Detail*) consistent with this analysis in its response to the preliminary analysis dated May 22, 2013. Further, SGI agreed to continue withholding the information in the record found to be personal information.

[91] However, as noted earlier, SGI continues to withhold records I have recommended be released. This includes 25 records SGI has claimed discretionary exemptions for after its section 7 response to the Applicant and after my office's review had already begun. This includes pages: P3, P55-P65, P104, P111, P119, P120, P123 and P129-P136.

V FINDINGS

[92] I find that Saskatchewan Government Insurance did not meet its obligations under section 7(2) of *The Freedom of Information and Protection of Privacy Act* by raising late discretionary exemptions and presenting new additional responsive records after the section 7 response was provided to the Applicant.

- [93] I find that Saskatchewan Government Insurance appropriately applied section 29(1) of *The Freedom of Information and Protection of Privacy Act* to some of the severed information on the 17 applicable pages of the record. This includes pages: P19, P103, P107, P108, P110, P124, P125, P151, P246, P247, P299, P309, P328, P338, P372, P389 and some of the information on redaction #35 - *Employee Statistics – Detail*.
- [94] I also find that Saskatchewan Government Insurance did not appropriately apply section 29(1) of *The Freedom of Information and Protection of Privacy Act* to other portions of the severed information on one page of 17 (redaction #35 *Employee Statistics – Detail*).

VI RECOMMENDATIONS

- [95] I recommend that Saskatchewan Government Insurance continue its efforts to improve both its techniques for searching for responsive records and preparing an intelligible record and response for purposes of a review.
- [96] I recommend that Saskatchewan Government Insurance release the remaining records withheld under sections 17(1)(b)(i), 17(1)(c), 17(1)(d), 18(1)(f), 21 and 22(a) of *The Freedom of Information and Protection of Privacy Act*. I recommend release of the following 25 pages: P3, P55-P65, P104, P111, P119, P120, P123 and P129-P136.
- [97] I recommend that Saskatchewan Government Insurance continue to withhold the personal information of individuals who are not the Applicant cited for exemption under section 29(1) of *The Freedom of Information and Protection of Privacy Act* on the remainder of the pages.

Dated at Regina, in the Province of Saskatchewan, this 31st day of December, 2013.

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