



Office of the  
Saskatchewan Information  
and Privacy Commissioner

# GUIDE TO FOIP

*The Freedom of Information and Protection of Privacy Act*

## Chapter 1

### Purposes and Scope of FOIP

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## OVERVIEW

This Chapter explains the purposes and scope of *The Freedom of Information and Protection of Privacy Act* (FOIP).

What follows is non-binding guidance. Every matter should be considered on a case-by-case basis. This guidance is not intended to be an exhaustive authority on the interpretation of these provisions. Government institutions may wish to seek legal advice when deciding on how to interpret the Act. Government institutions should keep section 61 of FOIP in mind. Section 61 places the burden of proof for establishing that access to a record may or must be refused on the government institution. For more on the burden of proof, see the *Guide to FOIP*, Chapter 2, "Administration of FOIP". **This is a guide.**

*The tests, criteria and interpretations established in this Chapter reflect the precedents set by the current and/or former Information and Privacy Commissioners in Saskatchewan through the issuing of Review Reports. Court decisions from Saskatchewan affecting The Freedom of Information and Protection of Privacy Act (FOIP) will be followed. Where this office has not previously considered a section of FOIP, the Commissioner looked to other jurisdictions for guidance. This includes other Information and Privacy Commissioners' Orders, Reports and/or other relevant resources. In addition, court decisions from across the country are relied upon where appropriate.*

*This Chapter will be updated regularly to reflect any changes in precedent. This office will update the footer to reflect the last update. Using the electronic version directly from our website will ensure you are always using the most current version.*

## QUASI-CONSTITUTIONAL STATUS

In 1992, *The Freedom of Information and Protection of Privacy Act* (FOIP) was proclaimed. FOIP applies to "government institutions". This captures all Ministries of the Saskatchewan Government plus Crown corporations, Boards, Commissions and Agencies prescribed in the Appendix at Part I of *The Freedom of Information and Protection of Privacy Regulations*.

The Supreme Court of Canada has interpreted Acts, such as FOIP, as quasi-constitutional legislation. It follows that as fundamental rights, the rights to access and to privacy are interpreted generously, while the exceptions to these rights must be understood strictly.<sup>1</sup>

The phrase quasi-constitutional implies that certain rights, such as the right to access information held by government institutions, are fundamentally important in their nature because they reflect primary assumptions about the relationship between citizen and state. Though the right to access information is not entrenched in the Canadian *Charter of Rights and Freedoms*, this quasi-constitutional right is protected by legislation such as FOIP.<sup>2</sup>

A privileged status is afforded access and privacy legislation wherein it is typically paramount to other legislation. The importance of the rights protected by this legislation must always be borne in mind whenever considering any decisions which impact upon these rights. As the Privy Council has stated about quasi-constitutional Acts:

Whether the quasi-constitutional status of these Acts derives from one of their provisions or from court decisions, the justification for it is the same. These Acts express values that are very important in Canada. Any derogation from them must be explicit.

The requirement of explicit derogation protects the values expressed in those Acts to the maximum extent possible, short of entrenching those values in the Constitution. It also ensures accountability to the public for any decision to derogate.<sup>3</sup>

## THE PURPOSES OF FOIP

### Object or Purpose Clause

FOIP does not have an object or purpose clause.

In the absence of an explicit purpose clause in FOIP, the Information and Privacy Commissioner (IPC) is required to infer the Legislative Assembly's purpose in designing such an instrument.

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<sup>1</sup> 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, also cited in Office of the Saskatchewan Information and Privacy Commissioner (SK OIPC) Review Report F-2010-002 at [44].

<sup>2</sup> SK OIPC Review Report F-2010-002 at [45].

<sup>3</sup> Privy Council Office, *Guide to Making Federal Acts and Regulations*, 2nd Ed., modified: 2017.

Both FOIP and *The Local Authority Freedom of Information and Protection of Privacy Act* started out as consecutive Bills receiving first reading in the Legislative Assembly on April 19, 1991.<sup>4</sup> On June 18, 1991, the Lieutenant Governor spoke to prorogation and stated:

Widespread consultations also revealed a significant element of demand for a less partisan government, the protection of democratic rights, and the accountability of elected governments. This spring the rules of the Legislative Assembly were changed, and the first Speaker elected, to respond to the first of these concerns. The government's comprehensive package of legislation, including *The Referendum and Plebiscite Act*, *The Freedom of Information and Protection of Privacy Act*, and *The Local Authority Freedom of Information and Protection of Privacy Act*, are reforms introduced to make government more open and allow people to play a more direct role in the government....Finally, the two freedom of information Acts provide the public with the right to know the activities of government as it touches their personal lives....<sup>5</sup>

The IPC has, in the past, also been guided by decisions of the Saskatchewan Court of Appeal and the Saskatchewan Court of King's Bench. In *Amendt v. Canada Life Assurance Co.*, 1999 CanLII 12560 (SK KB) at [43], Goldenberg J. observed:

The right of persons to apply for access to information in the hands of a government agency has no basis in common law. It is purely statutory. The Act is a code unto itself. The code sets out a detailed method for applications, reviews, and ultimately for appeals to the Court of Queen's Bench. Absent compliance with the process contained therein, this Court has no jurisdiction to entertain the matter.<sup>6</sup>

In *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance*, 1993 CanLII 9128 (SK CA) at [11], the Saskatchewan Court of Appeal stated:

The Act's basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy is the dominant objective of the Act. That is not to say that the statutory exemptions are of little or no significance. We recognize that they are intended to have a meaningful reach and application. The Act provides for

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<sup>4</sup> SK OIPC Review Report F-2012-001/LA-2012-001 at [47].

<sup>5</sup> Saskatchewan *Hansard*, June 18, 1991, available at <http://docs.legassembly.sk.ca/legdocs/Legislative%20Assembly/Hansard/21L4S/910618e.PDF>. See also SK OIPC Review Reports F-2012-001/LA-2012-001 at [47] and LA-2012-003 at [27].

<sup>6</sup> *Amendt v. Canada Life Assurance Co.*, 1999 CanLII 12560 (SK KB) at [43]. See also SK OIPC Review Report F-2004-003 at [7].

specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The Act's broad provisions for disclosure, coupled with specific exemptions, prescribe the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny.<sup>7</sup>

FOIP closely corresponds to provisions in the federal [Access to Information Act](#). The purpose of the *Access to Information Act* is described as follows:

**2(1)** The purpose of this Act is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.<sup>8</sup>

As stated by Mr. Justice La Forest in [Dagg v. Canada \(Minister of Finance\)](#), 1997 CanLII 358 (SCC), [1997] 2 SCR 403 at [61]:

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol Sci.* 479, at p. 480:

Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.<sup>9</sup>

In *Legislation on Public Access to Government Documents*, the reasons for access to information legislation are discussed. The author, Honourable John Roberts, Secretary of State, concluded that the reasons for such legislation include:

- Effective accountability - the public's judgment of choices taken by government - depends on knowing the information and options available to the decision-makers.

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<sup>7</sup> *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance*, 1993 CanLII 9128 (SK CA) at [11]. See also SK OIPC Review Report F-2004-003 at [8].

<sup>8</sup> *Access to Information Act*, RSC 1985, c A-1 at subsection 2(1).

<sup>9</sup> *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403 at [61].

- Government documents often contain information vital to the effective participation of citizens and organizations in government decision-making.
- (As) government has become the single most important storehouse of information about our society, information that is developed at public expense so should be publicly available wherever possible.<sup>10</sup>

Since the [Access to Information Act](#) came into force, provincial and territorial governments have enacted their own access to information and protection of privacy legislation. Many of those provincial instruments have included a more comprehensive purpose clause. Those purpose clauses tend to reflect and reinforce the approach taken by the federal Information Commissioner and numerous decisions of superior courts in Canada. A good example is section 2 of the British Columbia [Freedom of Information and Protection of Privacy Act](#):

**2(1)** The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

- (a) giving the public a right of access to records,
- (b) giving individuals a right of access to, and a right to request corrections of, personal information about themselves,
- (c) specifying limited exceptions to the rights of access,
- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
- (e) providing for an independent review of decisions made under this Act.<sup>11</sup>

This summarizes and clearly identifies the purpose of legislation such as FOIP. The Office of the Saskatchewan Information and Privacy Commissioner (SK OIPC) deals with requests for review and privacy breach complaints by reference to these same five purposes, which are outlined below.<sup>12</sup>

## **1. The Right of Access to Records**

FOIP establishes a right of access by any person to records in the possession or control of a government institution.

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<sup>10</sup> Roberts, Honourable John. Secretary of State. June 1977. *Legislation on Public Access to Government Documents*, Government of Canada, Ministry of Supply and Services Canada at pp. 1 and 3. See also SK OIPC Review Report F-2004-003 at [9]. There is a typo in the report "1997" should be "1977".

<sup>11</sup> *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 at subsection 2(1).

<sup>12</sup> SK OIPC Review Report F-2004-003 at [9].

See *Guide to FOIP*, Chapter 3, "Access to Records" for more information about the right of access.

## **2. Access to an Individual's Own Personal Information**

FOIP provides individuals with the right to access their own personal information.

See *Guide to FOIP*, Chapter 3, "Access to Records" for more information on what section 31 of FOIP requires.

## **3. Right to Request Correction of Personal Information**

FOIP provides an individual with the right to request a government institution correct the individual's personal information where the individual believes there is an error or omission.

See *Guide to FOIP*, Chapter 6, "Protection of Privacy" for more information on the right of correction.

## **4. Protection of Personal Privacy**

FOIP provides individuals with the right to privacy of their personal information held by government institutions. This includes restrictions on the collection, use and/or disclosure of the individual's personal information.

See *Guide to FOIP*, Chapter 6, "Protection of Privacy" for more information on the protection of privacy.

## **5. Independent Review of Decisions**

FOIP provides for the independent review of decisions made by government institutions with respect to access and protection of privacy. Independent review is provided by the Information and Privacy Commissioner.

See *Guide to FOIP*, Chapter 2, "Administration of FOIP" for more information on the Information and Privacy Commissioner's role and responsibilities under FOIP.

# THE SCOPE OF FOIP

## Government Institutions

FOIP applies to all government institutions as defined by subsection 2(1)(d) of FOIP and includes government institutions prescribed in the Appendix at Part I of *The Freedom of Information and Protection of Privacy Regulations*. All government institutions subject to FOIP



have statutory duties with regard to providing access to information and protecting personal information that is in the possession or control of the government institution.

## *Subsection 2(1)(d): Definition of a government institution*

### **Interpretation**

**2(1)** In this Act:

...

(d) **“government institution”** means, subject to subsection (2):

(i) the office of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan; or

(ii) any prescribed board, commission, Crown corporation or other body, or any prescribed portion of a board, commission, Crown corporation or other body, whose members or directors are appointed, in whole or in part:

(A) by the Lieutenant Governor in Council;

(B) by a member of the Executive Council; or

(C) in the case of:

(I) a board, commission or other body, by a Crown corporation; or

(II) a Crown corporation, by another Crown corporation;

Subsection 2(1)(d) of FOIP defines a government institution. Any body or organization that fits under this definition is subject to FOIP.

Subsection 2(1)(d)(ii) of FOIP uses the phrase “any prescribed board...”. The meaning of this can be found at subsection 2(1)(h) of FOIP which provides:

**2(1)** In this Act:

...

(h) **“prescribed”** means prescribed in the regulations;

Therefore, for subsection 2(1)(d)(ii) of FOIP, a body that is “prescribed” means any body listed in Part I of the Appendix of [The Freedom of Information and Protection of Privacy Regulations](#) (FOIP Regulations).

To further this, subsection 3(a) of the FOIP *Regulations* indicates bodies listed in Part I of the Appendix are prescribed as government institutions.

## *Subsection 2(2): Bodies Not Included*

### **Interpretation**

**2(2) "Government institution"** does not include:

- (a) a corporation the share capital of which is owned in whole or in part by a person other than the Government of Saskatchewan or an agency of it;
- (b) the Legislative Assembly Service or, subject to subsections 3(3) and (4), offices of members of the Assembly or members of the Executive Council; or
- (c) the Court of Appeal, Her Majesty's Court of Queen's Bench for Saskatchewan or the Provincial Court of Saskatchewan.

Bodies that are excluded from the definition of a government institution include those outlined at subsection 2(2) of FOIP. This includes:

- Courts such as the Court of King's Bench for Saskatchewan.<sup>13</sup>
- The Legislative Assembly Service and offices of members of the Legislative Assembly.
- Members of Executive Council such as ministers' offices.

This means records held by any of these bodies are not subject to the access provisions and, in some instances, the privacy provisions set out in FOIP. However, see *Subsection 3(3)* and *Subsection 3(4)*, later in this Chapter for more on the privacy provisions that apply to the Legislative Assembly Service and offices of members of the Assembly or members of the Executive Council.

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<sup>13</sup> FOIP still refers to the Court of Queen's Bench at subsection 2(2)(c) but this changed in 2022 to the Court of King's Bench. Future amendments to FOIP will likely capture and reflect this.

# FOIP Applies

## *Section 5: Possession or control*

### **Right of access**

**5** 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.

[emphasis added]

FOIP applies to any records in the “possession or under the control of a government institution”.

Section 5 of FOIP provides that every person has a right to request access to records that are in the possession or under the control of a government institution. Therefore, FOIP only applies to records that are in a government institution’s possession or control.

A **record** is defined at subsection 2(1)(i) of FOIP as “a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanisms that produce records”.

There are times when possession or control of records is not easily established. For that reason, the following terms, factors, and two-part test have been established.

**Possession** is physical possession plus a measure of control over the record.<sup>14</sup>

The mere possession of a record is not enough, there must be some right to deal with the records and some responsibility for their care and protection. For this reason, the definition for “possession” includes a “measure of control”. This originates from the Office of the Ontario Information and Privacy Commissioner Order P-239 at paragraph [4] and is also

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<sup>14</sup> SK OIPC Review Reports F-2014-007 at [10] and LA-2010-002 at [93]. The mere possession is not enough, there must be some right to deal with the records and some responsibility for their care and protection. This definition that includes a “measure of control” originates from the Office of the Ontario Information and Privacy Commissioner (ON IPC) Order P-239 at [4].

followed by the Office of the Information and Privacy Commissioner of British Columbia in several Orders including Order 309-1999 in which the following is stated at paragraph [50]:

Custody [possession] of records requires more than that the records be located on particular premises.

In order for a public body to have custody [possession] of records, the public body must have immediate charge and control of these records, including some legal responsibility for their safekeeping, care, protection, or preservation.

**Control** connotes authority. A record is under the control of a government institution when the government institution has the authority to manage the record including restricting, regulating, and administering its use, disclosure, or disposition.<sup>15</sup>

Possession and control are different things. It is conceivable that a government institution might have possession but not control of a record or that it might have control but not possession.<sup>16</sup> Section 5 uses the word, "or" which indicates that only one of "possession" or "control" is required. If a government institution has either possession or control of a record, FOIP applies to that record.<sup>17</sup>

To determine whether a government institution has a measure of control over a record(s), both parts of the following two-part test must be met:

### **1. Do the contents of the document relate to a government institution matter?**

The first question acts as a useful screening device. If the answer is no that ends the inquiry.

If the answer is yes, the inquiry into control continues.<sup>18</sup> Continue to the second part of the test.

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<sup>15</sup> SK OIPC Review Report F-2008-002 at [35].

<sup>16</sup> SK OIPC Review Report F-2008-002 at [22].

<sup>17</sup> SK OIPC Review Report LA-2010-002 at [43].

<sup>18</sup> *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306 at [55].

## **Unsolicited Information**<sup>19</sup>

An individual may submit personal information on their own initiative without the information being requested by a government institution. Receipt of this information is not considered a collection unless the government institution keeps or uses the information.<sup>20</sup> In other words, if the government institution keeps it, it should ensure it has authority to do so under section 25 of FOIP. If not, return it or safely destroy it. In addition, keeping it means the government institution has possession and/or control of the personal information.

If a government institution does not have specific authority to collect unsolicited personal information and the information is not necessary for an operating program or activity of the government institution, it is not an authorized collection. The government institution should adopt a policy of either returning the unsolicited information or destroying it in accordance with a transitory records schedule.<sup>21</sup>

## **Personal emails of employees**<sup>22</sup>

When a government employee uses their workplace email address to send and receive personal emails completely unrelated to their work, those emails are not subject to disclosure to members of the public who request them under FOIP. The terms “possession” and “control” do not include private communications of employees unrelated to government business.

It can be confidently predicted that any government employee who works in an office setting will have stored, somewhere in that office, documents that have nothing whatsoever to do with their job, but which are purely personal in nature. Such documents can range from the most intimately personal documents (such as medical records) to the most mundane (such as a list of household chores). It cannot be suggested that employees of an institution governed by FOIP are themselves subject to that legislation in respect of any piece of personal material

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<sup>19</sup> From *Guide to FOIP*, Chapter 6: “Protection of Privacy” at *Section 25, Unsolicited Information*.

<sup>20</sup> Ministry of Government and Consumer Services, Information, Privacy and Archives, *Freedom of Ontario Information and Protection of Privacy Manual* at p. 140. Available at [https://files.ontario.ca/books/foi\\_privacy\\_manual\\_-\\_final-v02-2018-03-08-en-accessible.pdf](https://files.ontario.ca/books/foi_privacy_manual_-_final-v02-2018-03-08-en-accessible.pdf). Accessed December 1, 2022. See also SK OIPC Investigation Reports F-2012-002 at [61] and F-2012-004 at [77].

<sup>21</sup> Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 7, p. 239. See also SK OIPC Investigation Report F-2012-002 at [60].

<sup>22</sup> The issue of possession & control can come up when it involves the personal emails or records of employees. In addition to the references noted in this section below, see also *Saskatchewan Government and General Employees Union v Unifor Local 481*, 2015 CanLII 28482 (SK LA).

they happen to have in their offices at any given time. That would clearly not be contemplated as being within the intent and purpose of FOIP.<sup>23</sup>

While the expectation of privacy may be somewhat circumscribed, there is still both a right to and a reasonable expectation of privacy in relation to certain personal information contained on or in government owned equipment and accounts.<sup>24</sup>

## **2. Can the government institution reasonably expect to obtain a copy of the document upon request?**<sup>25</sup>

All factors must be considered when determining the second question. These factors include:

- The substantive content of the record.
- The circumstances in which it was created.
- The legal relationship between the government institution and the record holder.<sup>26</sup>

The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is met.<sup>27</sup>

If both test questions are answered in the affirmative, the document is under the control of the government institution.

The following factors may also be considered if it is still unclear whether the government institution has “control” of the records at issue:

- The record was created by a staff member, an officer, or a member of the government institution in the course of his or her duties performed for the government institution.
- The record was created by an outside consultant for the government institution.

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<sup>23</sup> See *City of Ottawa v. Ontario*, 2010 ONSC 6835 (CanLII) at [37]. See also SK OIPC Review Report F-2014-007.

<sup>24</sup> Office of the Northwest Territories Information and Privacy Commissioner (NWT IPC) Review Report 20-247 at [37].

<sup>25</sup> *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306 at [55] and [56].

<sup>26</sup> *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306 at [56].

<sup>27</sup> *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306 at [56].

- The government institution possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory, statutory or employment requirement.
- An employee of the government institution possesses the record for the purposes of his or her duties performed for the government institution.
- The record is specified in a contract as being under the control of a government institution and there is no understanding or agreement that the records are not to be disclosed.
- The content of the record relates to the government institution's mandate and core, central or basic functions.
- The government institution has a right of possession of the record.
- The government institution has the authority to regulate the record's use and disposition.
- The government institution paid for the creation of the records.
- The government institution has relied upon the record to a substantial extent.
- The record is closely integrated with other records held by the government institution.
- A contract permits the government institution to inspect, review and/or possess copies of the records the contractor produced, received, or acquired.
- The government institution's customary practice in relation to possession or control of records of this nature in similar circumstances.
- The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances; and
- The owner of the records.<sup>28</sup>

More than one agency may have control of the same record at the same time. The control exercised by two different organizations need not be co-extensive and may be uneven between the two organizations. Any analysis of possession and control needs to ensure that the words have different meanings.<sup>29</sup>

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<sup>28</sup> The possession/control test has evolved over the years in SK OIPC Review Reports. Earlier SK OIPC Review Reports relied on five factors. The first SK OIPC Review Report to list the five factors was F-2008-002 at [27]. This changed to 15 factors in SK OIPC Review Report LA-2010-002 at [60] and [61]. The 15 factors originate from the Office of the British Columbia Information and Privacy Commissioner (BC IPC) Order F10-01. Following the Supreme Court of Canada decision *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (CanLII), [2011] 2 SCR 306, SK OIPC Review Reports shifted to the two-part test from this decision. The 15 factors are used to supplement the test and assist with determining possession and/or control. They are not intended to replace the two-part test.

<sup>29</sup> SK OIPC Review Report LA-2010-002 at [55].

## IPC Findings

In [Review Report F-2014-007](#), the Commissioner reviewed a denial of access involving the Ministry of Justice (Justice). An applicant had requested any records containing the name of an individual written, processed or possessed by a specific government employee. Justice responded to the request indicating that it did not have any responsive records in its possession or control and that any records were the personal records of the government employee which it described as emails. The applicant requested a review by the Commissioner. Upon review, the Commissioner applied the 15 factors noted in this Chapter (this was prior to the two-part Supreme Court of Canada test). The Commissioner found that Justice had possession of the records as the emails exist on the government email server. When considering “control”, the Commissioner noted that in support of its position that the emails were of a personal nature and not government business, Justice provided a sample email which was a letter sent from a family member to the government employee at his work address and the contents was of a personal nature. After considering the 15 factors, the Commissioner determined that Justice did not have a measure of control over the records. This finding was consistent with [City of Ottawa v. Ontario, 2010 ONSC 6835](#) which also dealt with personal emails in the possession of an employer.

In [Review Report 007-2019](#), the Commissioner reviewed a denial of access involving the former Ministry of Central Services (Central Services). An applicant had requested access to personal emails sent and received from the applicant’s (a former employee) Government of Saskatchewan email account. Central Services responded to the request indicating that any responsive records were personal emails that were outside the scope of FOIP and not in the possession or control of Central Services. Upon review, the Commissioner found that any emails sent or received by the applicant constituting their personal emails, that were retained on the backup tapes, were not in the possession or control of Central Services for the purposes of FOIP.

In [Review Report 297-2021](#), the Commissioner found that a portion of an applicant’s access to information request sent to the Ministry of Justice involved information maintained by ISC in the public registry. The Commissioner found the Ministry of Justice still maintained control of the information. As a result, the Ministry of Justice directed ISC to conduct an additional search for responsive records. ISC located an additional email chain.



## Section 24: Personal Information

FOIP applies to personal information recorded in any form in the possession or control of a government institution. To qualify as personal information, two elements must exist:

1. An identifiable individual
2. Information that is personal in nature

Some examples of what could constitute personal information include:

- The individual's race, national or ethnic origin, colour or religious or political beliefs or associations.
- The individual's age, sex, marital status or family status.
- Information about the individual's educational, financial, employment or criminal history, including criminal records, whether or not a pardon has been given.
- An identifying number, symbol or other particular assigned to the individual.
- Anyone else's opinions about the individual.
- The individual's name, home or business address or home or business telephone number.
- The individual's personal views or opinions, except if they are about someone else.<sup>30</sup>

For more information about what constitutes personal information, see the *Guide to FOIP*, Chapter 6, "Protection of Privacy".

## FOIP Does Not Apply

### Application

**3(1)** This Act does not apply to:

- (a) published material or material that is available for purchase by the public;
- (b) material that is a matter of public record; or
- (c) material that is placed in the custody of the Provincial Archives of Saskatchewan by or on behalf of persons or organizations other than government institutions.

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<sup>30</sup> *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 at subsection 24(1).

Subsection 3(1) of FOIP provides that certain information and records in the possession or control of a government institution are excluded from the application of FOIP. In some cases, another process is available to obtain access to these records. See *Section 4: Existing Rights Preserved*, later in this Chapter.

## Subsection 3(1)(a)

### Application

3(1) This Act does not apply to:

- (a) published material or material that is available for purchase by the public;

FOIP does not apply to published material **or** material that is available for purchase by the public.

**Published** means to make known to people in general...an advising of the public or making known of something to the public for a purpose.<sup>31</sup>

When considering whether a record or information is published, the government institution should confirm that:

- The specific information or record requested is published (what data elements are actually published).<sup>32</sup>
- There is a way for the public to access the published record or information.

Where FOIP does not apply to a public record, it would still apply to all actions related to collection or use of data. Government institutions are best served by determining what data elements are published or made part of a public record. Best practice when publishing information or putting it in a public record, would be to include the least amount of personal information. This is particularly relevant when posting to the internet where the public record is in fact online and searchable. Publishing online means the information is potentially available to six to nine billion people at any given time.<sup>33</sup>

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<sup>31</sup> Originated from Black, Henry Campbell, 1979. *Black's Law Dictionary, 5<sup>th</sup> Edition* St. Paul, Minn.: West Group. Adopted by the ON IPC in Order P-204 at p. 4. Adopted by SK OIPC in Review Report 249-2017 at [7].

<sup>32</sup> SK OIPC Investigation Report 249-2017 at [22].

<sup>33</sup> SK OIPC Investigation Report 249-2017 at [22].

**Material that is available to purchase** means that a pricing structure is in place for all who wish to obtain the information or record.<sup>34</sup>

When considering whether a record or information is available to purchase, the government institution should confirm that:

- The specific information or record requested is available for purchase.
- There is a way for the public to purchase the record or information (i.e., website, office to attend).
- A pricing structure exists for all who wish to obtain the information or record.

In some circumstances, information or records are available through a public registry. A **registry** means a registry established or continued pursuant to a public registry statute and includes information provided to, and the data created or maintained in the operation of, a public registry statute.<sup>35</sup> It can also be an electronic registry. Examples include the Information Services Corporation (ISC) land titles registry and the corporate registry. These registries provide information or records. Purchases can be made by attending ISC or through its website. There is also a fee structure in place for anyone wishing to purchase certain registry information. Some information is available free of charge.

When relying on this provision, the government institution should ensure the publicly available record is the record or information being requested by an applicant. Further, applicants should not be required to compile small pieces of information from a variety of sources to obtain a complete version of a record that could be disclosed.<sup>36</sup>

## Information Services Corporation (ISC)

Information Services Corporation (ISC) oversees several public registries for the Government of Saskatchewan.

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<sup>34</sup> Adapted from ON IPC Order MO-1693 at p.16.

<sup>35</sup> Subsection 2(1)(i) of *The Operation of Public Registry Statutes Act*, SS 2013, c O-4.2. Subsection 2(1)(h) of this Act also defines “public registry statute” as an Act designated by subsection (2) with respect to a service agreement that has been entered into and includes regulations or an Act for which a contractor is authorized to exercise powers or fulfill duties in accordance with subsection 10(1) and includes regulations.

<sup>36</sup> ON IPC Order MO-3191-F at [86], [87] and [88].

Subsection 2(1)(a) of *The Operation of Public Registry Statutes Act* establishes the relationship between the Government of Saskatchewan and a “contractor”:

**2(1)** In this Act:

(a) “**contractor**” means, with respect to a public registry statute, a person with whom the minister has entered into a service agreement;

ISC is a “contractor” as defined above. However, ownership of the information in the registries remains with the Government of Saskatchewan as per subsection 11(1) of *The Operation of Public Registry Statutes Act* which provides:

**11(1)** All information and records in the registries are the property of the Government of Saskatchewan.

The Ministry of Justice is the administrator of *The Operation of Public Registry Statutes Act* and has established the Office of Public Registry Administration within the ministry. A summary of *The Operation of Public Registry Statutes Act* is as follows:

*The Operation of Public Registry Statutes Act:*

- Created the Office of Public Registry Administration.
- Allowed the Government of Saskatchewan to enter into a service agreement with a business corporation, Information Services Corporation (ISC), to operate and manage the public registries on behalf of the Government.
- Maintained Government ownership of all registry data.
- Continued Government guarantee of title and assurance coverage for certain errors on title.
- Maintained the quasi-judicial decision-making within Government by requiring the registry officers (Registrar of Titles, Controller of Surveys, Director of Corporations, Registrar of Cooperatives, and Registrar of Personal Property Security) to be employed by the Government.

...

The service agreement with ISC covers the Land Registry, the Land Surveys Directory, the Personal Property Registry, the Corporate Registry, and the Common Business Identifiers Program (CBI).

The Public can access these registries through ISC, but Government retains ultimate

responsibility for the registries. The procedures for registering or searching documents in the public registries and the legal rights of people using public registries remain unchanged.<sup>37</sup>

In [Review Report 297-2021](#), the Commissioner found that a portion of an applicant's access to information request sent to the Ministry of Justice involved information maintained by ISC in the public registry. The Commissioner found the Ministry of Justice still maintained control of the information. This was a result of the relationship between the Ministry of Justice and ISC that is established in [The Operation of Public Registry Statutes Act](#).<sup>38</sup>

## IPC Findings

In [Review Report 235-2016](#), the Commissioner found that FOIP did not apply to records stored within a registry that any person may search provided they pay a fee. The registry was the Mineral Administration Registry System Saskatchewan (MARS).

In [Review Report 277-2016](#), the Commissioner considered the Ministry of Economy's (Economy) application of subsection 29(1) of FOIP to a map identifying parcels of land owned by individuals. The Commissioner found that the information on the map was publicly available through ISC at no cost and recommended release of the map.

In [Review Report LA-2007-001](#), the Commissioner found that a tax certificate enabled by section 395 of [The Rural Municipalities Act](#) (RMA) qualified as "material available for purchase by the public". If the applicant wanted the data elements included in the tax certificate, it would be excluded by virtue of the equivalent subsection 3(1)(a) of (LA FOIP). The applicant's remedy would be to pay the appropriate fee and purchase the relevant tax certificates. The Commissioner also determined that subsection 3(1)(a) of LA FOIP had no requirement that information already available to anyone as "published material" within the meaning of subsection 3(1)(a) of LA FOIP need all be contained in a single document or format. All of the applicant's requested information could be purchased through a combination of tax certificates and title searches from ISC.

In [Review Report 297-2021](#), the Commissioner found that a portion of an applicant's access to information request sent to the Ministry of Justice involved information maintained by ISC in the public registry. The Commissioner found the Ministry of Justice still maintained control

<sup>37</sup> Government of Saskatchewan, Publications, *Summary – the Operation of Public Registry Statutes Act*, available at <https://publications.saskatchewan.ca/#/products/114854>. Accessed February 27, 2023.

<sup>38</sup> SK OIPC Review Report 297-2021 at [24]. The Commissioner considered the relationship between ISC and the Government of Saskatchewan for the first time.

of the information. As a result, the Ministry of Justice directed ISC to conduct an additional search for responsive records. ISC located an email chain.

## Subsection 3(1)(b)

### Application

3(1) This Act does not apply to:

...

(b) material that is a matter of public record; or

FOIP does not apply to material that is a “matter of public record”. No definition of the term “matter of public record” appears in FOIP and there has not been a great deal of judicial comment on that term, especially in the context of similar “access to information” statutes.<sup>39</sup>

**A matter of public record** is defined as documents that one would typically find in a public register that the members of the public have ready access to.<sup>40</sup>

A “matter of public record” would be information collected and maintained specifically for the purpose of creating a record available to the general public. A good example would be the land titles registry operated by ISC.<sup>41</sup>

The only other province with freedom of information legislation that appears to contain the same “matter of public record” exemption provision as set out in subsection 3(1)(b) of FOIP is Nova Scotia. Subsection 4(2)(b) of *The Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, reads identically to subsection 3(1)(b) of FOIP. Courts in that province have endorsed the same definitions of “matter of public record” as were endorsed in *Germain v. Automobile Injury Appeal Commission*, 2009 SKQB 106 (CanLII).<sup>42</sup>

To be a “matter of public record” two characteristics must be present:

- i. The record is held by a government institution that is under a duty to keep or collect it.

<sup>39</sup> 605499 *Saskatchewan Ltd. v Rifle Shot Oil Corp.*, 2019 SKCA 133 at [67].

<sup>40</sup> SK OIPC Review Reports LA-2007-002 at [28] and 249-2017 at [8].

<sup>41</sup> SK OIPC Review Reports LA-2007-002 at [28]. Also cited in 605499 *Saskatchewan Ltd. v Rifle Shot Oil Corp.*, 2019 SKCA 133 (CanLII) at [65].

<sup>42</sup> 605499 *Saskatchewan Ltd. v Rifle Shot Oil Corp.*, 2019 SKCA 133 (CanLII) at [66].

- ii. The record is information that members of the public have a right to access.<sup>43</sup>

**Registry** means a registry established or continued pursuant to a public registry statute and includes information provided to, and the data created or maintained in the operation of, a public registry statute.<sup>44</sup> It can also be an electronic registry. Examples include the Information Services Corporation land titles registry and the corporate registry.

**Public record** is defined as a record that a government unit is required by law to keep, such as land deeds kept at a county courthouse. Public records are generally open to view by the public.<sup>45</sup>

## IPC Findings

In [Review Report 235-2016](#), the Commissioner found that FOIP did not apply to records stored within a registry that any person may search provided they pay a fee.

In [Review Report 277-2016](#), the Commissioner recommended release of a map that showed parcels of land and their owners because they were publicly available using the ISC website. The information was accessed free of charge.

In [605499 Saskatchewan Ltd. v Rifle Shot Oil Corp., 2019 SKCA 133 \(CanLII\)](#) the Saskatchewan Court of Appeal determined that agreements regarding compensation for surface rights were not excluded from access under subsection 3(1)(b) of FOIP.

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<sup>43</sup> [605499 Saskatchewan Ltd. v Rifle Shot Oil Corp., 2019 SKCA 133 \(CanLII\)](#) at [67].

<sup>44</sup> Subsection 2(1)(i) of *The Operation of Public Registry Statutes Act*, SS 2013, c O-4.2. Subsection 2(1)(h) of this Act also defines “public registry statute” as an Act designated by subsection (2) with respect to a service agreement that has been entered into and includes regulations or an Act for which a contractor is authorized to exercise powers or fulfill duties in accordance with subsection 10(1) and includes regulations.

<sup>45</sup> Garner, Bryan A., 2004. *Black’s Law Dictionary, 8<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 1301, relied on in *Germain v. Automobile Injury Appeal Commission*, 2009 SKKB 106 (CanLII) at [69] and [72]. Also cited in SK OIPC Investigation Report LA-2012-001 at [14] to [17].

## Subsection 3(1)(c)

### Application

3(1) This Act does not apply to:

...

(c) material that is placed in the custody of the Provincial Archives of Saskatchewan by or on behalf of persons or organizations other than government institutions.

Although the Provincial Archives of Saskatchewan (formerly the Saskatchewan Archives Board) is a government institution, FOIP does not apply to material that is placed in the custody of the Provincial Archives by or on behalf of persons or organizations other than government institutions.

The acquisition of private records from individuals and organizations is a core object and function of the mandate of the Provincial Archives of Saskatchewan under [The Archives and Public Records Management Act](#) (APRMA) (See subsection 4(a) and section 8). Under the APRMA, the general powers include the ability to “enter into agreements with any person, body or organization within or outside Saskatchewan that the Provincial Archives of Saskatchewan considers necessary to fulfill its objects and to carry out its functions.” (See subsection 6(1)) This includes the transfer of private records. Records are not ‘on deposit’ with the Archives but involve a formal transfer of ownership. Approximately 40% of the Permanent Collection is from the records of individuals and organizations. The records of individuals can include the political and personal records of MLAs and Ministers of the Crown. The latter are required to follow the APRMA for the transfer of the public portfolio record.

There are many reasons why individuals and organizations turn over their records to the Provincial Archives of Saskatchewan. For example, it is a means of sharing records with the broader community or for leaving a legacy. Records of individuals can come over time, as careers develop, or through the executors of estates. The records of organizations include businesses, associations, church groups, architectural firms, political associations etc. and cover every aspect of the history of the province. The Provincial Archives of Saskatchewan have produced a guide for organizations, both in terms of managing records and what to keep over the long term. (See [A Guide to Maintaining Records and Identifying Archival Material for Societies and Organizations](#))

Records offered to the Provincial Archives of Saskatchewan from individuals and organizations are appraised by archivists to determine whether they hold long-term historical



significance. Overall, these records complement the government record and provide insight into what has shaped the province over time. The transfer occurs through an agreement between the individual or organization and the Archives. Some agreements also include restrictions on access to the record and/or use.<sup>46</sup>

For subsection 3(1)(c) of FOIP, the following three-part test can be applied:

**1. Was the record placed in the Provincial Archives by or on behalf of persons or organizations other than a government institution?**

The records must have been placed in the Provincial Archives by a third person or organization separate from a government institution.

**2. Is the record now located in the Provincial Archives?**

One factor that must be met is the record(s) must have been physically transferred to the custody of the Provincial Archives. A written agreement can be evidence that ownership of the record and the physical record have been transferred to the Provincial Archives.

**3. If there is no agreement in place, is there correspondence that documents the transfer of the record(s) to the custody of the Provincial Archives?**

For some earlier private record donations, paper trails may exist but no formal agreement. The key is to document that the record is a private record from an individual or organization and that the Provincial Archives has ownership of the record in its Collection.<sup>47</sup>

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<sup>46</sup> The three preceding paragraphs were provided by the Provincial Archives of Saskatchewan on April 20, 2018.

<sup>47</sup> Test established with assistance from the Provincial Archives of Saskatchewan on April 30, 2018 and modified from SK OIPC Review Report LA-2010-002 at [135] to [153].

## Subsection 3(3)

### Application

**3(3)** Subject to the regulations, the following sections apply, with any necessary modification, to offices of members of the Assembly and their employees as if the members and their offices were government institutions:

- (a) sections 24 to 30;
- (b) section 33.

The access provisions of FOIP do not apply to the Legislative Assembly Services or offices of members of the Legislative Assembly as defined at subsection 2(2)(b) of FOIP. However, the privacy provisions in Part IV of FOIP do apply. This includes the duty to protect personal information as it is defined at section 24 of FOIP.

The IPC has a resource to assist with subsection 3(3) of FOIP. It is intended to assist Members of the Legislative Assembly and their offices with protecting personal information. It is titled, [\*MLA Guide to Protecting Personal Information\*](#).

## Subsection 3(4)

### Application

**3(4)** Subject to the regulations, the following sections apply, with any necessary modification, to offices of members of the Executive Council and their employees as if the members and their offices were part of the government institution for which the member of the Executive Council serves as the head:

- (a) sections 24 and 24.1;
- (b) sections 25 to 30;
- (c) section 33.

The access provisions of FOIP do not apply to members of the Executive Council and their employees as defined at subsections 2(2)(b) and 2(1)(b.1) of FOIP. However, the privacy provisions in Part IV of FOIP do apply. This includes the duty to protect personal information as it is defined at section 24 of FOIP.

The IPC has issued a resource to assist with subsection 3(4) of FOIP. It is intended to assist members of the Executive Council (Ministers) and their offices with protection of personal information. It is titled, [A Minister's Guide to Protecting Personal Information](#).

## Subsection 24(1.1)

### Interpretation

**24(1.1)** Subject to subsection (1.2), "personal information" does not include information that constitutes personal health information as defined in *The Health Information Protection Act*.

Subsection 24(1.1) of FOIP simply clarifies that FOIP does not apply to personal health information. The purpose of this provision is to ensure that two different laws do not apply to the same information at the same time.<sup>48</sup>

The practical effect of subsection 24(1.1) is that if personal health information is in the custody or control of a trustee and therefore subject to [The Health Information Protection Act \(HIPA\)](#), it cannot simultaneously be personal information subject to FOIP. The purpose of the Legislative Assembly in enacting subsection 24(1.1) was presumably to avoid duplication in legislative coverage.<sup>49</sup>

Government institutions should be aware that two acts could apply to the same records (not information) at the same time. For example, if a record contains both personal information and personal health information, FOIP and HIPA could both be engaged.<sup>50</sup>

If records in the possession or control of a government institution contain what appears to be personal health information, the test is to first see if the information fits within the definition of personal health information at subsection 2(m) of [The Health Information Protection Act \(HIPA\)](#).

If the information qualifies as personal health information under subsection 2(m) of HIPA, then HIPA applies to that information and not FOIP.

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<sup>48</sup> SK OIPC Investigation Report F-2010-001 at [31].

<sup>49</sup> SK OIPC Investigation Report F-2010-001 at [31].

<sup>50</sup> For an example of this, see SK OIPC Review Report F-2012-006 at [162] to [178].

The practical effect of subsection 24(1.1) of FOIP is that if personal health information is in the custody or control of a trustee and therefore subject to HIPA, it cannot simultaneously be personal information subject to FOIP. The purpose of the Legislative Assembly in enacting subsection 24(1.1) of FOIP was presumably to avoid duplication in legislative coverage, not to create a void where no privacy law applied to the information collected, used and/or disclosed.<sup>51</sup>

## IPC Findings

In [Investigation Report 293-2016](#), the Commissioner found that the information at issue was personal health information and that FOIP did not apply to the information pursuant to subsection 24(1.1) of FOIP. Rather, *The Health Information Protection Act* applied to the information.

In [Investigation Report 179-2019](#), the Commissioner found that, as FOIP did not apply to personal health information, FOIP was not engaged in the circumstances of the case.

## Section 23

### Confidentiality provisions in other enactments

**23(1)** Where a provision of:

- (a) any other Act; or
- (b) a regulation made pursuant to any other Act;

that restricts or prohibits access by any person to a record or information in the possession or under the control of a government institution conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.

(2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.

(3) Subsection (1) does not apply to:

- (a) *The Adoption Act, 1998*;
- (b) section 31 of *The Archives and Public Records Management Act*;

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<sup>51</sup> SK OIPC Investigation Report F-2010-001 at [31].

- (c) section 74 of *The Child and Family Services Act*;
- (d) section 14 of *The Enforcement of Maintenance Orders Act, 1997*;
- (e) *The Health Information Protection Act*;
- (f) section 91.1 of *The Police Act, 1990*;
- (g) section 11 of *The Proceedings against the Crown Act, 2019*;
- (h) section 15 of *The Securities Act, 1988*;
- (i) sections 40.1, 97 and 283 of *The Traffic Safety Act*;
- (j) section 61 of *The Trust and Loan Corporations Act, 1997*;
- (k) Part VIII of *The Vital Statistics Act, 2009*;
- (l) **Repealed.** 2019, c28, s. 12.
- (m) any prescribed Act or prescribed provisions of an Act; or
- (n) any prescribed regulation or prescribed provisions of a regulation.

**Primacy clauses** are clauses in a statute that define how a statute is interpreted if its provisions are inconsistent with another statute in the same jurisdiction. **Primacy** means the state or position of being first in order, importance, or authority.<sup>52</sup>

If engaging subsections 23(1), (2) or (3), the government institution should be able to demonstrate that the record or information in question falls within the statutory provision that is not subject to FOIP. It should be noted that section 23 of FOIP only applies to portions of Parts II and III of FOIP which refer to access to records. All the other provisions of FOIP would fully apply such as the protection of privacy provisions in Part IV and the review and appeal provisions in Part VII.

### Subsection 23(1)

Subsection 23(1) of FOIP provides that where there is a conflict between FOIP and any other Act or regulation, FOIP will prevail. FOIP prevails even where another Act or regulation restricts or prohibits access.

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<sup>52</sup> *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 2344.

**Prevail** means a provision of one Act having priority over a conflicting provision in another Act.<sup>53</sup> The ordinary meaning of the word means to be superior in strength or influence.<sup>54</sup>

The Supreme Court of Canada in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14 (CanLII), [2007] 1 SCR 591 stated:

The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Cote in his treatise on statutory interpretation:

According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.

(P.-A. Cote, *The Interpretation of Legislation in Canada* (3<sup>rd</sup> ed. 2000), at p. 350)<sup>55</sup>

Section 23 of FOIP ensures that the fundamental rights enshrined in FOIP are given proper deference when interpreting legislative intent as to its application in conjunction with other statutes. This *primacy clause* is a strong expression of legislative intent and a tool for ensuring public policy objectives are met. In the event of a contest between two statutes, the legislature is presumed to not intend conflict between the statutes. Therefore, if an interpretation allows concurrent application, that interpretation should be adopted.<sup>56</sup>

The following three-part test can be used to determine whether two laws can coexist or are in conflict:

### **1. Does compliance with one law involve the breach of the other?**

The first test is one of pure conflict.

### **2. Does one law supplement the other?**

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<sup>53</sup> SK OIPC Review Report 149-2017 at [50].

<sup>54</sup> *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 2340.

<sup>55</sup> *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14 (CanLII), [2007] 1 SCR 591 at [47]. See also SK OIPC Review Report 149-2017 at [52].

<sup>56</sup> SK OIPC Review Report F-2009-001 at [39].

The second test is whether one law is supplemental to the other by adding something. If the law is supplemental, then it will be valid concurrently with the other law.

### 3. Does one law duplicate the other?

The third test involves whether one law duplicates another such that there is not an actual conflict or contradiction. Mere duplication without actual conflict or contradiction is normally not sufficient to invalidate a law. It would simply mean that the government institution would be held to the higher standard of the competing statutes.<sup>57</sup>

#### Subsection 23(2)

Subsection 23(2) builds on subsection 23(1) of FOIP and provides that FOIP will still prevail even if the other Acts or regulations state that its provisions prevail over other Acts or laws.

**Prevail** means a provision of one Act having priority over a conflicting provision in another Act.<sup>58</sup> The ordinary meaning of the word means to be superior in strength or influence.<sup>59</sup>

#### Subsection 23(3)

Subsection 23(3) of FOIP provides a list of provisions where FOIP does not prevail. Additional provisions that FOIP does not prevail over are also prescribed in section 12 of the FOIP *Regulations*.

#### **Confidentiality provisions in other enactments (FOIP Regulations)**

**12** For the purposes of clauses 23(3)(l) and (m) of the Act, the following provisions are prescribed as provisions to which subsection 23(1) of the Act does not apply:

(a) section 178 of *The Election Act, 1996*;

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<sup>57</sup> Test first used in SK OIPC Review Report F-2009-001 at [40]. See also SK OIPC *Submission to the Workers Compensation Act Committee of Review*, April 29, 2011 at pp.10, 14 and 15; SK OIPC Review Reports F-2014-001 at [86] to [117], 276-2017 at [16] to [20] and 088-2014 at [8] to [25].

<sup>58</sup> SK OIPC Review Report 149-2017 at [50].

<sup>59</sup> *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 2340.

- (b) **Repealed.** 15 Dec 2017 SR 124/2017 s6.
- (c) section 3-51 of *The Saskatchewan Employment Act*;
- (d) Part III of *The Revenue and Financial Services Act*;
- (e) all of *The Income Tax Act* and *The Income Tax Act, 2000*;
- (f) section 32 of *The Safer Communities and Neighbourhoods Act*;
- (g) **Repealed.** 15 Dec 2017 SR 124/2017 s6.
- (h) section 415 of *The Credit Union Act, 1998*;
- (i) section 85 of *The Real Estate Act*;
- (j) section 10.40 of *The Insurance Act*;
- (k) **Repealed.** 15 Dec 2017 SR 124/2017 s6.
- (l) section 61 of *The Mortgage Brokerages and Mortgage Administrators Act*;
- (m) section 61 of *The Payday Loans Act*;
- (n) sections 32, 34, 36 and 62 of *The Coroners Act, 1999*;
- (o) section 12.1 of *The Coroners Regulations, 2000*;
- (p) section 22 of *The Witness Protection Act*;
- (q) subsections 39(5) and (6) and subsection 56(9.2) of *The Police Act, 1990*;
- (r) Part IV of *The Police Act, 1990* as it relates to a complaint concerning the actions of a member;
- (s) section 17-4 of *The Credit Union Central of Saskatchewan Act, 2016*;
- (t) section 12.1 of *The Saskatchewan Small Business Emergency Payment Regulations*;
- (u) section 14 of *The Saskatchewan Small Business Emergency Payment Regulations, 2020 (No. 2)*;
- (v) section 11.1 of *The Saskatchewan Temporary Wage Supplement Program Regulations*;
- (w) section 13 of *The Saskatchewan Temporary Wage Supplement (Seniors Care Workers) Program Regulations*;
- (x) section 13.1 of *The Saskatchewan Tourism Sector Support Program Regulations*;
- (y) section 14 of *The Saskatchewan Tourism Sector Support Program Regulations (No. 2)*;
- (z) section 10.1 of *The Self-isolation Support Program Regulations*;
- (aa) section 14 of *The Strong Recovery Adaptation Rebate Regulations*.



**Prevail** means a provision of one Act having priority over a conflicting provision in another Act.<sup>60</sup> The ordinary meaning of the word means to be superior in strength or influence.<sup>61</sup>

For subsection 23(3) of FOIP, the Legislative Assembly recognized that FOIP and some other provisions would be in conflict and provided the mechanism for resolving that by expressly stating that the provisions listed at subsection 23(3) of FOIP and section 12 of the FOIP *Regulations* would prevail over FOIP.<sup>62</sup>

If engaging subsection 23(3), the government institution should be able to demonstrate that the record or information in question falls within the statutory provision that is not subject to FOIP. It should be noted that section 23 of FOIP only applies to portions of Parts II and III of FOIP which refer to access to records. All the other provisions of FOIP would fully apply such as the protection of privacy provisions in Part IV and the review and appeal provisions in Part VII.

## IPC Findings

In [Review Report F-2014-001](#), the Commissioner considered subsection 23(3)(h) of FOIP. The Commissioner found that section 15 of [The Securities Act, 1988](#) prevailed and as such, that Parts II and III of FOIP did not apply to the records at issue.

In [Review Report 088-2014](#), the Commissioner considered subsection 23(3)(m) of FOIP and subsection 12(l) of the FOIP *Regulations*. The Commissioner determined that subsection 61 of [The Mortgage Brokerages and Mortgage Administrators Act](#) prevailed and as such, that Parts II and III of FOIP did not apply to the records at issue.

In [Review Report 149-2017](#), the Commissioner considered subsection 23(3)(c) of FOIP. The Commissioner determined that the Commissioner has authority to conduct a review of records that may be subject to section 74 of [The Child and Family Services Act](#).

In [Review Report 254-2017](#), the Commissioner considered subsection 23(3)(c) of FOIP. The Commissioner determined that the Ministry of Social Services (Social Services) failed to demonstrate that section 74 of [The Child and Family Services Act](#) applied to the records. The Commissioner also found that Social Services did not cooperate with the IPC during the review. The Commissioner made several recommendations including that the Ministry of

<sup>60</sup> SK OIPC Review Report 149-2017 at [50].

<sup>61</sup> *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 2340.

<sup>62</sup> Adapted from Service Alberta, *FOIP Bulletin Number 11 – Paramountcy*, March 2009.

Social Services work with the IPC and the Ministry of Justice to amend FOIP by repealing subsection 23(3)(c) of FOIP.

## Section 4: Existing Rights Preserved

### Existing rights preserved

#### 4 This Act:

- (a) complements and does not replace exiting procedures for access to government information or records;
- (b) does not in any way limit access to the type of government information or records that is normally available to the public;
- (c) does not limit the information otherwise available by law to a party to litigation;
- (d) does not affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents;
- (e) does not prohibit the transfer, storage or destruction of any record in accordance with any other Act or any regulation;
- (f) does not prevent access to a registry operated by a government institution where access to the registry is normally allowed to the public.

Section 4 of FOIP was considered by the Saskatchewan Court of King's Bench in [City Collection Co. v. Saskatchewan Government Insurance, 1993 CanLII 8956 \(SK KB\)](#) and [General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance, 1993 CanLII 8794 \(SK KB\)](#). In the latter decision, Malone, J. determined that the clear intent of section 4 of FOIP was to ensure that information available to the public prior to FOIP would remain available after its coming into effect. In his judgement, he stated as follows:

[8] In my opinion, s. 4 of the Act is determinative of the issue. The clear intent of this section is to provide that information available to the public prior to the passage of the Act shall remain available after its coming into effect. To interpret this section any other way would result in a restriction on the right of the public to obtain information which it previously had access to. This surely was not the intention of the Legislature. The provisions of the Act following s. 4 must be interpreted as applying to only information which is requested by the public which was not available to it prior to the passage of the Act. It is these provisions that attempt to balance the right of privacy of individuals with the desire of the public to obtain more information concerning the operation of

Government, its Crown corporations and agencies. This it does by setting out the procedures to be followed and the guidelines to be applied. In my opinion, however, s. 4 makes it clear the procedures and guidelines are not to be applied retrospectively so as to restrict access to information the public was previously entitled to.

In the *City Collection* decision, the Court observed that:

[8] Prior to the passage of the Act, SGI [Saskatchewan Government Insurance] routinely provided the appellants with vehicle registration information, and in particular, the names and addresses of the registered owners of vehicles which were parked in facilities operated by Imperial. This was in keeping with the then existing policy and procedure of SGI to make this information available to members of the public who had a genuine interest in this information.

Section 4 of FOIP was also considered by the Saskatchewan Court of Appeal in [\*General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance\*, 1993 CanLII 9128 \(SK CA\)](#). In this decision, the Court noted that:

[4] The evidence clearly established that this practice prevailed before proclamation of the Act. Before enactment of *The Vehicle Administration Act*, S.S. 1986, c. V-2.1, the Highway Traffic Board performed a similar function under *The Vehicles Act*, R.S.S. 1978, c. V-3 (REPEALED). When records of registration were under the control of the Highway Traffic Board, members of the public enjoyed access to its records for the type of information sought in this case.

...

[10] ...The Act does not limit or reduce the rights of access existing at the time of proclamation.

It is important whether access to information or records antedated the proclamation of FOIP. The approach the Court of Appeal has taken in the past is to view this provision as a kind of grandfathering provision.

## Subsection 4(a)

### Existing rights preserved

#### 4 This Act:

- (a) complements and does not replace existing procedures for access to government information or records;

FOIP is in addition to and does not replace existing procedures for obtaining access to information or records held by government institutions.

However, the existence of other processes where an applicant may be able to obtain records does not replace an applicant's right to make an access to information request.

In *Evenson v Saskatchewan (Ministry of Justice)*, 2013 SKQB 296 (CanLII), Justice Gabrielson confirmed that subsection 4(a) of FOIP was not intended to limit or reduce the rights of access existing at the time of FOIP's proclamation but only to complement existing rights:

[21] Counsel for the Ministry submits that the *Stinchcombe* procedure takes precedence over the *Act* and cannot be replaced by the *Act*. However, such a position ignores the basic premise referred to by the Court in the *General Motors Acceptance* case, *supra* – that s. 4 was intended not to limit or reduce the rights of access existing at the time of proclamation but only to complement such existing rights. In this case, the Ministry is suggesting that rather than contemplating existing procedures, the *Act* is limited by the existing criminal law procedures. In my opinion, that runs contrary to the Court of Appeal's statement that there should be full disclosure unless information is exempted under clearly delineated statutory language. Accordingly, unless a specific exemption from disclosure is found in the *Act*, I would apply the general philosophy of full disclosure.

### IPC Findings

In *Review Report 153-2015*, the University of Saskatchewan requested the Commissioner exercise the authority to dismiss a request for review, "and allow the normal course of exchanging documents to take place in due course, and pursuant to the many legal regimes [the applicant] has already engaged." The Commissioner found that the existence of other processes where the applicant may be able to obtain the record, he was seeking did not

replace the applicant's right to request access to records in the possession or control of the University of Saskatchewan. The Commissioner did not dismiss the request for review.

In [Review Report 150-2014](#), the Commissioner considered the equivalent subsection 4(a) in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner noted that the City of Saskatoon was correct that there were processes through the court to gain access to records, however the process of accessing records in a court proceeding was independent of LA FOIP. Further, the Commissioner determined that subsection 4(a) of LA FOIP provided that LA FOIP complemented and did not replace existing procedures for obtaining access to information.

In [Investigation Report LA-2012-001](#), the Commissioner considered a privacy complaint involving the publishing of employee salaries by the City of Moose Jaw in its annual public accounts. The City invoked the equivalent subsections 4(a), (b) and (e) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) for authority to publish the employee's salaries. The Commissioner determined that to successfully invoke subsections 4(a), (b), or (e) of LA FOIP, the City would have needed to show that the salary information of the employees had routinely been publicly available prior to the enactment of LA FOIP in 1993. As the City had not demonstrated this, the Commissioner found that subsections 4(a), (b) and (e) of LA FOIP would not apply.

In [Investigation Report LA-2005-003](#), the Commissioner considered a privacy complaint involving an individual who had applied to the City of Saskatoon for a building permit. The individual learned that personal information from the permit application form appeared to have been sold to contractors and suppliers. In support of this practice, the City invoked the equivalent subsections 4(a) and (d) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The City asserted that the personal information had been available for purchase via a Bylaw prior to LA FOIP coming into force on July 1, 1993. The Commissioner found that based on the material provided by the City that personal information disclosed by means of an external weekly building permit report was part of a practice of disclosure that existed prior to the proclamation of LA FOIP. As such, the Commissioner found that the City properly invoked subsections 4(a) and (b) of LA FOIP.

## Subsection 4(b)

### Existing rights preserved

#### 4 This Act:

...

(b) does not in any way limit access to the type of government information or records that is normally available to the public;

FOIP does not limit access to information or records that the public would normally have access to.

### IPC Findings

In [Review Report 122-2014](#), the Commissioner considered the Village of Lebreton's application of subsection 18(1)(c) of [The Local Authority Freedom of Information and Protection of Privacy Act](#) (LA FOIP) to deny access to records. The Commissioner determined that if the Village could rely on subsection 18(1)(c) of LA FOIP it would be preventing access to information that would normally be available to the public pursuant to subsection 117(1)(a) of [The Municipalities Act](#). Further, this would be contrary to subsection 4(b) of LA FOIP.

## Subsection 4(c)

### Existing rights preserved

#### 4 This Act:

...

(c) does not limit the information otherwise available by law to a party to litigation;

FOIP does not limit access to information otherwise available by law to parties to litigation.

**Litigation** is the process of carrying on a lawsuit.<sup>63</sup>

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<sup>63</sup> Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 1075.

It is relatively common for persons involved in a criminal or civil legal action to make an access to information request under FOIP for records relating to the case. Such requests should be processed like any other request.<sup>64</sup>

It is also relatively common to have both discovery processes and access to information processes going on at the same time.<sup>65</sup> What can be accessed in a court proceeding is often less constrained than what is accessible under FOIP legislation.<sup>66</sup>

Government institutions sometimes argue that applicants cannot get information or records because of subsection 4(c) of FOIP. However, this is incorrect. The disclosure process works parallel to FOIP. FOIP does not limit what would normally be made available through disclosure.

In *Evenson v Saskatchewan (Ministry of Justice)*, 2013 SKQB 296 (CanLII), Justice Gabrielson confirmed that disclosure should not be narrowed or broadened based upon procedures found in other processes:

[23] In accordance with the above comments, in my opinion, and even though in this case there has not been a judge's ruling in respect to the disclosure provided in the criminal proceedings, that does not mean that in other proceedings there could not be a conflict between disclosure provided pursuant to the principles set out in *R. v. Stinchcombe* and the disclosure sought under the Act. They are two separate processes and for two separate purposes. Accordingly, in my opinion, a court should consider only the Act and the jurisprudence guiding its interpretation and not narrow or broaden the scope of the disclosure required by the Act based upon the procedure found in other processes such as the *Stinchcombe* disclosure process.

In Alberta Information and Privacy Commissioner [Order H2004-005](#), the Commissioner stated the following about the equivalent provision in Alberta's [Health Information Act](#):

Section 3(a) of the Act expressly recognizes that information is otherwise available by law, and other procedures that enable parties to legal proceedings to obtain information outside the Act continue to exist. Although legislation is usually presumed to override the common law, this presumption is rebutted where the legislature clearly intends to preserve the common law. Read in its ordinary and grammatical sense, this section means that in the sphere of the "information otherwise available by law to a party to legal proceedings," the Act is not intended to change or alter the information available to

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<sup>64</sup> Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 1 at p. 5.

<sup>65</sup> Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 1 at p. 6.

<sup>66</sup> Office of the Nunavut Information and Privacy Commissioner Review Report 16-108 at p. 6.

parties to legal proceedings. In my view, the Act is intended to co-exist along with other laws such as the common law that previously governed the information available by law to a party to legal proceedings.

## IPC Findings

In [Review Report 145-2015](#), the Commissioner considered SaskPower's application of subsection 15(1)(d) of FOIP to deny access to an investigation report. SaskPower argued that "disclosure of the Investigation Report is likely to occur once proceedings have been commenced..." The Commissioner determined that discovery and disclosure provisions of the [Rules of the Court of Queen's Bench of Saskatchewan](#) operate independent of any process under FOIP. Further, that subsection 4(c) of FOIP established that FOIP did not limit access to information otherwise available by law to parties to litigation.

## Subsection 4(d)

### Existing rights preserved

**4** This Act:

...

(d) does not affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents;

FOIP does not override the power of any court or tribunal to compel a witness to testify or to compel the production of documents.

**Tribunal** is a body or person that exercises a judicial or quasi-judicial function outside the regular court system.<sup>67</sup>

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<sup>67</sup> British Columbia Government Services, *FOIPPA Policy Definitions* at <https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions>. Accessed April 23, 2020.



## Subsection 4(e)

### Existing rights preserved

#### 4 This Act:

...

(e) does not prohibit the transfer, storage or destruction of any record in accordance with any other Act or any regulation;

FOIP does not prohibit the transfer, storage or destruction of any record in accordance with any other Act or any regulation.

This provision permits the orderly disposition of records by government institutions in accordance with records retention and disposition schedules.<sup>68</sup>

[The Archives and Public Records Management Act](#) (APRMA) sets out obligations for government institutions to manage records in their possession or control. In order to comply with the APRMA, government institutions must establish a records management program. For more information, see the [Provincial Archives of Saskatchewan](#).

## Subsection 4(f)

### Existing rights preserved

#### 4 This Act:

...

(f) does not prevent access to a registry operated by a government institution where access to the registry is normally allowed to the public.

FOIP does not prevent access to a registry operated by a government institution where access to the registry is normally allowed to the public.

**Registry** means a registry established or continued pursuant to a public registry statute and includes information provided to, and the data created or maintained in the operation of, a

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<sup>68</sup> Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 1 at p. 6.

public registry statute.<sup>69</sup> It can also be an electronic registry. Examples include the Information Services Corporation land titles registry and the corporate registry.

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<sup>69</sup> Subsection 2(1)(i) of *The Operation of Public Registry Statutes Act*, SS 2013, c O-4.2. Subsection 2(1)(h) of this Act also defines “public registry statute” as an Act designated by subsection (2) with respect to a service agreement that has been entered into and includes regulations or an Act for which a contractor is authorized to exercise powers or fulfill duties in accordance with subsection 10(1) and includes regulations.



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