



Office of the  
Saskatchewan Information  
and Privacy Commissioner

# GUIDE TO FOIP

*The Freedom of Information and Protection of Privacy Act*

## Chapter 2

### Administration of FOIP

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## Overview

This Chapter explains the administration of *The Freedom of Information and Protection of Privacy Act* (FOIP). This includes the roles and responsibilities of various bodies including the Ministry of Justice, government institutions and the Information and Privacy Commissioner.

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 *Section 61: Burden of Proof* later in this Chapter. **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.*

# Minister of Justice and Attorney General – Roles & Responsibilities

The Lieutenant Governor of Saskatchewan designates the Minister responsible for the administration of *The Freedom of Information and Protection of Privacy Act* (FOIP) by Order in Council. This responsibility has been given to the Minister of Justice and Attorney General. While the nature of FOIP requires that decisions with respect to access to records and the management of personal information be made within each government institution, the Minister of Justice and Attorney General retains overall responsibility for its administration.<sup>1</sup>

The Minister is required by FOIP to prepare and submit an Annual Report to the Speaker of the Assembly on the administration of FOIP and *The Freedom of Information and Protection of Privacy Regulations*.

## Minister's Annual Report

### Minister's report

**63(1)** The minister shall prepare and submit an annual report to the Speaker of the Assembly on the administration of this Act and the regulations within each government institution during the year, and the Speaker shall cause the report to be laid before the Assembly in accordance with section 13 of *The Executive Government Administration Act*.

(2) The annual report of the minister is to provide details of:

- (a) the number of applications received by each government institution during the year;
- (b) the number of times during the year that the head of each government institution refused an application for access to a record, and the specific provisions of this Act or the regulations on which the refusals were based; and
- (c) the fees charged and collected by each government institution for access to records during the year.

(3) The minister may require government institutions to produce the information or records that, in the opinion of the minister, are necessary to enable the minister to fulfil the requirements of this section.

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<sup>1</sup> Ministry of Justice, *Annual Report 2001-2002, The Freedom of Information and Protection of Privacy Act* at p. 4.

The Minister of Justice and Attorney General transmits to the Speaker of the Assembly an Annual Report on the administration of FOIP and *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations).

The Annual Report breaks down the administration of FOIP and the FOIP *Regulations* for each government institution. The requirement for an Annual Report and its contents is outlined at section 63 of FOIP.

Each year, the Ministry of Justice and Attorney General collects and reports statistical information regarding the exercise of and compliance with access rights under FOIP. The reports provide statistical information both by individual government institutions and by the total provincial government administration.<sup>2</sup> The reports are divided into two categories: general and personal.

Applications for general information refer to records in the possession or under the control of a government institution other than those described as personal information in section 24 of FOIP.

Applications for personal information refer to records in the possession or under the control of a government institution described in section 24 of FOIP.

The Minister's Annual Report breaks down:

- The number of applications received government-wide, their status, the processing time in completing the applications, the fees estimated and collected.
- Exemptions applied to deny access.
- The number of general information requests received by each government institution, action taken, and fees estimated and collected.
- The number of personal information requests received by each government institution, action taken, and fees estimated and collected.<sup>3</sup>

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<sup>2</sup> Ministry of Justice, *Annual Report 2016-2017, The Freedom of Information and Protection of Privacy Act*, at p. 6.

<sup>3</sup> Ministry of Justice, *Annual Report 2016-2017, The Freedom of Information and Protection of Privacy Act*, at p. 6.

# Ministry of Justice and Attorney General

On an ongoing basis, the Ministry of Justice and Attorney General provides direction and support to government institutions as it relates to FOIP. The Ministry of Justice and Attorney General:

- Provides legal advice to government institutions.
- Plays a leadership role on access and privacy issues, including the collection of statistical information related to access to information requests and the preparation of the annual report.
- Prepares and maintains access and privacy tools, such as guidelines, checklists and administrative procedures.
- Provides and supports training and awareness regarding access and privacy.
- Through its website, provides information to the public, government institutions and local authorities to help with understanding both the access to information and the privacy components of the legislation.<sup>4</sup>

The Ministry of Justice and Attorney General collects statistical information regarding the exercise of and compliance with access rights under FOIP. The reports provide statistical information both by individual government institutions and by the total provincial government administration. This statistical information is reported in the Minister's Annual Report.<sup>5</sup>

## Government Institutions – Roles & Responsibilities

### 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

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<sup>4</sup> Ministry of Justice and Attorney General, *The Freedom of Information and Protection of Privacy Act, Annual Report 2021-22*, at p. 5.

<sup>5</sup> Ministry of Justice, *Annual Report 2016-2017, The Freedom of Information and Protection of Privacy Act*, at p. 6.

(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;

FOIP applies to all “government institutions” as defined by subsection 2(1)(d) of FOIP. This includes ministries, boards, commissions, Crown corporations and other bodies as prescribed in the Appendix, Part I of *The Freedom of Information and Protection of Privacy Regulations*. See the *Guide to FOIP*, Chapter 1, “Purposes and Scope of FOIP” for more on the definition of a government institution.

A government institution that is subject to FOIP has statutory duties with regard to providing access to information and protecting personal information in its possession or control.

The head of a particular government institution may claim that the government institution is not covered by FOIP<sup>6</sup> and consequently refuse a request for information on that basis. Such a refusal will likely be subject to review, at the request of the applicant, in the same way as a refusal based on a disclosure exemption. The applicability of FOIP to particular agencies may be resolved in this manner or through ultimate resort by the courts.<sup>7</sup>

FOIP states explicitly that the courts are not government institutions for the purposes of FOIP.<sup>8</sup>

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<sup>6</sup> Government institutions should consider the definition of a “government institution” at subsection 2(1)(d) of FOIP and the Appendix, Part I of the FOIP *Regulations* for additional prescribed “government institutions”.

<sup>7</sup> Adapted from McNairn and Woodbury, *Government Information: Access and Privacy*, (2009), Carswell: Toronto at p. 2-7.

<sup>8</sup> *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, at subsection 2(2)(c).



## IPC Findings

In [Review Report 056-2014](#), the Commissioner considered whether the Office of the Chief Coroner (OCC) was a government institution pursuant to subsection 2(d) of FOIP. The Commissioner found that the OCC was not a government institution and recommended that the Ministry of Justice take steps to amend section 3 of the Appendix, Part I of *The Freedom of Information and Protection of Privacy Regulations* to include the OCC as a prescribed government institution. An amendment was made in 2016 adding the Office of the Chief Coroner to the list of government institutions in *The Freedom of Information and Protection of Privacy Regulations*.<sup>9</sup>

## Head of a Government Institution

### Interpretation

2(1) In this Act:

...

(e) “**head**” means:

- (i) in the case of an agency mentioned in subclause d(i), the member of the Executive Council responsible for the administration of the agency; and
- (ii) in the case of a board, commission, Crown corporation or body mentioned in subsection (d)(ii), the prescribed person;

The head of each government institution is responsible for all decisions made under FOIP that relate to the government institution. It would be difficult and perhaps ineffective to have an entire government institution accountable. Therefore, accountability rests with the “head” of the government institution.

Subsection 2(1)(e) of FOIP defines the “head” of a government institution. In most circumstances, the head is generally the minister, chief executive officer or chair of a government institution.

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<sup>9</sup> Publications Saskatchewan, *OC 134/2016 – The Freedom of Information and Protection of Privacy (Designation) Amendment Regulations, 2016 (Minister of Justice and Attorney General)*. See <https://publications.saskatchewan.ca/#/products/78543>.

**Minister** is a member of the Executive Council appointed to head a ministry of the Government of Saskatchewan.<sup>10</sup>

Section 4 of *The Freedom of Information and Protection of Privacy Regulations* provides further definitions as follows:

#### **Heads prescribed**

4(1) For the purpose of subclause 2(1)(e)(ii) of the Act:

- (a) the chief executive officers of Crown corporations that are prescribed as government institutions pursuant to clause 3(a) are prescribed as the heads of their respective Crown corporations;
- (b) the chief executive officers of Crown corporations that are the parent corporations of subsidiaries that are prescribed as government institutions pursuant to clause 3(b) are prescribed as the heads of the respective subsidiaries;
  - (b.1) the Chief Coroner for Saskatchewan is prescribed as the head of the Office of the Chief Coroner;
- (c) the chairpersons of all other bodies that are prescribed as government institutions pursuant to clause 3(a) or the chairpersons of the boards of those bodies, as the case may be, are prescribed as the heads of their respective government institutions; and
- (d) in the case of a corporation sole prescribed as a government institution pursuant to clause 3(a), the individual that constitutes the corporation sole is prescribed as the head of that government institution.

The head of a government institution can delegate some or all of the responsibilities to another individual. In most cases, it is the deputy minister or another senior official who will be delegated this authority. Such delegation should be done in compliance with section 60 of FOIP. For more on delegation, see *Section 60: Delegation*, later in this Chapter.

## The FOIP Coordinator or Privacy Officer

Probably the most important person in managing access and privacy issues in any government institution is the designated FOIP Coordinator or Privacy Officer. The FOIP Coordinator may have different titles such as an Access Coordinator. It is also possible the

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<sup>10</sup> Adapted from 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.

title does not appear to relate to access and privacy, yet the individual also carries these duties.

The roles of the FOIP Coordinator and Privacy Officer might be combined and handled by one individual in the organization or the roles might be separated and handled by two. The duties and roles of each in an organization are very different but also very interrelated.

FOIP places responsibility on the “head” or Minister of a government institution. That head, however, may delegate some or all of those powers to someone else in the organization, such as the FOIP Coordinator and/or Privacy Officer, pursuant to section 60 of FOIP.

The FOIP Coordinator or Privacy Officer is responsible for the overall management of access to information and protection of personal information within the organization.<sup>11</sup>

So, what exactly does a FOIP Coordinator or Privacy Officer do? FOIP Coordinators and Privacy Officers assist departments to meet their statutory responsibilities, promoting open government and fostering “an organizational culture” that advances four fundamental principles:

1. Information (general records should be available to the public).
2. Individuals should have access to their own personal information.
3. Exemptions to access should be limited and specific.
4. Institutions should protect the privacy of individuals with respect to their personal information.<sup>12</sup>

A FOIP Coordinator or Privacy Officer should:

- Respond to access requests and privacy complaints.
- Raise awareness of access and privacy issues on a regular and proactive basis within their organization.
- Be aware of operations of the organization, the types of records and record-management systems in the department.

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<sup>11</sup> Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, p. 24.

<sup>12</sup> Office of the Saskatchewan Information and Privacy Commissioner (SK OIPC), *FOIP FOLIO*, January 2004 at p. 3.

- Quickly identify what units within the department are likely to have the records responsive to an access request and which employees should be consulted.
- Be senior enough to be able to provide access and privacy advice to the Deputy Minister or head of the organization on a regular basis.
- Monitor decisions and recommendations of the IPC and ensure those decisions are integrated into the orientation and in-service training of staff in the department.
- Be involved in the design of new programs that may impact access or privacy rights.
- Provide timely advice to the department to ensure that FOIP will be complied with.
- Improve general awareness about the legislation through training sessions and materials within the department. In large organizations, newsletters, notices, FAQs or a column in an intradepartmental bulletin may be helpful. The FOIP Coordinator or Privacy Officer may undertake internal audits to identify areas where more work is required to ensure full compliance.<sup>13</sup>

FOIP Coordinators and Privacy Officers may meet from time to time to discuss common problems or share knowledge and experience.

## Section 60: Delegation

### Delegation

**60(1)** A head may delegate to one or more officers or employees of the government institution a power granted to the head or a duty vested in the head.

(2) A delegation pursuant to subsection (1):

(a) is to be in writing; and

(b) may contain any limitations, restrictions, conditions or requirements that the head considers necessary.

**Delegation** means entrusting someone else to act in one's place.<sup>14</sup>

Only the head of a government institution has the power to delegate some or all of the head's powers under FOIP to one or more officers or employees of the government institution. The delegation should:

<sup>13</sup> SK OIPC, *FOIP FOLIO*, January 2004 at pp. 3-4.

<sup>14</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.

- Be in writing.
- Contain any limitations, restrictions, conditions or requirements the head considers necessary.<sup>15</sup>

The **head**, for purposes of FOIP, includes the member of the Executive Council responsible for the administration of the agency (i.e., Minister, President/CEO).<sup>16</sup>

Here are some important things regarding a delegation:

- The delegation should identify the position, not the individual, to which the powers are delegated. When delegation is to the position, a new delegation is not required when a new appointee assumes the position.
- The delegation can cover a wide variety of duties, powers and functions;
- It remains in effect until replaced by an updated version.
- It is important to review the delegation periodically for any changes that may be needed, especially if the government institution is restructured or part of the government institution is transferred to another government institution.
- The delegation should specifically refer to handling access to information requests including the processing of requests and the power to make decisions whether or not to disclose all or part of a record.
- A delegation relating to the handling of privacy can be more general and center on the delegated responsibility for collection, handling and protection of personal information.
- Delegated authority empowers certain officials and employees to make decisions or act.
- In general, delegation should be considered for all provisions of FOIP that state that the head may or must do something.<sup>17</sup>
- The person delegating the authority remains responsible and accountable for all actions and decisions made under that delegation.<sup>18</sup>

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<sup>15</sup> *The Freedom of Information and Protection of Privacy Act*, S.S. 19901-91, c. F-22.01 at s. 60(2)(a) and (b).

<sup>16</sup> *The Freedom of Information and Protection of Privacy Act*, S.S. 19901-91, c. F-22.01 at s. 2(1)(e).

<sup>17</sup> Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, p. 27.

<sup>18</sup> "Delegate" British Columbia Government Services, *FOIPPA Policy Definitions* at <https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foipppa-manual/policy-definitions>. Accessed April 23, 2020.

The FOIP Coordinator or Privacy Officer normally prepares the delegation and submits it to the head for approval.<sup>19</sup>

It is important that all delegated officers or employees know and understand their delegated responsibilities. It is also important that others in the organization understand that only those with delegated responsibilities under FOIP should be carrying out those duties and functions.<sup>20</sup>

If the individual with delegated authority is not actually making the decisions that they were delegated to make, the delegation is not being properly utilized.<sup>21</sup> In other words, in order to be a true delegation, the individual needs to actually be given the authority to make the decisions as per the delegation.

As noted earlier, the head of a government institution may delegate some or all of the head's powers under FOIP. Even with a delegation, the head may retain certain powers and make certain decisions.

There may be instances where there is no written delegation, but another Minister or Deputy Minister could act on behalf of the Minister (the head). *The Legislation Act* provides:

**2-34(1)** If an enactment directs or empowers a minister of the Crown to do an act or thing, or otherwise applies to the minister by the minister's name of office, a reference in that enactment to the minister includes:

- (a) another minister acting for the minister;
- (b) if the office of the minister is vacant, a minister designated to act in the office;
- (c) the successor in the office of the minister; and
- (d) the minister's deputy minister or a person acting as deputy minister.<sup>22</sup>

For more assistance on the delegation of powers, see *Guidance for Delegation Powers*, issued by the former Access and Privacy Branch with the Ministry of Justice and Attorney General.

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<sup>19</sup> Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, p. 27.

<sup>20</sup> Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, p. 28.

<sup>21</sup> Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, p. 29.

<sup>22</sup> *The Legislation Act*, SS 2019, c L-10.2 at s. 2-34.

## Notices Required by FOIP

FOIP contains requirements that government institutions give various types of notices to persons. For example, section 7 of FOIP provides that the head of the government institution shall give written notice to an applicant of its decision regarding access within 30 days after an application is made. The following are notices required to be provided by government institutions. This list does not include other obligations to inform:

- **Section 7** notice of the head's decision regarding access is to be provided to an applicant within 30 days after an application is received by the government institution.
- **Subsection 7.1(2)** notice is to be provided to applicants when applications are deemed abandoned.
- **Subsection 11(1)(b)** notice is to be provided to applicants when a record responsive to an access request is transferred to another government institution for processing.
- **Subsections 12(2) and (3)** requires a notice to be provided to applicants when the head extends the 30-day response time. Notice of the extension is to be given within the first 30 days after an application is made. Within the period of extension, the head shall give notice in accordance with section 7.
- **Subsection 26(2)** requires the government institution to inform an individual of the purpose for the direct collection of the individual's personal information unless the *FOIP Regulations* exempts the information from this notice.
- **Section 34** notice is to be given to third parties where a head intends to give access to third party information (see section 19 of FOIP) or personal information that may be disclosed pursuant to subsection 29(2)(o) of FOIP. This notice requirement can be waived by the third party (see section 35 of FOIP).
- **Section 37** notice of the head's decision regarding whether access to the third party information will be given is to be provided to the third party and applicant within 30 days after the third party was provided notice pursuant to section 34 of FOIP.
- **Section 52** notice is to be given to third parties that a review by the Information and Privacy Commissioner (IPC) is occurring. The head shall provide this notice to any third party that was or would have been given notice under section 34 of FOIP. This notice shall be given immediately upon learning of the IPC's review. The head must also immediately provide notice of a review to an applicant where the review is requested by the third party.
- **Section 56** notice of the head's decision regarding the Commissioner's report must be given to the Commissioner, applicant or individual and third party within 30 days of receiving the Commissioner's report.

- **Subsections 57(2) and (3)** requires notice to be given to any third party that was or would have been given notice under section 34 advising them that an appeal to the Court of King's Bench has been made by an applicant. If it is the third party that is appealing to the Court of King's Bench, then the head must give notice to the applicant.

Subsection 66(1)(c) of FOIP provides that no proceeding lies or shall be instituted against the Government of Saskatchewan, a government institution, a head or other officer or employee of a government institution if it fails to give any notice required under FOIP provided reasonable care was taken to give the notice.

Subsection 66(2) of FOIP provides that reasonable care is deemed to have been taken if the notice was sent to the applicant's address that was provided on the access to information form.

## IPC Findings

In [Review Report 110-2014](#), the Commissioner found that the Ministry of Health (Health) did not provide its section 7 notice within the legislated timeline. The Commissioner noted that 114 days had elapsed between when Health received the access request and when it provided its section 7 notice to the applicant. The Commissioner recommended that Health remain committed to the changes it is making to its processes by regularly evaluating whether it is achieving timelier responses and searches that are more comprehensive. Further, it should continue to make necessary changes until both are achieved.

In [Review Report 209-2015 to 213-2015](#) (five files in one report), the Commissioner found that the Ministry of Health (Health) did not respond to five access requests within the legislated timelines. The timelines were 81 to 107 days for the five access requests. The Commissioner noted that in 2015, the Commissioner issued 10 reports addressing 24 access requests to which Health had not responded within the legislated timelines. The Commissioner recommended Health change its processes so that responses to access requests go through a consistent streamlined process with no more than two or three approvers.

In [Review Report 311-2017, 312-2017, 313-2017, 316-2017, 340-2017, 341-2017 and 342-2017](#) (seven files in one report), the Commissioner found that the Global Transportation Hub's (GTH) responses to the applicant were inadequate in terms of what is required by subsections 12(3) and 7(2) of FOIP. The Commissioner also found that GTH did not provide notice to the third party pursuant to subsection 52(1) of FOIP. The Commissioner



recommended that GTH amend its procedures so that when it is extending the initial 30 days to respond pursuant to section 12, it provides the necessary notices to third parties pursuant to Part V of FOIP no later than the 30<sup>th</sup> day after it received an access request.

## Routine Disclosure & Active Dissemination

In addition to providing access to records and information in response to access requests, government institutions may provide access to information and records through two other processes:

1. Routine disclosure in response to inquiries and requests for information.
2. Active dissemination of information.<sup>23</sup>

Routine disclosure and active dissemination will likely satisfy many of the information needs of members of the public. There are numerous advantages of using routine disclosure and active dissemination processes. The public will be better served and better informed through the planned and targeted release of information in support of overall program objectives. As well, making information available outside the FOIP process can promote cost-effective management of public information resources.<sup>24</sup>

Personal information and personal health information must be handled differently. For more on handling personal information, see the *Guide to FOIP*, Chapter 6, "Protection of Privacy". For more on handling personal health information, see the IPC [Guide to HIPA](#).

For more on routine disclosure and active dissemination, see the *Guide to FOIP*, Chapter 3, "Access to Records" at *Section 65: Access to Manuals* and *Section 65.1: Records Available Without an Application*.

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<sup>23</sup> Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, p. 31.

<sup>24</sup> Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2 at p. 31.

## Proactive Reporting of Privacy Breaches

A **privacy breach** occurs when there is an unauthorized collection, use or disclosure of personal information.<sup>25</sup>

For more on what constitutes a privacy breach see Chapter 6, *Protection of Privacy*.

When a government institution believes that a privacy breach may have occurred, it has the option to proactively report the matter to the IPC rather than wait for the IPC to learn about the breach through other sources such as the media or affected individuals. The IPC has a form titled, *Proactively Reported Breach of Privacy Reporting Form: for Public Bodies*.

Government institutions should complete this form and submit it to [intake@oipc.sk.ca](mailto:intake@oipc.sk.ca).

Some of the benefits of proactively reporting privacy breaches include:

- May reduce the need for the IPC to issue a public report on the matter.
- Receive timely, expert advice from the IPC - the IPC can help guide the government institution on what to consider, what questions to ask and what parts of FOIP or *The Freedom of Information and Protection of Privacy Regulations* may be applicable.
- Should the media contact the government institution, the government institution can advise it has notified the IPC of the privacy breach and will seek assistance from the IPC with handling it.
- Should affected individuals contact the IPC, the IPC can assure the individuals that the IPC is aware of the breach which may prevent a formal complaint to the IPC.<sup>26</sup>

When a government institution proactively reports a privacy breach to the IPC, a file will be opened.

The government institution will be asked to complete and provide the IPC's *Privacy Breach Investigation Questionnaire* (Questionnaire) and any other relevant material within 30 days.

The Questionnaire takes government institutions through the four best practice steps of responding to a breach (see four steps below). The completed Questionnaire should provide the IPC with what is required to conduct an investigation. If further information is required, the IPC will advise.

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<sup>25</sup> SK OIPC Dictionary available at <https://oipc.sk.ca/resources/dictionary/>.

<sup>26</sup> SK OIPC Resource, *Privacy Breach Guidelines for Government Institutions and Local Authorities* at p. 11.

Upon receipt, the focus of the IPC is on whether the government institution appropriately handled the breach. This is based on whether the government institution adequately addressed each of the four best practice steps recommended by the IPC. The four best practice steps include:

1. Contain the breach
2. Notify affected individuals and/or appropriate organizations
3. Investigate the breach
4. Plan for prevention<sup>27</sup>

Once the IPC receives the relevant material, it will review the file and make a decision. The possible outcomes are as follows:

- If the Commissioner is satisfied with the government institution's overall response to the breach, the file will be closed informally without a public report. This process may include some informal recommendations from the IPC.
- If the breach is egregious or it involves a large number of affected individuals, the Commissioner may determine that a report will be issued.
- If an affected individual makes a formal complaint, the Commissioner may determine that a report will be issued.
- If the Commissioner is not satisfied with the government institution's response or handling of the breach, the IPC will issue a report.

Once the IPC has made a decision, the government institution will be advised if a report will be issued or not. The government institution will also be notified if an affected individual makes a formal complaint, which may also result in a public report.<sup>28</sup>

If you have questions or need further guidance, contact the SK OIPC at [intake@oipc.sk.ca](mailto:intake@oipc.sk.ca).

Government institutions should be aware of section 29.1 of FOIP. It requires government institutions to notify an individual of an unauthorized use or disclosure of the individual's

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<sup>27</sup> SK OIPC Resource, *Privacy Breach Guidelines for Government Institutions and Local Authorities* at pp. 6 to 9.

<sup>28</sup> For more, see SK OIPC resource, *Privacy Breach Guidelines for Government Institutions and Local Authorities*. Available at [Privacy Breach Guidelines \(oipc.sk.ca\)](https://www.oipc.sk.ca/Privacy-Breach-Guidelines).

personal information by the government institution if it is reasonable in the circumstances to believe that the incident creates a real risk of significant harm to the individual. For more on this, see the *Guide to FOIP*, Chapter 6, "Protection of Privacy" at *Section 29.1*.

## Information & Privacy Commissioner - Roles & Responsibilities

The Saskatchewan Information and Privacy Commissioner is an independent Officer of the Legislative Assembly.

Commencing November 1, 2003, the Commissioner became a full-time position and resources were provided to enable a stand-alone office. Prior to this, the Commissioner was a part-time position and there was no office.<sup>29</sup>

The enabling statute creates the powers of the Commissioner. In this case, that statute is FOIP. Under FOIP, the Commissioner has oversight over compliance with the Act by all government institutions in Saskatchewan that are subject to it.

FOIP provides for independent reviews of decisions made by government institutions under FOIP and the resolution of privacy complaints. There are four elements in the Commissioner's mandate:

1. The Commissioner responds to requests for review of decisions made by government institutions in response to access requests and makes recommendations to government institutions.
2. The Commissioner responds to complaints from individuals who believe their privacy has not been respected by government institutions and makes recommendations to those government institutions.
3. The Commissioner provides advice to government institutions on legislation, policies or practices that may impact access or privacy rights.

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<sup>29</sup> SK OIPC *Annual Report - 2003-2004* at p. 7.

4. The Commissioner undertakes public education with respect to information rights including both access to information and protection of privacy.<sup>30</sup>

The Commissioner prepares a report on the completion of a review or investigation that includes findings and recommendations for the government institution. The government institution has a responsibility to respond to the Commissioner's report under section 56 of FOIP indicating whether it will comply with the recommendations.

If not satisfied with the section 56 response from the government institution, an applicant can pursue an appeal to the Court of King's Bench for Saskatchewan. The Court of King's Bench will determine the matter *de novo*.

A hearing **de novo** means a review of a matter anew, as if the original hearing had not taken place.<sup>31</sup>

The Commissioner is neutral and does not represent a government institution or an applicant in a review or investigation.

In January 2018, the Commissioner wrote a blog about the Commissioner's office and when the roles of collaborator and neutral objective decision-maker come into play. For more see, [So, Do We Collaborate?](#)

## Section 33: Privacy Powers

### Privacy powers of commissioner

**33** The commissioner may:

- (a) offer comment on the implications for privacy protection of proposed legislative schemes or government programs;
- (b) after hearing the head, recommend that a government institution:
  - (i) cease or modify a specified practice of collecting, using or disclosing information that contravenes this Act; and
  - (ii) destroy collections of personal information that is collected in contravention of this Act;

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<sup>30</sup> SK OIPC *Annual Report - 2003-2004* at p. 7.

<sup>31</sup> Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 837.

(c) in appropriate circumstances, authorize the collection of personal information in a manner other than directly from the individual to whom it relates;

(d) from time to time, carry out investigations with respect to personal information in the possession or under the control of government institutions to ensure compliance with this Part.

Section 33 of FOIP enables the Commissioner to monitor compliance with FOIP and carry out investigations with respect to the handling of personal information in the possession or under the control of government institutions.

The Commissioner may:

- Offer comment on the implications for privacy protection of proposed legislative schemes or government programs [s. 33(a) of FOIP].
- Make recommendations to government institutions:
  - to cease or modify certain practices for collecting, using or disclosing personal information that contravenes FOIP.
  - to destroy collections of personal information that are collected in contravention of FOIP [s. 33(b) of FOIP].
- Where appropriate, authorize a government institution to collect personal information in a manner other than directly from the individual to whom it relates [s. 33(c) of FOIP].
- Carry out investigations with respect to personal information in the possession or under the control of government institutions to ensure compliance with FOIP [s. 33(d) of FOIP].

A **privacy breach** happens when there is an unauthorized collection, use or disclosure of personal information, regardless of whether the personal information ends up in a third party's possession.<sup>32</sup>

Generally, privacy breaches are investigated by the Commissioner in one of three ways:

- A complaint is received from an individual.
- A government institution proactively reports a privacy breach to the Commissioner.

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<sup>32</sup> SK OIPC *Annual Report - 2012-2013* at Appendix 3.

- A privacy matter comes to the attention of the Commissioner and the Commissioner initiates an investigation.

For more on privacy, see the *Guide to FOIP*, Chapter 6, "Protection of Privacy".

For more on the Commissioner's procedures during an investigation, see [The Rules of Procedure](#).

## Section 38: Appointment

### **Appointment of commissioner**

- 38(1)** The office of the Information and Privacy Commissioner is continued.
- (2) The commissioner is an Officer of the Legislative Assembly.
- (3) The commissioner shall be appointed by order of the Legislative Assembly.
- (4) Subject to sections 39 and 40, unless he or she resigns, dies or is removed from office, the commissioner holds office for a term of five years.
- (5) The commissioner may be reappointed for one additional term of five years.
- (6) The commissioner may resign the office at any time by giving written notice to the Speaker.

The Commissioner is an Officer of the Legislature and is independent of government. Section 38 of FOIP provides in part that the Commissioner:

- Is appointed by order of the Legislative Assembly.
- Is appointed for a term of five years.
- Can be extended an additional term of five years.

Sections 38, 39 and 40 of FOIP also provide that the Commissioner may resign or may be removed or suspended for cause, incapacity to act, neglect of duty or misconduct.

The Commissioner's office is made up of employees appointed by the Commissioner in order to exercise the powers and perform the duties of the commissioner effectively. Employees of the Commissioner's office are employees of the Legislative Assembly.

## Section 44: Oath or Affirmation

### Oath or affirmation

**44(1)** Before entering on the duties of office, the commissioner shall take and subscribe the prescribed oath or affirmation before the Speaker of the Assembly or the Clerk of the Assembly.

(2) Before entering on the duties of office, every member of the staff of the commissioner shall take and subscribe the prescribed oath or affirmation before the commissioner.

Before entering the duties of office, the Commissioner takes an oath of office before the Speaker of the Legislative Assembly or the Clerk of the Assembly (see section 44(1) of FOIP).

All staff of the Commissioner sign an oath of office on an annual basis. This oath is sworn before the Commissioner affirming that, except as provided for under FOIP, staff will not divulge any information received in the exercise of their powers or performance of their duties and functions at the IPC (see section 44(2) of FOIP).

Section 19 of *The Freedom of Information and Protection of Privacy Regulations* provides the language for those oaths as follows:

### Oath of office

**19(1)** For the purposes of subsection 44(1) of the Act, the following oath or affirmation is prescribed for the commissioner:

I,....., do swear/solemnly affirm that I will faithfully and impartially perform and discharge the duties and functions of the Information and Privacy Commissioner and that I will not, except as provided in *The Freedom of Information and Protection of Privacy Act* or in *The Local Authority Freedom of Information and Protection of Privacy Act*, divulge any information received by me in the exercise of my powers or the performance of my duties and functions under those Acts.

(2) For purposes of subsection 44(2) of the Act, the following oath or affirmation is prescribed for the members of the staff of the commissioner:

I,....., do swear/solemnly affirm that I will faithfully and impartially perform and discharge the duties and functions of my office as an employee of the Information and Privacy Commissioner and that I will not, except as provided in *The Freedom of Information and Protection of Privacy Act* or in *The Local Authority Freedom of Information and Protection of Privacy Act*, divulge any information received by me in the exercise of my powers or the performance of my duties and functions under those Acts.



## Section 46: Confidentiality

### **Confidentiality**

**46(1)** Subject to clause 45(2)(e), the commissioner shall not disclose any information that comes to the knowledge of the commissioner in the exercise of the powers, performance of the duties or carrying out of the functions of the commissioner pursuant to this Act.

(2) Subsection (1) applies, with any necessary modification, to the staff of the commissioner and any contractors employed by the commissioner.

(3) Notwithstanding subsection (1), the commissioner may disclose:

(a) in the course of a review pursuant to section 49, any matter that the commissioner considers necessary to disclose to facilitate the review; and

(b) in a report prepared pursuant to this Act, any matter that the commissioner considers necessary to disclose to establish grounds for the findings and recommendations in the report.

(4) When making a disclosure pursuant to subsection (3), the commissioner shall take every reasonable precaution to avoid disclosure, and shall not disclose:

(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.

(5) Notwithstanding subsection (1), the commissioner may disclose to the Attorney General for Saskatchewan or the Attorney General of Canada information that relates to the commission of an offence against:

(a) an Act or a regulation; or

(b) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada;

by an officer or employee of a government institution if, in the opinion of the commissioner, there is evidence of the commission of the offence.

Subsection 46(1) of FOIP provides that the Commissioner shall not disclose any information that comes to the knowledge of the Commissioner in the exercise of the powers, performance of the duties or carrying out of the functions of the Commissioner under FOIP. This also applies to the staff of the Commissioner (s.46(2) of FOIP).

However, the Commissioner may disclose:

- In the course of a review - any matter the Commissioner considers necessary to facilitate a review [s. 46(3)(a) of FOIP].

- In the Commissioner's report - any matter the Commissioner considers necessary to establish grounds for the findings and recommendations [s. 46(3)(b) of FOIP].

Relying on subsection 46(3)(b) of FOIP, the Commissioner will exercise discretion and may quote portions of a party's representations (submission) when issuing a report. This may include quotes from a government institution, applicant or third party's submission.

**Representation** means the documents, other evidence and/statements or affidavits provided by a party setting out its position with respect to the information at issue and often referred to as a submission.<sup>33</sup>

When making a disclosure, the Commissioner shall take every reasonable precaution to avoid disclosure and shall not disclose:

- Information or material which could justify a refusal by a head to give access to a record or part of a record.
- Any information as to whether a record exists where the head has applied subsection 7(4) of FOIP.

The Commissioner and the Commissioner's staff do not release records to applicants that have been withheld by a government institution. Decisions to release are made by the head under FOIP. The Commissioner may recommend release of certain records or information, however, that release must be done by the government institution.

During the course of a review, all parties will be asked if they agree to sharing their representations (submissions) with the other parties. If any party wishes to have its submission remain *in-camera*, it should indicate that to the IPC and it will remain so.

**In camera**, in this context, means only the Information and Privacy Commissioner (and necessary staff of the Commissioner) will see the submission and it will not be shared with the other parties to the review.

If the parties' consent, then submissions will be shared. Otherwise, they will not be.

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<sup>33</sup> SK OIPC *Rules of Procedure* at p. 3.

## Section 45: General Powers of Commissioner

### General powers of commissioner

**45(1)** In this section, “**extraprovincial, territorial or federal commissioner**” means a person who, with respect to Canada or with respect to another province or territory of Canada, has duties, powers and functions similar to those of the commissioner.

(2) The commissioner may:

- (a) engage in or commission research into matters affecting the carrying out of the purposes of this Act;
- (b) conduct public education programs and provide information concerning this Act and the commissioner’s role and activities;
- (c) receive representations concerning the operation of this Act;
- (d) determine the procedure to be followed in the exercise of the powers or performance of any duties of the commissioner pursuant to this Act; and
- (e) exchange personal information with an extraprovincial, territorial or federal commissioner for the purpose of carrying out investigations with respect to personal information in the possession or under the control of government institutions or to conduct a review involving a government institution and at least one other jurisdiction.

FOIP establishes the position of the Information and Privacy Commissioner, the supporting office and the general powers of the Commissioner. The general powers of the Commissioner are listed at section 45 of FOIP.

The Commissioner has general responsibility for monitoring how the legislation is administered to ensure that its purposes are achieved. Specifically, the Commissioner may:

- Engage in or commission research into matters affecting the carrying out of the purposes of FOIP [s. 45(2)(a) of FOIP].
- Conduct public education programs and provide information concerning FOIP and the Commissioner’s role and activities [s. 45(2)(b) of FOIP].
- Receive representations concerning the operation of FOIP [s. 45(2)(c) of FOIP].
- Determine the procedures to be followed in the exercise of the powers or performance of any duties the Commissioner has under FOIP [s. 45(2)(d) of FOIP].
- Exchange personal information with other information and privacy commissioners in Canada for the purpose of conducting investigations with respect to personal information in the possession or under the control of a government institution or to

conduct a review involving a government institution and at least one other jurisdiction [s. 45(2)(e) of FOIP].

## Section 45.1: Power to Authorize a Government Institution to Disregard Applications or Requests

### **Power to authorize a government institution to disregard applications or requests**

**45.1** (1) The head may apply to the commissioner to disregard one or more applications pursuant to section 6 or requests pursuant to section 32.

(2) In determining whether to grant an application or request mentioned in subsection (1), the commissioner shall consider whether the application or request:

- (a) would unreasonably interfere with the operations of the government institution because of the repetitious or systematic nature of the application or request;
- (b) would amount to an abuse of the right of access or right of correction because of the repetitious or systematic nature of the application or request; or
- (c) is frivolous or vexatious, not in good faith or concerns a trivial matter.

(3) The application pursuant to subsection 6(1) or the request pursuant to clause 32(1)(a) is suspended until the commissioner notifies the head of the commissioner's decision with respect to an application or request mentioned in subsection (1).

(4) If the commissioner grants an application or request mentioned in subsection (1), the application pursuant to subsection 6(1) or the request pursuant to clause 32(1)(a) is deemed to not have been made.

(5) If the commissioner refuses an application or request mentioned in subsection (1), the 30-day period mentioned in subsection 7(2) or subsection 32(2) resumes.

Section 45.1 of FOIP provides government institutions the ability to apply to the Commissioner requesting authorization to disregard an access request (section 6 application) or a correction request (section 32 request) made by an applicant.

Subsection 45.1(1) of FOIP requires a government institution to make an application to the Commissioner. Details of how to make an application are contained in [The Rules of Procedure](#).

Additional guidance is available in IPC resource, [Application to Disregard an Access to Information Request or Request for Correction](#).

A request to disregard is a serious matter as it could have the effect of removing an applicant's express right to seek access to information in a particular case. It is important for

a government institution to remember that a request to disregard must present a sound basis for consideration and should be prepared with this in mind.<sup>34</sup> The Commissioner sets a high standard when considering applications to disregard.

For more on disregarding applications or requests, see the *Guide to FOIP*, Chapter 3, “Access to Records” at *Section 45.1: Power to Authorize a Government Institution to Disregard Applications or Requests*.

## IPC Findings

In [Disregard Decision 343-2019, 352-2019](#) the Commissioner considered sections 45.1 and 45.2 for the first time. The Saskatchewan Worker’s Compensation Board (WCB) applied to the Commissioner for authorization to disregard two access to information requests that an applicant had made to the WCB. The Commissioner found that the applicant’s two requests were repetitious and an abuse of the right of access. As such, the Commissioner authorized the WCB to disregard the access to information requests.

## Section 47: Non-compellability

### Non-compellability

**47(1)** The commissioner is not compellable to give evidence in a court or in a proceeding of a judicial nature concerning any information that comes to the knowledge of the commissioner in the exercise of the powers, performance of the duties or carrying out of the functions of the commissioner pursuant to this Act.

(2) Subsection (1) applies, with any necessary modification, to the staff of the commissioner and any contractors employed by the commissioner.

(3) The commissioner, staff of the commissioner or any contractors employed by the commissioner may be a witness in or produce any documents relevant to the prosecution of an offence against this Act.

In any court or judicial proceeding, the Commissioner and the staff of the Commissioner cannot be compelled to give evidence about anything that comes to their knowledge in fulfilling their duties. As noted earlier, the Commissioner and the Commissioner’s staff are bound by confidentiality provisions at section 46 of FOIP.

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<sup>34</sup> Office of the New Brunswick Information and Privacy Commissioner (NB IPC), Interpretation Bulletin, *Section 15 – Permission to disregard access request*.

However, in cases where there is a prosecution under FOIP pursuant to section 68 of FOIP, the Commissioner, the Commissioner's staff or contracted employees of the Commissioner may participate in the proceeding as a witness or may produce documents relevant to the prosecution [s. 47(3) of FOIP].

## Section 50: Refusal to Review

### **Refusal to review**

**50(1)** Where the commissioner is satisfied that there are reasonable grounds to review any matter set out in an application pursuant to section 49, the commissioner shall review the matter.

(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:

(a) is frivolous or vexatious;

(a.1) does not affect the applicant or individual personally;

(a.2) has not moved forward as the applicant or individual has failed to respond to the requests of the commissioner;

(a.3) concerns a government institution that has an internal review process that has not been used;

(a.4) concerns a professional who is governed by a professional body that regulates its members pursuant to an Act, and a complaints procedure available through the professional body has not been used;

(a.5) may be considered pursuant to another Act that provides a review or other mechanism to challenge a government institution's decision with respect to the collection, amendment, use or disclosure of personal information and that review or mechanism has not been used;

(a.6) does not contain sufficient evidence;

(a.7) has already been the subject of a report pursuant to section 55 by the commissioner;

(b) is not made in good faith; or

(c) concerns a trivial matter.

Subsection 50(2) of FOIP permits the Commissioner to dismiss or discontinue a review under certain circumstances.

A government institution can request the Commissioner dismiss or discontinue a review based on subsection 50(2) of FOIP. The government institution should provide its arguments in support of its position to the Commissioner.

For more on dismissing or discontinuing reviews, see the *Guide to FOIP*, Chapter 3, "Access to Records" at *Section 50: Review or Refusal to Review*.

## IPC Findings

In [Review Report F-2010-002](#), the Commissioner considered subsections 50(2)(a) and (b) of FOIP. A series of access to information requests were repeatedly submitted by an applicant to six separate government institutions. Requests for review were submitted to the Commissioner on the grounds that the six government institutions failed to meet their obligations under section 7 of FOIP. Through the course of the reviews, the government institutions raised the issue that the requests for review were frivolous, vexatious and not in good faith pursuant to subsection 50(2) of FOIP. The Commissioner considered the actions of the applicant and agreed the applicant was engaging in a pattern of conduct that was vexatious and not in good faith. The Commissioner discontinued the reviews pursuant to subsections 50(2)(a) and (b) of FOIP.

In [Review Report 053-2015](#), the Commissioner considered subsection 50(2)(a) of FOIP. An applicant had made an access to information request to the Ministry of Justice (Justice). Justice responded to the applicant providing partial access to a report. The applicant requested a review by the Commissioner. Upon review, Justice requested the Commissioner dismiss the review as frivolous and vexatious pursuant to subsection 50(2)(a) of FOIP. The Commissioner found that the circumstances of the case did not meet the threshold to support a finding that the request for review was frivolous or vexatious. The review continued.

## Section 53: Conduct of Review

### Conduct of review

**53(1)** The commissioner shall conduct every review in private.

(2) The:

- (a) person who applies for a review;
- (b) third party or applicant who is entitled to notice pursuant to section 52; and

(c) head whose decision is the subject of a review;  
are entitled to make representations to the commissioner in the course of the review.

(3) No one is entitled as of right:

(a) to be present during a review; or

(b) before or after a review:

(i) to have access to; or

(ii) to comment on;

representations made to the commissioner by any other person.

Subsection 53(1) of FOIP provides that the Commissioner shall “conduct every review in private.” However, the Commissioner also has some discretion to disclose what the Commissioner deems necessary pursuant to subsection 46(3) of FOIP. For more on this, see *Section 44: Confidentiality* earlier in this Chapter. Further, the Commissioner has the authority to determine the procedure to be followed for reviews pursuant to subsection 45(2)(d) of FOIP.

Subsection 53(2) of FOIP provides that applicants, government institutions and third parties (given notice under section 52) are entitled to make submissions to the Commissioner in the course of a review.

Subsection 53(3) of FOIP provides that no person is entitled to be present during a review. Further, no person is entitled to have access to or comment on submissions made to the Commissioner before or after a review.



## IPC Findings

In [Review Report F-2013-003](#), the Commissioner found that the Ministry of Agriculture failed to provide notice to the third party and as such, the burden of proof was not met for third party exemptions. The Commissioner noted that by not providing notice to the third party, the rights of both the third party and the applicant were prejudiced. The third party was not afforded the opportunity to make submissions to the Commissioner. Further, if the third party did not actually oppose release of the information, the applicant was prejudiced by the Ministry's failure to notify as this would not be communicated.

## Section 54: Powers of Commissioner

### **Powers of commissioner**

**54(1)** Notwithstanding any other Act or any privilege that is available at law, the commissioner may, in a review:

- (a) require to be produced and examine any record that is in the possession or under the control of a government institution; and
- (b) enter and inspect any premises occupied by a government institution.

(2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them:

- (a) to give oral or written evidence on oath or affirmation; and
- (b) to produce any documents or things;

that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court.

(3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

Section 54 of FOIP also lays out other powers the Commissioner has including in the course of a review:

- The power to compel a government institution to produce records in its possession or control and examine them [s. 54(1)(a) of FOIP].
- The power to enter and inspect any premises occupied by a government institution [s. 54(1)(b) of FOIP].

- The power to summon and enforce the appearance of persons before the Commissioner and compel them to:
  - Give oral or written evidence on oath or affirmation.
  - To produce any documents or things [s. 54(2) of FOIP].

## IPC Findings

In [Review Report F-2013-001](#), when records were not forthcoming, the Commissioner warned the Saskatchewan Workers' Compensation Board (WCB) that if the records were not provided quickly that the Commissioner would resort to a *subpoena duce tecum* to obtain the records in question. Further, that the Commissioner was prepared to require the attendance of key officials in WCB who had some responsibility for the type of records in question to be examined under oath. Fortunately, the Commissioner did not have to take these steps as the WCB cooperated with the Commissioner's requests.

## Section 55: Report of Commissioner

### Report of commissioner

**55(1)** On completing a review or investigation, the commissioner may prepare a written report setting out the commissioner's recommendations with respect to the matter and the reasons for those recommendations.

(2) If a report is prepared pursuant to subsection (1), the commissioner shall forward a copy of the report to the head and, if the matter was referred to the commissioner by:

(a) an applicant or individual, to the applicant or individual and to any third party notified by the head pursuant to section 52; and

(b) a third party, to the third party and to the applicant.

(3) In the report mentioned in subsection (1), the commissioner may make any recommendations with respect to the matter under review or investigation that the commissioner considers appropriate.

Upon completion of a review or an investigation, the Commissioner may issue a report. The report will include the Commissioner's findings and recommendations.

If the Commissioner completes a report, it is provided to each party to the review or investigation prior to the report becoming publicly available via posting to the Commissioner's website.

All reports are generally posted to the Commissioner's website seven days after the report is provided to the parties. Reports may be posted to the website sooner where the Commissioner considers it appropriate. For example, where media coverage is going to occur before the report is generally made available to the public on the website. There are also limited circumstances where the Commissioner will not post a report to the website. For example, where the matters are extremely sensitive, an individual may be identified or where the circumstances of a case require additional measures be taken to protect individuals.

Government institutions are required, pursuant to section 56 of FOIP, to respond to a report of the Commissioner within 30 days indicating whether it will comply with the Commissioner's recommendations or any other decision the head considers appropriate. The head's response should be provided to the other parties to the review or investigation and to the Commissioner. The response should be in writing.

Once an applicant, individual or third party receives the head's section 56 response, it has 30 days to make an application to the Court of King's Bench if not satisfied pursuant to section 57 of FOIP. For more information on the Court of King's Bench see [Courts of Saskatchewan](#). See also *Court of King's Bench – Roles & Responsibilities*, later in this Chapter.

In the recent Court of Appeal for Saskatchewan decision, [Leo v Global Transportation Hub Authority, 2020 SKCA 91 \(CanLII\)](#), the court clarified the de novo nature of an appeal pursuant to 57 of FOIP. Part VII of FOIP does not in any way contemplate that, on an appeal to the Court of King's Bench, parties can raise any and all provisions of the Act that bear on the question of whether the record in issue may be released. The system of the Act offers no room for a direct appeal to the Court of King's Bench from the decision of a head, i.e., an appeal that circumvents the application to the Commissioner for a review.<sup>35</sup>

For more on the Commissioner's procedures for reviews, investigations and issuing reports, see [The Rules of Procedure](#).

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<sup>35</sup> *Leo v Global Transportation Hub Authority, 2020 SKCA 91 (CanLII)* at [41] and [47].

## Section 62: Annual Report

### Annual report

**62(1)** Within three months after the end of each fiscal year, the commissioner shall prepare and submit an annual report to the Speaker of the Assembly, and the Speaker shall cause the report to be laid before the Assembly in accordance with section 13 of *The Executive Government Administration Act*.

(2) The annual report of the commissioner is to provide details of the activities of the office in relation to the commissioner's responsibilities pursuant to this Act during that fiscal year and, in particular, concerning any instances where the commissioner's recommendations made after a review have not been complied with.

As an independent Officer of the Legislature, the Commissioner reports annually to the Legislative Assembly, describing the work of the Commissioner's office and any instances where the Commissioner's recommendations to government institutions were not complied with. This annual report is required pursuant to section 62 of FOIP.

All of the Commissioner's annual reports dating back to 2003 are posted on the Commissioner's website.

## Procedural Fairness

**Procedural fairness** is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. It requires a fair and proper procedure be used when making a decision. It is highly likely that a decision-maker who follows a fair procedure will reach a fair and correct decision.<sup>36</sup>

Procedural fairness involves decision-makers:

- Informing parties of the case against them.
- Giving parties the opportunity to be heard.
- Remaining neutral.
- Acting only on the basis of logically probative evidence.<sup>37</sup>

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<sup>36</sup> Ombudsman Western Australia, *Guidelines, Procedural Fairness (natural justice)*, May 2009.

<sup>37</sup> SK OIPC, Presentation, *Procedural Fairness: Factors that contribute to making an administratively fair decision*.

The important purpose of having procedural fairness is to ensure that, in the end, the result of an investigation or review can be fairly relied upon with confidence.

The courts have held on a considerable number of occasions that a proceeding before an administrative decision maker need not be absolutely perfect in order for it to comply with the duty of substantive or procedural fairness. The Supreme Court of Canada in *R. v. Harrer*, 1995 CanLII 70 (SCC), [1995] 3 SCR 562 at paragraph 45, observed in a general sense that:

A fair trial must not...be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.<sup>38</sup>

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected in a given set of circumstances (i.e., “the specific context of each case”).<sup>39</sup>

The Commissioner conducts reviews and investigations following the principles of procedural fairness within the limits of FOIP. For example, while sharing submissions amongst parties is procedurally fair, sections 46 and 53 of FOIP limit what the Commissioner can share with other parties during a review. Further, while FOIP provides the opportunity to make submissions to the Commissioner, it specifically limits the “right to be present during a review” or to have access to submissions by other parties made to the Commissioner before or after a review.<sup>40</sup>

All parties to a review or investigation are given the opportunity to provide representations (submissions) to the Commissioner.

**Representation** means the documents, other evidence and/statements or affidavits provided by a party setting out its position with respect to the information at issue and often referred to as a submission.<sup>41</sup>

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<sup>38</sup> *R. v. Harrer*, 1995 CanLII 70 (SCC), [1995] 3 SCR 562 at [45]. Also cited in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABKB 595 (CanLII) at [57].

<sup>39</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at [21] and [22]. Also cited in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABKB 595 (CanLII) at [59].

<sup>40</sup> *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 at s. 53(3).

<sup>41</sup> SK OIPC *Rules of Procedure* at p. 3.

The Commissioner considers those representations in a neutral non-biased manner and makes decisions based on a balance of probabilities or a preponderance of the evidence presented by the parties.

The process, because of the legislative requirements, is not like a trial in a court or a hearing by a tribunal. The legislation in effect requires the review to occur in private. It is within these limits that the Commissioner and staff attempt to be procedurally fair.

To assist parties in understanding the procedures used by the Commissioner's office, the Commissioner issued, [The Rules of Procedure](#).

## Court of King's Bench - Roles & Responsibilities

### Section 57: Appeal to Court

#### **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.

(2) A head who has refused an application for access to a record or part of a record shall, immediately on receipt of a notice of appeal by an applicant, give written notice of the appeal to any third party that the head:

(a) has notified pursuant to subsection 34(1); or

(b) would have notified pursuant to subsection 34(1) if the head had intended to give access to the record or part of the record.

(3) A head who has granted an application for access to a record or part of a record shall, immediately on receipt of a notice of appeal by a third party, give written notice of the appeal to the applicant.

(4) A third party who has been given notice of an appeal pursuant to subsection (2) or an applicant or individual who has been given notice of an appeal pursuant to subsection (3) may appear as a party to the appeal.

(5) The commissioner shall not be a party to an appeal.

A person or party who is dissatisfied with the head's decision following the Commissioner's review or investigation under FOIP, may pursue an appeal of the decision to the court.

An appeal to the court begins with an application to the Court of King's Bench for Saskatchewan and may be appealed further by any party. For more on the process of appealing to the Court of King's Bench see the *Guide to FOIP*, Chapter 3, "Access to Records" or IPC resource, [Guide to Appealing the Decision of a Head of a Government Institution, or a Local Authority, or a Health Trustee](#).

The levels of an appeal follow a hierarchical model as follows:

1. Court of King's Bench for Saskatchewan
2. Court of Appeal for Saskatchewan
3. Supreme Court of Canada<sup>42</sup>

Judges are required to give reasons for their decisions. These reasons may be contained in a written judgement of the court or may be given orally in court. Sometimes judges may do both – giving their decision orally in court with written reasons for the decision following at a later date.<sup>43</sup> These judgments or orders are binding on the parties. [The Queen's Bench Rules, Part 10: Judgments and Orders](#) at section 10-22 states:

**10-22** Every order of the Court in any cause or matter may be enforced against all persons bound by the order in the same manner as a judgement to the same effect.

The Court of King's Bench for Saskatchewan consists of a Chief Justice, an Associate Chief Justice, and currently 36<sup>44</sup> other judges. Each King's Bench judge is assigned to a specific judicial centre, but because the Court is an itinerant<sup>45</sup> court, the judges also travel to and sit in other judicial centres.<sup>46</sup>

In Saskatchewan, there are court locations in:

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<sup>42</sup> Courts of Saskatchewan, Resources, Court Structure. Available at <https://sasklawcourts.ca/index.php/home/resources/learn-about-the-courts-resources/court-structure>.

<sup>43</sup> Courts of Saskatchewan at <https://sasklawcourts.ca/index.php/home/decisions>.

<sup>44</sup> Courts of Saskatchewan at <https://sasklawcourts.ca/index.php/home/court-of-queen-s-bench/judges>. Accessed February 4, 2020.

<sup>45</sup> "Itinerant" (of a judge) means to travel on a circuit for the purpose of holding court - Garner, Bryan A., 2019. *Black's Law Dictionary, 11<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 997.

<sup>46</sup> Courts of Saskatchewan at <https://sasklawcourts.ca/index.php/home/court-of-queen-s-bench/judges>. See also *The Queen's Bench Act, 1998*, RSS c Q-1.01 at s. 4.

- Battleford
- Estevan
- La Ronge
- Meadow Lake
- Melfort
- Moose Jaw
- Prince Albert
- Regina
- Saskatoon
- Swift Current
- Weyburn
- Yorkton

## Section 58: Powers of Court on Appeal

### **Powers of court on appeal**

**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.

(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.

(4) The court may disclose to the Attorney General for Saskatchewan or the Attorney General of Canada information that relates to the commission of an offence against:

(a) an Act or a regulation; or

(b) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada;



by an officer or employee of a government institution if, in the opinion of the court, there is evidence of the commission of the offence.

(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.

The court's function is to consider the matter *de novo*, including, if necessary, a detailed review of the records in issue document by document. The review of records would be *in camera*.<sup>47</sup>

**De novo** means a review of a matter anew, as if the original hearing had not taken place.<sup>48</sup>

On an appeal *de novo*, the court is not constrained by the standard of review. It finds the facts and the law.<sup>49</sup>

In the recent Court of Appeal for Saskatchewan decision, [Leo v Global Transportation Hub Authority, 2020 SKCA 91 \(CanLII\)](#), the court clarified the *de novo* nature of an appeal pursuant to section 57 of FOIP. Part VII of FOIP does not in any way contemplate that, on an appeal to the Court of King's Bench, parties can raise any and all provisions of the Act that bear on the

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<sup>47</sup> *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 at s. 58(1)(b).

<sup>48</sup> Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 837.

<sup>49</sup> *Gordon v Regina Qu'Appelle Regional Health Authority*, 2017 SKKB 291 (CanLII) at [37].

question of whether the record in issue may be released. The system of the Act offers no room for a direct appeal to the Court of King's Bench from the decision of a head, i.e., an appeal that circumvents the application to the Commissioner for a review.<sup>50</sup>

**In camera**, in this context, means in the judge's private chambers.<sup>51</sup> In general terms, it means in private (not open to the public). For a case involving both the examination of records *in camera* by the judge and an *in camera* hearing, see [Leo v Global Transportation Hub Authority, 2018 SKKB 323 \(CanLII\)](#).

In order to avoid disclosure of withheld information or the existence of records (i.e., where subsection 7(2)(f) of FOIP has been applied), the court will take every reasonable precaution including, where appropriate, receiving representations *ex parte* and/or conducting hearings *in camera*.<sup>52</sup>

**Ex parte**, in this context, means receiving representations from one party only, usually without notice to or argument from the adverse party.<sup>53</sup>

The Information and Privacy Commissioner cannot be a party to an appeal.<sup>54</sup> Further, the Commissioner and the staff of the Commissioner are not compellable to give evidence in a court.

Where the court finds evidence of an offence by an officer or employee of a government institution under section 68 of FOIP or any Act or regulation provincially or federally, the court may disclose information to the Attorney General for Saskatchewan or the Attorney General of Canada.<sup>55</sup>

Unlike the review of many other government institution actions that must generally be upheld if supported by evidence and not arbitrary or capricious, the burden rests on the government institution to justify its action. Section 61 of FOIP provides:

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<sup>50</sup> *Leo v Global Transportation Hub Authority*, 2020 SKCA 91 (CanLII) at [41] and [47].

<sup>51</sup> Garner, Bryan A., 2019. *Black's Law Dictionary, 11<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 909.

<sup>52</sup> *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 at s. 58(3).

<sup>53</sup> Garner, Bryan A., 2019. *Black's Law Dictionary, 11<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 722.

<sup>54</sup> *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 at s. 57(5).

<sup>55</sup> *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 at s. 58(4).

**61** In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.<sup>56</sup>

For more on section 61 of FOIP and the burden of proof, see *Section 61: Burden of Proof* later in this Chapter.

The court is required to determine whether the government institution was authorized to refuse access. Where its refusal was not authorized, the court is given the authority to order a government institution to give an applicant access to a record, subject to any conditions the court considers appropriate. Alternatively, the court may make any other order it considers appropriate.<sup>57</sup>

If the court finds that refusal was authorized (i.e., an exemption under FOIP applies), the court will not order the government institution to provide access regardless of whether the exemption was a mandatory or discretionary exemption. To elaborate further, this means that the court will not exercise the heads discretion for any applicable discretionary exemptions.<sup>58</sup> For more on mandatory and discretionary exemptions, see the *Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”.

For appeals of fee estimates, fee waivers, transfers of requests and privacy matters, if the court determines that the decision made by the government institution was not authorized under FOIP, the court may order the government institution to reconsider its decision and proceed in accordance with FOIP, subject to any conditions the court considers appropriate.

The court may also make any order the court considers appropriate.<sup>59</sup> Alternatively, if the court finds the decision made by the government institution was authorized, it will not order the government institution to reconsider.<sup>60</sup>

Several access to information and privacy matters have been appealed to the Court of King’s Bench for Saskatchewan. Some cases have gone further to the Court of Appeal for Saskatchewan. However, to date, no Saskatchewan access to information or privacy matter

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<sup>56</sup> *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance*, 1993 CanLII 9128 (SK CA) at [12].

<sup>57</sup> *Evenson v Kelsey Trail Regional Health Authority*, 2012 SKKB 382 (CanLII) at [6]. See also, *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 at s. 58(5).

<sup>58</sup> *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 at s. 58(6).

<sup>59</sup> *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 at s. 58(7).

<sup>60</sup> *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 at s. 58(8).

has reached the Supreme Court of Canada. Some notable cases in Saskatchewan are as follows:

***Court of King's Bench for Saskatchewan:***

*Liick v. Saskatchewan (Minister of Health)*, 1994 CanLII 4934 (SK KB)  
*Weidlich v. Saskatchewan Power Corp.*, 1998 CanLII 14047 (SK KB)  
*Fogal v. Regina School Division No. 4*, 2002 SKKB 92 (CanLII)  
*Germain v. Automobile Injury Appeal Commission*, 2009 SKKB 106 (CanLII)  
*Evenson v Kelsey Trail Regional Health Authority*, 2012 SKKB 382 (CanLII)  
*Evenson v Saskatchewan (Ministry of Justice)*, 2013 SKKB 296 (CanLII)  
*Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII)  
*Consumers' Co-operative Refineries Limited v Regina (City)*, 2016 SKKB 335 (CanLII)  
*Shook Legal, Ltd v Saskatchewan (Government Insurance)*, 2018 SKKB 238 (CanLII)  
*D'Arcy Hande v University of Saskatchewan*, KBG 1222 of 2018 (unreported)  
*Britto v University of Saskatchewan*, 2018 SKKB 92 (CanLII)  
*Leo v Global Transportation Hub Authority*, 2018 SKKB 323 (CanLII)  
*Leo v. Global Transportation Hub Authority*, 2019 SKKB 150 (CanLII)

***Court of Appeal for Saskatchewan:***

*City Collection Co. Ltd. et al v. Saskatchewan Government Insurance*, 1993 CanLII 6654 (SK CA)  
*General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance*, 1993 CanLII 9128 (SK CA)  
*University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII)  
*Leo v Global Transportation Hub Authority*, 2020 SKCA 91 (CanLII)

## Section 61: Burden of Proof

### **Burden of proof**

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

Section 61 of FOIP provides that the government institution has the burden of proof if it claims that access should or must be refused under FOIP. The burden is not on the applicant to establish that an exemption does not apply.

**Burden of proof** is the obligation of one of the parties in a review to persuade the Commissioner to decide an issue in its favour.<sup>61</sup>

When it is said that a party has the “burden of proof”, what is meant is that one party has a duty in law first to bring forward evidence that a particular fact or situation exists, and then to persuade the Commissioner that the evidence meets the necessary standard of proof.<sup>62</sup>

### Standard Required to Meet Burden of Proof

In law there are different standards that must be met in order to satisfy the burden of proof. These standards are applied in different situations. The one most people are familiar with is the standard of proof “beyond a reasonable doubt.” This standard applies in criminal cases. Civil cases, such as cases involving contractual disputes, have a lesser standard. That standard is proof “on a balance of probabilities” or “on a preponderance of evidence.” For matters before the Commissioner, this lesser standard applies.<sup>63</sup>

The term **balance of probabilities** is difficult to define, but it is more than a mere possibility. It has been taken to mean that the person deciding a case must find that it is more probable than not that a contested fact exists. In the FOIP context, a party will have proven its case on a balance of probabilities if the Commissioner can say “I think it is more likely, or more probable, than not.”<sup>64</sup>

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<sup>61</sup> Service Alberta, *FOIP Guidelines and Practice: 2009 Edition*, Appendix 1, Definitions.

<sup>62</sup> SK OIPC Review Report F-2013-005 at [20].

<sup>63</sup> Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 2.

<sup>64</sup> Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 2.

The term **preponderance of evidence** means the same thing as “balance of probabilities.” If the Commissioner reaches a conclusion based on a preponderance of evidence, this means that the Commissioner has considered and weighed the evidence presented by both parties and the Commissioner is convinced by the persuasiveness or accuracy of one party’s evidence over the other party’s evidence. A party to a matter before the Commissioner is only required to prove something on a balance of probabilities when the party has the burden of proof.<sup>65</sup>

**Evidence** is the material that parties must submit in reviews/investigations to establish the facts on which they are relying.<sup>66</sup> Something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact.<sup>67</sup>

Evidence, broadly defined, is the means from which an inference may logically be drawn as to the existence of a fact; that which makes evident or plain. Evidence is the demonstration of a fact; it signifies that which demonstrates, makes clear or ascertains the truth of the very fact or point in issue, either on the one side or on the other. In legal acceptance, the term ‘evidence’ includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. ‘Evidence’ has also been defined to mean any species of proof legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects and the like.<sup>68</sup>

**Speculation** is the practice or an instance of theorizing about matters over which there is no certain knowledge.<sup>69</sup>

**Arguments** are the reasons why a party thinks that the evidence shows certain facts to be true, or why the Commissioner should interpret the law in a particular way, so as to make the decision that the party wants the Commissioner to make.<sup>70</sup>

Parties may not succeed in a review or investigation if they do not provide evidence to support their arguments. If the success of an argument depends on underlying facts,

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<sup>65</sup> Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 2.

<sup>66</sup> Office of the Information and Privacy Commissioner of Alberta (AB IPC) Adjudication Practice Note 2, *Evidence and Arguments for Inquiries* at p. 1.

<sup>67</sup> Garner, Bryan A., 2019. *Black’s Law Dictionary, 11<sup>th</sup> Edition*. St. Paul, Minn.: West Group at pp. 697 to 698.

<sup>68</sup> Garner, Bryan A., 2019. *Black’s Law Dictionary, 11<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 698.

<sup>69</sup> Garner, Bryan A., 2019. *Black’s Law Dictionary, 11<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 1687.

<sup>70</sup> AB IPC Adjudication Practice Note 2, *Evidence and Arguments for Inquiries* at p. 1.

providing the argument alone is not sufficient.<sup>71</sup> Examples of evidence include affidavits, expert reports, news articles, meeting minutes, policy documents or contracts. In a review, the records at issue are treated as evidence.<sup>72</sup> Although news articles are not generally thought of as reliable evidence, they may be relevant in cases such as where a party is trying to demonstrate that something is publicly available, or where personal information has been disclosed without authority.

It would not be sufficient to provide the Commissioner with records and leave it up to the Commissioner to draw from the records the facts on which the decisions will be based.<sup>73</sup>

It would not be sufficient to simply state “access is denied because of section 19.” It is up to the government institution to ‘make the case’ that a particular exemption applies. That means presenting reasons why the exemption is appropriate for the part of the record that has been withheld. This is usually done in the form of written representations, commonly called a submission.<sup>74</sup>

**Representation** means the documents, other evidence and/statements or affidavits provided by a party to the commissioner’s office setting out its position with respect to a review or investigation and often referred to as a submission.<sup>75</sup>

The *Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access” lays out all of the exemptions under Part III of FOIP along with tests that are relied on by the Commissioner to determine if an exemption has been appropriately applied by a government institution. These tests reflect the precedents set by the current and former Commissioners in Saskatchewan, Commissioners in other jurisdictions and court decisions in Saskatchewan and across Canada. The Commissioner shares these tests to assist government institutions, third parties and applicants with preparing persuasive representations (submissions) for the Commissioner. For more on preparing a persuasive submission see IPC blogs, [Tips for a Good Submission](#), [What Makes a Good Submission](#) and [Preparing and writing a submission](#). There is also additional guidance on preparing a submission, record and index in IPC resource, [What to Expect during a Review with the IPC](#). Finally, the IPC has also issued a resource titled, [A Guide to Submissions](#)

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<sup>71</sup> AB IPC Adjudication Practice Note 2, *Evidence and Arguments for Inquiries* at p. 1.

<sup>72</sup> Office of the Information and Privacy Commissioner of British Columbia (BC IPC), *Instructions for Written Inquiries*, May 2017 at p. 6.

<sup>73</sup> AB IPC Adjudication Practice Note 2, *Evidence and Arguments for Inquiries* at p. 1.

<sup>74</sup> SK OIPC Review Report F-2013-005 at [20].

<sup>75</sup> SK OIPC *Rules of Procedure* at p. 3.

that offers guidance and templates for applicants, government institutions, local authorities and third parties to assist in preparing and writing a submission for the Commissioner.

Applicants are not required to submit evidence or arguments in the form of written representations (submission) in a review because the Commissioner can decide as to whether the government institution correctly applied FOIP without an applicant's submission. However, applicants are always invited to provide submissions. There may be circumstances where the Commissioner may need an applicant to provide evidence or argument such as where an applicant claims a party has waived legal privilege, that information should be disclosed in the public interest or that an applicant is unable to pay a fee. For more on the applicant's submission see IPC blog, [But I'm the Applicant – how can my submission help?](#)

### IPC Findings

In [Review Report F-2006-005](#), the Commissioner considered a submission from SaskTel and found that SaskTel had not met the burden of proof in demonstrating that subsection 12(1)(b) of FOIP applied. The Commissioner determined that a restatement of SaskTel's decision and paraphrasing the statutory provision was insufficient for the Commissioner to assess the appropriateness of the decision. The Commissioner found that without particularizing the reasons for the decision SaskTel failed to discharge the burden of proof.

## Who has the Burden of Proof

Where FOIP does not explicitly state which party has the burden of proof, the Commissioner will determine where the burden lies. When making that determination, the Commissioner will consider:

- Who raised the issue.
- Who is in the best position to meet the burden of proof.<sup>76</sup>

**Privacy breaches:** FOIP does not define burden of proof in a breach of privacy investigation. Since a complainant raises the issue, the complainant has the initial burden to establish that a privacy breach has occurred involving the complainant's personal information. If a collection, use or disclosure is proven, the burden then shifts to the government institution to justify its authority under FOIP for the data transaction.<sup>77</sup> Only the government institution would have

<sup>76</sup> Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 4.

<sup>77</sup> Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 4.



intimate knowledge of the circumstances surrounding a breach. The burden of proof is assessed on a balance of probabilities.<sup>78</sup>

**Fees:** FOIP does not define burden of proof in a review of a fee estimate. However, having regard for the purpose of the Act and the practice in other Canadian jurisdictions, the head of the government institution should also bear the burden of establishing the reasonableness of the fee under the Act.<sup>79</sup>

**Transfers:** FOIP does not define burden of proof in a review of a transfer of an access request (section 11). However, the government institution that transfers the request is in the best position to explain why it transferred it.<sup>80</sup>

**Extensions:** FOIP does not define burden of proof in a review involving an extension of time (section 12). However, the burden of proof of establishing an appropriate basis to extend the time to respond to an applicant under FOIP should be borne by the government institution.<sup>81</sup>

**Corrections:** FOIP does not define burden of proof in a review of a request for correction (section 32). However, the applicant has the initial burden to establish that there are errors or omissions in the personal information that are subject to correction.<sup>82</sup> For example, where an applicant is asserting a birthdate or name is incorrect, an applicant can provide supporting documentation such as a copy of a driver's license or birth certificate. Once an error or omission is established, the burden of proof shifts to the government institution to justify its decision to not correct the personal information.

## IPC Findings

In [Review Report F-2013-005](#), the Commissioner considered which party had the burden of proof in supporting the decision of the Ministry of Health (Health) to transfer two access requests to the Ministry of Justice. The Commissioner found that since Health was in the best position to explain why it transferred the requests to Justice, it bore the burden of proof. The

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<sup>78</sup> SK OIPC Investigation Report LA-2010-001 at [26]. This is also consistent with Alberta – see Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 4.

<sup>79</sup> SK OIPC Review Report F-2005-005 at [29]. This is also consistent with Alberta – see Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 4.

<sup>80</sup> SK OIPC Review Report F-2013-005 at [21].

<sup>81</sup> SK OIPC Review Reports F-2008-001 at [14] and F-2006-005 at [27].

<sup>82</sup> SK OIPC Review Report F-2014-004 at [21].

Commissioner further found that Health did not meet the burden of proof in demonstrating that the transfer was proper under FOIP.

## Affidavit Evidence

An **affidavit** is a declaration of facts written down and sworn or affirmed to be true by a party who has personal knowledge of the records or matters at issue in a review or investigation.<sup>83</sup>

An affidavit should be sworn or affirmed before a Commissioner for Oaths or a Notary Public. There are serious legal consequences for a person who swears a false affidavit.<sup>84</sup>

Affidavits may be desirable because, unlike other statements made to the Commissioner, an affidavit is evidence given under oath and makes a stronger case.

A party is free to submit affidavit evidence in a review or investigation. In some circumstances, the Commissioner may request an affidavit to assist in determining factual issues in a review or investigation. For example, the Commissioner may request an affidavit where there is a question as to whether a reasonable or adequate search was undertaken for responsive records or where facts asserted by the government institution are contradictory or inconsistent with other material.

Following the decision of the Court of Appeal for Saskatchewan in *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner, (2018))*, the Commissioner is requiring an affidavit from the head where the government institution is claiming solicitor-client privilege over information or records. See *The Rules of Procedure* for more assistance with the process when claiming solicitor-client privilege over information or records.

For further guidance on using affidavits and for a sample format that can be used, see IPC resource, *Using Affidavits in a Review with the IPC* and *The Rules of Procedure*.

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<sup>83</sup> Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 9.

<sup>84</sup> Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 9.

## Offences & Penalties

### Section 66: Proceedings Prohibited

#### **Proceedings prohibited**

**66(1)** No proceeding lies or shall be instituted against the Government of Saskatchewan, a government institution, a head or other officer or employee of a government institution for:

- (a) the giving or withholding in good faith of access to any record pursuant to this Act;
- (b) any consequences that flow from the giving or withholding of access mentioned in clause (a); or
- (c) the failure to give any notice required pursuant to this Act, if reasonable care is taken to give the required notice.

(2) For the purposes of clause (1)(c), reasonable care is deemed to have been taken if notice required to be sent to an applicant is sent to the address of the applicant given on the prescribed application form.

(3) No proceeding lies or shall be instituted against the commissioner or any employee or agent of the commissioner, where the commissioner, employee or agent is acting pursuant to the authority of this Act or the regulations made pursuant to this Act, for any loss or damage suffered by a person by reason of anything in good faith done, caused, permitted or authorized to be done, attempted to be done or omitted to be done, by any of them, pursuant to or in the exercise of or supposed exercise of any power conferred by this Act or the regulations or in the carrying out or supposed carrying out of any order made pursuant to this Act or any duty imposed by this Act or the regulations.

There will undoubtedly be instances in which government institutions release information that is protected from disclosure by a mandatory exemption under FOIP. This is likely to be the result of a misinterpretation or misapplication of the statute or simply inadvertence. A person who is injured by such action may well look to the government for recovery of the amount of any damages suffered.<sup>85</sup> It is also possible that injury could occur from a decision to withhold a record. However, subsections 66(1)(a) and (b) of FOIP protect the government and its officials from civil liability in these circumstances, if the decision to disclose or withhold was made in good faith.

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<sup>85</sup> McNairn and Woodbury, *Government Information: Access and Privacy*, (2009), Carswell: Toronto at p. 6-34.

**Good faith** means that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. Good faith is an intangible quality encompassing honest belief, the absence of malice and the absence of design to defraud or take advantage of something.<sup>86</sup>

Subsection 66(1)(c) of FOIP also confers immunity from suit for failure to give any notice required under FOIP, if reasonable care was taken to give the notice. **Reasonable care** means the degree of care that a prudent and competent person engaged in the same endeavor would exercise under similar circumstances.<sup>87</sup> Subsection 66(2) of FOIP provides that reasonable care is deemed to have taken place if the notice required to be sent to an applicant is sent to the address of the applicant given on the access to information form.<sup>88</sup>

An injured party will usually find it extremely difficult to mount a successful case against the government or its agents in the face of these provisions.<sup>89</sup>

Subsection 66(3) of FOIP provides that the Information and Privacy Commissioner and staff of the Commissioner are also protected from civil liability when acting in good faith pursuant to any authority granted under FOIP or *The Freedom of Information and Protection of Privacy Regulations*.<sup>90</sup>

## Section 67: Immunity from Prosecution

### Immunity from prosecution

**67** No person is liable to prosecution for an offence against any Act or regulation by reason of that person's compliance with a requirement of the commissioner pursuant to this Act.

As the provision below states, no person is liable to prosecution for an offence against any Act or regulation where the person was following a requirement of the Commissioner under FOIP.

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<sup>86</sup> British Columbia Government Services, *FOIPPA Policy Definitions* at <https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foipppa-manual/policy-definitions>. Accessed April 23, 2020.

<sup>87</sup> Garner, Bryan A., 2019. *Black's Law Dictionary, 11<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 263.

<sup>88</sup> *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 at s. 66(2).

<sup>89</sup> McNairn and Woodbury, *Government Information: Access and Privacy*, (2009), Carswell: Toronto at p. 6-34.

<sup>90</sup> *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 at s. 66(3).

## Section 68: Summary Offences

### Offence

**68(1)** Every person who knowingly collects, uses or discloses personal information in contravention of this Act or the regulations is guilty of an offence and liable on summary conviction to a fine of not more than \$50,000, to imprisonment for not more than one year or to both.

(2) No proceeding shall be instituted pursuant to this section except with the consent of the Attorney General.

(3) Any person who:

(a) without lawful justification or excuse wilfully obstructs, hinders or resists the commissioner or any other person in the exercise of the powers, performance of the duties or the carrying out of the functions of the commissioner or other person pursuant to this Act;

(b) without lawful justification or excuse, refuses or wilfully fails to comply with any lawful requirement of the commissioner or any other person pursuant to this Act;

(c) wilfully makes any false statement to, or misleads or attempts to mislead, the commissioner or any other person in the exercise of the powers, performance of the duties or carrying out of the functions of the commissioner or other person pursuant to this Act; or

(d) wilfully destroys any record that is governed by this Act with the intent to evade a request for access to the record;

is guilty of an offence and liable on summary conviction to a fine of not more than \$50,000, to imprisonment for not more than one year or to both.

(4) No employee of a government institution or of an information management service provider shall knowingly disclose or direct another person to disclose personal information in circumstances that would constitute an offence by the government institution or an information management service provider pursuant to this Act.

(5) Every employee of a government institution or of an information management service provider who contravenes subsection (4) is guilty of an offence and is liable on summary conviction to a fine of not more than \$50,000, to imprisonment for not more than one year or to both, whether or not the government institution or information management service provider has been prosecuted or convicted.

(6) No employee of a government institution shall wilfully access or use or direct another person to access or use personal information that is not reasonably required by that individual to carry out a purpose authorized pursuant to this Act.

(7) Every employee of a government institution who contravenes subsection (6) is guilty of an offence and is liable on summary conviction to a fine of not more than \$50,000, to

imprisonment for not more than one year or to both, whether or not the government institution has been prosecuted or convicted.

(8) No employee of an information management service provider shall wilfully access or use or direct another person to access or use personal information for a purpose that is not authorized by subsection 24.2(1).

(9) Every employee of an information management service provider who contravenes subsection (8) is guilty of an offence and is liable on summary conviction to a fine of not more than \$50,000, to imprisonment for not more than one year or to both, whether or not the information management service provider has been prosecuted or convicted.

(10) No prosecution shall be commenced pursuant to this section after the expiration of two years from the date of the discovery of the alleged offence

Section 68 of FOIP lists a number of contraventions, which may give rise to criminal liability.

Offences under section 68 of FOIP are summary offences. *The Summary Offences Procedures Act, 1990* gives jurisdiction to the Provincial Court of Saskatchewan to decide whether a person has committed an offence under section 68 of FOIP and to assess an appropriate penalty.<sup>91</sup> Subsections 4(1) and (2) of *The Summary Offences Procedures Act, 1990* provides that:

4(1) Subject to this Act, any other Act or any regulation, proceedings to enforce an Act, regulation or bylaw by fine, penalty or imprisonment may be brought summarily before a justice under the summary conviction provisions of the *Criminal Code*.

(2) In an Act or regulation, the words “**on summary conviction**” mean under and by virtue of the summary conviction provisions mentioned in subsection (1).

A prosecution may only be commenced under FOIP with the consent of the Attorney General of Saskatchewan.<sup>92</sup>

**Attorney General**, in this context, is the chief law officer of Saskatchewan responsible for advising the government on legal matters and representing it in litigation.<sup>93</sup>

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<sup>91</sup> Adapted from Alberta IPC Order P2006-005 at [100].

<sup>92</sup> *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 68(2).

<sup>93</sup> Modified from Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 154.

The Commissioner does not determine guilt or innocence, convict persons for offences or assess penalties under FOIP. The Commissioner can make a recommendation to the Attorney General for Saskatchewan that a prosecution be considered.

Possible penalties for an offence under section 68 of FOIP include:

- A fine of not more than \$50,000.
- Imprisonment for not more than 1 year.
- Both fine and imprisonment.<sup>94</sup>

A prosecution cannot be commenced pursuant to section 68 of FOIP after two years from the date of the discovery of the alleged offence.<sup>95</sup> **Discovery** is the act or process of finding or learning something that was previously unknown.<sup>96</sup>

Summary offences begin with an appearance in the Provincial Court of Saskatchewan. The Court of King's Bench for Saskatchewan hears appeals of summary conviction matters that have been dealt with at Provincial Court. Matters that have been decided at the Court of King's Bench may be appealed to the Court of Appeal for Saskatchewan.<sup>97</sup>

To date, there have been no prosecutions in Saskatchewan for offences pursuant to section 68 of FOIP.

There are two categories of possible offences:

1. Privacy and access related offences.
2. Offences arising from not cooperating with the Commissioner or another person performing the duties of the Commissioner.

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<sup>94</sup> *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 68(1), (3), (9).

<sup>95</sup> *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 68(10).

<sup>96</sup> Garner, Bryan A., 2019. *Black's Law Dictionary, 11<sup>th</sup> Edition*. St. Paul, Minn.: West Group at p. 584.

<sup>97</sup> *Courts of Saskatchewan* available at <https://sasklawcourts.ca/index.php/home/court-of-queen-s-bench/criminal>.

## Privacy and Access Offences

Section 68 of FOIP provides that it is an offence:

- To knowingly collect, use or disclose personal information in contravention of FOIP or *The Freedom of Information and Protection of Privacy Regulations* [s. 68(1) of FOIP].
- To willfully destroy any record that is governed by FOIP with the intent to evade a request for access to the record [s. 68(3)(d) of FOIP].
- For an employee of either a government institution or an information management service provider to knowingly disclose or direct another person to disclose personal information in contravention of FOIP or *The Freedom of Information and Protection of Privacy Regulations* [s. 68(4) of FOIP].
- For an employee of a government institution to willfully access, use or direct another person to access or use personal information that is not reasonably required to carry out a purpose authorized under FOIP. In other words, if it is not needed to do your job it is likely snooping, and snooping is an offence [s. 68(6) of FOIP].
- For an employee of an information management service provider to willfully access, use or direct another person to access or use personal information in contravention of subsection 24.2(1) of FOIP. In other words, if it is not needed to do the job of an information service provider as outlined at subsection 24.2(1) of FOIP, it is likely snooping, and snooping is an offence [s. 68(8) of FOIP].

The penalties for doing any of the above is a fine of up to \$50,000, imprisonment of up to one year, or both.<sup>98</sup>

Subsections 68(5), 68(7) and 68(9) of FOIP provide that an employee who contravenes subsections 68(4), 68(6) and 68(8) of FOIP is liable on summary conviction to the above fine or imprisonment even where the government institution or information service provider has not been prosecuted or convicted under FOIP. In other words, employees of government institutions or information service providers can be prosecuted independently from their employers.

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<sup>98</sup> *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 68(1), (3), (9).



## IPC Findings

In [Investigation Report 228-2015](#), the Commissioner investigated a breach of privacy involving a SaskPower employee inappropriately accessing the personal information of 4,382 current and former SaskPower employees and copying two files from the data. Due to the number of records the employee snooped into, the Commissioner recommended that SaskPower send its final investigation report to the Ministry of Justice, Public Prosecutions Division. That was to allow prosecutors to further consider whether an offence had been committed and if charges should be laid under FOIP or any other statute.

### *Not Cooperating with the Commissioner*

Subsections 68(3)(a) through (c) of FOIP set out other offences and require individuals to cooperate with the Commissioner or any other person performing the duties of the Commissioner.

Subsections 68(3)(a) through (c) of FOIP provide that it is an offence to:

- Willfully obstruct, hinder or resist the Commissioner or another person (such as the Commissioner's staff) in the exercise of the powers, performance of the duties or functions of the Commissioner or other person under FOIP without lawful justification or excuse.
- Refuse or willfully fail to comply with any lawful requirement of the Commissioner or any other person under FOIP without lawful justification or excuse.
- Willfully make false statements, mislead or attempt to mislead the Commissioner or any other person in the exercise of the powers, performance of the duties or functions of the Commissioner or other person under FOIP.

The powers, duties and functions of the Commissioner are laid out in FOIP. The penalties for doing any of the above is a fine of up to \$50,000, imprisonment of up to one year, or both.<sup>99</sup>

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<sup>99</sup> *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 68(3).

## IPC Findings

In [Review Report LA-2013-004](#), the Commissioner considered the equivalent provision of FOIP's subsection 68(3) in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). After considering the actions of the Northern Village of Pinehouse, the Commissioner recommended the Minister of Justice and Attorney General consider prosecution pursuant to subsection 56(3) of LA FOIP.

In [Review Report LA-2014-001](#), the Commissioner considered the equivalent provision of FOIP's subsection 68(3) in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). After considering the actions of the Village of Killaly, the Commissioner recommended the Minister of Justice and Attorney General consider prosecution pursuant to subsection 56(3) of LA FOIP.



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