



Office of the
Saskatchewan Information
and Privacy Commissioner

Guide to Appealing the Decision of a Head of a Government Institution, or a Local Authority, or a Health Trustee

This guide provides assistance to applicants, complainants (individuals) or third parties who wish to appeal to the Court of King's Bench requesting reconsideration of the head's or trustee's decision.

Updated March 2024

DISCLAIMER

This document is not intended to provide legal advice and is provided for informational use only.

Introduction

If an applicant, complainant (individual) or third party does not agree with the decision of the head of a government institution (or a local authority or a health trustee) after the Information and Privacy Commissioner has made a recommendation, the applicant, complainant (individual) or third party can appeal to the Court of King's Bench requesting reconsideration of the head's decision.

Authority to Appeal

The authority for an appeal is contained in sections 57 and 58 of [The Freedom of Information and Protection of Privacy Act](#) (FOIP):

Appeal to Court

57(1) Within 30 days after receiving a decision of the head pursuant to section 56, an applicant or individual or a third party may appeal that decision to the Court.

...

Powers of Court on appeal 58

(1) On an appeal, the court:

(a) shall determine the matter *de novo* (*afresh*); and

(b) may examine any record *in camera* in order to determine on the merits whether the information in the record may be withheld pursuant to this Act.

(2) Notwithstanding any other Act or any privilege that is available at law, the court may, on an appeal, examine any record in the possession or under the control of a government institution, and no information shall be withheld from the court on any grounds.

(3) The court shall take every reasonable precaution, including, where appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid disclosure by the court or any person of:

(a) any information or other material if the nature of the information or material could justify a refusal by a head to give access to a record or part of a record; or

(b) any information as to whether a record exists if the head, in refusing to give access, does not indicate whether the record exists.

Similar wording is found in sections 46 and 47 of [The Local Authority Freedom of Information and Protection of Privacy Act](#) (LA FOIP) and sections 50 and 51 of [The Health Information Protection Act](#) (HIPA).

If you decide to appeal, this Guide suggests the steps and documents you need to use. The Office of the Information and Privacy Commissioner cannot assist you with completing the documents that you need and is not a party to the appeal. You will have to develop those yourself or, alternatively, engage in the services of a lawyer.

Cases Decided By the King's Bench

A series of cases have been decided by the King's Bench which provide clarity as to how to proceed with an appeal under FOIP or LA FOIP or HIPA.

Justice Kalmakoff, in a decision in [Geoff Leo v Global Transportation Hub Authority and Brightenvue Developments International Ltd.](#), 2019 SKQB 150, made the following comments about the process under FOIP:

[7] ...

[8] Section 58 clearly states that an appeal such as this is a hearing *de novo*, during which the court may examine any record *in camera* in order to determine, on the merits, whether the information in the record may be properly withheld by the government institution. This means I am not bound by the recommendations made by the IPC. Nor are those recommendations - or the decision of the head of the government institution - owed any particular deference: ...

[9] In the *Step One Decision*, I determined that it was necessary for me to review the records in question *in camera* before proceeding further. Following that review, I concluded that it was appropriate to receive further evidence and representations *in camera* from GTH relating to its reasons for redacting the records in question. I also permitted Brightenvue to participate in the *in camera* portion of the hearing, given the extent to which its interests are implicated by the information contained in the records Mr. Leo seeks.

[10] This decision relates to "Step Two" of the appeal. Step Two requires that I determine, in light of the evidence presented on the appeal, whether or not the exemptions applied by GTH were proper. In that regard, I must be guided by the provisions of s. 58 of *FOIP*, which read, in part, as follows:

58(1) On an appeal, the court:

- (a) shall determine the matter de novo; and
- (b) may examine any record in camera in order to determine on the merits whether the information in the record may be withheld pursuant to this Act.

...

(5) Where a head has refused to give access to a record or part of it, the court, if it determines that the head is not authorized to refuse to give access to the record or part of it, shall:

- (a) order the head to give the applicant access to the record or part of it, subject to any conditions that the court considers appropriate; or
- (b) make any other order that the court considers appropriate.

(6) Where the court finds that a record falls within an exemption, the court shall not order the head to give the applicant access to the record, regardless of whether the exemption requires or merely authorizes the head to refuse to give access to the record.

(7) If, with respect to an appeal of a decision of the head regarding the matters mentioned in clauses 49(1)(a.1) to (a.4), the court determines that the decision of the head was not authorized pursuant to this Act, the court may:

- (a) order the head to reconsider the decision and proceed in accordance with this Act, subject to any conditions that the court considers appropriate; or
- (b) make any other order that the court considers appropriate.

(8) If, with respect to an appeal mentioned in subsection (7), the court finds that the head had authority pursuant to this Act to make the decision that is the subject of the appeal, the court shall not order the head to reconsider the decision.

[11] Subsection 6 is particularly important. While the jurisprudence says that I am not bound by the decision of the head of the government institution, s. 58(6) makes clear that if I determine that a record which the head has refused to disclose falls within the exemption claimed, I cannot order the head to disclose that record, regardless of whether the head's authority to refuse disclosure is discretionary or mandatory in nature.

Justice Kalmakoff's decision was appealed to the Court of Appeal and the Court of Appeal rendered its' decision on August 4, 2020. The decision can be found at CanLII, [Geoff Leo v Global Transportation Hub Authority, 2020 SKCA 91](#). Regarding appeals under FOIP, the Chief Justice of the Court of Appeal outlined the process that is followed under FOIP:

[41] ... As explained, the *Act* clearly contemplates a review and appeal process that follows a very specific track: (a) an applicant or third party applies to the Commissioner for a review of a matter; (b) the Commissioner investigates and prepares a report setting out his or her recommendations with respect to the matter; (c) the head considers the report and decides whether to accept or follow the Commissioner's recommendations; and (d) an applicant or a third party who is unsatisfied with the head's decision about the matter appeals that decision to the Court of Queen's Bench...

The Chief Justice further commented on the scope of the appeal:

[47] ...The *de novo* nature of an appeal pursuant to s. 57 speaks to the fact that no deference is owed by a Chambers judge to the decision under appeal and that the record on which the Chambers judge makes his or her decision is to be developed afresh. It does not speak to the *scope* of the appeal, i.e., to the breadth or nature of the issues that the appeal is to address. As explained, Part VII of the *Act* covers all of this in some detail and does not in any way contemplate that, on an appeal to the Court of Queen's Bench, parties can raise any and all provisions of the *Act* that bear on the question of whether the records in issue may be released.

The Court of Appeal has clearly indicated that on an appeal *de novo*, the judge can hear evidence afresh, but the scope of the appeal is limited by what has been appealed by the applicant or third party.

In [West v Saskatchewan \(Health\)](#), 2020 SKQB 244 (Can LII) Justice Robertson J. stated:

Review process

[15] This Court, in *Leo v Global Transportation Hub Authority*, [2018 SKQB 323](#) at para [37](#) [*Leo* (#1)], recommended and in *Leo v Global Transportation Hub Authority*, [2019 SKQB 150](#) at para [9](#) [*Leo* (#2)] applied a two-step review process for an appeal under s. 58 of *FOIP*:

Leo #1

[37] An appeal under s. 58 involves a two-step process. First, the judge must decide whether to review the disputed records *in camera*. If the

judge decides that it is not necessary to do that, the matter is essentially at an end. If the judge concludes that it is necessary to examine the records, in the second step of the process, he or she reviews the records in light of the parties' submissions and the applicable law, then determines what order, if any, should be made, as set out in ss. 58(5) – (8): *Britto #2*, [2018 SKQB 92] at para [22](#).

...

Leo #2

[9] In the *Step One Decision*, I determined that it was necessary for me to review the records in question *in camera* before proceeding further. Following that review, I concluded that it was appropriate to receive further evidence and representations *in camera* from GTH relating to its reasons for redacting the records in question...

In [A.G. v Saskatchewan, 2022 SKQB 11 \(CanLII\)](#), Justice Mitchell J. stated:

[48] Typically, the record at issue in appeals brought pursuant to s. 58 of the *FIPPA* are sealed when they are filed with the court. Often part of the process contemplated by that section involves the reviewing court choosing to unseal the record at the outset and review its contents *in camera*. This is done to permit the court to better understand the nature of an appellant's submissions respecting the record and whether it should be disclosed. See, for example: *Leo* at paras [37 and 41-43](#).

Outline of the Appeal Procedure

The King's Bench Rules of Court set out the procedure for an Originating Application. In particular, you should review [Rules 3-49 to 3-52](#). You should also read [practice directive #9](#) regarding procedure for Originating Applications. You should also read [practice directive #6](#), "Chamber Appearance Memo" a sample of which is attached in Appendix D. Based on the cases referred to above, the following is an outline of the appeal procedure:

- Within 30 days of the head's or trustee's decision, an applicant, individual or a third party can launch an appeal of the head's decision to the Court of King's Bench. That appeal is launched by an Originating Application (see Appendix A).

- Prepare the Originating Application (Appendix A) amending the sample wording to fit current circumstances.
- Prepare the draft Order (Appendix B) amending the sample wording to fit the current circumstances.
- Prepare any Affidavits of the applicant or other person (Appendix C). Note this needs to be sworn or declared in front of a Commissioner for Oaths. [See Rule 3-55, and 13-30 to 13-38](#) of the King's Bench Rules regarding affidavits.
- Sign the Originating Application and deliver it to the Court of King's Bench and request a date from the Local Registrar, fill in the date on the Originating Application and sign it.
- Serve the Originating Application, draft Order and any Affidavits on the Respondent (public body or trustee). See [Rule 3-50 and Rules 12-5 to 12-9](#) for instructions and service of documents.
- At least two (2) days or earlier before the date of the Originating Application, file with the Court and serve the Respondent (public body or trustee) or the Respondent's lawyer with a copy of Chambers Appearance Memo (Appendix D). Amend the sample wording to fit the current circumstances.
- Appear at the courthouse, in the Chambers room, and be prepared to speak to the judge regarding the procedures to be followed in this case as initially set out in your draft Order (Appendix B). This is step one in the process. The parties will not be arguing the merits of the case but will only be getting the judge's direction on the procedure to be followed.
- Amend the draft Order to incorporate the judge's directions.
- Provide a copy of the amended Order to the Respondent's lawyer and request the Respondent's lawyer to consent to the amended Order. If the Respondent's lawyer will not consent, this probably means that there is a disagreement in the wording. The Respondent's lawyer may suggest alternate wording. Remember this Order is not about the merits of the case but is about the procedure to be followed. It is important to obtain the Respondent lawyer's consent as it will facilitate the issuing of the Order by a Court.
- Take the amended Order to the King's Bench courthouse and request the Local Registrar issue the Order.

- Serve the issued Order on the Respondent's lawyer.
- Within the time set in the Order, the applicant should file a brief of law explaining why the decisions made by the head regarding the record were incorrect and why the applicant should receive a copy of the record. See [Rules 3-50 and 13-38.1](#) for details on Briefs of Law.
- Appear in Court on the date set out in the issued Order or any other adjourned date and be prepared to present to the judge why the record should be released.

A simplified diagram of the process is outlined on the next page. It is simplified just to give the reader an idea of the process.

A Simplified Process

Prepare Originating Applications (Appendix A), draft Order (Appendix B), Affidavit(s) (Appendix C).

Go to Courthouse and request date to appear in Chambers. Insert in Originating Application.

Serve Originating Application, Affidavit and draft Order on public body or trustee.

Prepare Chamber Appearance Memo (Appendix D) and serve on public body or trustee.

Attend in Chambers on date in Originating Application and obtain judges direction on procedure.

Prepare Order. Have Order issued by the Court and serve on public body or trustee.

Prepare Brief of Law, file with Court and serve on public body or trustee.

Attend in Court on date in Order or assigned by the judge and make arguments as to why records should be released.

After hearing, issue Order and serve on public body or trustee.

Explanatory Notes

- The Chambers Appearance Memo is required according to Civil Practice Directive #6 [Chambers Appearance Memo](#). This is intended to give the judge an idea what will be discussed at this first appearance. Discussion with the Respondent's lawyer can assist in getting agreement as to what procedure will be followed on this appeal. At this first stage, the Court, the applicant and the respondent are only dealing with procedural matters. It can involve discussion about the unredacted record being filed under seal (only available to the judge). It can involve whether the judge will have an in-camera hearing for part of the evidence and argument. Usually, unredacted records **will** be filed under seal. In many cases the judge will have an in-camera session to look at the sealed record and hear arguments. Normally, the applicant will be excluded from the in-camera hearing.
- The draft Order (Appendix B) is a sample. The wording needs to be adjusted to fit current circumstances. If the applicant and respondent reach agreements before the first date in Court, the wording in the draft Order can change. The judge directs the procedure and can direct changes in the wording in the draft Order. After the first hearing, changes to the draft Order will have to be made and the Respondent's lawyer should be asked to consent. If the Respondent's lawyer does not consent, this may reflect a major disagreement as to what the judge said on procedure. If there is a disagreement on the wording of the order, this may have to go back to Court to get the judge's direction.
- It should be noted, the applicant does not have to serve the Office of the Information and Privacy Commissioner. The applicant only has to serve the respondent or the Respondent's lawyer. The Office of the Commissioner does appreciate being notified that a Court application is being made. The Office then monitors and watches out for a judge's decision on the issues.

Appendix A:

Originating Application (sample form)

Form 3-49

(Rule 3-49)

COURT FILE NUMBER KBG No. _____ of 20__

COURT OF KING'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE _____

APPLICANT(S) _____

RESPONDENT(S) _____

ORIGINATING APPLICATION

NOTICE TO THE RESPONDENT(S)

This application is made against you. You are a Respondent.

You have the right to state your side of this matter before the Court. To do so, you must be in Court when the application is heard as shown below:

Where _____

Date _____

Time _____

Go to the end of this document to see what you can do and when you must do it.

PARTICULARS OF APPLICATION

1. Factual Background

- a. On _____, 20__, the Applicant submitted an access to information request to the Respondent.
- b. The Applicant's application was filed pursuant to section 6 of [The Freedom of Information and Protection of Privacy Act](#) (FOIP) [OR section 6 of [The Local Authority Freedom of Information and Protection of Privacy Act](#) (LA FOIP) OR section 34 of [The](#)

[Health Information Protection Act](#) (HIPA)].

- c. The Respondent requested the following information:

- d. The Respondent possesses the responsive record, consisting of:

- e. On _____, 20____, the Respondent advised that it would not provide all (or part of) the responsive record.
- f. On _____, 20____, the Respondent requested that the Office of the Saskatchewan Information and Privacy Commissioner (Commissioner) review the matter, pursuant to section 49 of FOIP (OR section 38 of LA FOIP OR section 42 of HIPA).
- g. On _____, 20____, the Commissioner issued Review Report _____. The Report recommended: _____
- h. On _____, 20____, the Respondent made its decision in response to the Report's recommendations, pursuant to section 56 of FOIP (OR section 45 of LA FOIP OR section 49 of HIPA). The Respondent chose not to comply with all (certain) recommendations of the Commissioner.

2. The Applicant appeals the Respondent head's decision pursuant to section 57 of FOIP (OR section 46 of LA FOIP OR section 50 of HIPA).
3. The Applicant applies to this Honourable Court for an Order that the Respondent provide access to the records requested on _____, 20____, subject only to such conditions as the Court considers appropriate pursuant to section 58 of FOIP (OR section 47 of LA FOIP OR section 51 of HIPA).
4. The Applicant's grounds for appeal are:
- a. Section 57 of FOIP (OR section 46 of LA FOIP OR section 50 of HIPA);
- b. ...
5. In support of this application, the Applicant relies on the following material or evidence:
- a. Affidavit of _____
- b. Written Argument
- c.

DATED at _____, Saskatchewan, this _____ day of _____, 20____.

(signature)

This notice is issued at the above-noted judicial centre on the _____ day of _____, 20____.

Court Seal

Local Registrar

NOTICE

You are named as a Respondent because you have made or are expected to make an adverse claim with respect to this originating application. If you do not come to court either in person or by your lawyer, the court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the Applicant(s) and against all persons claiming under the Applicant(s). You will be bound by any order the court makes. If you want to take part in the application, you or your lawyer must attend in court on the date and at the time shown at the beginning of this form.

The rules require that a party moving or opposing an originating application must serve any brief of written argument on each of the other parties and file it at least 3 days before the date scheduled for hearing the originating application.

If you intend to rely on an affidavit or other evidence when the originating application is heard or considered, you must serve a copy of the affidavit and other evidence on the originating Applicant at least 10 days before the originating application is to be heard or considered.

CONTACT INFORMATION AND ADDRESS FOR SERVICE

If prepared by a lawyer for the party: or

Name of firm:

Name of lawyer in charge of file:

Address of legal firm:

Telephone number:

E-mail address:

If the party is self-represented:

Name of party:

Address for service:

Telephone number:

E-mail address:

Appendix B: Order (sample form)

COURT FILE NUMBER KBG No. _____ of _____, 20____

COURT OF KING'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE _____

ADDRESS _____

APPLICANT(S) _____

RESPONDENT(S) _____

ORDER

Order made this _____ day of _____, 20____.

Before the Honourable Justice _____ in chambers the
_____ day of _____, 20____.

On the application of the Applicant and on reading the Originating Application, and the
Affidavit of _____ dated
_____, 20____.

The Court:

1. Approves and gives effect to the following procedure on the within appeal:
 - (a) Within thirty (30) days of being served with a copy of this issued Order, the Respondent will provide the record, unredacted under seal and to the Court and the record redacted to the Court and the Applicant. The record in question is the record described in the Saskatchewan Information and Privacy Commissioner's Review Report.
 - (b) The record will remain under seal, subject only to the Court's decision to review same.
 - (c) Within thirty (30) days of serving the Respondent with a copy of this issued Order, the Applicant will file a written brief with the Court, and the Respondent will file a written brief under seal regarding the exemptions claimed for the record which have been filed under seal.

These briefs shall not be exchanged by counsel and shall be filed with the Court, and both of them shall be sealed. The Respondents brief, sealed, shall not be accessed by anyone without a specific Order authorizing same.

- (d) Upon the filing of the sealed record, the written briefs of the Applicant and Respondent, the local registrar shall forward the file to the Judge seized with this matter.
- (e) The Applicant and Respondent shall attend on the adjourned date to provide oral argument.
- (f) After receipt of the written brief(s), and hearing oral argument, the Court shall render a decision on the merits of the within appeal and the Respondent's claims of exemption from disclosure.

THIS ORDER IS HEREBY CONSENTED TO IN FORM AND CONTENT

this _____ DAY OF _____, 20_____.

Per: _____
Applicant

THIS ORDER IS HEREBY CONSENTED TO IN FORM AND CONTENT

this _____ DAY OF _____, 20_____.

Per: _____
Solicitor for the Respondent

THIS ORDER ISSUED at _____, Saskatchewan,
this _____ DAY OF _____, 20_____.

Local Registrar

CONTACT INFORMATION AND ADDRESS FOR SERVICE

If prepared by a lawyer for the party:

Name of firm:

Name of lawyer in charge of file:

Address of legal firm:

Telephone number:

E-mail address:

or

If the party is self-represented:

Name of party:

Address for service:

Telephone number:

E-mail address

Appendix C: Affidavit of Applicant (sample form)

COURT FILE NUMBER KBG No. _____ of _____, 20____
COURT OF KING'S BENCH FOR SASKATCHEWAN
JUDICIAL CENTRE _____
ADDRESS _____
APPLICANT(S) _____
RESPONDENT(S) _____

AFFIDAVIT OF APPLICANT

I, _____ of _____, Saskatchewan,
MAKE OATH AND SAY (or AFFIRM):

1. That I am the Applicant in this appeal and as such have knowledge of the facts deposed hereto.
2. On _____, 20____, I submitted an access to information request to the Respondent a copy of which is attached and marked Exhibit A.
3. On _____, 20____, the Respondent advised that it would not provide all (or part of) the responsive record in a letter, a copy of which is attached and marked Exhibit B.
4. On _____, 20____, the Respondent requested that the Office of the Saskatchewan Information and Privacy Commissioner (Commissioner) review the matter, pursuant to section 49 of [The Freedom of Information and Protection of Privacy Act](#) (FOIP) [OR section 38 of [The Local Authority Freedom of Information and Protection of Privacy Act](#) (LA FOIP) OR section 34 of [The Health Information Protection Act](#) (HIPA)].
5. On _____, 20____, the Commissioner issued Review Report _____. A copy of which is attached and marked as Exhibit C.
6. On _____, 20____, the Respondent made its decision in response to the Report's recommendation, pursuant to section 56 of FOIP (OR section 45 of LA FOIP OR section 49 of HIPA) in a letter, a copy of which is attached and marked as Exhibit D.

7. ...

8. I make this Affidavit in support of my appeal pursuant to section 57 of FOIP (OR section 46 of LA FOIP OR section 50 of HIPA).

SWORN (OR AFFIRMED) BEFORE ME

at, _____, Saskatchewan,

this _____ day of _____, 20____.

(signature of Applicant)

Commissioner for Oaths for Saskatchewan

Appendix D: Civil Chambers Appearance Memo

COURT FILE NUMBER KBG No. _____ of _____, 20__

COURT OF KING'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE _____

ADDRESS _____

APPLICANT(S) _____

RESPONDENT(S) _____

Civil Chambers Appearance Memo

for Chambers on _____, 20__

1. Participants:

a. This Memo is filed on behalf of the Applicant: _____

b. The other party/parties and counsel are:

i. _____

ii. _____

iii. _____

2. The Applicant applies for the relief set forth in the application dated

_____ and the draft Order filed on

_____.

3. A description of the position that will be advanced on the hearing date respecting readiness to proceed is: the Applicant is prepared to proceed with stage 1 and requests the issuing of an Order in similar form to the draft Order filed.

4. A concise summary of the legal aspects of the substantive position of the party filing this Memo is:
5. The following relief is consented to/unopposed: N/A
6. Materials filed and served:
 - a. To be completed by the Applicant: the Applicant party has served and filed the following affidavits/other material being relied upon in support of the relief sought:

Describe Document	Date Served	Date Filed

7. Other proceedings and applications:
 - a. The following is a summary of other applications and matters pending in this action:
 - i. Other applications pending:

☐ none
☐ returnable on _____
☐ reserved on _____ by Justice _____
 - ii. Pre-trial: ☐ Not scheduled ☐ Scheduled for: _____
 - iii. Trial: ☐ Not scheduled ☐ Scheduled for: _____
 - b. The following is a summary of any other relevant or related proceedings: N/A

8. This is the:

☐ First Memo filed respecting this application.

OR

- ☐ Updated Memo filed by the (Applicant) in respect of this application, and:
- ☐ The changes in circumstances and/or position being advanced since the filing of the last Memo are:

(describe changes in point form)

OR

- ☐ There is no change in circumstances and/or position being advanced since the last Memo was filed.

Dated at _____, this _____ day of _____, 20__.

(signature of party's lawyer or party, if
self-represented)

(print name of party's lawyer or party,
if self-represented)

CONTACT INFORMATION AND ADDRESS FOR SERVICE:

Name of party or party's lawyer:

Address:

Telephone number:

Fax number (if any):

Email address (if any):

CONTACT INFORMATION

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