Office of the
Saskatchewan Information
and Privacy Commissioner

GUIDE TO FOIP

The Freedom of Information and Protection of Privacy Act

Chapter 3

Access to Records

Table of Contents

OVERVIEW

This Chapter explains access to records under *The Freedom of Information and Protection of Privacy Act* (FOIP).

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

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

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

Who Has The Right of Access

Any person has a right of access to any records in the possession or control of a government institution. There are no limits on who can make an access to information request.

An **applicant** means a person who makes a written request for access to information under section 6 of *The Freedom of Information and Protection of Privacy Act* (FOIP)..[1]

Government institutions should be aware of section 59 of FOIP which authorizes other individuals to exercise the rights of applicants under FOIP in specific circumstances. This includes making an access to information request and receiving access to information (including the applicant's personal information) and addressing privacy matters on behalf of the applicant. These circumstances are outlined at subsections 59(a) through (e) of FOIP. For example, where a power of attorney has been granted, the power of attorney may exercise the rights of the individual under FOIP if the exercise of the right or power relates to the powers and duties of the power of attorney. For more on section 59, see *Section 59: Exercise of Rights by Other Persons* later in this Chapter.

For more on making an access to information request, see *Section 6: Application* later in this Chapter.

The applicant can be any person including individuals residing inside or outside of Saskatchewan, media outlets, corporations, political parties, etc. In addition, FOIP does not specify a minimum age, which means that minors may also make an access request.

IPC Findings

In Disregard Decision 285-2020, 286-2020, 287-2020, 288-2020, 289-2020, the Commissioner considered an application to disregard five access to information requests made by the Ministry of Parks, Culture and Sport (PCS). While presenting its arguments to the Commissioner that the requests were repetitious, systematic, vexatious and not made in good faith, PCS asserted that all five requests came from the Suffern Lake Cabin Owners Association (SLCOA). The applicants (two individuals) asserted that they made the requests as individuals and not as part of the SLCOA. After considering the arguments of both parties, the Commissioner found that there were two separate applicants in the matter. As such, only the access to information requests submitted by each individual were considered when reviewing whether the five requests met the tests for subsections 45.1(2)(a), (b) and (c) of

[1] *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 at subsection 2(1)(a).

FOIP. When assessing whether there was an abuse of the right of access, the Commissioner only considered the actions of each applicant separately and not as a group. As a result, the Commissioner found that the five access to information requests did not meet the tests for subsections 45.1(2)(a), (b) or (c) of FOIP and refused the PCS' application to disregard them. The 30-day clock for processing the five access to information requests resumed as of the date of the Commissioner's decision.

Section 5: Right of Access

Right of Access

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

Section 5 of FOIP establishes a right of access by any person to records in the possession or control of a government institution, subject to limited and specific exemptions, which are set out in FOIP.

The Supreme Court of Canada has interpreted access to information laws as quasi-constitutional. It follows that as fundamental rights, the rights to access and to privacy are interpreted generously, while the exceptions to these rights must be understood strictly.[2]

Access is defined as the right of an individual (or the individual's lawfully authorized representative) to view or obtain copies of the records in the possession or control of a government institution including the individual's personal information.[3]

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

A "record" includes transitory records that exist at the time of an access to information request. **Transitory records** are records of temporary usefulness that are needed only for a limited period of time, to complete a routine task or to prepare an ongoing document. This

[2] Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, *Access to Information and Protection of Privacy in Canadian Democracy*, May 5, 2009, also cited in Office of the Saskatchewan Information and Privacy Commissioner (SK OIPC) Review Report F-2010-002 at [44].
[3] SK OIPC, *2012-2013 Annual Report*, Appendix 3.

can include exact copies of official records made for convenience of reference.[4] Transitory records can include:

- Information in a form used for casual communication.
- Versions that were not communicated beyond the person who created the document.
- Copies used for information, reference or convenience only.
- Annotated drafts where the additional information is found in subsequent versions (except where retention is necessary as evidence of approval or the evolution of the document).
- Source records used for updating electronic records.
- Electronic versions of records where a hard copy is maintained in hard copy files.
- Poor quality photographs which do not contribute to the purpose of the photography.[5]

The right of access does not apply to records that are excluded under section 3 of FOIP or where another provision prevails over FOIP under section 23 of FOIP or section 12 of *The Freedom of Information and Protection of Privacy Regulations*. For more on this see the *Guide to FOIP*, Chapter 1, "Purposes and Scope of FOIP".

The right of access is not absolute. There will be circumstances where information may be legitimately withheld by government institutions. The right of access is subject to limited and specific exemptions that are set out in Part III of FOIP. This includes sections 13 to 22 of FOIP. It also includes the personal information provisions at subsections 29(1), 30(1), and 31(2) in Part IV of FOIP. The exemptions all have specific criteria or tests that need to be met before an exemption may be applied. For more on exemptions see Part III and Part IV of FOIP or the *Guide to FOIP*, Chapter 4, "Exemptions from the Right of Access".

The reason an applicant wants specific information is not relevant when a government institution processes an access to information request. To require applicants to demonstrate a need for the information would erect a barrier to access. FOIP grants an open-ended or unqualified right of access to public information of which government institutions are only the stewards,[6] unless it is found that the access to information request should be disregarded pursuant to section 45.1 of FOIP. For more on applications to disregard see *Section 45.1:*

---

[4] Provincial Archives of Saskatchewan, Records Classification and Retention Schedules, *Administrative Records Management System 2014* at p. 13. Available at https://www.saskarchives.com/services-government/records-classification-and-retention-schedules.
[5] Drapeau, Professor Michel W., Racicot, Me Marc-Auréle, *Federal Access to Information and Privacy Legislation Annotated 2020,* (Toronto: Thomson Reuters 2019) at p. 1-628.
[6] Office of the Ontario Information and Privacy Commissioner (ON IPC) Order M-618 at p.16-17.

Power to Authorize a Government Institution to Disregard Applications or Requests later in this Chapter.

Processing Access to Information Requests

When responding to access to information requests, it is important that a government institution assign responsibilities for the various processing steps.

Government institutions should develop a procedure for processing requests. The procedure should include steps that ensure legislated timelines and other requirements of FOIP are met.

Government institutions should also create and retain documentation on their processing of requests.[7] This becomes important in the event of a review pursuant to section 49 of FOIP or a court appeal pursuant to section 57 of FOIP.

Depending on the request and the type of records requested there may be several steps that need to be taken such as giving notice to third parties. However, the most basic of access to information requests will follow these broad steps:

1. Receive an access to information request.
2. Assess if fees are required.
3. Search and gather responsive records.
4. Review and prepare the records for disclosure.
5. Provide a response to the applicant.

The Ministry of Justice and Attorney General developed a checklist titled, *Help with FOIP - Access Request Checklist*. It provides the steps to take when a government institution receives an access to information request. It can be modified to suit the needs of the institution and the circumstances of the access to information request. In addition, see *FOIP/LAFOIP Flow Chart*.

The Ministry of Justice and Attorney General has also developed a resource titled, *In the Door, Out the Door: A User's Guide to Processing Access to Information Requests under FOIP and LA*

[7] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 3, at p. 68.

FOIP. It provides guidance on processing access to information requests from the time they are received, to sending the section 7 decision to the applicant.

Name of Applicant is Personal Information

Government institutions should be careful when sharing the name of an applicant who has submitted an access to information request.

When handling an access to information request, the government institution must protect the identity of the applicant, along with the applicant's contact information that appears on the access to information request. As the name and contact information of the applicant, in most cases, is their personal information pursuant to subsection 24(1) of FOIP, it is subject to the privacy protections in Part IV of FOIP. This includes restrictions on the collection, use and disclosure of that personal information. For more on the obligations on government institutions to protect personal information, see the *Guide to FOIP*, Chapter 6, "Protection of Privacy".

The data minimization and need-to-know principles should be abided by when deciding who to share the applicant's personal information with. The key question to ask is, does the person I am sharing this with need to know the identity of the applicant or their contact information to process the request or can it be done without sharing it? If the request can still be processed without sharing it, then it should not be shared. When considering sharing this personal information internally, section 28 of FOIP should be abided by. If considering sharing it externally (e.g., with another government institution), there must be authority to do so under subsection 29(2) of FOIP. For more on these two principles and section 28 and subsection 29(2) of FOIP, see the *Guide to FOIP*, Chapter 6, "Protection of Privacy".

All applicants are equal under FOIP. The identity of the applicant should not change how the government institution responds to the access to information request (e.g., the applicant is the media so the government institution decides not to release information it generally would release).

IPC Findings

In Investigation Report 278-2017, the Commissioner investigated an alleged breach of privacy involving Saskatchewan Power Corporation (SaskPower). The complaint alleged that when the individual sent an access to information request to SaskPower, it then sent a briefing note to the Minister responsible for SaskPower. The briefing note contained details about the access to information request and included the applicant's first and last name. Upon investigation, the Commissioner found that the name of an applicant was personal

information and referred to previous Review Reports LA-2012-002, 156-2017 and 267-2017. Furthermore, the Commissioner found that SaskPower did not appropriately consider the need-to-know and data minimization principles when the applicant's personal information was disclosed to the Minister. For more on the need-to-know and data minimization principles, see the *Guide to FOIP*, Chapter 6, "Protection of Privacy".

Reason for Request Not Relevant

The reason an applicant wants specific information is not relevant when processing an access to information request. To require applicants to demonstrate a need for the information would erect a barrier to access. FOIP grants an open-ended or unqualified right of access to public information of which government institutions are only the stewards.[8]

Access to information legislation exists to ensure government accountability and to facilitate democracy. Therefore, where an applicant's motivation is fact finding or to obtain proof of wrongdoing, these purposes cannot be considered unreasonable or illegitimate. Applicants may seek information to assist them in a dispute with a government institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by a government institution.[9]

Questions in Access to Information Requests

FOIP does not require government institutions to answer questions that come in an access to information request.[10] For example, access to information requests that ask why the government institution made certain decisions.

FOIP provides access to records and unless answers are in a record, the government institution is not required under FOIP to answer them. However, a government institution does have a duty to answer questions as to whether it has responsive records.[11]

[8] ON IPC Order M-618 at p.p. 16 and 17.
[9] SK OIPC Review Report 053-2015 at [32].
[10] SK OIPC Review Report 091-2015 at [15].
[11] AB IPC Order F2014-39 at [22].

IPC Findings

In Disregard Decision 130-2021, the Commissioner considered an application to disregard an access to information request from the Rural Municipality of North Qu'Appelle No. 187 (RM). Although the matter involved *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), the findings also apply to FOIP. While considering the application and the question of whether the applicant's access to information requests (current and previous) were repetitious, the Commissioner noted that the applicant's previous access to information requests pose several questions. The applicant had raised that previous access to information requests had not been completed answered or replied to. Furthermore, where the applicant was not satisfied with the answers to the questions, the applicant asked them again in subsequent requests. The Commissioner noted at paragraph [19] of the Decision that LA FOIP does not require an RM to answer questions that come in an access to information request. For example, why the RM made certain decisions. LA FOIP is about gaining access to records. Therefore, the RM was not required under LA FOIP to answer questions by the Applicant. However, the RM did have a duty to answer questions as to whether it had responsive records.

Verifying Identity

Government institutions should verify the identity of an applicant before giving the applicant access to the applicant's own personal information, especially if the information is sensitive.[12] Subsection 31(1)(b) of FOIP also requires that access to one's own personal information will be provided upon giving sufficient proof of his or her identity.

Authentication is the process of proving or ensuring that someone is who they purport to be. Authentication typically relies on one or more of the following:

- Something you know (e.g., password, security question, PIN, mother's maiden name).
- Something you have (e.g., smart card, key, hardware token).
- Something you are (e.g., biometric data, such as fingerprints, iris scans, voice patterns).[13]

[12] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 3 at p. 89.
[13] Service Alberta, *Bulletin #17, Consent and Authentication* at p. 2.

In some cases, one of these factors may be used alone to authenticate an individual. For others, combinations may be used.

There are multiple ways to confirm the identity of the applicant. The degree of authentication should be appropriate to the sensitivity of the personal information involved.

Social Insurance Numbers

Government institutions should be careful not to collect information beyond that required to fulfill the purpose to comply with section 25 of FOIP and the data minimization principle.

Identification purposes are not in themselves considered a legitimate basis for requiring an individual to provide a social insurance number. If a social insurance number is being requested for identification purposes only, the government institution must not in any way suggest that the social insurance number is required as a condition for providing records or services. Even where it is reasonable to ask an applicant for proof of identity, a request for a social insurance number must be presented and treated as optional. In verifying identity, a government institution may request the social insurance number as one option among others, but never as a requirement.[14]

Saskatchewan Health Services Number

Again, government institutions should be careful not to collect information beyond what is required to fulfill the purpose to comply with section 25 of FOIP and the data minimization principle.

Like social insurance numbers above, government institutions should not require an applicant to produce a health services number as a condition of receiving records. Section 11 of *The Health Information Protection Act* provides that an individual has a right to refuse to produce their health services number to any person, other than to a trustee who is providing a health service, as a condition of receiving a service unless the production is otherwise authorized by an Act or regulation.[15]

---

[14] Office of the Privacy Commissioner of Canada, *Fact Sheets - Best Practices for the use of Social Insurance Numbers in the private sector.* Available at Best Practices for the use of Social Insurance Numbers in the private sector - Office of the Privacy Commissioner of Canada. Also cited in SK OIPC Investigation Report F-2012-001 at [33].

[15] See *The Health Information Protection Act*, SS 1999, c H-0.021 at section 11.

For more on verifying identity, see the Ministry of Justice and Attorney General resource, *Verifying the Identity of an Applicant*. See also *Subsection 59(e)* later in this Chapter.

IPC Findings

In Investigation Report F-2012-001, the Commissioner investigated an alleged breach of privacy involving Saskatchewan Telecommunications (SaskTel). The complaint alleged that SaskTel was over collecting a customer's personal information as part of its identity verification process. Along with other findings, the Commissioner found that SaskTel did not have authority to collect the complainant's Saskatchewan Health Services Number. Furthermore, that SaskTel did not provide a satisfactory explanation as to why it needed to collect other unique identifiers over the phone since it could not verify the accuracy of same. The Commissioner recommended that SaskTel conduct a privacy impact assessment, revise its privacy policy and prepare a script to ensure that its customers understand what is optional when providing proof of identity. Furthermore, that SaskTel purge its system of all personal information and personal health information of its customers and third parties collected without the requisite authority within 60 days.

Requests Not on "Form A"

Applicants do not have to submit an access to information request on *Form A* for it to be considered a request under FOIP. A request need only be in writing and include the elements found on *Form A* to be a valid request under LA FOIP. *Form A* includes:

- First and last name.
- Name of organization or company (if applicable).
- Mailing address.
- Telephone number.
- Email address.
- The type of information being requested (personal or general).
- The government institution the request is being made to.
- The records being requested.
- The time period of the request.
- Signature of the applicant.

The Legislation Act establishes general rules that govern the interpretation of all statutory instruments in the province of Saskatchewan. Section 2-26 of *The Legislation Act* provides

that it is not mandatory for an individual to use a prescribed form provided certain criteria are met:

> **2-26** If an enactment requires the use of a specified form, deviations from the form do not invalidate a form used if:
>
> (a) the deviations do not affect the substance;
>
> (b) the deviations are not likely to mislead; and
>
> (c) the form used is organized in the same way or substantially the same way as the form the use of which is required.[16]

IPC Findings

In Review Report 150-2018, the Commissioner reviewed a denial of access involving the Ministry of Social Services (Social Services). Social Services was asserting that FOIP did not apply and the access to information requests were not requests under FOIP. As part of the review, the Commissioner considered whether the internal form created by Social Services were still access to information request forms under FOIP. The Commissioner found that by creating a separate form, Social Services had not removed the requests from the scope of FOIP. Regardless of which form was submitted by an applicant (the prescribed Form A or Social Services' form), FOIP was engaged when the form includes the elements of Form A and is recognized as a request for access to information. By creating its own separate process and form, Social Services was deciding in advance, independently, when FOIP applied and when it did not and was attempting to remove an applicant's right to have that decision reviewed by the Commissioner. In conclusion, the Commissioner found that all access requests submitted to Social Services on the *Child and Family Programs Access to Information Request* forms were access requests pursuant to subsection 6(1) of FOIP.

In Review Report 278-2019, the Commissioner reviewed a denial of access involving the Resort Village of Candle Lake (RVCL). An applicant sought access to documentation related to a cheque including the invoice for the amount, copy of the cheque, the council resolution and retainer agreement. In the process of handling the request, the applicant made some modifications to the request and added some additional things via emails and letters. The RVCL responded requesting the applicant remit the additions on the prescribed Form A as it would help in clarifying the request in detail. The applicant requested the Commissioner review the RVCL's decision. The Commissioner found that to qualify as a request under LA

[16] *The Legislation Act*, SS 2019, c L-10.2 at subsection 2-26.

FOIP, it is not required that the request be submitted on a prescribed form, provided it has all the required elements found on the prescribed form. RVCL recognized the applicant's email requesting records as a request under LA FOIP when it advised the applicant it would be processed in that manner. Furthermore, if RVCL did not intend to process the emailed request as a request under LA FOIP, it should not have requested and accepted the applicant's $20 application fee.

Search for Records

Subsection 5.1(1) of FOIP requires a government institution to respond to an applicant's access to information request openly, accurately and completely. This means that government institutions should make reasonable effort to not only identify and seek out records responsive to an applicant's access to information request, but to explain the steps in the process.

The threshold that must be met is one of "reasonableness". In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable.[17]

A **reasonable search** is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances.[18]

It is not reasonable for a government institution to rely on an employee's opinion that no records exist when deciding not to search. A government institution should not rely on anyone's memory as to whether records were created. It cannot know in advance of doing a search whether an individual will be right about whether records were created. All an individual can say, with any reasonable certainty, is whether he or she personally created any records. Otherwise, the individual is merely expressing an opinion as to the likelihood of whether anyone else created records.

[17] SK OIPC Review Report F-2012-002 at [27].
[18] SK OIPC Review Reports F-2008-001 at [38] and F-2012-002 at [26].

A government institution cannot absolve itself of its duty to search based on an individual's opinion about whether records were created. If a government institution could forego its duty to search based on such an opinion, the Act would be frustrated.[19]

IPC Review of Search Efforts

Subsection 49(1)(a) of FOIP provides that applicants can request a review by the Commissioner if they are not satisfied with the decision of the government institution pursuant to sections 7, 12 or 37.

The matter of search efforts is covered in subsection 7(2)(e) of FOIP. Subsection 7(2)(e) of FOIP provides that a government institution can respond to an applicant's access to information request indicating that access is denied because records do not exist.

Applicants must establish the existence of a reasonable suspicion that a government institution is withholding a record or has not undertaken an adequate search for a record. Sometimes this can take the form of having possession of or having previously seen a document that was not included with other responsive records or media reports regarding the record. The applicant is expected to provide something more than a mere assertion that a document should exist.[20]

A review by the Commissioner of a government institution's search efforts can occur in one or both of the following situations:

1. The government institution issued a section 7 decision letter indicating records do not exist.

2. The applicant believes there are more records than what the government institution provided.

The focus of an IPC search review is whether the government institution conducted a reasonable search. As noted above, a **reasonable search** is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request. A reasonable effort is the level of effort you would expect

[19] AB Order 99-021 at [33] to [35]. Also quoted in SK OPIC Review Report 180-2019 at [22].
[20] NFLD IPC, Resource, *Practice Bulletin, Reasonable Search,* a p. 2.

of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances.[21]

It is difficult to prove a negative, therefore FOIP does not require a government institution to prove with absolute certainty that records do not exist.[22]

When a government institution receives a notice of a review from the IPC requesting details of its search efforts, some or all of the following can be included in the government institutions' submission (not exhaustive):

- For personal information requests – explain how the individual is involved with the government institution (i.e., client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search.
- Describe how records are classified within the records management system. For example, are the records classified by:
    - Alphabet
    - Year
    - Function
    - Subject
- Consider providing a copy of your organization's record schedule and screen shots of the electronic directory (folders & subfolders).
- If the record has been destroyed, provide copies of record schedules and/or destruction certificates.
- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the government institution's control have been searched such as a contractor or information management service provider.

---

[21] SK OIPC Review Reports F-2008-001 at [38] and F-2012-002 at [26].
[22] SK OIPC Review Reports F-2008-001 at [38] to [40], F-2012-002 at [26] and NFLD IPC, Resource, *Practice Bulletin, Reasonable Search,* at p. 1.

- Explain how a search of mobile electronic devices was conducted (i.e., laptops, smart phones, cell phones, tablets).
- Explain which folders within the records management system were searched and how these folders link back to the subject matter requested. For electronic folders – indicate what key terms were used to search if applicable.
- Indicate the calendar dates each employee searched.
- Indicate how long the search took for each employee.
- Indicate what the results were for each employee's search.
- Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see *Using Affidavits in a Review with the IPC*.

The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested.

Providing the above details eliminates any apprehension of bias and bolsters the government institution's ability to show that a reasonable search was conducted. However, it is possible to have conducted a reasonable search without locating the record that was the basis for the allegation in the first place. Reasonableness is the standard and the efforts undertaken must be documented in the event the government institution's search efforts are called into question in a review by the Commissioner. The government institution must be able to show it has fulfilled its obligations under FOIP.[23]

Records management issues discovered in the process of conducting a search for records should be addressed as soon as possible as inadequate records management practices will not be accepted as a reasonable explanation for failure to locate responsive records.[24] For more on records management, see the *Guide to FOIP*, Chapter 6, "Protection of Privacy".

[23] NFLD IPC, Resource, *Practice Bulletin, Reasonable Search,* a p. 4.
[24] NFLD IPC, Resource, *Practice Bulletin, Reasonable Search,* a p. 4.

IPC Findings

In Review Report 110-2017, the Commissioner considered whether the Ministry of Labour Relations and Workplace Safety (LRWS) conducted a reasonable search for records from the applicant's case file. The applicant had requested a copy of his file from 2000/2001. The applicant believed that records were missing from the copy he received from LRWS. The applicant identified four records he believed were missing. Upon review of LRWS' search efforts, the Commissioner found that LRWS had demonstrated that its search for records was reasonable and adequate for purposes of FOIP. Furthermore, it persuaded the Commissioner in its attempts to explain why the four records did not exist. This finding was based partly on the fact that the applicant's claim that records existed was based on speculation and conclusions drawn from snippets of information in the copy of the file the applicant had received.

In Review Report 344-2017, the Commissioner considered whether the Ministry of Immigration and Career Training conducted a reasonable search for records. Upon review, the Commissioner found that the Ministry of Immigration and Career Training had not demonstrated that its search for records was adequate for purposes of FOIP. This finding was partly due to a lack of details provided regarding search efforts. The Commissioner recommended that the Ministry of Immigration and Career Training conduct a more fulsome search for responsive records.

In Review Report 016-2014, the Commissioner considered whether the Ministry of Education conducted a reasonable search for records. The records the applicant asserted were missing were correspondence between the applicant and the Deputy Minister. Upon review, the Commissioner found that the Ministry of Education demonstrated that its search for records was reasonable and adequate for purposes of FOIP.

In Review Report 101-2014, the Commissioner considered whether the Ministry of Justice (Corrections & Policing) had conducted a reasonable search for records. The applicant had requested a copy of a complaint that had been directed to the *Regina Leader Post* (Leader Post). In its submission, Corrections & Policing had explained that the applicant was seeking a letter written in 1995 to the Leader Post by a former Chief Provincial Firearms Officer in relation to an article about the applicant printed in the Leader Post by another individual. Corrections & Policing detailed the steps it took in its search to locate the letter from 1995. The Commissioner found that the search conducted by Corrections & Policing was reasonable.

Searching Records of Employees

There are two separate issues that come into play when it comes to searching records held by employees. These issues mainly come into play with electronic records, but the same considerations apply for paper records:

1. **Government records in personal accounts:** Records may exist in an employee's personal email account or record holdings because the employee conducted government-related business using a personal email account or from a remote location and the paper records are at the employee's personal residence or other non-government location or device. These are not personal records of the employee (see *Government Records in Personal Email Accounts* below).

2. **Personal records in government accounts:** The access to information request involves the personal records (either electronic or paper) of the employee because of the nature of the request. Depending on the request, these may be the personal records of employees and privacy matters could come into play (see *Personal Records in Government Accounts* below).

Government Records in Personal Email Accounts

Email is an easy and accessible form of communication and a tool that we all use in our professional and personal lives. However, for government-related activities, personal email accounts should not be used.

If a government employee uses a personal device and/or personal account (such as a personal email account) to conduct government related activities, the Commissioner has taken the position that such records are still subject to FOIP.[25] In such situations, the government institution should be searching those email accounts or personal devices for responsive records in addition to regular records holdings.

There are both access and privacy issues that arise when government-related activities are conducted using personal email accounts. FOIP provides individuals with the right to access records in the possession or under the control of a government institution, subject to limited

[25] SK OIPC resource, *Best Practices for Managing the Use of Personal Email Accounts, Text Messaging and Other Instant Messaging Tools,* May 2018 at p. 4. Available at Best Practices for Managing the Use of Personal Email Accounts, Text Messaging and Other Instant Messaging Tools (oipc.sk.ca). Accessed December 29, 2022.

and specific exemptions. Storing government records in personal email accounts, threatens the right of access to records that FOIP provides as searches for records responsive to an access to information request are not generally done of government officials' personal email accounts. There is also a risk that important records that reflect decision-making by government are not preserved as required by law.

The Archives and Public Records Management Act (APRM Act) defines a "public record" as follows:

> **2** In this Act:
>
> ...
>
> **"public record"** means:
>
> (a) a record made or received by a government institution in carrying out that government institution's activities;
>
> (b) a ministerial record;
>
> (c) a record made or received by the Legislative Assembly, the Legislative Assembly Service or an Officer of the Legislative Assembly;
>
> (d) a court record; or
>
> (e) an administrative record of a court;
>
> but does not include a prescribed record;

The Archives and Public Records Management Regulations further defines a public record as follows:

> **3**(2) For the purposes of the definition of **"public record"** in section 2 of the Act and in these regulations, a prescribed record includes the following records:
>
> (a) an exact duplicate or surplus copy of an official record if:
>
> (i) nothing has been added to, changed in or deleted from the information set out in the official record; and

(ii) the official record has been captured and maintained, in accordance with policies of the Provincial Archives of Saskatchewan, by the court, government institution, minister of the Government of Saskatchewan, Legislative Assembly, Legislative Assembly Service or Officer of the Legislative Assembly who or that is responsible for the record;

(b) a record of a temporary or limited usefulness, as determined in accordance with policies of the Provincial Archives of Saskatchewan, that is not necessary to sustain administrative or operational functions of the court, government institution, minister of the Government of Saskatchewan, Legislative Assembly, Legislative Assembly Service or Officer of the Legislative Assembly who or that is responsible for the record.

Public records need to be retained, destroyed or transferred to the Provincial Archives of Saskatchewan as per the APRM Act. Using personal email for government-related activities runs contrary to this requirement as the records reside elsewhere. Government should be taking steps to ensure that it is consistently preserving records in the name of good governance as well as for the responsible preservation of documents that could be subject to future access to information requests.[26]

Overall, such practices undermine the transparency and accountability of government that is the foundation of access and privacy legislation. FOIP requires a government institution to respond to a written access to information request openly, accurately and completely (s. 5.1(1) of FOIP). The use of personal email accounts by public servants makes this duty difficult to comply with because government may not be aware of the existence of records on personal email accounts that are responsive to an access to information request.

In addition to access to information concerns, there are also privacy concerns with housing government records in personal email accounts. Many public servants (or elected officials) are unclear how to protect government records in such environments. Email is not confidential by default and in some situations, records are stored outside Canada. See the *Guide to FOIP*, Chapter 6, "Protection of Privacy" at *Personal Email Use for Business* for more on this.

For more on this topic, see also IPC resource, *Best Practices for Managing the Use of Personal Email Accounts, Text Messaging and Other Instant Messaging Tools*.

[26] SK OIPC Investigation Report 101-2017 at [34].

Conflict of Interest

An employee with personal or special interest in whether records are disclosed should not be the person who decides the issue of disclosure when the records are held in the employee's personal email account.[27] When an employee is asked to search their own records to identify and provide copies of responsive records which they may not be reflected in the best light, there is an inherent conflict of interest and very human urge to expunge or attempt to hide embarrassing records. In all cases where there is a real or apparent conflict of interest in having an employee search their own records and supply responsive records, the searches should be conducted by the FOIP Coordinator or Privacy Officer.[28]

When determining whether there is a conflict of interest in having the employee search their own personal accounts, consider the following:

(a) Does the decision-maker (or employee) have a personal or special interest in the records.

(b) Would a well-informed person, considering all the circumstances, reasonably perceive a conflict of interest on the part of the decision-maker.[29]

IPC Findings

In Review Report 184-2016, the Commissioner addressed the issue of Global Transportation Hub (GTH) board members using personal email addresses to conduct government related activities. Board members received sensitive government documents at personal email addresses. The Commissioner recommended GTH board members use the Government of Saskatchewan email system for government-related activities.

In Review Report 051-2017, the Commissioner addressed the issue of the former Premier using a personal email account and a "saskparty.com" email account for government business. The Commissioner encouraged government leaders and public servants to use the Government of Saskatchewan email system to do government-related activities.

In Investigation Report 101-2017, the Commissioner investigated a complaint by an individual that alleged the Minister of the former Saskatchewan Transportation Company

[27] ON IPC Order MO-2867 at [22]. See also SK OIPC Review Report 023-2020, 027-2020, Part I, at [37].
[28] Office of the Nunavut Information and Privacy Commissioner (NU IPC) Review Report 16-102 at [4] and [5].
[29] ON IPC Order MO-2867 at [22]. See also SK OIPC Review Report 023-2020, 027-2020, Part I, at [37].

responded to the complainant using a personal/business email account. The Commissioner confirmed the alleged complaint and offered best practice advice with regards to the use of personal email for government-related activities.

In Review Report 216-2017, the Commissioner again raised concerns when it was learned that public servants with the Ministry of Economy (Economy) were using personal email accounts to conduct government-related activities. The Commissioner recommended that Economy prohibit its employees from using their personal email addresses for government-related activities and require them to use government-issued email accounts only.

In Investigation Report 262-2017, the Commissioner investigated a complaint involving the Ministry of Social Services (Social Services). CBC news articles reported concerns about the use of private email accounts for government business by Social Services. The Commissioner found that Social Services was using back-up tapes for the purposes of archiving official records which was not in compliance with *The Archives and Public Records Management Act* (APRMA). The Commissioner recommended that Social Services continue to work with Provincial Archives of Saskatchewan to develop an institution wide records retention schedule to be compliant with APRMA and to ensure records are accessible for purposes of FOIP.

Personal Records in Government Email Accounts

There are occasions when applicants request access to records that engage the personal records of an employee of the government institution.

When a government employee uses their workplace email address to send and receive personal emails completely unrelated to their work, are those emails subject to FOIP?

It can be confidently predicted that any government employee who works in an office setting will have stored, somewhere in that office, documents that have nothing whatsoever to do with their job, but which are purely personal in nature. Such documents can range from the most intimately personal documents (such as medical records) to the most mundane (such as a list of household chores). It cannot be suggested that employees of an institution governed by FOIP are themselves subject to that legislation in respect of any piece of personal material they happen to have in their offices at any given time. That would clearly not be contemplated as being within the intent and purpose of FOIP.[30]

[30] See *City of Ottawa v. Ontario*, 2010 ONSC 6835 (CanLII) at [37]. See also SK OIPC Review Report F-2014-007. Also cited in *Guide to FOIP*, Chapter 1, "Purposes and Scope of FOIP" at pp. 11 to 12.

While the expectation of privacy may be somewhat circumscribed, there is still both a right to and a reasonable expectation of privacy in relation to certain personal information contained on or in government owned equipment and accounts.[31]

Incidental personal use of government email accounts is generally anticipated. However, the government retains the right to monitor its information technology systems, which includes email. This is essential for security breaches, monitoring compliance with policies and network management.

Computers that are reasonably used for personal purposes - whether found in the workplace or the home - contain information that is meaningful, intimate and touching on the user's biographical core. Canadians may therefore reasonably expect privacy in the information contained on these computers, at least where personal use is permitted or reasonably expected. Ownership of property is a relevant consideration but is not determinative.[32]

Workplace policies are also not determinative of a person's reasonable expectation of privacy. Whatever the policies state, one must consider the totality of the circumstances in order to determine whether privacy is a reasonable expectation in the particular situation. While workplace policies and practices may diminish an individual's expectation of privacy on a work computer, these sorts of operational realities do not in themselves remove the expectation entirely. A reasonable though diminished expectation of privacy is nonetheless a reasonable expectation of privacy, protected by section 8 of the *Canadian Charter of Rights and Freedoms*. Accordingly, it is subject to state intrusion only under the authority of a reasonable law.[33]

The purpose and intent of the legislation is also an important consideration.[34] Would including personal and private communications of employees unrelated to government business do anything to advance the purposes of the legislation? Alternatively, would interpreting the language of the Act as not applying , interfere with a citizen's right to fully participate in democracy?

There have been a number of cases where the Commissioner has determined that the personal records of employees were not in the possession or control of a government

---

[31] Office of the Northwest Territories Information and Privacy Commissioner (NWT IPC) Review Report 20-247 at [37]. Also cited in *Guide to FOIP*, Chapter 1, "Purposes and Scope of FOIP" at pp. 11 to 12.
[32] *R. v. Cole*, 2012 SCC 53 (CanLII), [2012] 3 SCR 34.
[33] *R. v. Cole*, 2012 SCC 53 (CanLII), [2012] 3 SCR 34.
[34] For more on the purposes of FOIP, see *Guide to FOIP*, Chapter 1, "Purposes and Scope of FOIP".

institution or local authority (see *IPC Findings* at the end of this section). In each case, the starting point was for the government institution or local authority to successfully demonstrate for the Commissioner that the records were indeed the personal records of the employee. Second, the government institution or local authority presented its case on why it did not have possession or control of the records.

For best practices for how to manage personal emails in government email accounts, see IPC resource, *Best Practices for the Management of Non-Work Related Personal Emails in Work-Issued Email Accounts*.

Conflict of Interest

If a government employee uses a personal device and/or personal account (such as personal email account) to conduct government-related activities, the Commissioner has taken the position that such records are still subject to FOIP.[35] In such situations, the government institution should be searching those email accounts for responsive records in addition to regular records holdings.

An employee with personal or special interest in whether records are disclosed should not be the person who decides the issue of disclosure.[36]

When an employee is asked to search their own records to identify and provide copies of responsive records which they may not be reflected in the best light, there is an inherent conflict of interest and very human urge to expunge or attempt to hide embarrassing records. In all cases where there is a real or apparent conflict of interest in having an employee search their own records and supply responsive records, the searches should be conducted by the FOIP Coordinator or Access Coordinator.[37]

It is important to determine if a conflict of interest may exist. Consider the following:

(a) Does the decision-maker have a personal or special interest in the records.

---

[35] SK OIPC resource, *Best Practices for Managing the Use of Personal Email Accounts, Text Messaging and Other Instant Messaging Tools,* May 2018 at p. 4. Available at Best Practices for Managing the Use of Personal Email Accounts, Text Messaging and Other Instant Messaging Tools (oipc.sk.ca). Accessed December 29, 2022.
[36] ON IPC Order MO-2867 at [22]. See also SK OIPC Review Report 023-2020, 027-2020, Part I, at [37].
[37] Office of the Nunavut Information and Privacy Commissioner (NU IPC) Review Report 16-102 at [4] and [5].

(b) Would a well-informed person, considering all the circumstances, reasonably perceive a conflict of interest on the part of the decision-maker.[38]

IPC Findings

In Review Report F-2014-007, the Commissioner reviewed a denial of access by the Ministry of Justice and Attorney General (Justice). An applicant sought all records containing the name of an individual written, processed or possessed by a specific government employee. Justice responded indicating it did not have any responsive records. The applicant requested the Commissioner review Justice's decision. In its submission to the Commissioner, Justice asserted that any responsive records were the personal records of the government employee which it described as emails. Furthermore, Justice asserted that it did not have possession or control of the records. Upon review, the Commissioner determined that the applicant was a family member of the government employee. Furthermore, that there was a family feud occurring. The Commissioner found that the emails responsive to the access to information request were not related in any way to the government employee's work functions or government business. The records were personal emails sent and received using the employee's government assigned email address. After considering 15 factors[39], the Commissioner found that Justice did not have possession or control of the records.

In Review Report 023-2020, 027-2020 Part I, the Commissioner reviewed a denial of access involving the Ministry of Justice and Attorney General (Justice). An applicant sought records related to an automobile accident for which a Justice employee's daughter was involved. A search for records indicated one responsive record which Justice withheld pursuant to section 22 of FOIP. In addition, Justice indicated that other responsive records were not in Justice's possession or control. The applicant sought a review of this decision by the Commissioner. In its submission to the Commissioner, Justice asserted that the employee, whose daughter was involved in the accident, was asked to search their government email account for responsive records. The employee reported finding responsive records but asserted the records were not work related but rather personal and private. Justice accepted this response and provided the Commissioner with a sworn affidavit from the employee asserting same. The applicant raised concerns with the Commissioner that charges related to the accident were withdrawn at Traffic Safety Court by the Prosecutor and the applicant questioned whether the connection the other driver had to Justice played a factor in that. The Commissioner considered whether there was a conflict of interest for the employee and whether it was appropriate for the

[38] ON IPC Order MO-2867 at [22]. See also SK OIPC Review Report 023-2020, 027-2020, Part I, at [37].
[39] For the 15 factors, see the *Guide to FOIP*, Chapter 1, "Purposes and Scope of FOIP" under *Section 5: Possession or Control*.

employee to search their own records. The Commissioner found that the employee had a personal and special interest in the matter and should not have conducted their own search for records. The Commissioner recommended an official at Justice be designated to do the search of the employee's emails and determine whether any of those emails were responsive to the access to information request.

In Review Report 007-2019, the Commissioner considered a denial of access involving the former Ministry of Central Services (Central Services). An applicant sought access to personal emails that they had sent and received from their government email account from 2004 to the date their employment ended. The applicant requested emails from specified senders, emails related to specific topics, and listed a number of personal email folders. Central Services denied access asserting that any records related to the request were not subject to FOIP and not in the possession or control of Central Services. The applicant requested a review by the Commissioner. Upon review, the Commissioner found that the former employee's personal emails were not in the possession or control of Central Services. The Commissioner recommended that Central Services develop a policy or procedure to ensure access to information requests seeking emails from email backups are transferred to the appropriate government institution that may have the emails, if they still exist.

In Review Report 096-2015 and 097-2015, the Commissioner considered a denial of access involving the former Saskatchewan Transportation Company (STC). Two applicants sought access to emails sent or received by an STC employee that included any variation of the applicants' names. STC provided access to some records and denied access to others stating that the remainder of the records were private records that were outside the scope of FOIP and not in the possession or control of STC. Both applicants requested a review by the Commissioner. After considering 15 factors[40], the Commissioner determined that STC did not have possession or control of the records. The emails were the personal records of the STC employee and were not created as part of their employment duties.

[40] For the 15 factors, see the *Guide to FOIP*, Chapter 1, "Purposes and Scope of FOIP" under *Section 5: Possession or Control*.

Records Not Responsive

When a government institution receives an access to information request, it must determine what information is responsive to the access request.

Responsive means relevant. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably relate to an applicant's request will be considered "not responsive".

Subsection 5.1(1) of FOIP requires government institutions to respond to applicants openly, accurately and completely. If a government institution removes information from a responsive document because it has been deemed not responsive, it should advise the applicant in its section 7 response and explain why.[41]

Government institutions are not obligated to create records that do not exist. In Review Report 313-2016, the Commissioner said that a government institution's duty to assist does not include an obligation to create records which do not exist at the time the access to information request was made. However, if a government institution has records containing the raw information that is sought by an applicant that can be produced, then those records would be responsive to the applicant's access request.[42]

Where information being sought can be produced from a government institution's existing computer software by means of technical expertise normally used by it, it will constitute a record under subsection 2(1)(i) of FOIP.[43]

Avoid breaking up the flow of information (i.e., do not remove information as not responsive within sentences or paragraphs). Providing an applicant with a complete copy of a record subject only to limited and specific exemptions, even if this means providing what the government institution views as not responsive information is entirely consistent with the purposes of FOIP.[44]

When determining what information is responsive, consider the following:

- The request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.

---

[41] SK OIPC Review Reports 061-2017 at [82] and 023-2017 & 078-2017 at [39] and [40].
[42] SK OIPC Review Reports 313-2016 at [18] and 038-2018 at [21].
[43] *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, 2009, ONCA 20 (CanLII) at [59].
[44] SK OIPC Review Report 023-2017 and 078-2017 at [37].

- A government institution can remove information as not responsive only if the applicant has requested specific information, such as the applicant's own personal information.
- The government institution may treat portions of a record as not responsive if they are clearly separate and distinct and entirely unrelated to the access request. However, use it sparingly and only where necessary.
- If it is just as easy to release the information as it is to claim not responsive, the information should be released (i.e., releasing the information will not involve time consuming consultations nor considerable time weighing discretionary exemptions).
- The purpose of FOIP is best served when a government institution adopts a liberal interpretation of a request. If it is unclear what the applicant wants, a government institution should contact the applicant for clarification. Generally, ambiguity in the request should be resolved in the applicant's favour.[45]

IPC Findings

In Review Report 016-2014, the Commissioner considered whether information removed from a record by the Ministry of Education was responsive to the applicant's access to information request. The applicant had requested any record held by several Deputy and Assistant Deputy Ministers and a specific unit within the Ministry of Education that mentioned the applicant's name between January 2013 and December 2013. The Commissioner found that some of the information deemed not responsive by the Ministry of Education was indeed responsive. Furthermore, the Commissioner also found that some information deemed not responsive was appropriately removed, as the applicant's access to information request was very specific. The Commissioner recommended that the information found to be responsive be released to the applicant.

In Review Report 187-2015, the Commissioner considered whether information removed from records by Saskatchewan Government Insurance (SGI) was responsive to the applicant's access to information request. The applicant had requested copies of all records regarding his insurance claim files. Upon review, the Commissioner found that the information removed related to the applicant's claim files. Therefore, the Commissioner found that the information deemed as not responsive by SGI, was indeed responsive.

In Review Reports 061-2017 and 023-2017 & 078-2017, the Commissioner considered the Ministry of Economy (Economy) and the Saskatchewan Power Corporation's (SaskPower) claims that records or information were not responsive to the applicant's access to

[45] ON IPC Order PO-3492 at [15].

information requests. In both reviews, the Commissioner found that Economy and SaskPower did not indicate in its section 7 response to the applicants that it was severing or withholding information deemed non-responsive. The Commissioner recommended that Economy and SaskPower revise policy and procedures so that its section 7 letters indicate when records are being withheld as non-responsive or information is being severed from a record as non-responsive and give reasons why.

Creating Records

Government institutions are not obligated to create records which do not exist.

A government institution's "duty to assist" (section 5.1 of FOIP) does not include an obligation to create records which do not exist at the time the access to information request is made. However, if a government institution has records containing the raw information that is sought by an applicant that can be produced, then those records would be responsive to the applicant's access request.[46]

FOIP does not require a government institution to create records in response to an access to information request. However, if the information requested is contained within a database the information must be provided consistent with subsection 10(2) of FOIP. For more on subsection 10(2) of FOIP see *Section 10: Manner of Access*, later in this Chapter.

IPC Findings

In Review Report 313-2016, the Commissioner reviewed a denial of access involving the Ministry of Economy (Economy). An applicant sought access to how many Saskatchewan Immigration Nominee Program (SINP) applications were represented by various parties (e.g., lawyer, family member, employer etc.) between October 11, 2013 and October 31, 2016. Economy responded to the applicant indicating records did not exist. The applicant requested the Commissioner review Economy's decision. In its submission to the Commissioner, Economy asserted that the SINP does not create records with the type of information the applicant was seeking and that it was not possible to create a record that broke down the individual applicants by the criteria sought without double counting. Economy provided additional explanation as to why the records did not exist in the format sought by the applicant. The Commissioner found that Economy had demonstrated that it did not have the records responsive to the applicant's request. During the review, the Commissioner also considered the issue of whether Economy was obligated to create a

[46] SK OIPC Review Reports 313-2016 at [18], 038-2018 at [21] and 057-2019 at [9] to [15].

record for the applicant. The Commissioner found that some jurisdictions, such as Alberta, have provisions within the requisite FOIP Act requiring a public body to create a record (e.g., subsection 10(2) of Alberta's FOIP Act). However, Saskatchewan's FOIP does not have a similar obligation. The Commissioner found that in general, the duty to assist does not include an obligation to create records that do not exist at the time of the access to information request. However, if the government institution (or local authority) has records containing the raw information that is sought that can be produced, then those records would be responsive to an applicant's request.

In Review Report 038-2018, the Commissioner reviewed a denial of access involving the University of Regina (U of R). An applicant sought access to all external research funding (both private and public) to the U of R. The U of R ran a query on its database that contained information about research grants and contracts and created a spreadsheet for the applicant. However, the applicant responded by requesting the U of R add the search term "petroleum" to its search on the database. The applicant was willing to pay a fee for the request. The U of R severed portions of the spreadsheet. The applicant requested the Commissioner review the U of R's decisions in the matter. In its submission to the Commissioner, the U of R asserted that the applicant was requesting access to information and not records. Upon review, the Commissioner confirmed that local authorities did not have to create records that did not exist.

Section 5.1: Duty to Assist

Duty of government institution to assist

5.1 (1) Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.

(2) On the request of an applicant, the government institution shall:

(a) provide an explanation of any term, code or abbreviation used in the information; or

(b) if the government institution is unable to provide an explanation in accordance with clause (a), endeavor to refer the applicant to a government institution that is able to provide an explanation.

Subsection 5.1(1)

Duty of government institution to assist

5.1 (1) Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.

Subsection 5.1(1) of FOIP requires a government institution to respond to an applicant's written access to information request openly, accurately and completely. This means that government institutions should make reasonable effort to not only identify and seek out records responsive to an applicant's access to information request, but to explain the steps in the process and seek any necessary clarification on the nature or scope of the request within the legislated timeframe.[47]

Government institutions are not obligated to create records that do not exist. In Review Report 313-2016, the Commissioner said that a government institution's duty to assist does not include an obligation to create records that do not currently exist. However, if a government institution has records containing the raw information that is sought by an applicant that can be produced, then those records would be responsive to the applicant's access request.[48]

It is not necessary for a government institution to put records in any specific order (e.g., chronological order) unless negotiated with an applicant beforehand. The only exception to the order of the records would be the attachments to emails. If a government institution is

[47] SK OIPC, Resource, *Understanding the Duty to Assist: A Guide for Public Bodies,* January 2018, at p. 2.
[48] SK OIPC Review Reports 313-2016 at [18] and 038-2018 at [21].

going to leave duplicate attachments out of the record, or re-order the record, it is best practice to provide an explanation to the applicant when it provides the record. This is part of the duty to assist.[49]

Where information being sought can be produced from a government institution's existing computer software by means of technical expertise normally used by it, it will constitute a record under subsection 2(1)(i) of FOIP.[50]

Though FOIP requires the government institution to respond openly, accurately and completely, the duty to assist also involves making every reasonable effort to assist without delay. This should occur pre and post receipt of any access to information request.[51]

Reasonable effort is what a fair and rational person would expect to be done or would find acceptable and helpful in the circumstances.[52]

Open means to be honest, forthcoming and transparent. Where a decision is made to not provide an applicant with all or part of a record, a government institution should provide reasons for the refusal in an upfront and informative manner. Being open would also include explaining to an applicant other things such as how and why a decision was made, how responsive records were searched for, any additional information necessary to explain something found in the record that is believed to be confusing; how a fee is calculated and creating a record when appropriate.[53]

Accurate means careful; precise; lacking errors.[54] Furthermore, it means the government institution must provide the applicant with sufficient and correct information about the access process and how decisions are made. This includes understanding what the applicant is actually looking for including:

- Clarifying the nature of the access to information request.
- Understanding the nature of the records.
- Searching for the record to make sure that all possible responsive documents have been located.

---

[49] SK OIPC Review Reports 086-2018 at [151] to [154], 080-2018 at [85] to [87], 077-2018 at [75].
[50] *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, 2009, ONCA 20 (CanLII) at [59].
[51] SK OIPC Resource, *Understanding the Duty to Assist: A Guide for Public Bodies,* at p. 1.
[52] Office of the Nova Scotia Information and Privacy Commissioner (NS IPC), Resource, *What is the Duty to Assist*, at p. 1. Similar definition cited in SK Review Report F-2006-003 at [55].
[53] NS IPC, Resource, *What is the Duty to Assist*, at p. 1
[54] SK OIPC Review Report F-2006-003 at [49].

- Preparing an Index of Records if this would make the government institution's response more accurate.
- Reviewing the records line-by-line before a decision is made with respect to what, if any, exemptions apply.[55]

Complete means having all its parts; entire; finished; including every item or element; without omissions or deficiencies; not lacking in any element or particular.[56] Furthermore, it means the information from a government institution must be comprehensive and not leave any gaps in its response to an applicant's access to information request. A government institution should provide all the necessary details to enable an applicant to understand how a decision was reached. This will include explaining:

- Search procedures when no records are found, or records have been destroyed.
- What, if any, exemptions have been applied.
- The reason an exemption has been applied particularly when the exemption is discretionary.
- What factors were relied upon in exercising discretion to withhold a record or part of a record.
- Informing an applicant about the outcome of an access process.
- The right to request a review by the Commissioner.[57]

How a government institution fulfills its duty to assist will vary according to the circumstances of each request and requires the exercise of judgment. The most important aspects of the duty to assist are likely to arise in the course of:

- Providing the information necessary for an applicant to exercise his or her rights under FOIP.
- Clarifying the request, if necessary.
- Performing an adequate search for records.
- Responding to the applicant.[58]

When an individual first contacts a government institution, reasonable efforts to assist could include the following:

- Make sure the individual is redirected to the 'right person' (i.e., FOIP Coordinator).
- Discuss whether the request can be accommodated outside the formal process:

---

[55] NS IPC, Resource, *What is the Duty to Assist*, at p. 1
[56] SK OIPC Review Report F-2006-003 at [49].
[57] NS IPC, Resource, *What is the Duty to Assist*, at p. 2
[58] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 3 at p. 50.

    - Can this information be routinely released.
    - Have the records sought been released previously through an earlier access to information request.
    - Does the applicant only want an answer to a question and not access to records.
    - Is there another Act or administrative process that provides a right of access.
    - Is the information being sought available publicly online or in a government publication. If it is, direct the applicant where to look.
- Would another government institution be better able to assist the applicant. If so, the request may be transferred in certain cases.
- Provide information about records in the government institution's possession or control.
- Provide copies of the prescribed form or accept written requests that contain all the necessary elements.
- Explain the access to information processes to the applicant including:
    - That the applicant's identity will only be shared on a need-to-know basis.
    - Any pertinent timeframes.
    - What is required if identity needs to be authenticated.
    - What is required if a fee waiver is requested.
    - If and why consent is required in certain circumstances.
    - Methods of access to records (i.e., view or receive a copy).
    - Any fees estimated.
    - Extensions.
    - The right to request a review by the Commissioner's office if dissatisfied.[59]

For further guidance on the duty to assist, see IPC resource, *Understanding the Duty to Assist: A Guide for Public Bodies*.

IPC Findings

In Review Report 301-2017, 302-2017, 303-2017, 304-2017, 003-2018, the Commissioner found that several ministries involved in the review did not meet their duty to assist the applicant. The applicant had requested copies of all Deputy Ministers' emails received or sent to specific Saskatchewan Party email addresses. The applicant received identical responses from each ministry asking the applicant if he would be willing to alter or narrow his request pursuant to subsection 6(1)(b) of FOIP. Upon review, each ministry reconsidered its

[59] SK OIPC, Resource, *Understanding the Duty to Assist: A Guide for Public Bodies*, January 2018, at p. 3.

application of subsection 6(1)(b) of FOIP and began searching for records. The Commissioner found that the applicant's request contained sufficient information to process the request. As such, subsection 6(1)(b) of FOIP was not appropriately applied. The Commissioner considered how the ministries handled the applicant's request and concluded that the ministries did not meet their duty to assist the applicant. The Commissioner recommended the ministries implement a practice for processing access to information requests. In the Report, the Commissioner referred to best practices outlined in the Nova Scotia Information and Privacy Commissioner Review Report 16-05.

Subsection 5.1(2)

Duty of government institution to assist

5.1 (2) On the request of an applicant, the government institution shall:

(a) provide an explanation of any term, code or abbreviation used in the information; or

(b) if the government institution is unable to provide an explanation in accordance with clause (a), endeavor to refer the applicant to a government institution that is able to provide an explanation.

Subsection 5.1(2) of FOIP provides that a government institution will assist applicants when they:

(a) need explanation of a term, code, or abbreviation; or

(b) if the government institution is unable to explain it, refer the applicant to a government institution that can.

In addition to providing the record, if an applicant requires assistance with understanding a term, code or abbreviation, the government institution should assist the applicant.

SECTION 6: APPLICATION

Application

6(1) An applicant shall:

(a) make the application in the prescribed form to the government institution in which the record containing the information is kept; and

(b) specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject-matter to identify the record.

(2) Subject to subsection (4) and subsection 11(3), an application is deemed to be made when the application is received by the government institution to which it is directed.

(3) Where the head is unable to identify the record requested, the head shall advise the applicant, and shall invite the applicant to supply additional details that might lead to identification of the record.

(4) Where additional details are invited to be supplied pursuant to subsection (3), the application is deemed to be made when the record is identified.

For the legislation to work, both government institutions and applicants must follow what FOIP requires. Section 6 of FOIP provides direction for applicants who wish to make an access to information request to a government institution. The access to information request should be prepared in a way that enables the government institution to provide access to what has been requested.

Subsection 6(1)(a)

Application

6(1) An applicant shall:

(a) make the application in the prescribed form to the government institution in which the record containing the information is kept; and

An access to information request can be made on the prescribed form called "Form A". It is located at Part II of *The Freedom of Information and Protection of Privacy Regulations* (FOIP *Regulations*).

Access requests do not have to be made on Form A. An access request can be in the form of an email, but must include all the elements listed on Form A.[60]

In determining whether applicants can deviate from using Form A, *The Legislation Act* establishes general rules that govern the interpretation of all statutory instruments in the province of Saskatchewan. It defines words commonly used in legislation. Section 2-26 provides:

> **Deviations from required form**
>
> **2-26** If an enactment requires the use of a specified form, deviations from the form do not invalidate a form used if:
>
> (a) the deviations do not affect the substance;
>
> (b) the deviations are not likely to mislead; and
>
> (c) the form used is organized in the same way or substantially the same way as the form the use of which is required.[61]

Section 2-26 of *The Legislation Act* provides that it is not mandatory for an individual to use a prescribed form (e.g., Form A) to make an application for access to information.[62]

If a government institution receives a verbal request for access to information and there are no issues with releasing the information, the government institution can provide it without requiring a formal access request. However, applicants should be advised that only requests made in writing could be reviewed by the Commissioner.

Where a government institution knows a document does not contain sensitive information and it would be of interest to residents, a proactive approach to disclosure is best.[63] For more on proactive disclosure, see the *Guide to FOIP*, Chapter 2, "Administration of FOIP" at *Routine Disclosure & Active Dissemination* and *Section 65.1: Records Available Without an Application* later in this Chapter.

---

[60] See SK OIPC website under *Resources* tab, *FAQs*, *Access to Information*, *"I want to obtain information about the latest public sector program, how do I make an access request? How long do I have to wait for the information?"* www.oipc.sk.ca.
[61] *The Legislation Act*, SS 2019, c L-10.2 at s. 2-26.
[62] SK OIPC Review Reports 223-2018 at [10], 149-2017 at [13].
[63] Office of the Newfoundland and Labrador Information and Privacy Commissioner (NFLD IPC), Resource, *Guide for Municipalities*, December 2014 at p. 15.

IPC Findings

In Review Report 336-2017, the Commissioner addressed concerns raised by the Chinook School Division No. 211 regarding an applicant not using the prescribed access to information form (Form A). The Commissioner was of the view that it is not mandatory for applicants to use the prescribed form, provided the request is in writing and contains the information that pertains to the elements on Form A. Furthermore, if the School Division required any additional information, it should have advised the applicant at the time the access request was received. The Commissioner recommended that the School Division develop and implement a policy or procedure for the processing of access requests.[64]

Subsection 6(1)(b)

Application

6(1) An applicant shall:

...

(b) specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject-matter to identify the record.

While an applicant does not have a statutory duty to assist a government institution with responding to their access to information request under FOIP. However, the applicant should make a reasonable effort to assist the government institution so it can respond accurately and completely to the access to information request. Open communication between an applicant and a government institution is recommended, particularly when an access to information request is all-encompassing or unclear.[65]

Subsection 6(1)(b) of FOIP is intended to ensure that applicants provide enough detail to make it possible for the government institution to identify the record being requested. Applicants must be clear and provide parameters (i.e., timeframe, place, and event).

[64] SK OIPC Review Report 336-2017 at [56] to [57].
[65] NFLD IPC Review Report A-2010-006 at [17].

Sufficient particularity means stating precisely what is being sought. Applicants should provide sufficient detail to enable an experienced employee of the government institution, with reasonable effort, to identify the records sought.[66]

Specific and precise access requests enable government institutions to respond more quickly and cost-effectively. This avoids the delay often entailed when all-encompassing or imprecise access requests are made. Applicants, therefore, have an incentive to cooperate with government institutions by, whenever reasonably possible, making clear, specific and not unnecessarily broad access requests.[67]

Where the head cannot identify a record because it lacks sufficient particularity, the applicant will be asked to provide more detail. However, this provision is not intended to require applicants to "narrow" their requests. See below for more on clarifying versus narrowing.

If an applicant wishes to maintain a broad request, it is an applicant's right to do so. However, applicants should be aware that a broad access request may involve fees. Narrowing a request, therefore, may result in a smaller fee. For more on fees, see *Section 9: Fee*, later in this Chapter.

Government institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of FOIP. Generally, ambiguity in the request should be resolved in the applicant's favour. To be considered responsive to the request, records must "reasonably relate" to the request.[68]

Clarifying vs Narrowing

Clarifying versus narrowing mean very different things. The Commissioner has addressed this in more than one Report where it was found that a government institution or local authority, relying on subsections 6(1)(b) or 6(3) of FOIP or *The Local Authority Freedom of Information and Protection of Privacy Act*, had attempted to force applicants to narrow a request which is not an appropriate application of these subsections.

---

[66] See SK OIPC Disregard Decision 040-2022, 041-2022, 042-2022 at [49] and [50]. See also subsection 5(1)(a) of British Columbia's *Freedom of Information and Protection of Privacy Act*, subsection 24(1)(b) of Ontario's *Freedom of Information and Protection of Privacy Act*, and subsection 6(1)(b) of Nova Scotia's *Freedom of Information and Protection of Privacy Act*.

[67] Office of the British Columbia Information and Privacy Commissioner (BC IPC) Order 328-1999 at p. 3.

[68] ON IPC Order PO-3492 at [15]. See also SK OIPC Review Report 016-2014 at [20] to [27].

To **clarify** is to remove complexity, ambiguity or obscurity from; to make clear or plain; remove ignorance, misconception or error from.[69]

To **narrow** is to become narrower, decrease in width or breadth; diminish, lessen, contract.[70]

Government institutions are not authorized under FOIP to require an applicant to "narrow" an access to information request. If a request is clear but is voluminous and requires a lot of work to search and gather records, the government institution should issue a fee estimate pursuant to section 9 of FOIP. Once issued, the government institution should make efforts to work with the applicant to reduce the fee by narrowing the access to information request. However, if an applicant chooses not to narrow and prefers to pay the fee, the government institution should process the request. Narrowing should not be confused with clarifying an access to information request. Section 6 of FOIP does not contemplate "narrowing" but rather "clarifying".

Subsections 6(1)(b) and 6(3) of FOIP address situations where a government institution cannot determine what the applicant is seeking. Subsection 6(1)(b) of FOIP requires an applicant to provide "sufficient particularity" as to time, place and event to enable an individual familiar with the subject-matter to identify the record.

Sufficient particularity means stating precisely what is being sought. Applicants should provide sufficient detail to enable an experienced employee of the government institution, with reasonable effort, to identify the records sought.[71]

The requirement of FOIP on both applicants and government institutions in combination with the purposes of the Act demonstrate an intention on the part of the Legislature that an individual's access to information request will be processed by the government institution in a fair, reasonable, open and flexible manner. Requiring an applicant to narrow an access to information request because it is too much work or too expensive to process, is not authorized under FOIP.

In terms of "clarification" of an access to information request, many applicants are unfamiliar with an organization and its administrative practices. They may not be aware of the process

---

[69] *The Shorter Oxford English Dictionary on Historical Principles*, Sixth edition, Oxford University Press 1973, Volume 1 at p. 422.
[70] *The Shorter Oxford English Dictionary on Historical Principles*, Sixth edition, Oxford University Press 1973, Volume 2 at p. 1891.
[71] See SK OIPC Disregard Decision 040-2022, 041-2022, 042-2022 at [49] and [50]. See also subsection 5(1)(a) of British Columbia's *Freedom of Information and Protection of Privacy Act*, subsection 24(1)(b) of Ontario's *Freedom of Information and Protection of Privacy Act*, and subsection 6(1)(b) of Nova Scotia's *Freedom of Information and Protection of Privacy Act*.

by which a government institution reaches or implements a decision or policy, the kind of records that may be generated, or the process of disposing of records. As a result, their access to information requests may be unclear and they would be unsure how to articulate what they are looking for. Therefore, clarification of a request may involve assisting an applicant in defining the subject of the request, the specific kinds of records of interest and the time period for which records are being requested.[72]

Government institutions have a duty to engage in the clarification process up to the point when a fee estimate is provided. However, a government institution has no obligation [or authority] to require clarification of a request that is, on its face, very clear.[73]

In terms of "narrowing" of an access to information request, it is important to discuss with an applicant any request that involves a large amount of information or is estimated to require a large amount of search time. The objective of narrowing a large request is to reduce fees for the applicant and for the provision of better service, in terms of both time and results. However, applicants are not required to narrow a request and refusing to narrow a broad request would generally not be considered an abuse of the right of access.[74]

IPC Findings

In Review Report 301-2017, 302-2017, 303-2017, 304-2017, 003-2018 the Commissioner considered the application of subsection 6(1)(b) of FOIP by five separate ministries. The ministries initially did not process the applicant's access to information requests citing subsection 6(1)(b) of FOIP. The ministries requested the applicant alter or narrow the access to information requests. The Commissioner noted that subsection 6(1)(b) of FOIP provides that an applicant's request is to include time, place and event. After considering the applicant's access to information requests, the Commissioner found that it included these elements. Therefore, the ministries had not appropriately applied subsection 6(1)(b) of FOIP and the access request was sufficiently clear to enable the ministries to identify the record(s) requested.

In Disregard Decision 040-2022, 041-2022, 042-2022, the Commissioner considered an application from the Holy Family Roman Catholic Separate School Division No. 140 (Holy Family) to disregard an applicant's three access to information requests. Holy Family asserted that the requests were repetitious, systematic, would unreasonably interfere with Holy Family's operations, were an abuse of the right of access, were frivolous, vexatious and were

[72] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 3 at p. 51.
[73] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 3 at p. 52.
[74] SK OIPC Disregard Decision 040-2022, 041-2022, 042-2022 at [58].

not made in good faith pursuant to subsections 43.1(2)(a), (b) and (c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). While considering this application, the Commissioner noted that Holy Family appeared to confuse "clarifying" with "narrowing" and appeared to be forcing the applicant to narrow their access to information requests inappropriately. Holy Family had responded to the applicant's access to information requests indicating that "the scope of your request remains too large to identify specific records" and requested the applicant narrow the scope. The Commissioner found Holy Family wanted the applicant to narrow the access to information requests because they involved a large volume of records over a two-year period requiring a significant amount of work not because it could not identify records. When its attempts to narrow the access to information requests were unsuccessful, Holy Family should have proceeded to issue an estimate of fees associated with the broad requests. It failed to do so. Rather, it made an application to the Commissioner to have the access to information requests disregarded. Furthermore, the Commissioner found that the access to information requests were described with sufficient particularity by the applicant and Holy Family should have been able to identify the records responsive to the requests. In conclusion, the Commissioner refused Holy Family's application to disregard the applicant's access to information requests.

In Review Report 160-2020, the Commissioner reviewed a fee estimate issued to an applicant by the Ministry of Government Relations (Government Relations). Upon review, the Commissioner found that Government Relations did not invoke subsection 6(3) of FOIP appropriately because it attempted to require the applicant to "narrow" their access to information request and that if it did not hear back from the applicant by a certain date, it would consider the access to information request abandoned pursuant to subsection 7.1(1) of FOIP. The Commissioner found that the access to information request, although broad, was clear in terms of what was being sought. The Commissioner recommended that Government Relations develop policy and procedures that highlight the difference between clarifying and narrowing the scope of an access to information request. Furthermore, the Commissioner recommended Government Relations rescind its fee estimate.

In Review Report 127-2018, the Commissioner reviewed the response of the University of Saskatchewan (U of S) to an access to information request. The U of S had responded to an applicant's access to information request indicating that further clarification was required to identify records pursuant to subsection 6(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The applicant requested a review by the Commissioner. Upon notice of the review, the U of S raised concerns that the request for review by the applicant was frivolous and vexatious. The Commissioner found that there was jurisdiction to conduct the review and that the request for review was not frivolous or vexatious. Furthermore, the Commissioner found that "clarification" pursuant to section 6 of

LA FOIP was not necessary. The Commissioner recommended that the U of S develop and implement policies and procedures for clarifying and narrowing requests.

Subsection 6(2)

Application

6(2) Subject to subsection (4) and subsection 11(3), an application is deemed to be made when the application is received by the government institution to which it is directed.

Provided no clarification is needed (see s. 6(4)) and the application does not have to be transferred (see s. 11(3)), the application is considered made when the government institution receives it. The 30-day deadline to respond begins when the application is received.

In accordance with subsection 2-28(3) of *The Legislation Act*[75] the first day shall be excluded in the calculation of time. Therefore, the 30-day clock begins the day following receipt of the access to information request. For more on calculating the time see *Response required, Calculating 30 Days*, later in this Chapter.

Subsection 6(3)

Application

6(3) Where the head is unable to identify the record requested, the head shall advise the applicant, and shall invite the applicant to supply additional details that might lead to identification of the record.

Where an access to information request is unclear or lacks sufficient detail to identify the record, the government institution must provide the applicant with the opportunity to provide more detail.

Contact with the applicant to clarify the request should occur as soon as possible.

[75] Subsection 2-28(3) of *The Legislation Act*, SS 2019, c L-10.2 provides "A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens".

Clarifying vs Narrowing

Clarifying versus narrowing mean very different things. The Commissioner has addressed this in more than one Report where it was found that a government institution or local authority, relying on subsections 6(1)(b) or 6(3) of FOIP or *The Local Authority Freedom of Information and Protection of Privacy Act*, had attempted to force applicants to narrow a request which is not an appropriate application of these subsections.

To **clarify** is to remove complexity, ambiguity or obscurity from; to make clear or plain; remove ignorance, misconception or error from.[76]

To **narrow** is to become narrower, decrease in width or breadth; diminish, lessen, contract.[77]

Government institutions are not authorized under FOIP to require an applicant to "narrow" an access to information request. If a request is clear but is voluminous and requires a lot of work to search and gather records, the government institution should issue a fee estimate pursuant to section 9 of FOIP. Once issued, the government institution should make efforts to work with the applicant to reduce the fee by narrowing the access to information request. However, if an applicant chooses not to narrow and prefers to pay the fee, the government institution should process the request. Narrowing should not be confused with clarifying an access to information request. Section 6 does not contemplate "narrowing" but rather "clarifying".

Subsections 6(1)(b) and 6(3) of FOIP address situations where a government institution cannot determine what the applicant is seeking. Subsection 6(1)(b) of FOIP requires an applicant to provide "sufficient particularity" as to time, place and event to enable an individual familiar with the subject-matter to identify the record.

Sufficient particularity means stating precisely what is being sought. Applicants should provide sufficient detail to enable an experienced employee of the government institution, with reasonable effort, to identify the records sought.[78]

---

[76] *The Shorter Oxford English Dictionary on Historical Principles*, Sixth edition, Oxford University Press 1973, Volume 1 at p. 422.
[77] *The Shorter Oxford English Dictionary on Historical Principles*, Sixth edition, Oxford University Press 1973, Volume 2 at p. 1891.
[78] See SK OIPC Disregard Decision 040-2022, 041-2022, 042-2022 at [49] and [50]. See also subsection 5(1)(a) of British Columbia's *Freedom of Information and Protection of Privacy Act*, subsection 24(1)(b) of Ontario's *Freedom of Information and Protection of Privacy Act*, and subsection 6(1)(b) of Nova Scotia's *Freedom of Information and Protection of Privacy Act*.

The requirement of FOIP on both applicants and government institutions in combination with the purposes of the Act demonstrate an intention on the part of the Legislature that an individual's access to information request will be processed by the government institution in a fair, reasonable, open and flexible manner. Requiring an applicant to narrow an access to information request because it is too much work or too expensive to process, is not authorized under FOIP.

In terms of "clarification" of an access to information request, many applicants are unfamiliar with an organization and its administrative practices. They may not be aware of the process by which a government institution reaches or implements a decision or policy, the kind of records that may be generated or the process of disposing of records. As a result, their access to information requests may be unclear and they would be unsure how to articulate what they are looking for. Therefore, clarification of a request may involve assisting an applicant in defining the subject of the request, the specific kinds of records of interest and the time period for which records are being requested.[79]

Government institutions have a duty to engage in the clarification process up to the point when a fee estimate is provided. However, a government institution has no obligation [or authority] to require clarification of a request that is, on its face, very clear.[80]

In terms of "narrowing" of an access to information request, it is important to discuss with an applicant any request that involves a large amount of information or is estimated to require a large amount of search time. The objective of narrowing a large request is to reduce fees for the applicant and for the provision of better service, in terms of both time and results. However, applicants are not required to narrow a request and refusing to narrow a broad request would generally not be considered an abuse of the right of access.[81]

IPC Findings

In Disregard Decision 040-2022, 041-2022, 042-2022, the Commissioner considered an application from the Holy Family Roman Catholic Separate School Division No. 140 (Holy Family) to disregard an applicant's three access to information requests. Holy Family asserted that the requests were repetitious, systematic, would unreasonably interfere with Holy Family's operations, were an abuse of the right of access, were frivolous, vexatious and were not made in good faith pursuant to subsections 43.1(2)(a), (b) and (c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). While considering this

[79] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 3 at p. 51.
[80] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 3 at p. 52.
[81] SK OIPC Disregard Decision 040-2022, 041-2022, 042-2022 at [58].

application, the Commissioner noted that Holy Family appeared to confuse "clarifying" with "narrowing" and appeared to be forcing the applicant to narrow their access to information requests inappropriately. Holy Family had responded to the applicant's access to information requests indicating that "the scope of your request remains too large to identify specific records" and requested the applicant narrow the scope. The Commissioner found Holy Family wanted the applicant to narrow the access to information requests because they involved a large volume of records over a two-year period requiring a significant amount of work not because it could not identify records. When its attempts to narrow the access to information requests were unsuccessful, Holy Family should have proceeded to issue an estimate of fees associated with the broad requests. It failed to do so. Rather, it made an application to the Commissioner to have the access to information requests disregarded. Furthermore, the Commissioner found that the access to information requests were described with sufficient particularity by the applicant and Holy Family should have been able to identify the records responsive to the requests. In conclusion, the Commissioner refused Holy Family's application to disregard the applicant's access to information requests.

In Review Report 160-2020, the Commissioner reviewed a fee estimate issued to an applicant by the Ministry of Government Relations (Government Relations). Upon review, the Commissioner found that Government Relations did not invoke subsection 6(3) of FOIP appropriately because it attempted to require the applicant to "narrow" their access to information request and that if it did not hear back from the applicant by a certain date, it would consider the access to information request abandoned pursuant to subsection 7.1(1) of FOIP. The Commissioner found that the access to information request, although broad, was clear in terms of what was being sought. The Commissioner recommended that Government Relations develop policy and procedures that highlight the difference between clarifying and narrowing the scope of an access to information request. Furthermore, the Commissioner recommended Government Relations rescind its fee estimate.

In Review Report 127-2018, the Commissioner reviewed the response of the University of Saskatchewan (U of S) to an access to information request. The U of S had responded to an applicant's access to information request indicating that further clarification was required to identify records pursuant to subsection 6(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The applicant requested a review by the Commissioner. Upon notice of the review, the U of S raised concerns that the request for review by the applicant was frivolous and vexatious. The Commissioner found that there was jurisdiction to conduct the review and that the request for review was not frivolous or vexatious. Furthermore, the Commissioner found that "clarification" pursuant to section 6 of LA FOIP was not necessary. The Commissioner recommended that the U of S develop and implement policies and procedures for clarifying and narrowing requests.

Subsection 6(4)

Application

6(4) Where additional details are invited to be supplied pursuant to subsection (3), the application is deemed to be made when the record is identified.

Where a government institution needs to request additional details from an applicant, the 30-day deadline for a government institution to respond pursuant to subsection 7(2) of FOIP does not start until the head can identify what record(s) the applicant is requesting.

In other words, until the necessary clarification is received, the 30-day clock has not started.

For more on calculating the time see *Section 7: Response Required, Calculating 30 Days*, later in this Chapter.

Section 7: Response Required

Response required

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

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

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

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

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

(b) if the record requested is published, referring the applicant to the publication;

(c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

(e) stating that access is refused for the reason that the record does not exist;

(f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4); or

(g) stating that the request has been disregarded pursuant to section 45.1, and setting out the reason for which the request was disregarded.

(3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

(4) If an application is made with respect to a record that is exempt from access pursuant to section 15, 16, 21 or 22 or subsection 29(1), the head may refuse to confirm or deny that the record exists or ever did exist.

(5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.

Section 7 of FOIP provides that an applicant must receive a response from the government institution. The response must be within 30 days and must contain certain elements, which are enumerated at subsections 7(2) and 7(3) of FOIP.

FOIP does not require government institutions to answer questions that come in an access to information request.[82] For example, access to information requests that ask why the government institution made certain decisions. FOIP provides access to records and unless answers are in a record, the government institution is not required under FOIP to answer them. However, it does have a duty to answer questions as to whether it has responsive records.[83]

All responses provided to applicants pursuant to subsection 7(2) of FOIP must include a statement that advises applicants of their right to request a review by the Information and Privacy Commissioner. The requirement is addressed at subsection 7(3) of FOIP.

The Ministry of Justice and Attorney General has developed model letters to assist government institutions with responding to applicants in each of the circumstances outlined at subsection 7(2) of FOIP. See *Model Letters (FOIP)* for samples.

[82] SK OIPC Review Report 091-2015 at [15].
[83] AB IPC Order F2014-39 at [22].

Subsection 7(1)

Response required

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

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

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

Subsection 7(1) of FOIP requires that when a government institution receives an access to information request from an applicant, it must respond in writing advising the applicant of its decision regarding the request. Subsection 7(2) of FOIP enumerates what the response must include and the timeframe it must be provided in.

If the government institution believes that another government institution has a greater interest in the records being requested, it can transfer the access to information request to the other government institution. For more on transferring access to information requests, see *Section 11: Transfer of Application*, later in this Chapter.

Subsection 7(2)

Response required

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

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

(b) if the record requested is published, referring the applicant to the publication;

(c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

(e) stating that access is refused for the reason that the record does not exist;

(f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4); or

(g) stating that the request has been disregarded pursuant to section 45.1, and setting out the reason for which the request was disregarded.

It is often said that information delayed is information denied. One of the major problems with access to information regimes across Canada is delay in providing applicants with access to public records.[84]

Subsection 7(2) of FOIP provides that within 30 days of receiving an access to information request, the government institution must provide a response to the applicant. The response should include one or more of the enumerated statements listed at subsection 7(2) of FOIP.

Calculating 30 Days

The Legislation Act establishes general rules that govern the interpretation of all statutory instruments in the province of Saskatchewan. Section 2-28 of *The Legislation Act* provides the following for the computation of time:

2-28(1) A period expressed in days and described as beginning or ending on, at or with a specified day, or continuing to or until a specified day, includes the specified day.

(2) A period expressed in days and described as occurring before, after or from a specified day excludes the specified day.

(3) A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens.

(4) In the calculation of time expressed as a number of clear days, weeks, months or years or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days are excluded.

(5) A time limit for the doing of anything that falls or expires on a holiday is extended to include the next day that is not a holiday.

(6) A time limit for registering or filing documents or for doing anything else that falls or expires on a day on which the place for doing so is not open during its regular hours of

[84] SK OIPC Review Reports LA-2013-004 at [13], LA-2014-001 at [20] and 104-2018 at [12].

business is extended to include the next day the place is open during its regular hours of business[85]

...

Based on this, the following can be applied for calculating 30 days under FOIP:

- The first day the access request is received is excluded in the calculation of time [s. 2-28(2)].
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday [s. 2-28(5)].
- If the due date falls on a weekend, the time is extended to the next day the office is open [s. 2-28(6)].
- As FOIP expresses the time in a number of days, this is interpreted as 30 calendar days, not business days.

The Legislation Act does not allow for additional time for personal holidays, scheduled days off or if staff are away from the office due to illness.[86]

Subsection 49(1)(b) of FOIP provides applicants with the right to request a review where the government institution fails to respond to an access to information request within 30 days.

IPC Findings

In Review Report 063-2015 to 077-2015, the Commissioner considered a lack of a section 7 response by the Ministry of Health (Health). The applicant had submitted 15 access to information requests over the course of four months. When no response was received to any of the requests, the applicant requested a review by the Commissioner. The Commissioner found that Health did not respond to the access to information requests within the legislated timeline of 30 days. The Commissioner recommended that Health respond to the remaining access to information requests within a week of the issuance of the Commissioner's report. The Commissioner also recommended that Health conduct a lean event within a month of issuance of the Commissioner's report to address its issues with routing, review and approval of responses to access to information requests.

In Review Report 064-2016 to 076-2016, the Commissioner considered the *Guidelines for Government Communications Activities During a General Election* and its impact on the timing

[85] *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.
[86] SK OIPC Blog, *The Interpretation Act, 1995 – Things to Know*, June 7, 2017. *The Legislation Act* replaced *The Interpretation Act, 1995*. It came into force on May 15, 2019.

of responses by government institutions. The Commissioner found that the guidelines do not distinguish a separate protocol for freedom of information requests filed by the media. Furthermore, FOIP did not speak to special handling of requests because of an election. As such, access to information requests should be handled routinely during elections or the period before an election.

Subsection 7(2)(a)

Response required

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

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

Subsection 7(2)(a) of FOIP provides that the government institution can respond to the access to information request indicating that a fee must be paid prior to records being provided. This statement should also include directions for the applicant on where and how the fee can be paid.

If the government institution intends to provide notice to the applicant that a fee is required pursuant to subsection 7(2)(a), there are additional requirements when issuing fee estimates. These are outlined at section 9 of FOIP. Subsection 9(2) of FOIP requires a government institution to provide a fee estimate where the cost for providing access to records exceeds the prescribed amount of $100. This prescribed amount is found in subsection 7(1) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Furthermore, applicants are not required to pay any fees beyond what is originally estimated. Sections 6, 7, 8 and 9 of the FOIP Regulations provide further instruction regarding calculating fees and fee waivers.

FOIP provides for reasonable cost recovery associated with providing individuals with access to records.

A **reasonable fee estimate** is one that is proportionate to the work required on the part of the government institution to respond efficiently and effectively to an applicant's request. A fee estimate is equitable when it is fair and even-handed, that is, when it supports the principle that applicants should bear a reasonable portion of the cost of producing the

information they are seeking, but not costs arising from administrative inefficiencies or poor records management practices.[87]

Fees encourage responsible use of the right of access by applicants. However, fees should not present an unreasonable barrier to access. Therefore, fees should be reasonable, fair and at a level that does not discourage any resident from exercising their access rights.

Government institutions should ensure that in keeping with best practices it:

- Treats all applicants the same (fairness).
- Calculates its fees the same (consistency).

For more on fees, see *Section 9: Fee*, later in this Chapter.

Subsection 7(2)(b)

Response required

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

(b) if the record requested is published, referring the applicant to the publication;

Subsection 7(2)(b) of FOIP provides that if the record requested is published, the government institution can refer the applicant to the publication. This provision is intended to provide a government institution with the option of referring an applicant to a publicly available source of the information where the balance of convenience favors this method of alternative access. It is not intended to be used in order to avoid a government institution's obligations under FOIP.

The government institution should take adequate steps to ensure that the record that it alleges is publicly available is the record that is responsive to the access to information request. Furthermore, applicants should not be required to compile small pieces of information from a variety of sources in order to obtain a complete version of a record that could be disclosed.[88]

[87] SK OIPC Review Report 2005-005 at [21].
[88] ON IPC Order MO-3191-F at [86], [87] and [88].

Published is defined as to make known to people in general…an advising of the public or making known of something to the public for a purpose.[89]

Subsection 3(1)(a) of FOIP provides that FOIP does not apply to material that is published or material available for purchase by the public. For more on subsection 3(1)(a) of FOIP see the *Guide to FOIP*, Chapter 1, "Purposes and Scope of FOIP".

Subsection 7(2)(c)

Response required

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

…

(c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

Subsection 7(2)(c) of FOIP provides that if the record requested will be published within 90 days, the government institution can advise the applicant of this and provide the approximate date of publication.

The 90 days starts to run on the date the applicant's access to information request is received by the government institution.[90]

Published means to make known to people in general…an advising of the public or making known of something to the public for a purpose.[91]

It is not appropriate for a government institution to invoke only subsection 7(2)(c) of FOIP if only some of the records that would be responsive to the access request will be part of the publication in 90 days.[92]

---

[89] SK OIPC Review Report 249-2017 at [7].
[90] SK OIPC Review Report F-2004-005 at [18].
[91] Originated from Black, Henry Campbell, 1979. *Black's Law Dictionary, 5th Edition* St. Paul, Minn.: West Group. Adopted by ON IPC in Order P-204 at p. 4. Adopted by SK OIPC in Review Report 249-2017 at [7].
[92] SK OIPC Review Report F-2004-005 at [22].

IPC Findings

In Review Report F-2004-005, the Commissioner considered whether Executive Council properly responded to an applicant when it cited subsection 7(2)(c) of FOIP in its response. The applicant had sought materials that showed the results of 17 budget-related questions undertaken in November 2003 including the questions, answers, and costs of a survey. Executive Council responded to the applicant indicating that the information would be published in April 2004. Upon review, the Commissioner found that the 90 days referred to in subsection 7(2)(c) of FOIP starts to run on the date the applicant's access to information request is received by the government institution. The Commissioner further found that by responding to the applicant citing only subsection 7(2)(c) of FOIP, Executive Council failed to meet its duty to assist as it did not disclose the existence of additional documents. The Commissioner recommended Executive Council release data tables and the cost of the survey to the applicant within 30 days.

In Review Report 107-2018, the Commissioner considered whether the City of Regina (City) met its obligations under subsection 7(2)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The City responded to an applicant's request citing subsection 7(2)(c) of LA FOIP and indicating that the survey requested would be published within 90 days, the approximate date of publication and where the applicant could obtain a copy at that time. The Commissioner found that the City appropriately engaged subsection 7(2)(c) of LA FOIP.

Subsection 7(2)(d)

Response required

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

Subsection 7(2)(d) of FOIP provides that where access to records is refused, the government institution must set out the reason for the refusal and identify the specific exemption in FOIP that it is relying on to withhold the records or information.

For subsection 7(2)(d) of FOIP, the written response to the applicant must have three elements:

1. It must state that access is refused in full or in part.
2. It must set out the reason for refusal.
3. It must identify the specific provision in FOIP on which the refusal is based.[93]

Subsection 7(2)(d) of FOIP requires a reasonable degree of transparency as to the decision of the government institution such that the applicant can understand the basis for the denial of access.[94]

The *Guide to FOIP*, Chapter 4, "Exemptions from the Right of Access" provides guidance on determining whether an exemption under Part III of FOIP applies to a record or information in a record.

Subsection 5.1(1) of FOIP requires government institutions to respond to applicants openly, accurately and completely. If a government institution removes information from a responsive document because it has been deemed not responsive, it should advise the applicant in its section 7 response and explain why.[95]

IPC Findings

In Review Report F-2006-003, the Commissioner considered whether the Ministry of Justice and Attorney General (Justice) complied with the requirements of subsection 7(2)(d) of FOIP. The applicant had requested copies of Civil Law Division billable hours for 2002 and 2003. In addition, the applicant requested copies of private legal billings for 2002, 2003 and 2004. Justice responded to the applicant indicating that access was refused in part and provided a severed version of the record. The Commissioner found that Justice's minimal notice of refusal did not satisfy the requirements of subsection 7(2)(d) of FOIP. In particular, Justice's response did not set out the reason for the refusal or identify specific provisions under FOIP it was relying on.

[93] SK OIPC Review Report F-2006-003 at [22].
[94] SK OIPC Review Report F-2006-003 at [25].
[95] SK OIPC Review Reports 061-2017 at [82] and 023-2017 & 078-2017 at [39] and [40].

Subsection 7(2)(e)

Response required

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

(e) stating that access is refused for the reason that the record does not exist;

Subsection 7(2)(e) of FOIP provides that where a government institution determines that the record requested does not exist, it should indicate that in its response to the applicant.

A statement by a government institution that a record does not exist does not imply that the record in question does not exist at all. It would not be possible for a government institution to make such a sweeping statement about the general existence of a record. The term "exist" in subsection 7(2)(e) of FOIP is a function of being possessed or controlled by the government institution to which the access request is being made.[96]

There are two circumstances where a response that records do not exist can occur:

1. Search did not produce records

There are times when a search for responsive records turns up nothing.

When responding to the applicant, government institutions should include the steps taken to find records.[97]

Where a record has been destroyed, information should be provided on the date of destruction and the authority for carrying it out.[98]

Applicants have a right to request a review of search efforts conducted by the government institution pursuant to subsection 49(1)(a) of FOIP. In such situations, a government institution should be prepared to provide documentation of the search that was conducted to locate the responsive records. For more on search efforts and reviews involving search efforts, see *Search for Records* and *IPC Review of Search Efforts,* earlier in this Chapter.

A **reasonable search** is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request. A

[96] SK OIPC Review Report F-2008-002 at [17] to [18].
[97] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 3 at p. 90.
[98] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 3 at p. 90.

reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances.[99]

2. No possession/control of the record

There are times that a record exists, but it is not within the possession or under the control of the government institution.

Section 5 of FOIP provides the right of access to records that are in the possession or under the control of the government institution that received the access to information request. For more on possession and control see, the Guide to FOIP, Chapter 1, "Purposes and Scope of FOIP" under *FOIP Applies, Section 5: Possession or Control*.

Even if a government institution does not possess or control a record, merely citing subsection 7(2)(e) of FOIP may not be adequate. If the government institution considers that another government institution has a "greater interest" in the record, the government institution should transfer the applicant's access to information request in accordance with section 11 of FOIP.[100] For more on transferring an access to information request, see *Section 11: Transfer of Application,* later in this Chapter.

Subsection 7(2)(f)

Response required

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

(f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4); or

Subsection 7(2)(f) of FOIP provides that in certain cases, a government institution may refuse to confirm or deny the existence of a record. If a government institution intends to invoke this provision, it must do so in compliance with subsection 7(4) of FOIP. For more, see *Subsection 7(4)*, later in this Chapter.

[99] SK OIPC Review Reports F-2008-001 at [38] and F-2012-002 at [26].
[100] SK OIPC Review Report F-2008-002 at [20].

Subsection 7(2)(g)

Response required

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

…

(g) stating that the request has been disregarded pursuant to section 45.1, and setting out the reason for which the request was disregarded.

Subsection 7(2)(g) of FOIP provides that a government institution can respond to an applicant indicating that the access to information request has been disregarded pursuant to subsection 45.1 of FOIP. The government institution must set out the reasons why the request is being disregarded.

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.

Where a government institution intends to initiate the process for disregarding an access to information request, subsection 45.1(1) of FOIP requires a government institution to make an application to the Commissioner. This should be in the form of a written application (letter) that includes evidence and argument about how the criteria under subsection 45.1(2) are met. Details of how to make an application are contained in the IPC resource, *Application to Disregard an Access to Information Request or Request for Correction*. Further assistance can also be found in the IPC's *The Rules of Procedure*.

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.[101]

For more on disregarding access requests, see *Section 45.1: Power to Authorize a Government Institution to Disregard Applications or Requests* later in this Chapter.

[101] NB IPC, Interpretation Bulletin, *Section 15 – Permission to disregard access request*.

Subsection 7(3)

Response required

7(3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

All responses provided to applicants pursuant to subsection 7(2) of FOIP must include a statement that advises applicants of their right to request a review by the Information and Privacy Commissioner.

Generally, this statement can appear as follows:

> If you would like to exercise your right to request a review of this decision, you may do so by completing a "Request for Review" form and forwarding it to the Saskatchewan Information and Privacy Commissioner within one year of this notice. Your completed form can be sent to #503 – 1801 Hamilton Street, Regina, Saskatchewan, S4P 4B4 or be submitted via email to intake@oipc.sk.ca. This form is available at the same location where you applied for access or by contacting the Office of the Information and Privacy Commissioner at (306) 787-8350.

Subsection 7(4)

Response required

7(4) If an application is made with respect to a record that is exempt from access pursuant to section 15, 16, 21 or 22 or subsection 29(1), the head may refuse to confirm or deny that the record exists or ever did exist.

Subsection 7(4) of FOIP provides that where a government institution intends to respond to an applicant citing subsection 7(2)(f) of FOIP, it can only do so for records that would be exempt from disclosure pursuant to sections 15, 16, 21, or 22 or subsection 29(1) of FOIP.

By invoking subsection 7(4) of FOIP, a government institution is denying an applicant the right to know whether a record exists. This subsection provides government institutions with a significant discretionary power that should be exercised only in rare cases. It is the Commissioner's view that this provision is meant to protect **highly sensitive** records where confirming or denying the mere existence of a record would in itself impose significant risk. For example, the risk of harm to witnesses as a result of revealing a law enforcement

investigation is underway. Although section 15 of FOIP could protect records from being disclosed that fall into the category of law enforcement and investigations, this provision enables the government institution to address risks that could occur just by revealing records exist. It is not meant to protect a government institution from possible embarrassment or negative public scrutiny.[102]

Subsection 49(1)(a) of FOIP provides applicants the right to request a review of a government institution's use of subsection 7(4) of FOIP. In order for a government institution to be able to show it properly invoked subsections 7(2)(f) and 7(4) of FOIP, the government institution must be able to:

1. Demonstrate that records (if they existed) would qualify for the particular exemption provided for at subsection 7(4) of FOIP.

2. Explain how disclosing the existence of records (if they existed) could reasonably compromise what it is protecting.[103]

IPC Findings

In Review Report F-2005-002, the Commissioner considered the application of subsection 7(4) of FOIP for the first time. The applicant had requested access to any estimates of the government's financial liability concerning a specific family. The Ministry of Justice and Attorney General (Justice) applied subsection 7(4) and refused to confirm or deny the existence of records. Upon review, the Commissioner considered whether there was a reasonable basis for the decision of Justice. The Commissioner saw no particular prejudice to Justice in that case if it acknowledged responsive records. The Commissioner found no reasonable basis for the exercise of statutory discretion for Justice to invoke subsection 7(4) of FOIP.

In Review Report 035-2015, the Commissioner considered whether the Rural Municipality of Shellbrook #493 (RM) could rely on the equivalent subsection 7(4) in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The applicant had requested records involving the installation of a culvert and communications between specific individuals and a Councillor. The Commissioner found that there was no reasonable basis for

[102] SK OIPC Review Report 339-3017 at [18].
[103] SK OIPC Review Report 339-2017 at [19].

the RM to invoke subsection 7(4) of LA FOIP. The Commissioner recommended that if responsive records existed that they be released to the applicant.

In Review Report 223-2015 and 224-2015, the Commissioner considered whether the City of Regina (City) could rely on the equivalent subsection 7(4) in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The applicant had requested a copy of an audit and all internal correspondence related to the Coroner's requirement for an independent audit related to the death of a specific individual. The City responded indicating it was refusing to confirm or deny the existence of records pursuant to subsection 7(4) of LA FOIP. Upon review, the Commissioner found that subsection 14(1)(d) of LA FOIP would apply if the records existed. As such, the Commissioner concluded that subsection 7(4) of LA FOIP could be relied on by the City.

In Review Report 023-2016, the Commissioner considered whether the Saskatchewan Workers' Compensation Board (WCB) could rely on subsection 7(4) of FOIP. The applicant had requested information that had been provided about him to WCB and information about him that was in the possession of WCB outside his claim file. WCB responded indicating that records were not found and also that WCB refused to confirm or deny whether responsive records were found in the Fair Practices Office. The Commissioner found that WCB had not demonstrated that subsection 7(4) of FOIP was appropriately applied. The Commissioner recommended that the Fair Practices Office be searched for records responsive to the request and that a new section 7 response be provided to the applicant.

In Review Report 273-2016, the Commissioner considered whether Saskatchewan Polytechnic could rely on the equivalent of subsection 7(4) in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The applicant had requested the complete file of his allegations of harassment. Saskatchewan Polytechnic responded citing subsection 7(4) of LA FOIP. Upon review, the Commissioner found that there was no reasonable basis for Saskatchewan Polytechnic to invoke subsection 7(4) of LA FOIP. The Commissioner recommended that if records existed, they be released to the applicant.

In Review Report 037-2017, the Commissioner considered whether the City of Saskatoon (City) could rely on the equivalent subsection 7(4) in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The applicant had requested an explanation of all cost increases in construction of the Remai Modern Art Gallery. The City responded providing access to some records and refusing to confirm or deny the existence of any further records pursuant to subsection 7(4) of LA FOIP. Following the commencement of a review by the Commissioner, the City indicated it was no longer relying on subsection 7(4) of LA FOIP.

In Review Report 339-2017, the Commissioner considered whether the City of Regina (City) could rely on the equivalent subsection 7(4) in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The applicant had requested a copy of all records pertaining to a specific fire report and records surrounding a previous access to information request. The City responded indicating that access to some records was granted, others were redacted pursuant to exemptions and confirmation or denial of the existence of further records was refused. Upon review, the Commissioner found that the City could not rely on subsection 7(4) of LA FOIP. The Commissioner recommended that the City reconsider its application of subsection 7(4) of LA FOIP.

In Review Report 063-2021, the Commissioner reviewed a denial of access by the Regina Police Service (RPS). An applicant had requested access to records related to a call to the police involving the applicant. The RPS refused to confirm or deny that any records existed pursuant to subsection 7(4) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The position of RPS was that if the records existed, subsection 28(1) of LA FOIP would apply to the records. Upon review, the Commissioner found that if the records existed, it would be the applicant's personal information involved and therefore RPS could not rely on subsection 7(4) of LA FOIP to neither confirm nor deny the existence of records.

Subsection 7(5)

Response required

7(5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record. (c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

Subsection 7(5) of FOIP provides that where a government institution has failed to respond to an applicant within 30 days it is deemed to have responded on the 30th day refusing access to the record.

The government institution should be aware that if it does not respond within the original 30-day deadline as required by section 7, it is no longer able to request an extension via section 12 of FOIP. Subsection 12(2) of FOIP supports this view, as it requires that notice of an

extension be given within 30 days of the application being made.[104] For more on extensions, see *Section 12: Extension of Time,* later in this Chapter.

IPC Findings

In Review Report 104-2018, the Commissioner considered the lack of response by the Northern Village of Pinehouse (Village) to an applicant's access to information request. The Commissioner noted that pursuant to subsection 7(5) of LA FOIP, the Village failed to provide a section 7 response to the applicant within the 30-day deadline. Therefore, it was deemed to have responded on the 30th day with a refusal to provide access. The Commissioner referred to such a situation as a "deemed refusal". The Commissioner indicated that the Village was now required to account for responsive records in its possession and/or control and only deny access to all or part of the records if permitted by the limited and specific exemptions in LA FOIP. As the Village had not done so, the Commissioner recommended the Village release the records to the applicant.

Section 7.1: Applications Deemed Abandoned

Applications deemed abandoned

7.1(1) If the head has invited the applicant to supply additional details pursuant to subsection 6(3) or has given the applicant notice pursuant to clause 7(2)(a) and the applicant does not respond within 30 days after receiving the invitation or notice, the application is deemed to be abandoned.

(2) The head shall provide the applicant with a notice advising that the application is deemed to be abandoned.

(3) A notice provided pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

[104] SK OIPC Review Report F-2008-001 at [32].

Subsection 7.1(1)

Applications deemed abandoned

7.1(1) If the head has invited the applicant to supply additional details pursuant to subsection 6(3) or has given the applicant notice pursuant to clause 7(2)(a) and the applicant does not respond within 30 days after receiving the invitation or notice, the application is deemed to be abandoned.

Often, it is clear when an applicant has decided not to pursue an access request. An applicant will indicate either in writing or on the telephone an intention not to proceed. This may be for a variety of reasons. For example, the applicant has found the information is available another way or no longer needs the information.[105]

Sometimes situations will arise where an applicant simply ceases to respond during the processing of an access to information request. No indication is given that the applicant has decided not to pursue the request. They simply do not respond to queries from the government institution.[106] When this situation occurs, section 7.1(1) of FOIP sets out provisions for declaring an application abandoned.

Subsection 7.1(1) of FOIP provides that the government institution can consider an application for access abandoned:

- If the government institution invited the applicant to supply additional details to help identify the record pursuant to subsection 6(3) of FOIP and the applicant does not respond within 30 days.
- If the government institution provided a subsection 7(2)(a) notice and the applicant does not respond within 30 days.

IPC Findings

In Review Report 302-2018, 303-2018, 304-2018, the Commissioner considered equivalent subsection 7.1(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) for the first time. The City of Regina (City) had received three separate access to information requests along with a request to waive the full fees for processing each request. The City provided its fee estimate for each request to the applicant, and included a fee reduction, but not a full waiver. At a certain point, the City deemed the applications abandoned because the applicant had not provided the required deposit to proceed with

[105] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 3 at p. 81.
[106] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 3 at p. 81.

each request in what the City felt was the applicable timeline. The applicant requested a review by the IPC. The Commissioner found that the conditions for issuing a notice of abandonment pursuant to section 7.1 of LA FOIP were not met and that the City improperly issued a notice of abandonment to the applicant. In other words, subsection 7.1(1) of LA FOIP was not applicable following the issuing of a fee estimate. It was only applicable for the final notice of payment of the remainder of the fees pursuant to subsection 7(2)(a) of LA FOIP.[107]

In Review Report 136-2022, the Commissioner reviewed a fee estimate issued to an applicant by the Water Security Agency (WSA). The fee estimate was $200, and the applicant requested the Commissioner review the WSA's estimate. Shortly after requesting a review, the applicant received a letter from the WSA indicating that as no response to the fee estimate was received in the form of a deposit, the WSA had deemed the request abandoned pursuant to subsection 7.1(1) of FOIP. Upon review, the Commissioner pointed to Review Report 302-2018, 303-2018, 304-2018 where the Commissioner found that subsection 7.1(1) of the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) was not applicable following the issuance of a fee estimate. It was only applicable following the final notice of payment of the remainder of the fees pursuant to subsection 7(2)(a) of LA FOIP. The Commissioner found that WSA was premature in its decision to deem the access to information request abandoned.

Subsection 7.1(2)

Applications deemed abandoned

7.1(2) The head shall provide the applicant with a notice advising that the application is deemed to be abandoned.

If the applicant does not respond within 30 days of being contacted, the government institution can advise the applicant, in writing, that the application has been declared abandoned.

The Ministry of Justice and Attorney General has developed model letters. The samples include a letter to an applicant notifying them that the application is being declared abandoned. See *20 Applications Deemed Abandoned – FOIP*.

[107] SK OIPC Review Report 302-2018, 303-2018, 304-2018 at [51] to [52].

Subsection 7.1(3)

Applications deemed abandoned

7.1(3) A notice provided pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

The notice provided to the applicant should include a statement that if the applicant is not satisfied with the decision to deem the application abandoned, the applicant may make a request for review by the Information and Privacy Commissioner within one year after the notice is given.

Generally, this statement can appear as follows:

> If you would like to exercise your right to request a review of this decision, you may do so by completing a "Request for Review" form and forwarding it to the Saskatchewan Information and Privacy Commissioner within one year of this notice. Your completed form can be sent to #503 – 1801 Hamilton Street, Regina, Saskatchewan, S4P 4B4 or emailed to intake@oipc.sk.ca. This form is available at the same location which you applied for access or by contacting the Office of the Information and Privacy Commissioner at (306) 787-8350.

The Ministry of Justice and Attorney General has developed model letters. The samples include a letter for applicants where an application is being declared abandoned. See *20 Applications Deemed Abandoned – FOIP*.

Section 8: Severability

Severability

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

Severability is the principle described in section 8 of FOIP requiring that information be disclosed if it does not contain, or if it can be reasonably severed from, other information that the head of a government institution is authorized or obligated to refuse to disclose under the Act.[108]

Severing is the actual exercise by which portions of a document are blacked or greyed out before the document is provided to an applicant. It is the physical masking or removal from a record any information that is being exempted from disclosure in order that the remainder of the record may be disclosed.[109]

Reasonable severability – section 8 of FOIP uses the phrase "can reasonably be severed." FOIP does not elaborate on what constitutes reasonable severability. One principle that has emerged from decisions of other IPC offices and the courts is that information that would comprise of only disconnected or meaningless snippets is not reasonably severable and such snippets need not be released. In this regard, an important consideration is whether the degree of effort to sever the record is proportionate to the quality of information remaining in the record.[110] In *SNC-Lavalin Inc. v. Canada (Minister of Public Works),* (1994), the court held that "disconnected snippets of releasable information taken from otherwise exempt passages are not…reasonably severable[111] and severance of exempt and nonexempt portions should be attempted only when the result is a reasonable fulfillment of the purposes of the *Act*."[112] The process of reaching the conclusion that information is not reasonably severable is

---

[108] Treasury Board of Canada Secretariat, *Glossary of terms related to access to information and privacy,* https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/glossary-access-information-privacy.html. Accessed on June 27, 2019.
[109] 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.
[110] ON IPC PHIPA Decision 52, HA15-8-2 at [57].
[111] *SNC-Lavalin Inc. v. Canada (Minister of Public Works),* (1994), 79 F.T.R. 113, 1994 CarswellNat 354, [1994] F.C.J. No. 1059 (Fed. T.D.) at [48].
[112] *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1998] 3 F.C. 551 (Fed. T.D.) at p.p. 558-559.

one which should be approached with caution. It is not an issue of "what purpose is to be served by disclosure" so much as an issue of "whether there is any information which is reasonably being conveyed by the exercise of severance." If there are more than disconnected snippets being disclosed, the information can be considered reasonably severable.[113]

Furthermore, the Supreme Court of Canada affirmed the approach above in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23 and also suggested two types of analysis that are needed:

> [236] To begin, it is important to recognize that applying s. 25 is mandatory, not discretionary. The section directs that the institutional head "shall [not 'may'] disclose any part of the record that does not contain" exempted information, provided it can reasonably be severed: see *Dagg*, at para. 80. Thus, the institutional head has a duty to ensure compliance with s. 25 and to undertake a severance analysis wherever information is found to be exempt from disclosure.
>
> [237] The heart of the s. 25 exercise is determining when material subject to the disclosure obligation "can reasonably be severed" from exempt material. In my view, this involves both a semantic and a cost-benefit analysis. The semantic analysis is concerned with whether what is left after excising exempted material has any meaning. If it does not, then the severance is not reasonable. As the Federal Court of Appeal put it in *Blank v. Canada (Minister of the Environment)*, 2007 FCA 289, 368 N.R. 279, at para. 7, "those parts which are not exempt continue to be subject to disclosure if disclosure is meaningful". The cost-benefit analysis considers whether the effort of redaction by the government institution is justified by the benefits of severing and disclosing the remaining information. Even where the severed text is not completely devoid of meaning, severance will be reasonable only if disclosure of the unexcised portions of the record would reasonably fulfill the purposes of the Act. Where severance leaves only "[d]isconnected snippets of releasable information", disclosure of that type of information does not fulfill the purpose of the Act and severance is not reasonable: *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551 (T.D.), at pp. 558-59; *SNC-Lavalin Inc.*, at para. 48. As Jerome A.C.J. put it in *Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, [1989] 1 F.C. 143 (T.D.):
>
> > To attempt to comply with section 25 would result in the release of an entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such

[113] *Astrazeneca Canada Inc. v. Canada (Minister of Health)*, 2005 FC 189 at [104] to [105].

> severance would require on the part of the Department is not reasonably proportionate to the quality of access it would provide. [Emphasis added; pp. 160-61.]
>
> [238] That said, one must not lose sight of the purpose of s. 25. It aims to facilitate access to the most information reasonably possible while giving effect to the limited and specific exemptions set out in the Act: *Ontario (Public Safety and Security)*, at para. 67.

The IPC discourages the use of *white space redacting*. **White space redacting** is where software removes the content of a record in such a way that it renders the redacted content indistinguishable from the blank background of the document. This type of redacting creates uncertainty as to what, if anything, has been redacted. White space redaction lacks specificity because when reviewing the responsive pages, an applicant cannot tell if the white space accounts for a missing line, paragraph, table, image etc. or if the page was naturally left blank. Government institutions have a duty to assist applicants by responding openly, accurately and completely. Invisible white space redactions fall short of this mandatory duty. Applicants should be able to evaluate the amount of missing information.[114] The preference is black-out or grey-out redacting which allows sufficient visual context to indicate the length and general nature of the information (e.g., chart, column, list, sentence, or paragraph).

A line-by-line review is essential to comply with the principle of severability set out in section 8 of FOIP. This provision grants an applicant a right of access to any record from which exempted material can be reasonably severed.[115]

For audio and video records that need to be severed, government institutions should have technology in place to enable it to blur out images or audio.[116]

Each severed item should have a notation indicating which exemption(s) applies in each instance. If the exemptions are clearly marked beside severed line items/sections, it will be clear upon review which of the multiple exemptions applies to the severed items in question. The same procedure should be utilized when providing severed records to applicants even though an applicant is not provided the information that has been severed. This would remove any doubt as to which exemption applies to which line item. Section 7 of FOIP requires that when denying an applicant's access application, whether in full or in part, the written notice must meet three requirements:

---

[114] Office of the Quebec Information and Privacy Commissioner Order 2017 QCCAI 274 at [46]. Office of the Prince Edward Island Information and Privacy Commissioner (PEI IPC) Order FI-10-008 at [66] and [71].
[115] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 3 at p. 82.
[116] See SK OIPC Review Report 023-2019, 098-2019 at [111].

1. It must state that access is refused to all or part of the record.
2. It must set out the reason for refusal.
3. It must identify the specific provision of the Act on which the refusal is based.[117]

When providing the record to the IPC for a review, the government institution can submit the record in one of two ways:

1. By showing the withheld portion of the record in red ink, leaving the disclosed portion in black ink, and clearly indicating, beside or near the withheld portion, the applicable exemption(s) of the Act.
2. Alternatively, by providing a copy of the record with:
    a. The withheld information outlined or highlighted so it is still visible; and
    b. The applicable exemption(s) clearly indicated beside or near the withheld information.[118]

However, any format will be accepted provided it is clear what is withheld and what exemptions are being relied upon for each item severed. If including multiple exemptions to a sentence or a paragraph, government institutions should indicate which portion of the sentence or paragraph the individual exemption(s) is being applied.

For more on how to sever, see IPC Webinar, *Modern Age Severing Made a Lot Easier*.

IPC Findings

In Review Report F-2006-003, the Commissioner addressed issues with severing in a review involving the Ministry of Justice. The Commissioner noted that though severing of line items was apparent, each severed item lacked a notation indicating which exemption(s) applied in each instance. The Commissioner commented on the requirements of section 8 of FOIP. The Commissioner indicated that the duty to sever means that any exemption claimed by a government institution must be clearly linked to the appropriate lines in the document being severed.

[117] SK OIPC Review Reports F-2006-003 at [21] to [22], F-2008-001 at [28], F-2012-006 at [126], F-2014-001 at [62], 211-2017 at [125].
[118] SK OIPC Resource, *What to Expect During a Review with the IPC*, at p. 4, Review Reports F-2006-003 at [20], F-2008-001 at [27], F-2012-006 at [126], F-2013-006 at [36], F-2014-001 at [62], 263-2016 to 268-2016 at [51], 211-2017 at [125].

SECTION 9: FEE

Fee

9(1) An applicant who is given notice pursuant to clause 7(2)(a) is entitled to obtain access to the record on payment of the prescribed fee.

(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.

(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.

(5) Where a prescribed circumstance exists, the head may waive payment of all or any part of the prescribed fee.

Subsection 9(1)

Fee

9(1) An applicant who is given notice pursuant to clause 7(2)(a) is entitled to obtain access to the record on payment of the prescribed fee.

Subsection 9(1) of FOIP provides that when an applicant pays the fee required, the applicant will be entitled to receive the records.

Subsection 9(2)

Fee

9(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.

Subsection 9(2) of FOIP requires a government institution to provide a fee estimate where the cost for providing access to records exceeds the prescribed amount of $100. This prescribed amount is found in subsection 7(1) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Furthermore, applicants are not required to pay any fees beyond what is originally estimated.

If the fees end up being less than what was originally estimated, the government institution should refund the applicant accordingly as required by subsection 7(2) of the FOIP Regulations.

Fees cannot be charged when access to the record is refused pursuant to subsection 8(1) of the FOIP Regulations.

Creating a Fee Estimate

FOIP provides for reasonable cost recovery associated with providing individuals access to records.

A **reasonable fee estimate** is one that is proportionate to the work required on the part of the government institution to respond efficiently and effectively to an applicant's request. A fee estimate is equitable when it is fair and even-handed, that is, when it supports the principle that applicants should bear a reasonable portion of the cost of producing the information they are seeking, but not costs arising from administrative inefficiencies or poor records management practices.[119]

FOIP is an instrument to foster openness, transparency and accountability in government institutions. Fees should not present an unreasonable barrier to access to information in Saskatchewan. Therefore, fees should be reasonable, fair and at a level that does not discourage any resident from exercising their access rights. At the same time, the fee regime

[119] SK OIPC Review Report 2005-005 at [21].

should promote and encourage applicants to be reasonable and to cooperate with government institutions in defining and clarifying their access requests.[120]

When it comes to charging fees, government institutions should ensure that:

- All applicants are treated the same (fairness).
- Fees are calculated the same way for all applicants (consistency).

Fairness and consistency are best achieved when the government institution has a written policy or procedure in place for assessing fees and issuing fee estimates.

The Commissioner has recommended that government institutions issue fee estimates within the first three to 10 days of an access request being received so there is still time to process the request once a deposit is received.[121]

Steps When Charging Fees

As a best practice, where an estimate of costs will be issued, the FOIP Coordinator should take steps to contact the applicant in an attempt to narrow the scope of the requests to reduce work and costs.[122]

The following are the steps that can be taken when charging fees:

1. Contact the applicant:
    a. Advise that fees will be necessary.
    b. Attempt to clarify or offer ways to narrow the request to reduce or eliminate fees.
    c. Follow up in writing with the applicant when narrowing occurs to ensure agreed scope is clear.
    d. Address any requests for a fee waiver accordingly.
2. Make a search strategy (see *Search for Records* earlier in this Chapter).
3. Prepare a fee estimate based on the search strategy (do not complete the search yet).
4. Decide whether to charge a fee (refer to your internal policy or procedure).
5. Send out fee estimate and suspend work.

---

[120] SK OIPC Review Report 2005-005 at [24].
[121] SK OIPC Review Reports 261-2016 at [21], [71], and 037-2017 at [20].
[122] SK OIPC Review Reports 064-2016 to 076-2016 at [51] and 078-2016 to 091-2016 at [50].

6. Clarify or narrow the request again (if the applicant initiates it).
7. Start searching for records when applicant pays 50% deposit.

Types of Fees

There are generally three kinds of fees that can be included in a fee estimate:

1. Fees for searching for records.
2. Fees for preparing records.
3. Fees for reproduction of records.[123]

1. Fees for Searching

Fees for searching for a responsive record are pursuant to subsection 6(2) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations).

The government institution should develop a search strategy when preparing its fee estimate. For more on search strategies, see *Search for Records* earlier in this Chapter.

The Commissioner has found that it is not reasonable to charge an applicant a fee for work already completed before the applicant has agreed to pay the fee.[124] Government institutions should not complete the work when fee estimates are being prepared. It should be a true estimate. Completing the entire search before an applicant has agreed to pay fees or has the opportunity to narrow the search is a potential waste of government resources. This is supported by the language found at subsection 9(4) of FOIP which indicates a deposit is paid by the applicant "before a search is commenced for the records".

Fees for search time consists of every half hour of manual search time required to locate and identify responsive records. For example:

- Staff time involved with searching for records.
- Examining file indices, file plans or listings of records either on paper or electronic.
- Pulling paper files/specific paper records out of files.
- Reading through files to determine whether records are responsive.

---

[123] Subsection 6(3) of *The Freedom of Information and Protection of Privacy Regulations* provides that where search and retrieval of electronic records is required, a fee equal to the actual cost is payable at the time access is given. See SK OIPC Review Report 258-2022 at [35] to [43] for more on this.
[124] SK OIPC Review Reports 146-2015 and 147-2015 at [16] to [19], 115-2016 at [15].

Search time **does not** include:

- Time spent to copy the records.
- Time spent going from office to office or off-site storage to look for records.
- Having someone review the results of the search.

Generally, the following has been applied:

- It should take an experienced employee 1 minute to visually scan 12 pages of paper or electronic records to determine responsiveness.
- It should take an experienced employee 5 minutes to search one regular file drawer for responsive file folders.
- It should take 3 minutes to search one active email account and transfer the results to a separate folder or drive.

In instances where the above does not accurately reflect the circumstances, the government institution should design a search strategy and test a representative sample of records for time. The time can then be applied to the responsive records as a whole.

Where the search for responsive records exceeds two hours, the government institution can charge $15.00 for every half hour in excess of two hours for search or preparation (as per subsection 6(2) of FOIP Regulations.

IPC Findings

In Review Report 064-2016 to 076-2016, the Commissioner noted that where a search of active email accounts of current employees is required, search time should be calculated using subsection 6(2) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations) and not subsection 6(3) of the FOIP Regulations unless it is less expensive and the applicant agrees. Furthermore, the Commissioner found that government institutions cannot charge for searches of archived email accounts pursuant to subsection 6(3) of the FOIP Regulations because *The Archives and Public Records Management Act* requires records be useable and accessible.

2. Fees for Preparing

Fees for preparing the record for disclosure is pursuant to subsection 6(2) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations).

Preparation includes time spent preparing the record for disclosure including:

- Time anticipated to be spent physically severing exempt information from records.

Preparation time **does not** include:

- Deciding whether to claim an exemption.
- Identifying records requiring severing.
- Identifying and preparing records requiring third party notice.
- Packaging records for shipment.
- Transporting records to the mailroom or arranging for courier service.
- Time spent by a computer compiling and printing information.
- Assembling information and proofing data.
- Photocopying.
- Preparing an index of records.

The test related to reasonable time spent on preparation is generally, it should take an experienced employee 2 minutes per page to physically sever only.

In instances where the above test does not accurately reflect the circumstances (i.e., a complex record), the government institution should test the time it takes to sever on a representative sample of records. The time can then be applied to the responsive records as a whole.

Where the preparation of responsive records exceeds two hours, the government institution can charge $15.00 for every half hour in excess of two hours for search or preparation (as per subsection 6(2) of *The Freedom of Information and Protection of Privacy Regulations)*.

3. Fees for Reproduction

Fees for the reproduction of records are pursuant to subsection 6(1) of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations).

FOIP prescribes $0.25 per page for photocopying or computer printouts.

Applicants sometimes want records provided to them in electronic format. Government institutions should not charge fees for records provided electronically. However, if the applicant requests the record on a portable storage device, FOIP provides that for reproduction of electronic copies for an applicant, the government institution can charge the actual cost of any portable storage device that is used to provide the records. Examples include USB flash drives and memory cards (see subsection 6(1)(b.1) of *The Freedom of Information and Protection of Privacy Regulations*).

For records that are in other forms besides paper or electronic, the government institution can charge the actual cost of copying the record (see subsection 6(1)(l) of *The Freedom of Information and Protection of Privacy Regulations*).

The Ministry of Justice and Attorney General issued a resource titled, *Preparing a Cost Estimate: Fees and Fee Estimates For Access Requests Under FOIP*. It aids with understanding fees and preparing fee estimates.

In November 2014, the IPC posted a guest blog on its website from the former Sun Country Health Region, titled, *Using an Index to Clarify an Access Request and Reduce the Cost*. The blog provides advice on how to handle fees and provides an example of a template that can be used to break down a fee estimate.

IPC Review of Fee Estimates

Subsection 49(1)(a.1) of FOIP provides that an applicant can make a request for review to the Commissioner if the applicant is not satisfied that a reasonable fee was estimated by the government institution.

Reviews involving fee estimates can occur both at the time the fee estimate was issued or after the fee has already been paid and records provided to an applicant. For all fee reviews, the IPC requires details on how the fee amount was arrived at. This includes how fees were calculated for search, preparation and reproduction of the record.

For this reason, a government institution should retain details and notes about its search, preparation and reproduction so it can support the amount of the fee estimate in the event of a review.

Fee estimates under FOIP are generally judged on the basis of whether they are *reasonable* and *equitable*:

> A fee estimate is **reasonable** when it is proportionate to the work required on the part of the government institution to respond efficiently and effectively to the applicant's request.
>
> A fee estimate is **equitable** when it is fair and even-handed, that is, when it supports the principle that applicants should bear a reasonable portion of the cost of producing the information they are seeking, but not costs arising from administrative inefficiencies or poor records management practices.[125]

[125] SK OIPC Review Report 2005-005 at [21].

Subsection 9(3)

Fee

9(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

For the government institution, the 30-day deadline to respond to an access request is suspended once the fee estimate is sent and remains suspended until the applicant notifies the government institution that the applicant wishes to proceed with the application.

When an applicant pays the 50% deposit referred to in subsection 9(4) of FOIP, this qualifies as an indication that they wish to proceed.

When the applicant indicates they wish to proceed, the clock is no longer suspended, and the government institution has whatever days are left within its original 30 days to complete the work and issue the response.

IPC Findings

In Review Report 261-2016 & 284-2016, the Commissioner found that an extension applied at the same time of a fee estimate was not necessary and not in keeping with FOIP because the clock stopped when the fee estimate was issued. The Commissioner recommended government institutions issue fee estimates within the first three to 10 days of an access request being received so there is still time to process the request once a deposit is received.

Subsection 9(4)

Fee

9(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.

Subsection 9(4) of FOIP provides that the government institution can require the applicant to pay a 50% deposit on the fee estimate. The applicant must pay this deposit before the government institution commences its search for records.

Alternatively, the applicant could request a review of the fee estimate.

If a review of the fee estimate is requested and the applicant has paid the 50% deposit, the government institution should proceed with processing the request despite the review underway. This prevents a delay in accessing records. Depending on the outcome of the review, a fee can be adjusted or refunded at any point.[126]

If the applicant requests a review of the fee estimate but chooses not to pay the 50% deposit until the review is complete, the government institution does not need to proceed with processing the request until the review is complete and the applicant indicates he or she wishes to proceed.

Where a 50% deposit has been paid and access to the records is refused, the deposit must be refunded to the applicant pursuant to subsection 8(2) of *The Freedom of Information and Protection of Privacy Regulations*.

Subsection 9(5)

Fee

9(5) Where a prescribed circumstance exists, the head may waive payment of all or any part of the prescribed fee.

Subsection 9(5) of FOIP provides that a government institution can waive payment of all or part of the fees in prescribed circumstances. The prescribed circumstances are outlined at section 9 of *The Freedom of Information and Protection of Privacy Regulations*.

Fee Waivers

Section 9 – *FOIP Regulations*

Waiver of fees

9(1) For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:

[126] SK OIPC Review Report F-2010-001 at [13] and [14].

(a) if payment of the prescribed fees will cause a substantial financial hardship for the applicant and, in the opinion of the head, giving access to the record is in the public interest;

(b) if the application involves the personal information of the applicant;

(c) if the prescribed fee or actual cost for the service is $100 or less.

(2) For the purposes of clause 9(1)(a), substantial financial hardship includes circumstances in which the applicant:

(a) is receiving assistance pursuant to *The Saskatchewan Assistance Act* as an individual or as part of a family unit;

(b) is receiving assistance pursuant to *The Training Allowance Regulations*; or

(c) is receiving legal assistance or representation from any of the following organizations, including any of the same organizations operating from time to time under another name:

(i) The Saskatchewan Legal Aid Commission;

(ii) Pro Bono Law Saskatchewan;

(iii) Community Legal Assistance Services for Saskatoon Inner City Inc. (CLASSIC).

Subsection 9(1)(a) – FOIP Regulations

Waiver of fees

9(1) For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:

(a) if payment of the prescribed fees will cause a substantial financial hardship for the applicant and, in the opinion of the head, giving access to the record is in the public interest;

…

(2) For the purposes of clause 9(1)(a), substantial financial hardship includes circumstances in which the applicant:

(a) is receiving assistance pursuant to *The Saskatchewan Assistance Act* as an individual or as part of a family unit;

(b) is receiving assistance pursuant to *The Training Allowance Regulations*; or

(c) is receiving legal assistance or representation from any of the following organizations, including any of the same organizations operating from time to time under another name:

(i) The Saskatchewan Legal Aid Commission;

(ii) Pro Bono Law Saskatchewan;

(iii) Community Legal Assistance Services for Saskatoon Inner City Inc. (CLASSIC).

This provision allows a government institution to waive the payment of fees if payment would cause substantial financial hardship for the applicant and giving access is in the public interest.

Subsection 9(2) of *The Freedom of Information and Protection of Privacy Regulations* includes additional circumstances under which substantial financial hardship can exist. See *Subsection 9(2) FOIP Regulations*, later in this Chapter.

Applicants must establish that payment of the fee would cause substantial financial hardship. Government institutions should have established criteria to apply for determining when payment of fees may be waived (i.e., policy or form to be completed by applicants). Government institutions should only collect what information is necessary and destroy it when no longer needed.

Substantial financial hardship is where any money spent outside of life sustaining requirements (food, water, clothing and shelter) is cause for financial difficulties.[127] For example, one can consider whether an applicant's expenses exceed their income and the value of their assets.

Two overriding principles and a non-exhaustive list of criteria have been established to help assess whether records relate to a matter of **public interest** in the context of a fee waiver. The two principles are: 1) the Act was intended to foster open, transparent and accountable government, subject to the limits contained in the Act; and 2) the Act contains the principle that the user seeking records should pay. The criteria are:[128]

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be if the public knew about it. The following may be relevant:
    - Have others besides the applicant sought or expressed an interest in the records.
    - Are there other indicators that the public has or would have an interest in the records.

[127] ON IPC Order PO-2464 at p. 10.

[128] AB IPC originally relied on 13 criteria when assessing public interest when reviewing a fee waiver decision. The 13 criteria originate from AB IPC Order 96-002 at pp. 16-17. Due to repetition and overlap of some of the criteria, AB IPC condensed them in Order 2006-032 at [42] and [43]. The condensed criteria are reflected in this Guide. These criteria were adopted in SK OIPC Review Report 145-2014 at [12] and [13].

2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public. The following may be relevant:
    - Do the records relate to a personal conflict between the applicant and the government institution.
    - What is the likelihood the applicant will disseminate the contents of the records in a manner that will benefit the public.

3. If the records are about the process or functioning of the government institution, will they contribute to open, transparent and accountable government. The following may be relevant:
    - Do the records contain information that will show how the government institution reached or will reach a decision.
    - Are the records desirable for subjecting the activities of the government institution to scrutiny.
    - Will the records shed light on an activity of the government institution that have been called into question.

The following additional factors may be relevant to decide if a waiver is warranted on grounds of fairness:

- If others have asked for similar records, have they been given at no cost.
- Would the waiver of the fee significantly interfere with the operations of the government institution, including other programs of the government institution.
- Are there other less expensive sources of the information.
- Is the request as narrow as possible.
- Has the government institution helped the applicant to define their request.[129]

The factors above do not require that all questions be answered in the affirmative in order for the government institution to find that access to the records is in the public interest. The government institution should weigh the circumstances of each case when making its decision.

If an applicant requests a fee waiver and it is denied by the government institution, the applicant has a right to request a review by the Information and Privacy Commissioner pursuant to subsection 49(1)(a.2) of FOIP. A review of a fee waiver denial considers the criteria or process used by the government institution to deny the request and whether it was consistent with FOIP.

---

[129] AB IPC Order 2006-032 at [44].

For this reason, government institutions should have a policy or process for dealing with fee waivers and not make decisions arbitrarily. A government institution should be able to explain in detail how it arrived at its decision to deny the request for a fee waiver.

For more information, the Ministry of Justice and Attorney General developed a resource titled, *Managing Fee Waiver Requests*.

IPC Findings

In Review Report 302-2018, 303-2018, 304-2018, the Commissioner considered the equivalent provision [s. 8(1)(b)] of *The Local Authority Freedom of Information and Protection of Privacy Regulations*. An applicant had requested the City of Regina (City) waive all of the fee for accessing records because the fee would cause financial hardship to the applicant. The City denied a full fee waiver. Upon review, the Commissioner found that the applicant did not provide what was requested by the City in order to establish financial hardship and to meet the prescribed circumstances. The Commissioner recommended the City amend its fee waiver application form to include examples of what "documented evidence" could include so applicants are aware of what constitutes acceptable documentation or evidence. This may include, but not be limited to, copies of a Notice of Assessment, an existing program eligibility letter or pay stub.

Subsection 9(1)(b) - FOIP Regulations

Waiver of fees

9(1) For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:

…

(b) if the application involves the personal information of the applicant;

Subsection 9(1)(b) of *The Freedom of Information and Protection of Privacy Regulations* provides that the government institution can waive the payment of fees if the application involves the personal information of the applicant.

It is important for government institutions to be open with individuals regarding their own personal information.[130]

[130] Ministry of Justice, Resource, *Managing Fee Waiver Requests,* at p. 5.

Subsection 9(1)(c) - FOIP Regulations

Waiver of fees

9(1) For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:

...

(c) if the prescribed fee or actual cost for the service is $100 or less.

Subsection 9(1)(c) of *The Freedom of Information and Protection of Privacy Regulations* provides that the government institution can waive the payment of fees if the fee is $100 or less.

In view of the administrative costs involved to collect $100 for processing fees from an applicant, the government institution may decide to waive the fees. Once a policy for this is adopted, it should be applied consistently for all access requests (i.e., the practice should not just be applied to certain applicants and not others).[131]

Subsection 9(2) - FOIP Regulations

Waiver of fees

9(2) For the purposes of clause 9(1)(a), substantial financial hardship includes circumstances in which the applicant:

(a) is receiving assistance pursuant to *The Saskatchewan Assistance Act* as an individual or as part of a family unit;

(b) is receiving assistance pursuant to *The Training Allowance Regulations*; or

(c) is receiving legal assistance or representation from any of the following organizations, including any of the same organizations operating from time to time under another name:

(i) The Saskatchewan Legal Aid Commission;

(ii) Pro Bono Law Saskatchewan;

(iii) Community Legal Assistance Services for Saskatoon Inner City Inc. (CLASSIC).

[131] Ministry of Justice, Resource, *Managing Fee Waiver Requests,* at p. 5.

Subsection 9(2) of *The Freedom of Information and Protection of Privacy Regulations* provides that substantial financial hardship for an applicant includes the enumerated list in the subsections below.

Subsection 9(2)(a) - FOIP Regulations

Waiver of fees

9(2) For the purposes of clause 9(1)(a), substantial financial hardship includes circumstances in which the applicant:

(a) is receiving assistance pursuant to *The Saskatchewan Assistance Act* as an individual or as part of a family unit;

Substantial financial hardship includes applicants that are receiving assistance under *The Saskatchewan Assistance Act*. This includes assistance as an individual or as part of a family unit.

Some individuals or families may continue to be on the Saskatchewan Assistance Program (SAP), while others may be on Saskatchewan Income Support (SIS). Both support individuals and families who cannot meet their basic living costs. The Saskatchewan Assured Income for Disability Program (SAID) is for individuals experiencing significant and enduring disabilities.

These programs are for families and individuals who, for various reasons – including disability, illness, low income or unemployment – cannot meet their basic living costs.

For more on these programs see Saskatchewan Financial Support Programs.

Subsection 9(2)(b) - FOIP Regulations

Waiver of fees

9(2) For the purposes of clause 9(1)(a), substantial financial hardship includes circumstances in which the applicant:

...

(b) is receiving assistance pursuant to *The Training Allowance Regulations*; or

Substantial financial hardship includes applicants that are receiving assistance under *The Training Allowance Regulations*.

The Provincial Training Allowance (PTA) provides income assistance to low-income adult students enrolled in full-time Adult Basic Education, workforce development or skills training programs. For more on this program see Provincial Training Allowance.

Subsection 9(2)(c) - FOIP Regulations

Waiver of fees

9(2) For the purposes of clause 9(1)(a), substantial financial hardship includes circumstances in which the applicant:

...

(c) is receiving legal assistance or representation from any of the following organizations, including any of the same organizations operating from time to time under another name:

(i) The Saskatchewan Legal Aid Commission;

(ii) Pro Bono Law Saskatchewan;

(iii) Community Legal Assistance Services for Saskatoon Inner City Inc. (CLASSIC).

Substantial financial hardship includes applicants receiving assistance or representation from any of the following organizations:

1. The Saskatchewan Legal Aid Commission.
2. Pro Bono Law Saskatchewan.
3. Community Legal Assistance Services for Saskatoon Inner City Inc. (CLASSIC).

The names of these organizations may change from time to time. Subsection 9(2)(c) of *The Freedom of Information and Protection of Privacy Regulations* will still apply to the organizations under the new names.

Section 10: Manner of Access

Manner of access

10(1) If an applicant is entitled to access pursuant to subsection 9(1), a head shall provide the applicant with access to the record in accordance with this section.

(2) Subject to subsection (3), if a record is in electronic form, a head shall give access to the record in electronic form if:

(a) it can be produced using the normal computer hardware and software and technical expertise of the government institution;

(b) producing it would not interfere unreasonably with the operations of the government institution; and

(c) it is reasonably practicable to do so.

(3) If a record is a microfilm, film, sound or video recording or machine-readable record, the head may give access to the record:

(a) by permitting the applicant to examine a transcript of the record;

(b) by providing the applicant with a copy of the transcript of the record; or

(c) in the case of a record produced for visual or aural reception, by permitting the applicant to view or hear the record or by providing the applicant with a copy of it.

(4) A head may give access to a record:

(a) by providing the applicant with a copy of the record; or

(b) if it is not reasonable to reproduce the record, by giving the applicant an opportunity to examine the record.

Section 10 of FOIP deals with how access to a record will be given to applicants. Depending on the type of record, the manner of access can include providing paper copies of records, providing electronic copies or allowing applicants to view a record. Section 10 of FOIP guides government institutions on the manner of access to records.

Subsection 10(1)

Manner of access

10(1) Where an applicant is entitled to access pursuant to subsection 9(1), the head shall provide the applicant with access to the record in accordance with this section.

Subsection 10(1) of FOIP provides that if an applicant is entitled to access a record, the government institution should provide that access in accordance with section 10 of FOIP.

Subsection 10(2)

Manner of access

10(2) Subject to subsection (3), if a record is in electronic form, a head shall give access to the record in electronic form if:

(a) it can be produced using the normal computer hardware and software and technical expertise of the government institution;

(b) producing it would not interfere unreasonably with the operations of the government institution; and

(c) it is reasonably practicable to do so.

Subsection 10(2) of FOIP was an amendment on January 1, 2018. The provision provides that if the records requested are in electronic format, government institutions must provide access if three circumstances exist:

1. It can be produced using the normal computer hardware and software and technical expertise of the government institution.

2. Producing it would not interfere unreasonably with the operations of the government institution.

3. It is reasonably practicable to do so.

Electronic means created, recorded, transmitted or stored in digital or other intangible form by electronic, magnetic or optical means or by any other similar means.[132]

Be produced means to be brought forward for use.[133]

Normal computer hardware and software and technical expertise means the computerized data processing equipment, accompanying software programs and in-house technical staff employed by the government institution on a daily basis. A government institution is not required to acquire equipment or software or seek the expertise of an outside body or person to create a record from a machine-readable record in its possession or under its control.[134]

For subsection 10(2)(c) of FOIP, the phrase "reasonably practicable" appears. This phrase is not defined in FOIP. However, the following assists:

Reasonably practicable:

Reasonable means fair, proper or moderate under the circumstances, sensible.[135]

Practicable means feasible, fair and convenient and is not synonymous with possible. An act is practicable of which conditions or circumstances permit the performance.[136]

What is reasonably practicable depends on the circumstances in each case.

To interfere unreasonably with the operations of the government institution is language also found in subsection 12(1)(a) of FOIP. **Interference**, in this context, means to obstruct or hinder the range of effectiveness of the government institution's activities.[137]

---

[132] *The Electronic Information and Documents Act*, 2000, SS 2000, c E-7.22 at s. 3(a).
[133] 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.
[134] 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.
[135] Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 1456.
[136] Gardner, J., and Gardner K. (2016) *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 4, P to R, at p. P-280. The Court of Appeal of Alberta relied on this definition in *R. v. Mudry*, 1979 ABCA 286 (CanLII) at [14] and again in the Provincial Court of Alberta decision *R. v. Graham*, 2014 ABPC 197 (CanLII) at [14].
[137] SK OIPC Review Report F-2006-005 at [60] to [63].

IPC Findings

In Review Report 313-2016, the Commissioner considered whether the Ministry of Economy was required to create records requested by the applicant. The applicant requested the number of Saskatchewan Immigrant Nominee Program (SINP) applicants represented by a lawyer, family member, employer or consultant (RCIC) between October 11, 2013, and October 31, 2016. The Ministry of Economy advised the applicant that it did not have a way to create a record that would break down individual applicants by these criteria without double counting applications. To avoid duplication, it would require manual review and sorting. The Commissioner found that the Ministry of Economy had demonstrated that it did not have records responsive to the applicant's access to information request.

In Review Report 038-2018, the Commissioner considered whether information stored in a University of Regina database was responsive to an access to information request and whether the University of Regina was required to create records in response to an access to information request. The applicant had requested the amount of all external research funding between 2006 and 2017, the agency/company awarding the money, the title of the research project and the faculty/department that received the funding. The applicant was willing to accept a spreadsheet. Upon review, the Commissioner found that information in a database was responsive to an access request for purposes of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). Furthermore, the equivalent subsection 10(2) in LA FOIP required local authorities to give access to a record in electronic form if the record could be produced using normal computer hardware, software and technical expertise if it would not interfere with the operations of the local authority. The Commissioner found that in this case, the University of Regina was able to pull the data requested from the database without difficulty and therefore it should provide it to the applicant.

Subsection 10(3)

Manner of access

10(3) A head may give access to a record that is a microfilm, film, sound recording, machine-readable record or other record of information stored by electronic means:

(a) by permitting the applicant to examine a transcript of the record;

(b) by providing the applicant with a copy of the transcript of the record; or

(c) in the case of a record produced for visual or aural reception, by permitting the applicant to view or hear the record or by providing the applicant with a copy of it.

Subsection 10(3) of FOIP provides that if the record is:

- Microfilm
- Film
- Sound or video recording
- Machine-readable record

The government institution can provide access by:

- Letting the applicant examine a transcript of the record.
- Providing the applicant with a copy of the transcript.
- For sound or video recording - enabling the applicant to view or hear the recording.
- For sound or video recording - providing the applicant a copy of the recording.

Machine-readable record means anything upon which information is stored or recorded such that a computer or other mechanical device can render the information intelligible. Examples include:

- A word processing electronic document stored on a hard or floppy computer disk.
- An electronic database containing personal or general information that is stored on magnetic tape.
- A videocassette containing recorded sound and images.
- An offset plate used in the printing industry for printing paper copies.[138]

IPC Findings

In Review Report 138-2015, the Commissioner considered whether the Attorney General (Justice) permitting the applicant to view recordings was in compliance with subsection 10(3)(c) of FOIP. The applicant had requested copies of video surveillance records from the entrances of the Court of King's Bench in Saskatoon recorded on a specific date. The applicant was not satisfied with Justice's decision to allow him to view the recordings and wanted copies. Upon review, Justice asserted that it chose this manner of access because of court security reasons and that there was a high profile court case taking place the date the applicant specified for the recordings. The Commissioner found that subsection 10(3)(c) of

[138] 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.

FOIP had no qualifier that must be met by the government institution when opting for viewing of records other than the record needed to be a sound or video recording. In this case, the record was a video recording. As such, it was the discretion of the government institution whether to allow viewing or providing a copy. The Commissioner found that Justice was not obligated under FOIP to provide the applicant with a copy of the video recordings pursuant to subsection 10(3)(c) of FOIP.

In Review Report 110-2015, the Commissioner considered whether the Saskatchewan Police Commission complied with subsection 10(3) of FOIP. The applicant requested copies of tape recordings of interviewed witnesses involved in an investigation. As the tape recordings were transcribed and part of the file, it chose to provide copies of the transcripts to the applicant. Furthermore, the original tape recordings were considered transitory once transcribed and had been destroyed. Upon review, the Commissioner found that destroying the audio recordings following transcription complied with guidance from the Saskatchewan Archives Board. Furthermore, the Commissioner found that subsection 10(3) of FOIP did not require a government institution to provide both audio and transcription copies of a record. As such, the Saskatchewan Police Commission providing a transcript of the recordings was an appropriate manner of access for the applicant.

Subsection 10(4)

Manner of access

10(4) A head may give access to a record:

(a) by providing the applicant with a copy of the record; or

(b) if it is not reasonable to reproduce the record, by giving the applicant an opportunity to examine the record.

Government institutions can provide applicants with a copy of the record or give the applicant an opportunity to examine the record if it is not reasonable to reproduce it.

This provision was formerly subsection 10(2) of FOIP prior to the amendments of January 1, 2018.

IPC Findings

In Review Report 027-2016, the Commissioner considered whether the Ministry of Justice and Attorney General (Justice) had an obligation to provide the applicant copies of records

pursuant to subsection 10(2) of FOIP (now subsection 10(4) of FOIP). The applicant had requested access to any and all written documents that included the applicants name in any form from June 2014 until the time of the access request. Justice did not provide the applicant with copies of emails that were sent to or from the applicant. Justice did not provide them because the applicant was an employee of Justice and the applicant had access to the emails sent to and from him through his work email account. Justice asserted that this satisfied its requirement under subsection 10(2) of FOIP. Upon review, the Commissioner found that if the applicant wanted Justice to gather and print copies of records the applicant had access to, it was reasonable to charge fees.

Section 11: Transfer of Application

Transfer of application

11(1) Where the head of the government institution to which an application is made considers that another government institution has a greater interest in the record, the head:

(a) may, within 15 days after the application is made, transfer the application and, if necessary, the record to the other government institution; and

(b) if a record is transferred pursuant to clause (a), shall give written notice of the transfer and the date of the transfer to the applicant.

(2) For the purposes of this section, a government institution has a greater interest in a record if:

(a) the record was originally prepared in or for the government institution; or

(b) the government institution was the first government institution to obtain the record or a copy of the record.

(3) For the purposes of section 7, an application that is transferred pursuant to subsection (1) is deemed to have been made to the government institution on the day of the transfer.

There are occasions when an applicant makes a request to one government institution that would be more appropriately handled by another government institution.

Greater interest is where two or more government institutions have possession or control of a record, the concept of greater interest may be used to determine which government

institution should respond to a request for access to the record.[139] See *Subsection 11(2)* below for the criteria to determine "*greater interest*" in a record.

Transfer means the act by which one government institution formally passes to another government institution the responsibility for processing a request for access to records under FOIP.[140]

Subsection 49(1)(a.3) of FOIP provides that an applicant can request a review of the government institution's decision to transfer the applicant's access to information request. For more on requests for review, see *Section 49: Application for Review* later in this Chapter.

Subsection 11(1)

Transfer of application

11(1) Where the head of the government institution to which an application is made considers that another government institution has a greater interest in the record, the head:

(a) may, within 15 days after the application is made, transfer the application and, if necessary, the record to the other government institution; and

(b) if a record is transferred pursuant to clause (a), shall give written notice of the transfer and the date of the transfer to the applicant.

Subsection 11(1) of FOIP enables government institutions to transfer an access to information request (and if necessary, the responsive records) to another government institution if the other government institution has a greater interest in the record.

The transfer must take place within 15 days of the government institution receiving the access to information request.

Once transferred, the 30-day deadline for the receiving government institution begins [subsection 11(3)]. In accordance with subsection 2-28(3) of *The Legislation Act*, the first day

[139] 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.
[140] 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.

is excluded in the calculation of time.[141] Therefore, the 30-day clock begins the day following the day of the transfer. For more on calculating time, see *Section 7: Response Required, Calculating 30 Days*, earlier in this Chapter.

The receiving government institution may extend the 30-day deadline pursuant to subsection 12(1) of FOIP. This means a maximum of 60 days to process.

Where a government institution transfers a request (and if necessary, the record), it is required to provide written notice of the transfer to the applicant and provide the date of the transfer.

IPC Findings

In Review Report 059-2014, the government institution did not transfer the access to information request until more than 15 months after receiving the request. The Commissioner found that the government institution did not comply with section 11 of FOIP.

Subsection 11(2)

Transfer of application

11(2) For the purposes of this section, a government institution has a greater interest in a record if:

(a) the record was originally prepared in or for the government institution; or

(b) the government institution was the first government institution to obtain the record or a copy of the record.

Subsection 11(2) of FOIP provides the circumstances under which another government institution would have a greater interest in an access to information request or the responsive record:

- The responsive record was originally prepared in or for the other government institution.
- The other government institution was the first government institution to obtain the responsive record or a copy of it. This is common where a government institution

[141] Subsection 2-28(3) of *The Legislation Act*, SS 2019, c L-10.2 provides, "A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens".

sends a record or copy to several other government institutions such as contracts or agreements.

IPC Findings

In Review Report F-2013-005, the Commissioner considered subsection 11(2) of FOIP. The Ministry of Health (Health) had transferred two access to information requests to the Ministry of Justice and Attorney General (Justice) stating that Justice held the responsive records for litigation purposes. However, Health acknowledged that there were responsive records "contained" within its Ministry. The Commissioner found that Health did not demonstrate that Justice had a "greater interest" in the records pursuant to subsection 11(2) of FOIP. The Commissioner also found that Health improperly transferred the requests to Justice. Furthermore, the Commissioner found that Health should have processed the responsive records it had in its possession in response to the request. The Commissioner recommended that Health complete a search for additional records it may have in its possession and process the records in response to the request.

Subsection 11(3)

Transfer of application

11(3) For the purposes of section 7, an application that is transferred pursuant to subsection (1) is deemed to have been made to the government institution on the day of the transfer.

Government institutions that receive a transferred access to information request must provide a response within 30 days.

In accordance with subsection 2-28(3) of *The Legislation Act*, the first day is excluded in the calculation of time.[142] Therefore, the 30-day clock begins the day following the day of transfer. For more on calculating time, see *Section 7: Response Required, Calculating 30 Days*, earlier in this Chapter.

[142] Subsection 2-28(3) of *The Legislation Act*, SS 2019, c L-10.2 provides, "A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens".

The receiving government institution may extend the 30-day deadline pursuant to subsection 12(1) of FOIP. This means a maximum of 60 days to process. If the government institution intends to extend the timeline, it must comply with the requirements of section 12 of FOIP.

Applicants have a right to request a review of a government institution's decision to extend a response time pursuant to subsection 49(1)(a) of FOIP.

Section 12: Extension of Time

Extension of time

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

(i) the application is for access to a large number of records or necessitates a search through a large number of records; or

(ii) there is a large number of requests;

and completing the work within the original period would unreasonably interfere with the operations of the government institution;

(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or

(c) where a third party notice is required to be given pursuant to subsection 34(1).

(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.

(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

Section 12 of FOIP provides that government institutions can extend the initial 30-day response deadline for a maximum of 30 more days. This means 60 days in total. However, this is only under limited circumstances, which are outlined in this section.

If a government institution has not complied with subsection 12(3) of FOIP, the Commissioner will not consider whether the government institution has complied with

subsections 12(1) or 12(2) of FOIP.[143] Therefore, government institutions should ensure that the section 7 decision letter is provided to the applicant within the period of the extension.

When it comes to calculating the due date, subsection 2-28(3) of *The Legislation Act*, provides that the first day is excluded in the calculation of time.[144] Therefore, the initial 30-day clock begins the day following receipt of the access to information request. For more on calculating time, see *Section 7: Response Required, Calculating 30 Days,* earlier in this Chapter.

Subsection 12(1)(a)

Extension of time

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

(a) where:

(i) the application is for access to a large number of records or necessitates a search through a large number of records; or

(ii) there is a large number of requests;

and completing the work within the original period would unreasonably interfere with the operations of the government institution;

Subsection 12(1)(a) of FOIP provides for an additional 30 days where:

- The access to information request is for a large number of records.
- A search through a large number of records is required.
- A large number of access to information requests were received.

However, government institutions must demonstrate that even where one of the above circumstances exist, completing the work within the original 30 days would unreasonably interfere with the government institution's operations.

If a government institution has not complied with subsection 12(3) of FOIP, the Commissioner will not consider whether a government institution has complied with

[143] SK OIPC Review Reports 322-2021, 030-2022at [19], 164-2021 at [124].
[144] Subsection 2-28(3) of *The Legislation Act*, SS 2019, c L-10.2 provides, "A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens".

subsections 12(1) or 12(2) of FOIP.[145] Therefore, government institutions should ensure that the section 7 decision letter is provided to the applicant within the period of the extension.

Subsection 12(1)(a)(i)

Subsection 12(1)(a)(i) of FOIP provides that an extension can be applied where there are a large number of records responsive to the request that require processing or where a search through a large number of records is required in order to respond to the request. In addition, completing this work within the original 30 days would unreasonably interfere with the operations of the government institution.

Subsection 49(1)(a) of FOIP provides that an applicant can request a review by the Commissioner if not satisfied with a decision of the government institution pursuant to section 12 of FOIP.

In the event an applicant requests a review of the government institution's application of an extension, the Commissioner will consider whether the government institution's application of the extension complied with section 12 of FOIP.

If a government institution has not complied with subsection 12(3) of FOIP, the Commissioner will not consider whether a government institution has complied with subsections 12(1) or 12(2) of FOIP.[146] Therefore, government institutions should ensure that the section 7 decision letter is provided to the applicant within the period of the extension.

For this purpose, both parts of the following test must be met:

1. **Are there a large number of records requested or needing to be searched?**

Volume considerations:

- How many pages are involved?
- Do the records require special handling?
- Does the type of record require different methods of searching or handling?[147]

IPC Findings

In Review Report F-2014-003, the Commissioner found that the Ministry of Justice and Attorney General appropriately applied an extension for purposes of processing a large

[145] SK OIPC Review Reports 322-2021, 030-2022at [19], 164-2021 at [124].
[146] SK OIPC Review Reports 322-2021, 030-2022at [19], 164-2021 at [124].
[147] BC IPC, Resource, *Time Extension Guidelines for Public Bodies*, at p. 5-6.

number of records. The Commissioner found that generally more than 500 records constitute a large number of records for purposes of subsection 12(1)(a)(i) of FOIP.

In Review Report 322-2021, 030-2022, the Commissioner found that the Ministry of Health (Health) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Health was not in compliance with subsection 12(3) of FOIP and as a result, the Commissioner did not need to consider whether Health was in compliance with subsections 12(1) or 12(2) of FOIP.

In Review Report 164-2021, the Commissioner found that the Ministry of Corrections, Policing and Public Safety (Corrections) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Corrections was not in compliance with subsection 12(3) of FOIP and as a result the Commissioner did not need to consider whether Corrections had complied with subsections 12(1) or 12(2) of FOIP. The Commissioner recommended Corrections follow its obligations pursuant to subsection 12(3) of FOIP.

2. Will meeting the original time limit unreasonably interfere with the operations of the government institution?

Unreasonably interfere means going beyond the limits of what is reasonable or equitable in time and resources and the impact, which this use of resources would have on the government institution's day-to-day activities.[148]

Circumstances that may contribute to unreasonable interference:

- Significant increase in access to information requests (e.g., sharp rise over 1-4 months)
- Significant increase in access to information caseloads
- Computer systems or technical problems
- Unexpected employee leaves from the FOIP branch
- Unusual number (high percentage) of new FOIP employees in training
- Cross government requests
- Program area discovers a significant amount of additional records
- Type of records (maps, etc.)
- Number of program areas searched

[148] 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.

- Location of records[149]

Circumstances that would not qualify:

- The government institution has not allocated the FOIP area sufficient resources
- Long term or systemic problems
- Vacations
- Office processes (e.g., sign-off)
- Personal commitments
- Pre-planned events (e.g., retirements)
- No work done during initial 30 days
- Type of applicant (media, political, etc.)[150]

Subsection 12(1)(a)(ii)

Subsection 12(1)(a)(ii) of FOIP provides that an extension can be applied where the government institution has received a large number of access to information requests and completing them within the original 30 days would unreasonably interfere with the operations of the public body.

Subsection 49(1)(a) of FOIP provides that an applicant can request a review by the Commissioner if not satisfied with a decision of the government institution pursuant to section 12 of FOIP.

In the event an applicant requests a review of the government institution's application of an extension, the Commissioner will consider whether the government institution's application of the extension complied with section 12 of FOIP.

If a government institution has not complied with subsection 12(3) of FOIP, the Commissioner will not consider whether a government institution has complied with subsections 12(1) or 12(2) of FOIP.[151] Therefore, government institutions should ensure that the section 7 decision letter is provided to the applicant within the period of the extension.

For this purpose, both parts of the following test must be met:

1. Were there a high number of requests at the time?

Volume considerations:

- How many requests are involved.

---

[149] BC IPC, Resource, *Time Extension Guidelines for Public Bodies*, at p. 5-6.
[150] BC IPC, Resource, *Time Extension Guidelines for Public Bodies*, at p. 5-6.
[151] SK OIPC Review Reports 322-2021, 030-2022at [19], 164-2021 at [124].

- How does volume compare with average request volume.[152]

IPC Findings

In Review Report 158-2017, the Commissioner found that an increase from 69 to 112 requests (61.6% increase) qualified as a high number of requests for purposes of subsection 12(1)(a)(ii) of FOIP.

In Review Report 322-2021, 030-2022, the Commissioner found that the Ministry of Health (Health) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Health was not in compliance with subsection 12(3) of FOIP and as a result, the Commissioner would not consider whether Health was in compliance with subsections 12(1) or 12(2) of FOIP.

In Review Report 164-2021, the Commissioner found that the Ministry of Corrections, Policing and Public Safety (Corrections) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Corrections was not in compliance with section 12(3) of FOIP and as a result the Commissioner would not consider whether Corrections had complied with subsections 12(1) or 12(2) of FOIP. The Commissioner recommended Corrections follow its obligations pursuant to subsection 12(3) of FOIP.

2. Will meeting the original time limit unreasonably interfere with the operations of the government institution?

Unreasonably interfere mean going beyond the limits of what is reasonable or equitable in time and resources and the impact, which this use of resources would have on the government institution's day-to-day activities.[153]

Circumstances that may contribute to unreasonable interference:

- Significant increase in FOIP requests (e.g., sharp rise over 1-4 months)
- Significant increase in FOIP caseloads
- Computer systems or technical problems
- Unexpected employee leaves from FOIP branch
- Unusual number (high percentage) of new FOIP employees in training

---

[152] BC IPC, Resource, *Time Extension Guidelines for Public Bodies*, at p. 5-6.
[153] 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.

- Cross government requests
- Program area discovers a significant amount of additional records
- Type of records (maps, etc.)
- Number of program areas searched
- Location of records[154]

Circumstances that would not qualify:

- The government institution has not allocated the FOIP area sufficient resources
- Long term or systemic problems
- Vacations
- Office processes (e.g., sign-off)
- Personal commitments
- Pre-planned events (e.g., retirements)
- No work done during initial 30 days
- Type of applicant (media, political, etc.)[155]

IPC Findings

In Review Report 123-2015, the Commissioner found that, at least double the number of requests normally opened within the Ministry of Justice and Attorney General (Justice) qualified as a "large number" of requests. In addition, because Justice had seven vacancies in its Freedom of Information and Privacy Branch, it was reasonable to consider the interference with its operations if it were to try to complete them within the original 30 days. Justice normally had 25 to 50 access to information requests. However, it had over 100 at the time it applied the extension.

In Review Report 158-2017, the Commissioner found that a position becoming vacant in the FOIP unit during the time the access request was being processed met the second part of the test for subsection 12(1)(a)(ii) of FOIP. The Ministry of Energy and Resources was engaged in a staffing process to fill the vacant position.

In Review Report 322-2021, 030-2022, the Commissioner found that the Ministry of Health (Health) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Health was not in compliance with

[154] BC IPC, Resource, *Time Extension Guidelines for Public Bodies*, at p. 5-6.
[155] BC IPC, Resource, *Time Extension Guidelines for Public Bodies*, at p. 5-6.

subsection 12(3) of FOIP and as a result, the Commissioner did not need to consider whether Health was in compliance with subsections 12(1) or 12(2) of FOIP.

In Review Report 164-2021, the Commissioner found that the Ministry of Corrections, Policing and Public Safety (Corrections) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Corrections was not in compliance with section 12(3) of FOIP and as a result the Commissioner did not need to consider whether Corrections had complied with subsections 12(1) or 12(2) of FOIP. The Commissioner recommended Corrections follow its obligations pursuant to subsection 12(3) of FOIP.

Subsection 12(1)(b)

Extension of time

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

...

(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or

Subsection 12(1)(b) of FOIP provides that an extension can be applied where the government institution needs more time to consult in order to process the request. The consultations must be necessary in order to comply with the application.

Comply with means to act in accordance with or fulfil the requirements.[156]

Subsection 49(1)(a) of FOIP provides that an applicant can request a review by the Commissioner if not satisfied with a decision of the government institution pursuant to section 12 of FOIP.

In the event an applicant requests a review of the government institution's application of an extension, the Commissioner will consider whether the government institution's application of the extension complied with section 12 of FOIP.

[156] 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.

If a government institution has not complied with subsection 12(3) of FOIP, the Commissioner will not consider whether a government institution has complied with subsections 12(1) or 12(2) of FOIP.[157] Therefore, government institutions should ensure that the section 7 decision letter is provided to the applicant within the period of the extension.

For this purpose, both parts of the following test must be met:

1. Was the government institution consulting a third party or other public body?

The government institution should be able to explain why it was necessary to consult with a third party or other public body in order to make a decision about access, including how the third party or other public body is expected to assist.

Public body, in this context, means a separate government institution or local authority as defined by *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) or health trustee as defined by *The Health Information Protection Act* (HIPA).[158]

Some valid reasons for consulting:

- Third party or other public body has an interest in the records.
- Records were created or controlled jointly.[159]

Consultations with staff, program areas or branches within the government institution processing the access to information request do not qualify for this provision. Internal consultations are part of every government institution's routine responsibilities when responding to access to information requests. Therefore, activities that constitute consultations should be those outside of intrinsic and routine obligations of any government institution.[160]

Consultations for a purpose other than deciding whether to give access do not qualify for this provision.[161]

2. Was it not reasonable for the consultations to be completed within the first 30 days?

Considerations:

- When did the government institution initiate consultations.

---

[157] SK OIPC Review Reports 322-2021, 030-2022at [19], 164-2021 at [124].
[158] Adapted from BC IPC, Resource, *Time Extension Guidelines for Public Bodies*, at p. 8.
[159] BC IPC, Resource, *Time Extension Guidelines for Public Bodies*, at p. 8.
[160] SK OIPC Review Report F-2006-003 at [44].
[161] BC IPC, Resource, *Time Extension Guidelines for Public Bodies*, at p. 8.

- Were a large number of consultations required.
- Availability of third party and public body contacts.
- Did the government institution set deadline expectations.
- Is time required for consultation reasonable.
- Did the government institution follow up on consultation requests.
- Has the government institution proceeded with a phased release.[162]

IPC Findings

In Review Report 261-2016 & 284-2016, the Commissioner found that an extension applied by the Ministry of Central Services at the same time of a fee estimate was not necessary and not in keeping with FOIP because the clock stopped when the fee estimate was issued.

In Review Report F-2006-003, the Commissioner considered whether the Ministry of Justice and Attorney General (Justice) appropriately applied an extension pursuant to subsections 12(1)(a)(i) and 12(1)(b) of FOIP. The Commissioner found that extending the response deadline for purposes of consultations was not appropriate. In arriving at this finding, the Commissioner noted that Justice did not provide sufficient explanation of the nature or complexity of the consultations. Furthermore, when considering why the consultations could not be completed within the original 30-day deadline, the Commissioner found that Justice did not offer any evidence that it sent additional reminders to the public bodies it had consulted to ensure that it would be in a position to respond to the applicant within the original 30-day deadline. The Commissioner also was not satisfied that Justice initiated and oversaw the consultations in a timely manner. In addition, the Commissioner found that many of the activities undertaken by Justice in preparation of its response did not constitute consultations under the provision.

In Review Report 322-2021, 030-2022, the Commissioner found that the Ministry of Health (Health) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Health was not in compliance with subsection 12(3) of FOIP and as a result, the Commissioner did not need to consider whether Health was in compliance with subsections 12(1) or 12(2) of FOIP.

In Review Report 164-2021, the Commissioner found that the Ministry of Corrections, Policing and Public Safety (Corrections) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Corrections was not in compliance with section 12(3) of FOIP and as such the Commissioner did not need to consider whether Corrections had complied with subsections 12(1) or 12(2) of FOIP. The

[162] BC IPC, Resource, *Time Extension Guidelines for Public Bodies*, at p. 8.

Commissioner recommended Corrections follow its obligations pursuant to subsection 12(3) of FOIP.

Subsection 12(1)(c)

Extension of time

12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:

...

(c) where a third party notice is required to be given pursuant to subsection 34(1).

Subsection 12(1)(c) of FOIP provides that an extension can be applied where the government institution needs to provide notice to third parties pursuant to subsection 34(1) of FOIP.

If a government institution has not complied with subsection 12(3) of FOIP, the Commissioner will not consider whether a government institution has complied with subsections 12(1) or 12(2) of FOIP.[163] Therefore, government institutions should ensure that the section 7 decision letter is provided to the applicant within the period of the extension.

For more on notices to third parties, see the *Guide to FOIP*, Chapter 5, "Third Party Information".

IPC Findings

In Review Report 311-2017, 312-2017, 313-2017, 316-2017, 340-2017, 341-2017, 342-2017, the Commissioner considered the timeframe under which the Global Transportation Hub (GTH) provided its response to an applicant. The Commissioner found that the GTH issued a fee estimate 25 days into the original 30-day deadline. Once the fee estimate was issued, the clock stopped until the applicant paid a 50% deposit. Once paid, this left only five days for GTH to provide a section 7 response. GTH then extended the response time an additional 30 days pursuant to subsection 12(1)(a) of FOIP. However, the GTH failed to provide a response within the extended 30-day deadline. GTH explained that the primary reason for the delay was significant objection by the third party to release of information. The Commissioner recommended that the GTH amend its procedures so that even where it is extending the response period, it ensures it is providing notice to third parties no later than the 30th day of

[163] SK OIPC Review Reports 322-2021, 030-2022at [19], 164-2021 at [124].

the initial 30-day deadline. This would minimize the likelihood of GTH putting itself in a "deemed refusal" situation in the future.

In Review Report 322-2021, 030-2022, the Commissioner found that the Ministry of Health (Health) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Health was not in compliance with subsection 12(3) of FOIP and as a result, the Commissioner did not need to consider whether Health was in compliance with subsections 12(1) or 12(2) of FOIP.

In Review Report 164-2021, the Commissioner found that the Ministry of Corrections, Policing and Public Safety (Corrections) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Corrections was not in compliance with section 12(3) of FOIP and as a result the Commissioner did not need to consider whether Corrections had complied with subsections 12(1) or 12(2) of FOIP. The Commissioner recommended Corrections follow its obligations pursuant to subsection 12(3) of FOIP.

Subsection 12(2)

Extension of time

12(2) A head who extends a period pursuant to subsection (l) shall give notice of the extension to the applicant within 30 days after the application is made.

Subsection 12(2) of FOIP provides that where a government institution intends to extend the response time, it must give notice of the extension to the applicant within the first 30 days following receipt of the access to information request.

If a government institution does not give notice within the original 30 day deadline, it is no longer able to request an extension as its lack of response constitutes a "deemed refusal" pursuant to subsection 7(5) of FOIP. Subsection 12(2) of FOIP supports this view, as it requires that notice of an extension be given within 30 days of the application being made.[164]

If a government institution has not complied with subsection 12(3) of FOIP, the Commissioner will not consider whether a government institution has complied with

[164] SK OIPC Review Report F-2008-001 at [32].

subsections 12(1) or 12(2) of FOIP.[165] Therefore, government institutions should ensure that the section 7 decision letter is provided to the applicant within the period of the extension.

IPC Findings

In Review Report 322-2021, 030-2022, the Commissioner found that the Ministry of Health (Health) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Health was not in compliance with subsection 12(3) of FOIP and as a result, the Commissioner did not need to consider whether Health was in compliance with subsections 12(1) or 12(2) of FOIP.

In Review Report 164-2021, the Commissioner found that the Ministry of Corrections, Policing and Public Safety (Corrections) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Corrections was not in compliance with section 12(3) of FOIP and as a result the Commissioner did not need to consider whether Corrections had complied with subsections 12(1) or 12(2) of FOIP. The Commissioner recommended Corrections follow its obligations pursuant to subsection 12(3) of FOIP.

Subsection 12(3)

Extensions of time

12(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.

Subsection 12(3) of FOIP provides that following the extension, the government institution must provide its section 7 decision letter to the applicant within the extended 30-day deadline.

In other words, the government institution has a maximum of 60 days to provide a section 7 decision letter to the applicant (initial 30 days + extension of up to 30 days).

If a government institution has not complied with subsection 12(3) of FOIP, the Commissioner will not consider whether a government institution has complied with

[165] SK OIPC Review Reports 322-2021, 030-2022at [19], 164-2021 at [124].

subsections 12(1) or 12(2) of FOIP.[166] Therefore, government institutions should ensure that the section 7 decision letter is provided to the applicant within the period of the extension.

For more on notices to third parties, see the *Guide to FOIP*, Chapter 5, "Third Party Information".

IPC Findings

In Review Report 311-2017, 312-2017, 313-2017, 316-2017, 340-2017, 341-2017, 342-2017, the Commissioner considered the timeframe under which the Global Transportation Hub (GTH) provided its response to an applicant. The Commissioner found that the GTH issued a fee estimate 25 days into the original 30-day deadline. Once the fee estimate was issued, the clock stopped until the applicant paid a 50% deposit. Once paid, this left only five days for GTH to provide a section 7 response. GTH then extended the response time an additional 30 days pursuant to subsection 12(1)(a) of FOIP. However, the GTH failed to provide a response within the extended 30-day deadline. GTH explained that the primary reason for the delay was significant objection by the third party to release of information. The Commissioner recommended that the GTH amend its procedures so that even where it is extending the response period, it ensures it is providing notice to third parties no later than the 30th day of the initial 30-day deadline. This would minimize the likelihood of GTH putting itself in a "deemed refusal" situation in the future.

In Review Report 322-2021, 030-2022, the Commissioner found that the Ministry of Health (Health) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Health was not in compliance with subsection 12(3) of FOIP and as a result, the Commissioner did not need to consider whether Health was in compliance with subsections 12(1) or 12(2) of FOIP.

In Review Report 164-2021, the Commissioner found that the Ministry of Corrections, Policing and Public Safety (Corrections) failed to provide the section 7 decision letter to the applicant within the period of extension. As such, the Commissioner found that Corrections was not in compliance with section 12(3) of FOIP and as a result the Commissioner did not need to consider whether Corrections had complied with subsections 12(1) or 12(2) of FOIP. The Commissioner recommended Corrections follow its obligations pursuant to subsection 12(3) of FOIP.

[166] SK OIPC Review Reports 322-2021, 030-2022at [19], 164-2021 at [124].

Section 31: Individual's Access to Personal Information

Individual's access to personal information

31(1) Subject to Part III and subsection (2), an individual whose personal information is contained in a record in the possession or under the control of a government institution has a right to, and:

(a) on an application made in accordance with Part II; and

(b) on giving sufficient proof of his or her identity;

shall be given access to the record.

(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits, where the information is provided explicitly or implicitly in confidence.

This section can also be found in the *Guide to FOIP*, Chapter 4: "Exemptions to the Right of Access" and Chapter 6: "Protection of Privacy" because it falls under Part IV of FOIP which deals with the protection of "personal information".

Subsection 31(1)

Individual's access to personal information
31(1) Subject to Part III and subsection (2), an individual whose personal information is contained in a record in the possession or under the control of a government institution has a right to, and:

(a) on an application made in accordance with Part II; and

(b) on giving sufficient proof of his or her identity;

shall be given access to the record.

Subsection 31(1) of FOIP provides that upon application an individual is entitled to their own personal information contained within a record unless an exemption applies under Part III or subsection 31(2) of FOIP applies.

Government institutions should interpret the exemptions to this right to personal information with a view to giving an individual as much access as possible.

Records containing personal information may be very sensitive in nature, so care must be taken to ensure that proper safeguards are in place when these types of records are released.

When providing an applicant with access to personal information, a government institution must be satisfied that the individual receiving the information is indeed the individual that the information is about or a duly appointed representative of that person.[167] For more on duly appointed representatives, see *Section 59: Exercise of Rights by Other Persons* later in this Chapter.

For more information on verifying the identity of the applicant, the Ministry of Justice and Attorney General issued the resource, *Verifying the Identity of an Applicant*. It provides helpful direction on steps that can be taken to verify identity.

Subsection 31(2)

Individual's access to personal information

31(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits, where the information is provided explicitly or implicitly in confidence.

Subsection 31(2) of FOIP enables a government institution to withhold an individual's information when it is evaluative or opinion material compiled for the purposes of determining suitability, eligibility, or qualifications for employment.

The provision attempts to address two competing interests: the right of an individual to have access to their personal information and the need to protect the flow of frank information to government institutions so that appropriate decisions can be made respecting the awarding of jobs, contracts, and other benefits.

The following three-part test can be applied:

1. Is the information personal information that is evaluative or opinion material?

To qualify as *personal information*, the information must be about an identifiable individual and must be personal in nature. Some examples are provided in subsection 24(1) of FOIP. See *Section 24* in the *Guide to FOIP*, Chapter 6, "Protection of Privacy".

[167] Government of Saskatchewan, Ministry of Justice, Resource, *Verifying the Identity of an Applicant*, September 2017, at p. 2.

Evaluative means to have assessed, appraised, to have found or to have stated the number of.[168]

Opinion material is a belief or assessment based on grounds short of proof; a view held as probable for example, a belief that a person would be a suitable employee, based on that person's employment history. An opinion is subjective in nature and may or may not be based on facts.[169]

2. Was the personal information compiled solely for one of the enumerated purposes?

Compiled means that the information was drawn from several sources or extracted, extrapolated, calculated or in some other way manipulated.[170]

The enumerated purposes are:

- For determining the individual's suitability, eligibility or qualifications for employment.
- For the awarding of contracts with the government institution.
- For awarding other benefits.

Suitability means right or appropriate for a particular person, purpose or situation.[171]

Eligibility means fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege or status.[172]

Qualifications means the possession of qualities or properties inherently or legally necessary to make one eligible for apposition or office, or to perform a public duty or function.[173]
Employment means the selection for a position as an employee of a government institution.[174]

---

[168] AB IPC Order 98-021 at p.4.
[169] AB IPC Order 98-021 at p.4.
[170] 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.
[171] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed.*, (Oxford University Press) at p. 1434.
[172] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 657.
[173] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1497.
[174] Service Alberta, *FOIP Guidelines and Practices, 2009 Edition*, Chapter 4 at p. 141.

Employment reference means personal information that is evaluative, or opinion material compiled solely for the purpose of describing an individual's suitability, eligibility or qualifications for employment.[175]

Award means to give or to order to be given as a payment, compensation or prize; to grant; to assign.[176]

Benefit means a favourable or helpful factor or circumstance; advantage, profit.[177]

Other benefits refer to benefits conferred by a government institution through an evaluative process. The term includes research grants, scholarships and prizes. It also includes appointments required for employment in a particular job or profession such as a bailiff or special constable.[178]

Employee of a government institution means an individual employed by a government institution and includes an individual retained under a contract to perform services for the government institution.[179]

The personal information must have been compiled solely for one of the enumerated purposes to qualify.

3. Was the personal information provided explicitly or implicitly in confidence?

In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information provided *in confidence* means that the supplier of the information has stipulated how the information can be disseminated.[180] In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the party providing the information.[181]

---

[175] *The Freedom of Information and Protection of Privacy Regulations,* c. F-22.01 Reg. 1, s. 2(1)(b).
[176] AB IPC, Order 98-021 at p.5.
[177] 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.
[178] Service Alberta, *FOIP Guidelines and Practices, 2009 Edition*, Chapter 4 at p. 141.
[179] *The Freedom of Information and Protection of Privacy Act* [S.S. 1990-91, c. F-22.01 as am], s. 2(1)(b.1).
[180] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 104, SK OIPC Review Reports F-2006-002 at [51], H-2008-002 at [73], ON IPC Order MO-1896 at p. 8.
[181] SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [57]; ON IPC Order MO-1896 at p. 8.

Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential.[182]

Explicitly means that the request for confidentiality has been clearly expressed, distinctly stated or made definite. There may be documentary evidence that shows that the information was provided on the understanding that it would be kept confidential.[183]

Factors considered when determining whether a document was provided in confidence *implicitly* include (not exhaustive):

- What is the nature of the information. Would a reasonable person regard it as confidential. Would it ordinarily be kept confidential by the party providing it or by the government institution.[184]
- Was the information treated consistently in a manner that indicated a concern for its protection by the party providing it and the government institution from the point at which it was provided until the present time.[185]
- Is the information available from sources to which the public has access.[186]
- Does the government institution have any internal policies or procedures that speak to how records or information such as that in question are to be handled confidentially.
- Was there a mutual understanding that the information would be held in confidence. **Mutual understanding** means that the government institution and the party providing it both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intended the information to be kept confidential but the other did not, the information is not considered to have been provided in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.[187]

---

[182] SK OIPC Review Reports F-2006-002 at [57], F-2009-001 at [62], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], F-2014-002 at [47].
[183] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 104 and 105.
[184] BC IPC Orders 331-1999 at [8], F13-01 at [23]; NS IPC Review Reports 17-03 at [34], 16-09 at [44]; PEI IPC Order FI-16-006 at [19].
[185] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[186] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[187] *Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence)*, 2001 FCT 556 at [40]; SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [58] to [59]; ON IPC Order MO-1896 at p. 8; BC IPC Order F-11-08 at [32].

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was provided implicitly in confidence would not be sufficient.[188]

Factors to consider when determining if a document was provided in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the government institution and the party providing it.[189]
- The fact that the government institution requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions to the party prior to the information being provided.[190]

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments.

Two cases came before the Court of King's Bench for Saskatchewan dealing with the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act* [see s. 30(2)]. Those two cases are as follows:

- *Fogal v. Regina School Division No. 4*, 2002 SKKB 92 (CanLII)
- *Britto v University of Saskatchewan*, 2018 SKKB 92 (CanLII)

IPC Findings

In Review Report LA-2004-001, the Commissioner considered the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The review involved Lloydminster Public School Division (Division). An applicant requested access to records related to the applicant's suitability for volunteering in after-school sport activities. Upon review, the Commissioner found that the evaluative or opinion material was not compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of a contract or other benefit. It was compiled for the purpose of determining the suitability of a volunteer to engage in "volunteer" activity in an after-hours sports program. The Commissioner found that a volunteer does not meet the

[188] SK OIPC Review Report LA-2013-002 at [60].
[189] SK OIPC Review Reports F-2006-002 at [56], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Orders 97-013 at [23] to [24], 2001-008 at [54].
[190] SK OIPC Review Reports F-2006-002 at [56], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; AB IPC Order 97-013 at [25].

definition of "employee" of a local authority. As such, the Commissioner found that subsection 30(2) of LA FOIP did not apply.

In Review Report 258-2016, the Commissioner found that the name of the individual giving the opinion was also captured by the provision. The purpose and intent of the provision is to allow individuals to provide frank feedback where there is an evaluation process occurring. In addition, evaluating suitability for employment can take place not only during the hiring process but also during an employee's tenure. Furthermore, the provision can include unsolicited records such as letters of concern or complaint (*Fogal v. Regina School Division No. 4, (2002)*).

In Review Report 010-2018, the Commissioner considered the equivalent provision in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The review involved the South East Cornerstone Public School Division #209 (Cornerstone). An applicant was seeking parental complaints and witness statements regarding an incident. Cornerstone withheld the records pursuant to several provisions in LA FOIP including subsection 30(2) of LA FOIP. Upon review, the Commissioner found that the records contained personal information that was evaluative or opinion material. Furthermore, the Commissioner found that the personal information was compiled solely for the purpose of determining the applicant's suitability for employment. Finally, the Commissioner found that the interview notes were provided explicitly in confidence. However, the written complaints were not provided implicitly or explicitly in confidence. The Commissioner recommended that Cornerstone sever the opinions and other personal information of individuals other than the applicant and release the rest.

In Review Report 142-2022, the Commissioner considered a denial of access involving the Ministry of Social Services (Social Services). Social Services withheld portions of the record totaling 255 pages. It applied subsection 31(2) of FOIP to portions of the records. Upon review, the Commissioner found that the assessment information collected on the applicant was for the enumerated purpose of determining eligibility to an income program offered by Social Services. The assessment information contained the comments of the assessor. However, the Commissioner found that Social Services did not demonstrate that the scores on the assessment were provided explicitly or implicitly in confidence. As such, the Commissioner found that subsection 31(2) of FOIP did not apply.

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.

The right of access to information is not absolute. The Legislature recognizes that there will be certain individuals who may use the access provisions of FOIP in a way that is contrary to the principles and objects of FOIP.[191]

[191] AB IPC *Application by Alberta Municipal Affairs to disregard an access request made by an applicant under the Freedom of Information and Protection of Privacy Act* at p. 3.

Subsection 45.1(1)

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.

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) requires a government institution to make an application to the Commissioner. This should be in the form of a written application (letter) that includes evidence and argument about how the criteria under subsection 45.1(2) are met. Details of how to make an application are contained in the IPC resource, *Application to Disregard an Access to Information Request or Request for Correction*.

An application to disregard is a serious matter as it could have the effect of removing an applicant's express right to seek access to information. 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.[192]

Generally, the actions of applicants are not under scrutiny. They have no duty to be accountable to the provincial government. The law is in place to allow for the scrutiny of those who govern, not the other way around. When making access requests, applicants who frequently use the Act are exercising a statutory right. While some requests can be complicated and may even be intended as "fishing expeditions", they are lawful and ought to be treated with respect.[193]

However, FOIP must not become a weapon for disgruntled individuals to use against a government institution for reasons that have nothing to do with the Act.[194]

For more on the IPC process for applications to disregard an application or request, see *The Rules of Procedure*.

---

[192] Office of the New Brunswick Information and Privacy Commissioner (NB IPC) Interpretation Bulletin, *Section 15 – Permission to disregard access request*.
[193] AB IPC Investigation Report F2017-IR-01 at [80].
[194] BC IPC Order 110-1996 at p. 6.

Subsection 45.1(2)(a)

Power to authorize a government institution to disregard applications or requests

45.1(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

For this provision to be found to apply, the government institution would have to demonstrate that the applicant's access to information requests or requests for correction interfere unreasonably with the operations of the government institution due to their repetitious or systematic nature.

Both parts of the following test must be met:

1. Are the requests for access or correction repetitious or systematic?

Repetitious requests are requests that are made two or more times.[195]

Systematic requests are those made according to a method or plan of acting that is organized and carried out according to a set of rules or principles.[196] It includes a pattern of conduct that is regular or deliberate.[197]To be methodical; arranged, conducted, according to system; deliberate.[198]

The following factors should be considered:

- Are the requests repetitious (does the applicant ask more than once for the same records or information or for the same information to be corrected).
- Are the requests similar in nature or do they stand alone as being different.
- Do previous requests overlap to some extent.
- Are the requests close in their filing time.
- Does the applicant continue to engage in a determined effort to request the same information (an important factor in finding whether requests are systematic, is to determine whether they are repetitious).

---

[195] BC IPC Order F10-01 at [16].
[196] BC IPC Order F13-18 at [23].
[197] AB IPC Request to Disregard F2019-RTD-01 at p. 9.
[198] 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.

- Is there a pattern of conduct on the part of the applicant in making the repeated requests that is regular or deliberate.
- Does the applicant methodically request records or information in many areas of interest over extended time periods, rather than focusing on accessing specific records or information of identified events or matters.
- Has the applicant requested records or information of various aspects of the same issue.
- Has the applicant made a number of requests related to matters referred to in records already received.
- Does the applicant follow up on responses received by making further requests.
- Does the applicant question the content of records received by making further access requests.
- Does the applicant question whether records or information exist when told they do not.
- Can the requests be seen as a continuum of previous requests rather than in isolation.[199]

The government institution should address any of the above factors that apply. Depending on the nature of the case, one factor alone or multiple factors in concert with each other can lead to the first part of the test being met.

There is an important distinction to be drawn between overlap and repetition. Where there is overlap between requests that are made at the same time, only one search will be required for all of the overlapping requests. Where more than one request has been made for the same information at more than one time, more than one search will be required for the same information. The latter is repetitious; the former is not.[200]

Evidence of previous requests is relevant to the determination of whether the current request is repetitious.[201]

2. Do the repetitious or systematic requests unreasonably interfere with the operations of the government institution?

To interfere with operations, the request(s) must obstruct or hinder the range of effectiveness of the government institution's activities. The circumstances of the particular institution must

[199] NB IPC Interpretation Bulletin, *Section 15 – Permission to disregard access request.*
[200] AB IPC Request to Disregard F2019-RTD-01 at p. 10.
[201] AB IPC Request to Disregard F2019-RTD-01 at p. 9.

be considered. For example, it would take less to interfere with the operations of a small municipality compared to a large ministry.

Unreasonably interfere means going beyond the limits of what is reasonable or equitable in time and resources and the impact, which this use of resources would have on the government institution's day-to-day activities.[202]

Each of the following factors should be considered:

- Are the requests large and complex, rather than confusing, vague, broadly worded, or wide-ranging (e.g., "all records" on a topic), without parameters such as date ranges.
- Did the government institution seek clarification and was it obtained.
- Did the clarification of the applicant's requests, if obtained, provide useful details to enable the effective processing of the requests.
- Do the applicant's requests impair the government institution's ability to respond to other requests in a timely fashion.
- What is the amount of time to be committed for the processing of the request, such as:
    - Number of employees to be involved in processing the request;
    - Number of employees and hours expended to identify, retrieve, review, redact if necessary, and copy records;
    - Number of total employees in the same office; and
    - Whether there is an employee assigned solely to process access requests.[203]

For the second part of the test, the government institution should address all of the above factors in its application to the Commissioner.

Requests for branch-wide searches could be found to amount to unreasonable interference, especially where an applicant is able to name the individuals who may possess the requested information.[204]

The government institution must meet a high threshold of showing "unreasonable interference", as opposed to mere disruption. It will usually be the case that a request for information will pose some disruption or inconvenience to a government institution; that is

---

[202] 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.
[203] NB IPC Interpretation Bulletin, *Section 15 – Permission to disregard access request.*
[204] AB IPC Request to Disregard F2019-RTD-01 at p. 11.

not cause to keep information from a citizen exercising their democratic and quasi-constitutional rights.[205]

IPC Findings

In Disregard Decision 181-2021, 182-2021, the Commissioner considered an application from Saskatchewan Government Insurance (SGI) to disregard two access to information requests from an applicant. SGI asserted that the two access to information requests should be disregarded on the grounds that the requests amounted to an abuse of the right of access pursuant to subsections 45.1(2)(b) and (c) of FOIP. Specifically, SGI asserted the access to information requests were vexatious and not submitted in good faith. The Commissioner considered subsection 45.12(2)(c) of FOIP first at the request of SGI. While considering the application, the Commissioner noted that it was not the first disregard application from SGI involving the applicant and that the Commissioner had previously issued three disregard decisions and one Review Report. In each of the disregard cases, the Commissioner found the applicant's conduct amounted to an abuse of the right of access. The current disregard application would be the fourth from SGI involving the applicant. Considering this and the additional arguments submitted by SGI in this case, the Commissioner found that SGI had established reasonable grounds for finding the applicant's two requests were vexatious and not made in good faith within the meaning of subsection 45.1(2)(c) of FOIP. As a result of this finding, the Commissioner did not need to consider subsection 45.1(2)(b) of FOIP. However, the Commissioner noted that in the past three disregard decisions involving the applicant and SGI, the Commissioner had found that subsection 45.1(2)(b) of FOIP applied because of the applicant's conduct and as the circumstances in the present case were similar, it would likely result in a similar finding. **Most notable in this disregard decision, is the Commissioner went further with the decision for the first time**. The Commissioner was concerned with the cost and inefficiency of the multiple applications to disregard being submitted by SGI involving the applicant. Furthermore, that it was not in the public interest to unnecessarily add to SGI's costs of complying with FOIP. In addition, other members of the public had an equal right to share in the public resources allocated to responding to access to information requests. When an individual overburdens the system in the way this applicant was, it has a negative impact on others who want to legitimately exercise their access to information rights. After considering how other jurisdictions handle similar situations, the Commissioner's decision imposed other conditions not previously put forward. The Commissioner granted SGI's application to disregard the two access to information requests. In addition, the Commissioner authorized SGI to disregard all future access to information requests made by or on behalf of the applicant that pertain to the motor vehicle accident in

[205] AB IPC Request to Disregard F2019-RTD-01 at p. 12.

2019. Upon issuance of the disregard decision, the Commissioner discontinued all reviews involving SGI and the applicant that were open pertaining to the motor vehicle accident pursuant to subsections 50(2)(a) and (a.7) of FOIP (three files at the time) and any future requests for review involving the motor vehicle accident in 2019 would not be conducted pursuant to subsections 50(2)(a) and (a.7) of FOIP.

Subsection 45.1(2)(b)

Power to authorize a government institution to disregard applications or requests

45.1(2) In determining whether to grant an application or request mentioned in subsection (1), the commissioner shall consider whether 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

For this provision to be found to apply, the government institution would have to demonstrate that the applicant's access to information requests or requests for correction are of such a repetitious or systematic nature that they can be said to be an abuse of the right of access or correction.

Both parts of the following test must be met:

1. Are the requests for access or correction repetitious or systematic?

Repetitious requests are requests that are made two or more times.[206]

Systematic requests are those made according to a method or plan of acting that is organized and carried out according to a set of rules or principles.[207] It includes a pattern of conduct that is regular or deliberate.[208]

The following factors should be considered:

- Are the requests repetitious (does the applicant ask more than once for the same records or information or for the same information to be corrected).
- Are the requests similar in nature or do they stand alone as being different.
- Do previous requests overlap to some extent.

[206] BC IPC Order F10-01 at [16].
[207] BC IPC Order F13-18 at [23].
[208] AB IPC Request to Disregard F2019-RTD-01 at p. 9.

- Are the requests close in their filing time.
- Does the applicant continue to engage in a determined effort to request the same information (an important factor in finding whether requests are systematic, is to determine whether they are repetitious).
- Is there a pattern of conduct on the part of the applicant in making the repeated requests that is regular or deliberate.
- Does the applicant methodically request records or information in many areas of interest over extended time periods, rather than focusing on accessing specific records or information of identified events or matters.
- Has the applicant requested records or information of various aspects of the same issue.
- Has the applicant made a number of requests related to matters referred to in records already received.
- Does the applicant follow up on responses received by making further requests.
- Does the applicant question the content of records received by making further access requests.
- Does the applicant question whether records or information exist when told they do not.
- Can the requests be seen as a continuum of previous requests rather than in isolation.[209]

The government institution should address any of the above factors that apply. Depending on the nature of the case, one factor alone or multiple factors in concert with each other can lead to the first part of the test being met.

There is an important distinction to be drawn between overlap and repetition. Where there is overlap between requests that are made at the same time, only one search will be required for all of the overlapping requests. Where more than one request has been made for the same information at more than one time, more than one search will be required for the same information. The latter is repetitious; the former is not.[210]

Evidence of previous requests is relevant to the determination of whether the current request is repetitious.[211]

2. Do the repetitious or systematic requests amount to an abuse of the right of access or correction?

---

[209] NB IPC Interpretation Bulletin, *Section 15 – Permission to disregard access request.*
[210] AB IPC Request to Disregard F2019-RTD-01 at p. 10.
[211] AB IPC Request to Disregard F2019-RTD-01 at p. 9.

An **abuse of the right of access or correction** is where an applicant is using the access/correction provisions of FOIP in a way that is contrary to its principles and objects.

Abuse of the right of access or correction can have serious consequences for the rights of others and for the public interest. By overburdening a government institution, misuse by one person can threaten or diminish a legitimate exercise of that same right by others. Such abuse also harms the public interest since it unnecessarily adds to a government institution's costs of complying with the Act.

Once it is determined that the requests are repetitious or systematic, one must consider whether there is a pattern or type of conduct that amounts to an abuse of the right of access or correction or are made for a purpose other than to obtain access to information or correction.

It is possible to have a repetitious request without there being an abuse of the right of access. For example, applicants are not always sure how to word their access requests and may submit additional requests to pinpoint the specific records they are seeking. Although the requests may be repetitious, it would not be an abuse of the right of access. Such a situation would be better handled through the duty to assist and clarification with the applicant.

The following factors should be considered:

- *Number of requests:* is the number excessive.
- *Nature and scope of the requests:* are they excessively broad and varied in scope or unusually detailed. Are they identical to or similar to previous requests.
- *Purpose of the requests:* are the requests intended to accomplish some objective other than to gain access. For example, are they made for "nuisance" value, or is the applicant's aim to harass the public body or to break or burden the system.
- *Timing of the requests:* is the timing of the requests connected to the occurrence of some other related event, such as a court or tribunal proceeding. [212]
- *Wording of the requests*: are the requests or subsequent communications in their nature offensive, vulgar, derogatory or contain unfounded allegations.

Offensive or intimidating conduct or comments by applicants is unwarranted and harmful. They can also suggest that an applicant's objectives are not legitimately about access to

[212] Four factors adopted from ON IPC Order MO-3108 at [24]. Also, in SK OIPC Review Report F-2010-002 at [69].

records. Requiring employees to be subjected to and to respond to offensive, intimidating, threatening, insulting conduct or comments can have a detrimental effect on well-being.[213]

The government institution should address any of the above factors that apply. Depending on the nature of the case, one factor alone or multiple factors in concert with each other can lead to the second part of the test being met.

IPC Findings

In Disregard Decision 343-2019, 352-2019 the Commissioner considered section 45.1 of FOIP 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 pursuant to subsection 45.1(2)(b) of FOIP. As such, the Commissioner authorized the WCB to disregard the two access to information requests.

In Disregard Decision 181-2021, 182-2021, the Commissioner considered an application from Saskatchewan Government Insurance (SGI) to disregard two access to information requests from an applicant. SGI asserted that the two access to information requests should be disregarded on the grounds that the requests amounted to an abuse of the right of access pursuant to subsections 45.1(2)(b) and (c) of FOIP. Specifically, SGI asserted the access to information requests were vexatious and not submitted in good faith. The Commissioner considered subsection 45.12(2)(c) of FOIP first at the request of SGI. While considering the application, the Commissioner noted that it was not the first disregard application from SGI involving the applicant and that the Commissioner had previously issued three disregard decisions and one Review Report. In each of the disregard cases, the Commissioner found the applicant's conduct amounted to an abuse of the right of access. The current disregard application would be the fourth from SGI involving the applicant. Considering this and the additional arguments submitted by SGI in this case, the Commissioner found that SGI had established reasonable grounds for finding the applicant's two requests were vexatious and not made in good faith within the meaning of subsection 45.1(2)(c) of FOIP. As a result of this finding, the Commissioner did not need to consider subsection 45.1(2)(b) of FOIP. However, the Commissioner noted that in the past three disregard decisions involving the applicant and SGI, the Commissioner had found that subsection 45.1(2)(b) of FOIP applied because of the applicant's conduct and as the circumstances in the present case were similar, it would likely result in a similar finding. **Most notable in this disregard decision, is the**

[213] Fifth factor adopted from AB IPC Order F2015-16 at [39] to [54]. Added to criteria in SK OIPC Review Report 053-2015 at [15] and [38] to [41].

Commissioner went further with the decision for the first time. The Commissioner was concerned with the cost and inefficiency of the multiple applications to disregard being submitted by SGI involving the applicant. Furthermore, that it was not in the public interest to unnecessarily add to SGI's costs of complying with FOIP. In addition, other members of the public had an equal right to share in the public resources allocated to responding to access to information requests. When an individual overburdens the system in the way this applicant was, it has a negative impact on others who want to legitimately exercise their access to information rights. After considering how other jurisdictions handle similar situations, the Commissioner's decision imposed other conditions not previously put forward. The Commissioner granted SGI's application to disregard the two access to information requests. In addition, the Commissioner authorized SGI to disregard all future access to information requests made by or on behalf of the applicant that pertain to the motor vehicle accident in 2019. Upon issuance of the disregard decision, the Commissioner discontinued all reviews involving SGI and the applicant that were open pertaining to the motor vehicle accident pursuant to subsections 50(2)(a) and (a.7) of FOIP (three files at the time) and any future requests for review involving the motor vehicle accident in 2019 would not be conducted pursuant to subsections 50(2)(a) and (a.7) of FOIP.

Subsection 45.1(2)(c)

Power to authorize a government institution to disregard applications or requests

45.1(2) In determining whether to grant an application or request mentioned in subsection (1), the commissioner shall consider whether the application or request:

…

(c) is frivolous or vexatious, not in good faith or concerns a trivial matter.

For this provision to be found to apply, the government institution would have to demonstrate that the applicant's access to information request(s) or request(s) for correction is frivolous, vexatious, not in good faith or concerns a trivial matter.

Similar to subsection 50(2) of FOIP, the following definitions and factors have been established:

Frivolous is typically associated with matters that are trivial or without merit, lacking a legal or factual basis or legal or factual merit; not serious; not reasonably purposeful; of little weight or importance.[214]

Vexatious means without reasonable or probable cause or excuse.[215] A request is *vexatious* when the primary purpose of the request is not to gain access to information but to continually or repeatedly harass a government institution in order to obstruct or grind a government institution to a standstill. It is usually taken to mean with intent to annoy, harass, embarrass or cause discomfort.[216]

A request is not vexatious simply because a government institution is annoyed or irked because the request is for information the release of which may be uncomfortable for the government institution.[217]

However, FOIP must not become a weapon for disgruntled individuals to use against a government institution for reasons that have nothing to do with the Act.[218]

A vexatious proceeding means "…that the litigant's mental state goes beyond simple animus against the other side and rises to a situation where the litigant is attempting to abuse or misuse the legal process": *Jamieson v Denman*, 2004 ABQB 593 (CanLII), para 127.[219] In *Chutskoff v Bonora*, 2014 ABQB 389 (CanLII), Michalyshyn J identified a "catalogue" of features of vexatious litigation:

- Collateral attack.
- Hopeless proceedings.
- Escalating proceedings.
- Bringing proceedings for improper purposes.
- Initiating "busybody" lawsuits to enforce alleged rights of third parties.
- Failure to honour court-ordered obligations.
- Persistently taking unsuccessful appeals from judicial decisions.
- Persistently engaging in inappropriate courtroom behavior.
- Unsubstantiated allegations of conspiracy, fraud and misconduct.
- Scandalous or inflammatory language in pleadings or before the court.

---

[214] SK OIPC Review Report F-2010-002 at [57], [60] and [61].
[215] SK OIPC Review Report F-2010-002 at [62].
[216] Office of the Northwest Territories Information and Privacy Commissioner (NWT IPC), Review 17-161 at p. 10. Also, in SK OIPC Review Report 2010-002 at [69].
[217] SK OIPC Review Report F-2010-002 at [69].
[218] BC IPC Order 110-1996 at p. 6.
[219] AB IPC Request to Disregard F2019-RTD-01 at p. 13.

- Advancing "Organized Pseudolegal Commercial Argument."

Any of these indicia are a basis to classify a legal action as vexatious.[220]

There is no burden on an applicant to show that the access to information request is for a legitimate purpose. It is not improper to request information from the state for the purpose of seeking civil redress arising from the manner in which the state conducted proceedings against an applicant.[221]

When considering whether a request was made on grounds that are frivolous or vexatious, the Commissioner is determining whether there is a pattern or type of conduct on the part of the applicant that amounts to an abuse of the right of access or correction.

An **abuse of the right of access or correction** is where an applicant is using the access/correction provisions of FOIP in a way that are contrary to its principles and objects.

The following factors should be considered:

- *Number of requests:* is the number excessive.
- *Nature and scope of the requests:* are they excessively broad and varied in scope or unusually detailed. Are they identical to or similar to previous requests.
- *Purpose of the requests:* are the requests intended to accomplish some objective other than to gain access. For example, are they made for "nuisance" value, or is the applicant's aim to harass the public body or to break or burden the system.
- *Timing of the requests:* is the timing of the requests connected to the occurrence of some other related event, such as a court or tribunal proceeding.[222]
- *Wording of the request*: are the requests or subsequent communications in their nature offensive, vulgar, derogatory or contain unfounded allegations. Offensive or intimidating conduct or comments by applicants is unwarranted and harmful. They can also suggest that an applicant's objectives are not legitimately about access to records. Requiring employees to be subjected to and to respond to offensive, intimidating, threatening, insulting conduct or comments can have a detrimental effect on well-being.[223]

---

[220] *Chutskoff v Bonora*, 2014 ABQB 389 (CanLII) at [93]. See also AB IPC Request to Disregard F2019-RTD-01 at p. 13.
[221] AB IPC Request to Disregard F2019-RTD-01 at p. 13.
[222] Four factors adopted from ON IPC Order MO-3108 at [24]. Also in SK OIPC Review Report F-2010-002 at [69].
[223] Fifth factor adopted from AB IPC Order F2015-16 at [39] to [54]. Added to criteria in SK OIPC Review Report 053-2015 at [15] and [38] to [41].

The government institution should address any of the above factors that apply. Depending on the nature of the case, one factor alone or multiple factors in concert with each other can lead to a finding that a request is an abuse of the right of access or correction.

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.[224]

Not in good faith means the opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive.[225]

When an applicant refuses to cooperate with a government institution in the process of accessing information or if a party misrepresents events to the IPC, this could suggest the party is not acting in good faith.[226]

The intention to use information obtained from an access request in a manner that is disadvantageous to the government institution does not qualify as bad faith. To the contrary, it is appropriate for requesters to seek information "to publicize what they consider to be inappropriate or problematic decisions or processes undertaken"[227] by government institutions. Applicants do not need to justify a request and FOIP does not place limits on what an applicant can do with the information once access has been granted.[228]

A **trivial matter** is something insignificant, unimportant or without merit. It is similar to frivolous.

Information that may be trivial from one person's perspective, however, may be of importance from another's. Therefore, what is trivial is somewhat subjective.[229]

---

[224] 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.
[225] SK OPIC Review Report F-2010-002 at [89].
[226] SK OIPC Review Report F-2010-002 at [103] and [105].
[227] ON IPC Order MO-1924 at p. 10.
[228] ON IPC Order MO-1924 at p. 10.
[229] ON IPC Order M-618 at [17].

IPC Findings

In Disregard Decision 181-2021, 182-2021, the Commissioner considered an application from Saskatchewan Government Insurance (SGI) to disregard two access to information requests from an applicant. SGI asserted that the two access to information requests should be disregarded on the grounds that the requests amounted to an abuse of the right of access pursuant to subsections 45.1(2)(b) and (c) of FOIP. Specifically, SGI asserted the access to information requests were vexatious and not submitted in good faith. The Commissioner considered subsection 45.12(2)(c) of FOIP first at the request of SGI. While considering the application, the Commissioner noted that it was not the first disregard application from SGI involving the applicant and that the Commissioner had previously issued three disregard decisions and one Review Report. In each of the disregard cases, the Commissioner found the applicant's conduct amounted to an abuse of the right of access. The current disregard application would be the fourth from SGI involving the applicant. Considering this and the additional arguments submitted by SGI in this case, the Commissioner found that SGI had established reasonable grounds for finding the applicant's two requests were vexatious and not made in good faith within the meaning of subsection 45.1(2)(c) of FOIP. As a result of this finding, the Commissioner did not need to consider subsection 45.1(2)(b) of FOIP. However, the Commissioner noted that in the past three disregard decisions involving the applicant and SGI, the Commissioner had found that subsection 45.1(2)(b) of FOIP applied because of the applicant's conduct and as the circumstances in the present case were similar, it would likely result in a similar finding. Most notable in this disregard decision, is the Commissioner went further with the decision for the first time. The Commissioner was concerned with the cost and inefficiency of the multiple applications to disregard being submitted by SGI involving the applicant. Furthermore, that it was not in the public interest to unnecessarily add to SGI's costs of complying with FOIP. In addition, other members of the public had an equal right to share in the public resources allocated to responding to access to information requests. When an individual overburdens the system in the way this applicant was, it has a negative impact on others who want to legitimately exercise their access to information rights. After considering how other jurisdictions handle similar situations, the Commissioner's decision imposed other conditions not previously put forward. The Commissioner granted SGI's application to disregard the two access to information requests. In addition, the Commissioner authorized SGI to disregard all future access to information requests made by or on behalf of the applicant that pertain to the motor vehicle accident in 2019. Upon issuance of the disregard decision, the Commissioner discontinued all reviews involving SGI and the applicant that were open pertaining to the motor vehicle accident pursuant to subsections 50(2)(a) and (a.7) of FOIP (three files at the time) and any future requests for

review involving the motor vehicle accident in 2019 would not be conducted pursuant to subsections 50(2)(a) and (a.7) of FOIP.

Section 49: Application for Review

Application for review

49(1) Where:

(a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 37;

(a.1) an applicant is not satisfied that a reasonable fee was estimated pursuant to subsection 9(2);

(a.2) an applicant believes that all or part of the fee estimated should be waived pursuant to subsection 9(5);

(a.3) an applicant believes that an application was transferred to another government institution pursuant to subsection 11(1) and that government institution did not have a greater interest;

(a.4) an individual believes that his or her personal information has not been collected, used or disclosed in accordance with this Act or the regulations;

(b) a head fails to respond to an application for access to a record within the required time; or

(c) an applicant requests a correction of personal information pursuant to clause 32(1)(a) and the correction is not made;

the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

(2) An applicant or individual may make an application pursuant to subsection (1) within one year after being given written notice of the decision of the head or of the expiration of the time mentioned in clause (1)(b).

(3) A third party may apply in the prescribed form and manner to the commissioner for a review of a decision pursuant to section 37 to give access to a record that affects the interest of the third party.

(4) A third party may make an application pursuant to subsection (3) within 20 days after being given notice of the decision.

Section 49 of FOIP provides the circumstances under which an applicant, individual or third party can request a review by the Commissioner.

Those who wish to make a request for review can do so using Form B found in the Appendix, Part II of *The Freedom of Information and Protection of Privacy Act*. The form should be completed and provided to the IPC along with a copy of the government institution's response to the applicant's access to information request or privacy complaint. Any other relevant information, such as other communications with the government institution, can also be attached. The IPC will also accept requests for review that are not on Form B provided the request is in writing and contains the same elements of information as Form B.

Applicants can request a review of one issue or several issues. The issues identified in the request for review are considered the "scope of the review". The scope generally remains the same through the course of the review. If the applicant raises new issues, a new request for review is needed and, in most cases, a separate file is opened.

The Commissioner is an independent Officer of the Legislative Assembly. The Commissioner has oversight over FOIP and jurisdiction to review compliance of FOIP by all government institutions in Saskatchewan subject to it.

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

The Commissioner prepares a report on the completion of a review or investigation, which 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 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.[230]

For more on the IPC review process, see *The Rules of Procedure*.

For more on the role of the Commissioner, see the *Guide to FOIP*, Chapter 2, "Administration of FOIP" at *Information and Privacy Commissioner – Roles and Responsibilities*.

[230] Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 837.

Subsection 49(1)(a)

Application for review

49(1) Where:

(a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 37;

...

the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

Subsection 49(1)(a) of FOIP provides that an applicant can request a review of decisions made by the government institution pursuant to:

- Section 7 (response required).
- Section 12 (extension of time).
- Section 37 (decision following third party notice).

Section 7 involves any decision related to the government institution's section 7 response to the applicant. Under this provision, applicants can request a review where the government institution has:

- Not provided a response that contains the elements required by subsection 7(2).[231]
- Not responded openly, accurately, or completely (s. 5.1).
- Has deemed the applicant's access request abandoned (s. 7.1).
- Has offered access in a manner the applicant does not agree with (s. 10).
- Denied access because records were deemed not responsive.
- Denied access because the record is published (publicly available).
- Denied access because the record will be published within 90 days.
- Denied access because exemptions apply.
- Denied access because records do not exist.
- Denied access because the government institution refused to confirm or deny the existence of records.

A review involving section 12 would be any decision related to the government institution's extension of the time allotted to respond to an applicant's access to information request. Applicants can request a review:

- Of the decision to extend the deadline for a response (s. 12).

[231] This also includes if the applicant is not satisfied with the final fee. For example, see SK OIPC Review Report 037-2022 at [64] to [65].

- Of the contents and timing of the notice to the applicant (s.12(2) and 12(3)).

In terms of calculating time, subsection 2-28(3) of *The Legislation Act* provides that the first day is excluded in the calculation of time.[232] Therefore, the initial 30-day clock begins the day following receipt of the access to information request. For more on the timeframe for responses see *Section 7: Response Required, Calculating 30 Days*, earlier in this Chapter.

If a government institution has not complied with subsection 12(3) of FOIP, the Commissioner will not consider whether a government institution has complied with subsections 12(1) or 12(2) of FOIP.[233] Therefore, government institutions should ensure that the section 7 decision letter is provided to the applicant within the period of the extension.

A review involving section 37 of FOIP would be focused on the decision of the government institution to deny access to information or records following a consideration of a third party's representations. Applicants can request a review:

- Of the government institution's decision to deny access to information deemed third party information.
- Of the content or timing of the government institution's notice [s. 37(1)(b)/37(2)]; and/or
- Of the lack of notice [s. 37(4)].

[232] Subsection 2-28(3) of *The Legislation Act*, SS 2019, c L-10.2 provides "A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens".
[233] SK OIPC Review Reports 322-2021, 030-2022at [19], 164-2021 at [124].

Subsection 49(1)(a.1)

Application for review

49(1) Where:

…

(a.1) an applicant is not satisfied that a reasonable fee was estimated pursuant to subsection 9(2);

…

the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

Subsection 49(1)(a.1) of FOIP provides that an applicant can request a review of the government institution's fee estimate. Applicants can request a review of how:

- The fee estimate was provided (s. 7(2)(a)).
- Access was provided following payment of fees (s. 9(2)).
- Payment of a deposit was handled (s. 9(4)).
- The fee estimate was calculated (s. 6 FOIP Regulations).
- Fees exceeding the estimate were handled (s. 7(2) FOIP Regulations).
- Fees for records that were refused were handled (s. 8(1) FOIP Regulations).
- Refunds of fees were handled (s. 8(2) FOIP Regulations).

Government institutions issue fee estimates in accordance with subsection 7(2)(a) and section 9 of FOIP. In addition, fee estimates are issued pursuant to sections 6, 7 and 8 of *The Freedom of Information and Protection of Privacy Regulations*.

Reviews involving fee estimates can occur both at the time the fee estimate was issued or after the fee has already been paid and records provided to an applicant. For all fee reviews, the IPC requires details on how the fee amount was arrived at. This includes how fees were calculated for search, preparation and reproduction of the record.

For this reason, a government institution should retain details and notes about its search, preparation and reproduction so it can support the amount of the fee estimate in the event of a review.

Fee estimates under FOIP are generally judged on the basis of whether they are reasonable and equitable. A fee estimate is reasonable when it is proportionate to the work required on the part of the government institution to respond efficiently and effectively to the applicant's request. A fee estimate is equitable when it is fair and even-handed, that is, when it supports

the principle that applicants should bear a reasonable portion of the cost of producing the information they are seeking, but not costs arising from administrative inefficiencies or poor records management practices.[234]

If the fees end up being less than what was originally estimated, the government institution should refund the applicant accordingly as required by subsection 7(2) of *The Freedom of Information and Protection of Privacy Regulations*.

Fees cannot be charged to the applicant when access to the record is refused pursuant to subsection 8(1) of *The Freedom of Information and Protection of Privacy Regulations*.

For more on fee estimates, see *Section 9: Fee,* earlier in this Chapter.

Subsection 49(1)(a.2)

> **Application for review**
>
> **49**(1) Where:
>
> …
>
> (a.2) an applicant believes that all or part of the fee estimated should be waived pursuant to subsection 9(5);
>
> …
>
> the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

Subsection 49(1)(a.2) of FOIP provides that an applicant can request a review of the government institution's decision not to waive some or all of the fees. Applicants can request a review:

- Of the decision not to waive some or all of the fees (s. 9 of FOIP Regulations).

Subsection 9(5) of FOIP provides that a government institution can waive payment of all or part of the fees in prescribed circumstances. The prescribed circumstances are outlined at section 9 of *The Freedom of Information and Protection of Privacy Regulations*.

For more on waiving of fees, see *Section 9: Fee, Assessing Fees, Subsection 9(5), Fee Waivers* earlier in this Chapter.

---

[234] SK OIPC Review Report 2005-005 at [21].

Subsection 49(1)(a.3)

Application for review

49(1) Where:

…

(a.3) an applicant believes that an application was transferred to another government institution pursuant to subsection 11(1) and that government institution did not have a greater interest;

…

the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

Subsection 49(1)(a.3) of FOIP provides that an applicant can request a review of the government institution's decision to transfer the applicant's access to information request (s. 11).

For more on transfers, see *Section 11: Transfer of Application*, earlier in this Chapter.

Subsection 49(1)(a.4)

Application for review

49(1) Where:

…

(a.4) an individual believes that his or her personal information has not been collected, used or disclosed in accordance with this Act or the regulations;

…

the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

Subsection 49(1)(a.4) of FOIP provides that an individual can request a review if the individual believes that his or her personal information has not been collected, used or disclosed in accordance with FOIP or *The Freedom of Information and Protection of Privacy Regulations*.

The IPC refers to these reviews as "privacy breach investigations" and the individuals requesting them as "complainants".

Subsection 49(1)(a.4) of FOIP refers to a "prescribed form" that should be submitted to the Commissioner. Subsection 2(1)(h) of FOIP provides:

> **2**(1) In this Act:
>
> …
>
> (h) **"prescribed"** means prescribed in the regulations;

Individuals who wish to request an investigation by the Commissioner because they are not satisfied with how a government institution handled their privacy breach complaint, can do so using Form B found in the Appendix, Part II of *The Freedom of Information and Protection of Privacy Regulations*. The form should be completed and provided to the IPC along with a copy of the government institution's response to the individual's privacy complaint. Any other relevant information, such as other communications with the government institution, can also be attached. The IPC will also accept requests that are not on Form B provided the request is in writing and contains the same elements of information as Form B.

Privacy in terms of 'information privacy' means the right of the individual to determine when, how and to what extent he or she will share information about him/herself with others. Privacy captures both security and confidentiality of personal information.[235]

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.[236]

An **unauthorized collection, use or disclosure** is one that does not comply with Part IV of FOIP. Part IV of FOIP contains the privacy provisions related to a government institution's handling of personal information of individuals.

The IPC is the office of last resort. For the Commissioner to consider a request for a privacy breach investigation, the complainant should take the following steps first:

1. The individual has made a written complaint to the government institution. Government institutions must have the opportunity to address an individual's privacy concerns first. It is only after this has occurred, and the individual is still not satisfied, that the IPC can investigate.

[235] SK OIPC *2012-2013 Annual Report*, at Appendix 3.
[236] SK OIPC *2012-2013 Annual Report*, at Appendix 3.

2. The government institution has responded (provide 30 days for a response). The IPC considers it reasonable to allow a government institution 30 days to respond to a privacy complaint. If an individual does not receive a response, it should follow up with the government institution.

3. Once a response is received from the government institution, if the individual is still not satisfied with how their concerns were handled, the individual can request the Commissioner investigate. The Commissioner cannot levy fines. The Commissioner's objective in an investigation is to assist government institutions with ensuring its policies and practices are compliant with FOIP. Outcomes of investigations where a privacy breach is found to have occurred generally, result in recommendations that policies and/or procedures be amended and/or individuals receive apologies for the breach.

To proceed, the Commissioner needs sufficient information and evidence that a breach of privacy may have occurred. When making the complaint, the following should be provided to the IPC:

1. A written complaint to the Commissioner:
    a. include details of the alleged breach; and
    b. attach any evidence that supports the complaint.
2. A copy of the response from the government institution or indication that a response was not provided within a reasonable period (i.e., 30 calendar days).
3. A copy of the original complaint submitted to the government institution and any supporting evidence of the breach.

For more on the role and authorities of the Commissioner see, *Guide to FOIP,* Chapter 2: "Administration of FOIP", *Information and Privacy Commissioner – Roles & Responsibilities*.

For more on the IPC process for an investigation, see *The Rules of Procedure*.

Subsection 49(1)(b)

Application for review

49(1) Where:

...

(b) a head fails to respond to an application for access to a record within the required time; or

...

the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

Subsection 49(1)(b) of FOIP provides that an applicant can request a review if the government institution fails to respond to an access to information request within the required time. The required time is either the initial 30 days or the extended maximum 60 days.

In terms of calculating time, subsection 2-28(3) of *The Legislation Act* provides that the first day is excluded in the calculation of time.[237] Therefore, the initial 30-day clock begins the day following receipt of the access to information request.

For more on response requirements, see *Section 7: Response Required*, earlier in this Chapter.

Subsection 49(1)(c)

Application for review

49(1) Where:

...

(c) an applicant requests a correction of personal information pursuant to clause 32(1)(a) and the correction is not made;

the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

[237] Subsection 2-28(3) of *The Legislation Act*, SS 2019, c L-10.2 provides, "A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens".

Subsection 49(1)(c) of FOIP provides that an applicant can request a review where the applicant requested a government institution correct personal information and the government institution decided not to make the correction.

Applicants who wish to make a request for review because they are not satisfied with how a government institution handled their correction request, can do so using Form B found in the Appendix, Part II of *The Freedom of Information and Protection of Privacy Regulations.* The form should be completed and provided to the IPC along with a copy of the government institution's response to the applicant's correction request. Any other relevant information, such as other communications with the government institution, can also be attached. The IPC will also accept requests for review that are not on Form B provided the request is in writing and contains the same elements of information as Form B.

For the Commissioner to conduct a review, the information must constitute the applicant's personal information. In addition, the applicant must be able to specify what information is incorrect and why.

For more on the right to request correction of personal information, see *Guide to FOIP*, Chapter 6, "Protection of Privacy", at *Section 32: Right of correction*.

Subsection 49(2)

Application for review

49(2) An applicant or individual may make an application pursuant to subsection (1) within one year after being given written notice of the decision of the head or of the expiration of the time mentioned in clause (1)(b).

Subsection 49(2) of FOIP provides that applicants may make a request for review to the Commissioner within one year after being given written notice of the decision of the government institution.

Subsection 2-28(3) of *The Legislation Act*, provides that the first day is excluded in the calculation of time.[238] In addition, if the due date falls on a holiday, the due date falls on the next day that is not a holiday.[239]

If an applicant did not receive a response from the government institution, the applicant has one year from the 30th day under which the government institution was deemed to have responded pursuant to subsection 7(5) of FOIP.

Subsection 49(3)

> **Application for review**
>
> **49**(3) A third party may apply in the prescribed form and manner to the commissioner for a review of a decision pursuant to section 37 to give access to a record that affects the interest of the third party.

Subsection 49(3) of FOIP provides that a third party can request a review by the Commissioner. Third parties can request a review where a government institution has decided to provide access to information or records pursuant to section 37 of FOIP.

Third party means a person, including an unincorporated entity, other than an applicant or a government institution.[240]

A government institution may have information in its records that engage third party interests. When an access to information request is received and records or information appear to engage the interests of a third party and the government institution **intends to provide access** to the information or records, the government institution must provide notice to the third party pursuant to section 34 of FOIP.

The types of information that may engage a third party includes:

- The information described in subsection 19(1) of FOIP.
- Personal information described in section 24(1) of FOIP but only if the government intends to release it pursuant to subsection 29(2)(o) of FOIP.

---

[238] Subsection 2-28(3) of *The Legislation Act*, SS 2019, c L-10.2 provides "A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens".
[239] Subsection 2-28(5) of *The Legislation Act*, SS 2019, c L-10.2 provides "A time limit for the doing of anything that falls or expires on a holiday is extended to include the next day that is not a holiday".
[240] *The Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. F-22.01, s. 2(1)(j).

Upon receiving notice, a third party has a right to make representations to the government institution explaining why it believes the information should not be released (section 36 of FOIP).

After considering the representations, the government institution must decide whether it intends to release the information. The government institution must give notice of its decision to the third party (section 37 of FOIP).

If the third party is not satisfied with that decision, it can request a review by the Commissioner pursuant to subsection 49(3) of FOIP. That request must be made within 20 days after receiving the government institution's decision (subsection 49(4) of FOIP).

For more on third parties and the timelines involved in third party notices see *Guide to FOIP*, Chapter 5, "Third Party Information".

Subsection 49(4)

Application for review

49(4) A third party may make an application pursuant to subsection (3) within 20 days after being given notice of the decision.

Subsection 49(4) of FOIP provides that where a third party requests the Commissioner review the decision of the government institution, it must make that request within 20 days after receiving the government institution's decision.

Subsection 2-28(3) of *The Legislation Act*, provides that the first day is excluded in the calculation of time.[241] In addition, if the due date falls on a holiday, the due date falls on the next day that is not a holiday.[242]

[241] Subsection 2-28(3) of *The Legislation Act*, SS 2019, c L-10.2 provides, "A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens".
[242] Subsection 2-28(5) of *The Legislation Act*, SS 2019, c L-10.2 provides, "A time limit for the doing of anything that falls or expires on a holiday is extended to include the next day that is not a holiday".

IPC Findings

In Review Report 012-2018, the Commissioner considered whether a request for review had been received from the third party within the legislated 20-day deadline. The third party had said it missed the 20-day deadline because it was confused about how to request a review. The Commissioner found that the City of Regina (City) met its duty to assist when it informed the third party of its right to request a review and how the third party could request one. The Commissioner further found that the third party did not request the review within the legislated timeline of 20 days after receiving the City's notice that it intended to release information. The Commissioner recommended that the City provide the applicant with the records.

Section 50: Review or Refusal to Review

Review or 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(1)

Review or 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.

Subsection 50(1) of FOIP provides that where the Commissioner is satisfied that there are reasonable grounds to conduct a review on any matter set out in section 49 of FOIP, the Commissioner will conduct a review.

IPC Findings

In Review Report 023-2017 & 078-2017, the Commissioner considered the issue of non-responsive information. SaskPower had removed portions of two documents based on its interpretation of the applicant's access to information request. Upon review, SaskPower asserted that the applicant did not have an "unfettered right to a review" by the Commissioner and the Commissioner must first be satisfied that there were reasonable grounds to review. SaskPower further argued that there were no reasonable grounds to review whether the entirety of the documents were responsive to the access request. The Commissioner reminded SaskPower that subsection 7(2)(d) of FOIP required government institutions to set out the reason for refusal and identify the specific provision of FOIP on which refusal is based. Further, there was no explicit authority in FOIP to redact records as "non responsive". Finally, that the Commissioner currently accepts the application of "non-responsive" to information in records, however, the practice may be reconsidered if its application by government institutions is counter to the purposes of FOIP. The Commissioner found that there were reasonable grounds to review the issue of "non-responsive". The Commissioner recommended that when SaskPower removes information from documents that it include an explanation in its responses to applicants.

Subsection 50(2)

Review or refusal to review

50(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 where it appears an applicant is not utilizing the access provisions of FOIP appropriately.

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 IPC.

The Commissioner may also initiate this process independent of a request from a government institution where it appears appropriate.

Subsection 50(2)(a)

Review or refusal to review

50(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;

Subsection 52(2)(a) of FOIP provides that the Commissioner can refuse to conduct a review or discontinue one where the Commissioner is of the opinion that the request for review is frivolous or vexatious.

Frivolous is typically associated with matters that are trivial or without merit, lacking a legal or factual basis or legal or factual merit; not serious; not reasonably purposeful; of little weight or importance.[243]

Vexatious means without reasonable or probable cause or excuse. A request is *vexatious* when the primary purpose of the request is not to gain access to information but to continually or repeatedly harass a government institution in order to obstruct or grind a government institution to a standstill. It is usually taken to mean with intent to annoy, harass, embarrass or cause discomfort.[244]

A request is not vexatious simply because a government institution is annoyed or irked because the request is for information the release of which may be uncomfortable for the government institution.[245]

FOIP must not become a weapon for disgruntled individuals to use against a government institution for reasons that have nothing to do with the Act.[246]

A vexatious proceeding means "…that the litigant's mental state goes beyond simple animus against the other side and rises to a situation where the litigant is attempting to abuse or misuse the legal process": *Jamieson v Denman*, 2004 ABQB 593 (CanLII), para 127.[247] In *Chutskoff v Bonora*, 2014 ABQB 389 (CanLII), Michalyshyn J identified a "catalogue" of features of vexatious litigation:

1. Collateral attack.

---

[243] SK OIPC Review Report F-2010-002 at [57] to [63].
[244] SK OIPC Review Report F-2010-002 at [57] to [63] and [69].
[245] SK OIPC Review Report F-2010-002 at [69].
[246] BC IPC Order 110-1996 at p. 6.
[247] AB IPC Request to Disregard F2019-RTD-01 at p. 13.

2. Hopeless proceedings.
3. Escalating proceedings.
4. Bringing proceedings for improper purposes.
5. Initiating "busybody" lawsuits to enforce alleged rights of third parties.
6. Failure to honour court-ordered obligations.
7. Persistently taking unsuccessful appeals from judicial decisions.
8. Persistently engaging in inappropriate courtroom behavior.
9. Unsubstantiated allegations of conspiracy, fraud and misconduct.
10. Scandalous or inflammatory language in pleadings or before the court.
11. Advancing "Organized Pseudolegal Commercial Argument."

Any of these indicia are a basis to classify a legal action as vexatious.[248]

It is not improper to request information from the state for the purpose of seeking civil redress arising from the manner in which the state conducted proceedings against an applicant.[249]

When considering whether a request for review was made on grounds that are frivolous or vexatious, the Commissioner is determining whether there is a pattern or type of conduct that amounts to an abuse of the right of access. Depending on the nature of the case, one factor alone or multiple factors in concert with each other can lead to a finding that a request is an abuse of the right of access.[250] The following are the factors considered when determining if there is a pattern or type of conduct that amounts to an abuse of the right of access:

- *Number of requests:* is the number excessive. Where the volume of requests interferes with the operations of a public body it can be argued the requests are excessive. To interfere with operations, the volume of requests must obstruct or hinder the range of effectiveness of the government institution's activities.
- *Nature and scope of the requests:* are they excessively broad and varied in scope or unusually detailed. Are they identical to or similar to previous requests.
- *Purpose of the requests:* are the requests intended to accomplish some objective other than to gain access. For example, are they made for "nuisance" value, or is the applicant's aim to harass the government institution or to break or burden the system.

---

[248] *Chutskoff v Bonora*, 2014 ABQB 389 (CanLII) at [93]. See also AB IPC Request to Disregard F2019-RTD-01 at p. 13.
[249] AB IPC Request to Disregard F2019-RTD-01 at p. 13.
[250] SK OIPC Review Report F-2010-002 at [70].

- *Timing of the requests:* is the timing of the requests connected to the occurrence of some other related event, such as a court or tribunal proceeding.[251]
- *Wording of the request*: are the requests or subsequent communications in their nature offensive, vulgar, derogatory or contain unfounded allegations. Offensive or intimidating conduct or comments by applicants is unwarranted and harmful. They can also suggest that an applicant's objectives are not legitimately about access to records. Requiring employees to be subjected to and to respond to offensive, intimidating, threatening, insulting conduct or comments can have a detrimental effect on well-being.[252]

IPC Findings

In Review Report F-2010-002, the Commissioner considered subsection 50(2) 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 IPC 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). 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 and Attorney General (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.

[251] Four factors adopted from ON IPC Order MO-3108 at [24]. Also, in SK OIPC Review Report F-2010-002 at [69].
[252] Fifth factor adopted from AB IPC Order F2015-16 at [39] to [54]. Added to criteria in SK OIPC Review Report 053-2015 at [15] and [38] to [41].

Subsection 50(2)(a.1)

Review or refusal to review

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

Subsection 50(2)(a.1) of FOIP provides that the Commissioner can dismiss or discontinue a review where the request for review does not affect the applicant personally. This is a new provision following the amendments of January 1, 2018.

Subsection 50(2)(a.2)

Review or refusal to review

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

Subsection 50(2)(a.2) of FOIP provides that the Commissioner can dismiss or discontinue a review where the applicant has failed to respond to requests from the Commissioner and as a result the request has not moved forward. This is a new provision following the amendments of January 1, 2018.

Subsection 50(2)(a.3)

Review or refusal to review

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

Subsection 50(2)(a.3) of FOIP provides that the Commissioner can dismiss or discontinue a review where the request for review involves a government institution that has an internal review process that has not been used. This is a new provision following the amendments of January 1, 2018.

Subsection 50(2)(a.4)

Review or refusal to review

50(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.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;

Subsection 50(2)(a.4) of FOIP provides that the Commissioner can dismiss or discontinue a review where the request for review concerns a professional who is governed by a professional body that regulates its members pursuant to an Act, and a complaints procedure is available that has not been used. This is a new provision following the amendments of January 1, 2018.

Subsection 50(2)(a.5)

Review or refusal to review

50(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.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;

Subsection 50(2)(a.5) of FOIP provides that the Commissioner can dismiss or discontinue a review where the request for review may be considered pursuant to another Act. The other Act should provide a review or other mechanism to challenge a government institution's decision with respect to collection, use, disclosure or correction of personal information and

that review or mechanism was not used. This is a new provision following the amendments of January 1, 2018.

Subsection 50(2)(a.6)

> **Review or refusal to review**
>
> **50**(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.6) does not contain sufficient evidence;

Subsection 50(2)(a.6) of FOIP provides that the Commissioner can dismiss or discontinue a review where the request for review does not contain sufficient evidence. This is a new provision following the amendments of January 1, 2018.

Validity Test

There are times when a privacy complaint is received, and it needs to be tested for validity. To test for validity means to measure the degree of accuracy in the complaint to see if there is enough evidence to proceed with an investigation.

Validity means actually supporting the intended point or claim. To *validate* is to check or prove the validity of.[253]

To test validity, the following three questions can be considered:

1. What is alleged.

2. What argument and/or evidence was presented in support of the allegations.

3. Is there sufficient evidence to proceed with each part of the complaint.

When applying the validity test, consideration should be made of all facts and evidence provided.

---

[253] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1583.

When there is not enough evidence to proceed with a complaint, the complaint will be determined to be "not well founded".

Subsection 50(2)(a.7)

> **Review or refusal to review**
>
> **50**(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.7) has already been the subject of a report pursuant to section 55 by the commissioner;

Subsection 50(2)(a.7) of FOIP provides that the Commissioner can dismiss or discontinue a review where the request for review has already been the subject of a previous report by the Commissioner. This is a new provision following the amendments of January 1, 2018.

Subsection 50(2)(b)

> **Review or refusal to review**
>
> **50**(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:
>
> …
>
> (b) is not made in good faith; or

Subsection 50(2)(b) of FOIP provides that the Commissioner can dismiss or discontinue a review where the request for review has not been made in good faith.

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.[254]

---

[254] 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.

Not in good faith means the opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive.[255]

When an applicant refuses to cooperate with a government institution in the process of accessing information or if a party misrepresents events to the IPC, this could suggest the party is not acting in good faith. *Bad faith* is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

The intention to use information obtained from an access request in a manner that is disadvantageous to the government institution does not qualify as bad faith. To the contrary, it is appropriate for requesters to seek information "to publicize what they consider to be inappropriate or problematic decisions or processes undertaken" by government institutions.[256]

When considering whether a request for review was made on grounds that are frivolous, vexatious or not in good faith, the Commissioner is determining whether there is a pattern or type of conduct that amounts to an abuse of the right of access. The following factors are considered. Depending on the nature of the case, one factor alone or multiple factors in concert with each other can lead to a finding that a request is an abuse of the right of access:

- *Number of requests:* is the number excessive. Where the volume of requests interferes with the operations of a government institution it can be argued the requests are excessive. To interfere with operations, the volume of requests must obstruct or hinder the range of effectiveness of the government institution's activities.
- *Nature and scope of the requests:* are they excessively broad and varied in scope or unusually detailed. Are they identical to or similar to previous requests.
- *Purpose of the requests:* are the requests intended to accomplish some objective other than to gain access. For example, are they made for "nuisance" value, or is the applicant's aim to harass the public body or to break or burden the system.
- *Timing of the requests:* is the timing of the requests connected to the occurrence of some other related event, such as a court or tribunal proceeding.[257]
- *Wording of the request*: are the requests or subsequent communications in their nature offensive, vulgar, derogatory or contain unfounded allegations. Offensive or

[255] ON IPC Order MO-3108 at [37].
[256] ON IPC Order MO-1924 at p. 9.
[257] Four factors adopted from ON IPC Order MO-3108 at [24]. Also, in SK OIPC Review Report F-2010-002 at [69].

intimidating conduct or comments by applicants is unwarranted and harmful. They can also suggest that an applicant's objectives are not legitimately about access to records. Requiring employees to be subjected to and to respond to offensive, intimidating, threatening, insulting conduct or comments can have a detrimental effect on well-being.[258]

IPC Findings

In Review Report F-2010-002, the Commissioner considered subsection 50(2) 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 IPC 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). 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.

Subsection 50(2)(c)

Review or refusal to review

50(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:

…

(c) concerns a trivial matter.

Subsection 50(2)(c) of FOIP provides that the Commissioner can dismiss or discontinue a review where the request for review concerns a trivial matter.

A **trivial matter** is something insignificant, unimportant or without merit. It is similar to frivolous. However, what is trivial to one person may not be trivial to another.[259]

[258] Fifth factor adopted from AB IPC Order F2015-16 at [39] to [54]. Also, in SK OIPC Review Report 053-2015 at [15] and [38] to [41].
[259] SK OIPC Review Report F-2010-002 at [50] and [51].

Section 57: Appeal to the Court

Appeal to courts

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 (not the government institution) 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 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[260]

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.[261] 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[262] other judges. Each King's Bench judge is assigned to a specific judicial centre, but because the Court is an itinerant[263] court, the judges also travel to and sit in other judicial centres.[264]

In Saskatchewan, there are court locations in:

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

---

[260] Courts of Saskatchewan, Resources, Court Structure. Available at https://sasklawcourts.ca/index.php/home/resources/learn-about-the-courts-resources/court-structure.
[261] Courts of Saskatchewan at https://sasklawcourts.ca/index.php/home/decisions.
[262] Courts of Saskatchewan at https://sasklawcourts.ca/index.php/home/court-of-queen-s-bench/judges. Accessed February 4, 2020.
[263] "*Itinerate*" (of a judge) means to travel on a circuit for the purpose of holding court - Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 997.
[264] 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.

When the Commissioner concludes a review, an applicant, individual or third party can appeal the decision of the head of the government institution to the Court of King's Bench. The steps for this are as follows:[265]

1. The Commissioner issues report with recommendations.
2. The head of the government institution has 30 days from the date of the Commissioner's report to make a decision in regard to the Commissioner's recommendations or any other decision the head decides. The head's decision must be sent to the applicant (if an access matter), the individual (if a privacy matter), the third party (if applicable) and the Commissioner within those 30 days of the Commissioner's report.
3. Once received, the applicant, individual or third party can launch an appeal of the head's decision to the Court of King's Bench. The application form is called an *Originating Application* (Form 3-49). It should be filed at the Local Registrar's office. There is a fee involved for filing the application. It is around $200. A sample of an *Originating Application* for an access to information appeal can be found at Appendix A of IPC resource, *Guide to Appealing the Decision of a Head of a Government Institution, or a Local Authority, or a Health Trustee*.
4. The applicant, individual or third party that launches the appeal is responsible for serving the government institution with the *Originating Application* once filed with the court.
5. Once the *Originating Application* is filed and served, the parties are embarking on a two-step procedure:
    i. The first step involves determining whether the parties can agree or whether the court will have to decide what is filed sealed and what is argued *in camera* or in open court. Because of the nature of the appeal, the government institution will have filed sealed records (both unredacted and redacted) which means they are not seen by the other parties to the appeal.

    If the parties agree that submissions need not be filed sealed and the representations can be made in open court, the parties can proceed directly to argue the appeal.

[265] Modified from SK OIPC Resource, *Guide to Appealing the Decision of a Head of a Government Institution, or a Local Authority, or a Health Trustee*. Available at https://oipc.sk.ca/assets/guide-to-appealing-to-the-decision-of-a-head.pdf.

If the parties cannot agree, a court application will have to be made to determine the procedure to be used, what is filed sealed, what is argued *in camera* and what is argued in open court. The court will determine this procedure and issue an order.

In camera, in private or in the judge's private chambers.[266]

ii. The second step will be the actual argument by the parties as has been previously directed by the judge or agreed by the parties.[267]

In the recent Saskatchewan Court of Appeal 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.[268]

Section 59: Exercise of Rights by Other Persons

Exercise of rights by other persons

59 Any right or power conferred on an individual by this Act may be exercised:

(a) where the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate;

(b) where a personal guardian or property guardian has been appointed for the individual, by the guardian if the exercise of the right or power relates to the powers and duties of the guardian;

(c) where a power of attorney has been granted, by the attorney if the exercise of the right or power relates to the powers and duties of the attorney conferred by the power of attorney;

(d) where the individual is less than 18 years of age, by the individual's legal custodian in situations where, in the opinion of the head, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual; or

---

[266] Adapted from Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 909.
[267] SK OIPC Resource, *Guide to Appealing the Decision of a Head of a Government Institution, or a Local Authority, or a Health Trustee* at p. 10.
[268] *Leo v Global Transportation Hub Authority*, 2020 SKCA 91 (CanLII) at [41] and [47].

(e) by any person with written authorization from the individual to act on the individual's behalf.

Section 59 of FOIP provides that another person, under specific circumstances, may exercise any right or power under FOIP that is conferred on an individual.

Subsection 59(a)

Exercise of rights by other persons

59 Any right or power conferred on an individual by this Act may be exercised:

(a) where the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate;

Subsection 59(a) of FOIP provides that where an individual is deceased, the individual's personal representative can exercise the deceased individual's rights or powers under FOIP provided it relates to the administration of the deceased individual's estate.

For this provision to apply, the applicant must meet two requirements:

1. **Proof of the right to act as the personal representative is required.**

A **personal representative** would be someone appointed by the court as Executor or Executrix or Administrator of an estate.[269]

Proof could include a copy of the signed and attested document naming the representative to act in matters related to the individual's estate such as copies of a will or letters of administration.

[269] SK OIPC Review Reports H-2006-001 at [12], LA-2009-002/H-2009-001 at [81], 098-2015 at [14].

IPC Findings

In Review Report F-2006-001, copies of the Letters of Administration from a law firm were determined to be sufficient in demonstrating that the law firm's client (mother of the deceased) was acting as the personal representative of two deceased persons.[270]

2. Proof that disclosure of the requested information is necessary for purposes of administering the deceased's estate.

FOIP does not permit a personal representative to access information for all purposes, but only those relating to the administration of the estate.

Administration of an estate means the management and settlement of the estate of a deceased, including selling, collecting and liquidating assets, paying debts, and making claims for funds owing or exercising any right of a financial benefit of the deceased.[271]

The duties of an executor in administering an estate in Saskatchewan are not always limited to winding up the estate. There is a function of administration that includes the management of the estate and considerations of what assets may exist or may come into existence (such as when an estate sues for damages resulting from a wrongful death) and form part of the estate to be administered.[272]

An example of a case where disclosure may be necessary for this purpose would be where a widower needs information to help decide whether to proceed with litigation related to the partner's death.[273]

IPC Findings

In Review Report 098-2015, the Commissioner considered subsection 59(a) of FOIP. The Applicant requested records from Saskatchewan Government Insurance (SGI) related to her deceased son's auto claim file. SGI denied access to some of the information under subsection 29(1) of FOIP because the information was the personal information of the Applicant's deceased son. The Commissioner considered subsection 59(a) of FOIP and determined that the Applicant was appointed Administrator of her son's estate. Furthermore, the Applicant requested the information to challenge SGI's decision to deny her son's claim.

[270] SK OIPC Review Report F-2006-001 at [103] to [106].
[271] SK OIPC Review Report 098-2015 at [16].
[272] SK OIPC Review Report LA-2009-002/H-2009-001 at [106].
[273] Service Alberta, Resource, *Bulletin #16, Personal Information of Deceased Persons* at p. 3.

The Commissioner found that this related to the administration of her son's estate. The Commissioner recommended the personal information of the Applicant's son be released to the Applicant.

Subsection 59(b)

Exercise of rights by other persons

59 Any right or power conferred on an individual by this Act may be exercised:

...

(b) where a personal guardian or property guardian has been appointed for the individual, by the guardian if the exercise of the right or power relates to the powers and duties of the guardian;

The Adult Guardianship and Co-decision-making Act provides a means of protection and assistance for adults who are not able to make sound decisions independently and, as a result, may be vulnerable to personal or financial harm.[274] For more information about this Act or about adult guardianship, contact the Public Guardian and Trustee's office in Saskatchewan.

Subsection 59(b) of FOIP provides that where an individual has a personal guardian or property guardian, the guardian can exercise the individual's rights or powers under FOIP provided it relates to the powers and duties of the guardian. FOIP provides for broader permission for a personal guardian than for the personal representative of a deceased individual.

For this provision to apply, the applicant must meet two requirements:

1. **Proof of the right to act as the personal guardian or property guardian is required.**

A **guardian** is someone who has the authority to make decisions for an adult. A **personal guardian** makes decisions about an adult's personal welfare and a **property guardian** makes decisions about an adult's finances and property.[275]

[274] Public Guardian and Trustee, Resource, *Adult Guardianship in Saskatchewan, Application Manual*, January 2002 at p. 2.
[275] Public Guardian and Trustee, Resource, *Adult Guardianship in Saskatchewan, Application Manual*, January 2002 at p. 4.

To become a personal or property guardian, an application must be made to the Court of King's Bench to be appointed. Proof could include a copy of the court order naming the person as personal or property guardian.

The role of personal or property guardian can be permanent or temporary.

2. Proof that disclosure of the requested information relates to the powers and duties of the guardian.

The court determines what matters come under the authority of the personal or property guardian.

Section 15 of *The Adult Guardianship and Co-decision-making Act* provides several matters that can fall under the authority of an appointed personal guardian. This includes for example, decisions where and with whom the individual will live, what social activities the individual will engage in, what educational, vocational or training the individual will participate in. The court order may include limitations or conditions that it deems necessary.

A property guardian has authority for all financial and property matters except for any limitations or conditions indicated in the court order.[276] Section 43 of *The Adult Guardianship and Co-decision-making Act* outlines the authority of an appointed property guardian.

An applicant can provide a copy of the court order which would outline the matters the guardian has authority over. The applicant should explain what the information is needed for, and it should be within the scope of the powers and duties set out in the court order.

IPC Findings

In Review Report 047-2021, the Commissioner considered subsection 59(b) of FOIP. The applicant had submitted an access to information request to the Ministry of Social Services (Social Services). The applicant sought access to information pertaining to another individual whom the applicant asserted they were the personal guardian for pursuant to subsection 19(1) of *The Adult Guardianship and Co-decision-making Act*. The applicant included a copy of a completed Form N- *Order Appointing a Decision-Maker of the Court of Queen's Bench for Saskatchewan* (a Guardianship Order). Social Services responded to the applicant indicating that it was working to establish legal authority to release the requested records to the applicant. After some delay and no response, the applicant requested the Commissioner review the matter. Upon review, the Commissioner found that the first part of the two-part

[276] Public Guardian and Trustee, Resource, *Adult Guardianship in Saskatchewan, Application Manual*, January 2002 at p. 6.

test was met. This was based on a review of the Guardianship Order. The Commissioner found that the applicant did have the legal right to act as the individual's personal guardian. For the second part of the test, the Commissioner found that the applicant had failed to demonstrate that the information sought related to the powers and duties of the guardian. In fact, the applicant's lawyer had indicated to Social Services that "it is not the applicant's responsibility to, nor within their capacity to explain to you the order and its effects." The Commissioner did not agree. When an applicant is making a request for another individual's personal information, the onus is on the applicant to demonstrate they have the authority to do so pursuant to section 59 of FOIP. The Commissioner looked at the matters under which the applicant had authority under the Guardianship Order and determined that the applicant did not have authority under subsection 59(b) of FOIP to exercise the rights of the individual in this case.

Subsection 59(c)

Exercise of rights by other persons

59 Any right or power conferred on an individual by this Act may be exercised:

...

(c) where a power of attorney has been granted, by the attorney if the exercise of the right or power relates to the powers and duties of the attorney conferred by the power of attorney;

Subsection 59(c) of FOIP provides that a power of attorney can exercise the rights and powers of an individual provided it relates to the powers and duties of the power of attorney. FOIP provides for broader permission for a power of attorney than for the personal representative of a deceased individual.

For this provision to apply, the applicant must meet two requirements:

1. **Proof of the right to act as the power of attorney is required.**

A **power of attorney** is an authority given to one person (called the attorney) to do certain acts in the name of, and personally representing, the person granting the power (called the grantor).[277]

[277] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 2, at p. 37.

Lawyers usually draft a power of attorney. However, there are also forms that can be completed by both the grantor and the attorney without the use of a lawyer.[278]

A grantor can appoint more than one attorney and give each specific powers or state that they are to act separately, together or successively when dealing with his or her affairs.

The applicant can provide a copy of the power of attorney. The government institution should verify the identity of the person exercising the power of attorney. It may also be necessary to verify that the grantor is alive. The death of a grantor normally revokes the power of attorney.[279] In addition, a power of attorney may be enduring and either comes into effect immediately or on a specified future date or on the occurrence of a specified event, such as when the grantor becomes mentally incapable.[280]

2. Proof that disclosure of the requested information relates to the powers and duties of the power of attorney.

A grantor may appoint a personal attorney, a property attorney or both a personal and property attorney. A power of attorney may be general, covering all of the grantor's personal affairs (in the case of a personal attorney), all of the grantor's property affairs (in the case of a property attorney) or all of the grantor's personal and property affairs (in the case of a personal and property attorney). It can also be specific, limiting the attorney's authority to a specific purpose, such as the sale of a property on the grantor's behalf.[281]

The government institution should be satisfied that the scope of the power of attorney is sufficient to authorize the attorney to access the information being requested.

---

[278] Government of Saskatchewan, *Powers of Attorney for Adults*, www.saskatchewan.ca/residents/justice-crime-and-the-law/power-of-attorney-guardianship-and-trusts/powers-of-attorney-for-adults.
[279] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, at p. 37.
[280] Government of Saskatchewan, *Powers of Attorney for Adults*, www.saskatchewan.ca/residents/justice-crime-and-the-law/power-of-attorney-guardianship-and-trusts/powers-of-attorney-for-adults.
[281] Government of Saskatchewan, *Powers of Attorney for Adults*, www.saskatchewan.ca/residents/justice-crime-and-the-law/power-of-attorney-guardianship-and-trusts/powers-of-attorney-for-adults.

Subsection 59(d)

Exercise of rights by other persons

59 Any right or power conferred on an individual by this Act may be exercised:

…

(d) where the individual is less than 18 years of age, by the individual's legal custodian in situations where, in the opinion of the head, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual; or

Subsection 59(d) of FOIP provides that the legal custodian of a minor (less than 18 years of age), can exercise the minor's rights and powers under FOIP, provided it would not constitute an unreasonable invasion of the minor's privacy.

A person reaches 18 years immediately at the beginning of the relevant anniversary of the person's date of birth.[282]

For this provision to apply, two requirements must be met:

1. **The applicant must demonstrate the right to act as the legal decision-maker.**

Legal decision-maker means the person having lawful decision-making responsibility with respect to a child.[283]

A **child** means a person who:

(a) is under 18 years of age
(b) has never married[284]

Legal decision-maker is not necessarily always the parent of the minor. A legal decision-maker can be a birth parent, an adoptive parent, a stepparent, the Minister, a foster parent or a legal decision-maker appointed under an agreement.[285]

---

[282] Subsection 2-28(10) of *The Legislation Act*, SS 2019, c L-10.2 provides "A person reaches a particular age expressed in years at the beginning of the relevant anniversary of the person's birth date."
[283] *The Children's Law Act, 2020* [S.S., 2020], s. 2(1).
[284] *The Children's Law Act, 2020* [S.S., 2020], s. 2(1).
[285] Schirr Q.C., Darcia, *Legal Issues on Consent and Counselling of Minors* at p. 3. Available at: https://sasw.in1touch.org/document/4522/Consent%20when%20Counselling%20with%20Minors%20Schirr.pdf.

In terms of legal decision-makers, *The Children's Law Act, 2020* provides for who would be a legal decision-maker for a child as follows:

- The parents of a child are joint legal decision-makers with equal rights unless otherwise ordered in a court order or an agreement.[286]
- Where parents have not lived together after the birth of a child, the parent with whom the child resides is the sole legal decision-maker.[287]
- If a parent dies, the surviving parent is the legal decision-maker of that child unless changed by a court order or an agreement.[288]

If parents are separated, they both are still joint legal decision-makers unless changed by a court order or an agreement. In a court order, a judge can order that one parent is the sole legal decision-maker. In an agreement, one parent can give up his or her rights to be a joint legal decision-maker. In these instances, the head should ask for a copy of the court order or agreement and identify the clause that deals with legal decision-making.[289]

A parent's girlfriend, boyfriend or new spouse has no rights unless it has been directed in a court order or dealt with in an agreement.[290] If a stepparent is a legal decision-maker, then he or she will have the same rights and responsibilities as any other legal decision-maker.

In demonstrating that an applicant is the legal decision-maker for purposes of subsection 59(d) of FOIP, the applicant could provide a copy of:

- A custody order.
- A copy of an agreement dealing with the legal decision-makers for the child.
- Other evidence that would be considered reliable and appropriate in the circumstances (e.g., a statutory declaration may suffice in some cases or a copy of documentation showing the child is in the care of the Minister).[291]

The government institution should also verify the individual's identity (e.g., photo identification).

2. Access to the information would not be an unreasonable invasion of the personal privacy of the minor.

---

[286] *The Children's Law Act, 2020* [S.S., 2020], s. 3(1).
[287] *The Children's Law Act, 2020* [S.S., 2020], s. 3(2).
[288] *The Children's Law Act, 2020* [S.S., 2020], s. 4(1).
[289] SK OIPC Blog, *Who Signs for a Child*, February 15, 2018.
[290] SK OIPC Blog, *Who Signs for a Child*, February 15, 2018, Investigation Report 101-2016 at [22].
[291] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 2 at p. 38.

The fact that an applicant is the legal decision-maker for a minor does not automatically entitle the applicant to the minor's personal information. The head must determine if the exercise of the rights and powers by the legal decision-maker would be an unreasonable invasion of the minor's privacy.

Some minors have the capacity to exercise their own access and privacy rights under FOIP. They may be considered mature minors and disclosure of their personal information to a legal decision-maker may not be appropriate.

Even though FOIP does not include an express requirement to consider if a child is a mature minor, it is recommended that local authorities do so. For more on this see my offices blog, *UPDATED: Who Signs for a Child?* Applying this approach, the head should use their discretion to enable the exercise of rights by the minor "understands the nature of the right or power and the consequences of exercising the right or power." Some factors to consider are maturity, economic status (i.e., self-supporting, or not), living arrangements and mental state.[292]

Social workers, teachers and guidance counsellors can run into this problem. Parents may want all the information, but that information could include information on pregnancy, drug addiction, sexually transmitted disease, contemplated suicide, contemplated leaving home or commission of a crime. In these instances, the professional involved, their supervisor or the head must consider very carefully the words "unreasonable invasion of privacy".[293]

If the child verbally or in writing tells the professional that the child has shared the information in confidence and does not want his or her parents to know, it is important that the professional takes that into consideration in determining whether there would be an "unreasonable invasion of privacy" when disclosing the information to a legal decision-maker.

Where the head determines it is not an unreasonable invasion of privacy, the legal decision-maker can sign on behalf of the child.

IPC Findings

In Investigation Report 083-2022, the Commissioner investigated an alleged breach of privacy involving St. Paul's Roman Catholic Separate School Division #20 (St. Paul's). The complainant was the mother of two children. The complainant alleged that disclosure of the children's personal information to the children's stepmother was a breach of the children's privacy. Part of that investigation involved considering the equivalent provision (subsection 49(d)) of *The*

[292] SK OIPC Investigation Report 083-2022 at [44].
[293] SK OIPC Blog, *UPDATED: Who Signs for a Child?* February 15, 2018.

Local Authority Freedom of Information and Protection of Privacy Act (LA FOIP). The mother and father had joint legal decision-making for the children via an agreement pursuant to subsection 3(3) of *The Children's Law Act, 2020*. The Commissioner found that both parents had equal responsibility for and were entitled to communicate with the children's school. Therefore, both parents had equal rights to exercise the powers and rights of the children under subsection 49(d) of LA FOIP. Furthermore, that subsection 49(d) of LA FOIP should not be interpreted to permit one equally ranked substitute decision-maker to override the decision of the other equally ranked substitute decision-maker. This is particularly the case where the substitute decision-makers share rights as joint custodians. Without an agreement, court order or other evidence that one decision-maker's views should prevail in a conflict, a head should not rely on the consent of one joint decision-maker where the other joint decision-maker objects. The Commissioner also clarified that there was no requirement for a local authority to canvass the views of every substitute decision-maker who is equally ranked to satisfy itself that it has the requisite authority. However, where a local authority is aware that one of the decision-makers does not agree with a request from the other equally ranked decision-maker, the local authority should not rely on the direction of one of the decision-makers only. For this reason, the Commissioner found that St. Paul's did not properly apply subsection 49(d) of LA FOIP.

Subsection 59(e)

Exercise of rights by other persons

59 Any right or power conferred on an individual by this Act may be exercised:

...

(e) by any person with written authorization from the individual to act on the individual's behalf.

Subsection 59(e) of FOIP provides that any person can act on another's behalf in terms of exercising the rights and powers under FOIP provided they have written authorization to do so.

A **written authorization** is a document in writing signed by an individual who authorizes another individual to do certain acts in the name of and on behalf of the individual signing the document.[294]

[294] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 2 at p. 39.

Subsection 18(1) of *The Freedom of Information and Protection of Privacy Regulations* provides that:

> **18**(1) If consent is required by the Act for the collection, use or disclosure of personal information, the consent:
>
> (a) must relate to the purpose for which the information is required;
>
> (b) must be informed;
>
> (c) must be given voluntarily; and
>
> (d) must not be obtained through misrepresentation, fraud or coercion.

A written authorization should be to perform specific acts (e.g., provide consent, make a FOIP request on behalf of the authorizing individual) or, more generally, to exercise the rights or powers of the individual under FOIP.

For this provision to apply, the applicant must meet two requirements:

1. Provide a copy of the written authorization

Applicants should provide a copy of the written authorization. For a sample written authorization, see the Ministry of Justice and Attorney General resource, *Verifying the Identity of an Applicant* at Appendix A.

In some instances, government institutions may want to contact the individual who has granted the authority to confirm that they are aware of the amount and type of personal information that will be disclosed. In other instances, the government institution may want to insist on documents verifying the identity of the individual signing the authorization.

2. Verify the identity of the applicant

When a government institution receives a written authorization from an applicant to act on behalf of another person, the government institution should authenticate the identity of the person exercising the right.[295]

Authentication is the process of proving or ensuring that someone is who he or she purports to be. Authentication typically relies on one or more of the following:

- Something you know (e.g., password, security question, PIN, mother's maiden name);
- Something you have (e.g., smart card, key, hardware token); or

[295] Service Alberta, *Bulletin #17, Consent and Authentication* at p. 3.

- Something you are (e.g., biometric data, such as fingerprints, iris scans, voice patterns).[296]

In some cases, one of these factors may be used alone to authenticate an individual; for others, combinations may be used.

There are multiple ways to confirm the identity of the applicant. The degree of authentication should be appropriate to the sensitivity of the personal information involved.

For more on verifying identity, see the Ministry of Justice and Attorney General resource, *Verifying the Identity of an Applicant*.

IPC Findings

In Review Report 277-2017, an individual had given consent for another individual to act on the individual's behalf and access any records containing the subject individual's personal information. Rather than accept the consent form, the Ministry of Corrections and Policing asked the applicant for further details regarding the subject individual's consent. Upon review, the Commissioner agreed with the Ministry of Corrections and Policing that the consent form was too vague because it:

- Was not addressed to the Ministry of Corrections and Policing;
- Was not clear the subject individual understood what specific personal information was to be disclosed to the applicant;
- Was older with the consent signed ten months earlier. It did not have an effective and expiration date;
- Was not clear if the subject individual voluntarily gave the consent or if it was obtained through misrepresentation, fraud or coercion.

The Commissioner recommended that the Ministry of Corrections and Policing try to work with the applicant and the subject individual to obtain informed consent.

[296] Service Alberta, *Bulletin #17, Consent and Authentication* at p. 2.

Section 65: Access to Manuals

Access to manuals

65(1) Every government institution shall take reasonable steps to:

(a) make available on its website all manuals, policies, guidelines or procedures that are used in decision-making processes that affect the public by employees of the government institution in administering or carrying out programs or activities of the government institution; or

(b) provide those documents when requested in electronic or paper form.

(2) Any information in a record that a head would be authorized to refuse to give access to pursuant to this Act or the regulations may be excluded from manuals, policies, guidelines or procedures that are made available or provided pursuant to subsection (1).

Subsection 65(1)

Access to manuals

65(1) Every government institution shall take reasonable steps to:

(a) make available on its website all manuals, policies, guidelines or procedures that are used in decision-making processes that affect the public by employees of the government institution in administering or carrying out programs or activities of the government institution; or

(b) provide those documents when requested in electronic or paper form.

Subsection 65(1) of FOIP requires government institutions to take reasonable steps to make available its manuals, policies, guidelines, or procedures used in decision-making where they affect the public in terms of administering or carrying out its programs or activities. The manuals, policies, guidelines and procedures should be made available on the government institution's website.

The principle underpinning this provision is one of open government. The availability of material that guides decision-making allows members of the public to understand how decisions that affect them are made and opens up the decision-making process to public scrutiny.[297]

[297] Service Alberta, *Bulletin No. 3: Access to Manuals and Guidelines* at p. 1 and Service Alberta, *FOIP Guidelines and Practices: 2009 Edition,* Chapter 2, at p. 42.

The documentation need not carry the title, "manual", "policy", "guideline" or "procedure". They may be stand-alone documents, or they may be part of larger documents.

A **decision-making process that affects the public** means a process that determines how a government institution's programs and services will be delivered to the public in general or the segment of the public that the government institution is intended to serve or to regulate.[298]

Examples of decision-making processes include:

- Assessing or verifying eligibility for a program.
- Calculating a fee.
- Awarding a contract in a tendering business.
- Applying standards in tests or inspections.
- Deciding to use a law enforcement measure that carries a risk of harm.[299]

In the context of an access to information request by the public, there is no requirement under this provision for a government institution to provide access to a manual, policy, guideline or procedure that is already available to the public. However, government institutions should direct applicants to where they can find the manual, policy, guideline or procedure online. For more on published material or material that is available for purchase see the *Guide to FOIP*, Chapter 1, "Purposes and Scope of FOIP" at *FOIP Does Not Apply*.

Subsection 65(1) applies to manuals, policies, guidelines or procedures that are used by employees of the government institution. **Employee of a government institution** is defined at subsection 2(1)(b.1) of FOIP as an individual employed by a government institution and includes an individual retained under a contract to perform services for the government institution.

Subsection 65(1) of FOIP does not apply to manuals, policies, guidelines or procedures that do not involve decision-making, such as manuals and guidelines for administrative support staff who perform clerical functions relating to an application process. Nor does this provision apply to technical documentation for machines or equipment, even if these may be used in support of a decision-making process. It also does not apply to manuals, policies, guidelines or procedures that do not affect the public. For example, a government institution is not required to make internal administrative guidelines available under this provision (if they do not affect the public).[300]

---

[298] Service Alberta, *Bulletin No. 3: Access to Manuals and Guidelines* at p. 2.
[299] Service Alberta, *Bulletin No. 3: Access to Manuals and Guidelines* at p. 2.
[300] Service Alberta, *Bulletin No. 3: Access to Manuals and Guidelines* at p. 2.

IPC Findings

In Review Report 042-2019, the Commissioner considered subsection 65(1) of FOIP. The Ministry of Corrections and Policing (Ministry) received an access to information request from Pro Bono Law Saskatchewan. The request was for copies of various policies, directives and other records used in decision-making processes that affect offenders. Pro Bono Law Saskatchewan requested a waiver of processing fees however, the Ministry denied the request. Pro Bono Law Saskatchewan requested a review by the Commissioner. Upon review, the Commissioner found that given the types of records requested, and the context surrounding those records, the requirements imposed on the Ministry by subsection 65(1) of FOIP superseded the issue related to fees. The Commissioner recommended that the Ministry ensure records used in a decision-making process that affects the public are provided in accordance with subsection 65(1) of FOIP, and without charging any fees.

Subsection 65(2)

Access to manuals

65(2) Any information in a record that a head would be authorized to refuse to give access to pursuant to this Act or the regulations may be excluded from manuals, policies, guidelines or procedures that are made available or provided pursuant to subsection (1).

Subsection 65(2) of FOIP provides that any information within the manuals, policies, guidelines or procedures that can be withheld in accordance with exemptions under FOIP can be excluded prior to posting them online. For more on what exemptions may apply see Part III of FOIP or the *Guide to FOIP*, Chapter 4, "Exemptions from the Right of Access".

This provision allows a government institution to remove or "sever" information from the manuals, policies, guidelines or procedures. For more on severing see *Section 8: Severability* earlier in this Chapter.

Section 65.1: Records Available Without an Application

Records available without an application

65.1(1) Subject to subsection (2), the head may establish categories of records that are in the possession or under the control of the government institution and that are available to the public within a reasonable time without an application for access pursuant to this Act.

(2) The head shall not establish a category of records that contain personal information or third party information unless that information may be disclosed pursuant to this Act or the regulations.

Section 65.1 of FOIP is a new provision following the amendments of January 1, 2018. The purpose of this provision is to encourage open information strategies within government institutions.

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

1. Routine disclosure in response to inquiries and requests for information.
2. Active dissemination of information.[301]

Routine Disclosure

Routine disclosure, in response to an inquiry or request, occurs when access to a record can be granted without a request under FOIP.[302]

A government institution may make information accessible by routine disclosure through:

- **Answers to particular questions:** Many inquiries are from members of the public seeking the answer to a question rather than asking for access to records. Occasionally, a person will combine a question with a request for records. To the greatest extent possible, government institutions should deal with these questions without a request for access under FOIP.[303]

[301] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, at p. 31.
[302] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2 at p. 31.
[303] Service Alberta, *FOIP Guidelines and Practice: 2009 Edition*, Chapter 2 at p. 32.

- **Specifying categories of records for routine disclosure:** Section 65.1 of FOIP provides that government institutions may specify categories of records in their possession or under their control that will be made available to the public without a request for access under FOIP. This is intended to enable government institutions to take a proactive approach by setting up channels for the release of information. This approach promotes openness and accountability.

Active Dissemination

Active dissemination occurs when information or records are periodically released without any request, under a program or communications plan.[304]

Active dissemination is best used where there is an anticipated demand for information by the public. For example, a government institution may establish sites or online databases where interested citizens can obtain information.

Open government is a governing culture that holds the public has the right to access the documents and proceedings of government to allow for greater openness, accountability, and engagement.[305]

Open data is the idea that data should be freely available for everyone to access, use and republish as they wish, published without restrictions from copyright, patents or other mechanisms of control. Public sector information made available to the public as open data is termed 'Open Government Data'.[306]

In Canada, the access to information and privacy commissioners are advocates for open government and promote the paradigm shift from reactive to proactive disclosure, and ultimately to open government.[307]

Examples of open data or active dissemination by government institutions in Saskatchewan include:

- Ministry of Energy and Resources – *Saskatchewan Mineral Assessment Database*;

---

[304] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2 at p. 33.
[305] Government of Canada, *Open Data 101,* 2017, available at www.open.canada.ca/en/open-data-principles.
[306] Open Government Partnership, *Open Government Guide*, at p. 197. Available at www.opengovguide.com.
[307] Resolution of Canada's Access to Information and Privacy Commissioners, September 1, 2010. Cited in SK OIPC Investigation Report LA-2012-002 at [68].

- Ministry of Finance – *Public Accounts*;
- Saskatchewan Bureau of Statistics – *Economic reports* and *Demography reports*; and
- Ministry of Environment, Sask Spills – *Hazardous Materials Storage Search*.

For more on routine disclosure and active dissemination, see the *Guide to FOIP*, Chapter 2, "Administration of FOIP" at *Government Institutions - Roles & Responsibilities, Routine Disclosure & Active Dissemination*.

Office of the
Saskatchewan Information
And Privacy Commissioner

503 – 1801 Hamilton Street
Regina SK S4P 4B4
306-787-8350

www.oipc.sk.ca