Office of the
Saskatchewan Information
and Privacy Commissioner

GUIDE TO FOIP

The Freedom of Information and Protection of Privacy Act

Chapter 5

Third Party Information

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Overview

The Freedom of Information and Protection of Privacy Act (FOIP) provides a right of access to all records under the possession or control of government institutions, subject to limited and specific exemptions. Some of the records to which FOIP applies contain information of third parties, such as private-sector businesses or individuals. Applicants often ask government institutions for access to records that contain third party business and personal information.[1]

The term "third party information" is generally used to refer to information the disclosure of which might particularly affect a person or organization, other than the government from which it is sought. That person or organization is called a 'third party" because they are not involved directly in the request for information, either as the applicant or the government institution that must respond to the request.[2] This Chapter explains the various provisions in FOIP that deal with third party information.

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. 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 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.

[1] Service Alberta, *FOIP Bulletin No. 10: Third Party Notice* at p. 1.
[2] *Government Information Access and Privacy*, McNairn and Woodbury, Carswell, 2008, at p. 4-1.

Quick Reference 1: Third party timelines

If the government institution does not intend to disclose third party information, third party notice is not required. However, if the government institution intends to disclose, notice is required to the third party.

The following is a quick reference for the time limits involved with third party information.[3] For more detail on each section below, refer to that section in this Chapter.

The timelines set out in subsections 34(2), 36(1)(b), 37(1), 37(2), 37(3), 49(2), 49(4), and sections 56, and 57 of FOIP are fixed and there is no mechanism established within FOIP to formally modify or extend them.

Step	Step Description	Time Limit
1.	*Notice to Third Party* (section 34) *Wavier of Notice* (section 35) *Extension of Time* (section 12)	As soon as possible, but at least within 30 days of receipt of the access to information request (unless time limit is extended by section 12).
2.	*Right to Make Representations* (section 36)	Government institution must have received representation from the third party within 20 days after *Notice to Third Party* is sent.
3.	*Notice of Decision* (section 37)	Within 30 days after *Notice to Third Party* is sent. (Can also be articulated as 10 days after

[3] The above table was adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at Section 24 - Time limit and notice of decision - Province of British Columbia (gov.bc.ca). Accessed Sept. 1, 2022. For a more detailed reference document on timelines and procedures, see the Access and Privacy Branch, Ministry of Justice resource, *Help with FOIP!!, Access Request Checklist, Third Party Notification Required*.

		expiry of the 20 days for third party representation) The section 7 decision to the applicant can be combined with the section 37 response for efficiency.
4.	*Request for Review of Decision* (subsections 37(2)(b), 49(3) & 49(4))	Within 20 days after *Notice of Decision* for third party. Within one year after *Notice of Decision* for applicant.
5.	Access to the Record (subsection 37(3))	20 days after *Notice of Decision*, if no request for review by third party, the records may be released to the applicant. Check with IPC to see if a request for review has been received by the IPC.
6.	Report of Commissioner (section 55)	If a review is requested by the applicant, a Review Report by the Commissioner will be issued. This may take several months to be issued.
7.	Decision of Head (section 56)	30 days after issuance of Commissioner's Review Report.
8.	Appeal to Court (section 57)	30 days after receipt of *Decision of the Head*.
9.		

	Access to the Record	If no appeal to the Court of King's Bench after 30 days of the *Decision of the Head*, the head can release the records to the applicant.

Quick Reference 2: Contracting with government institutions

Common types of records that arise in access to information requests involving third party information are contracts and tender/bidding or proposal documents. The following is a quick reference guide for the precedent set by the Commissioner and the courts regarding contracts and tender/bidding or proposal documents.

Topic	**Precedent**
Tender/bidding or proposal documents	• Entire proposal packages submitted by third parties to a government institution in response to a Request for Proposals (RFPs) could constitute commercial information and be supplied explicitly in confidence if the RFP included a confidentiality clause.[4] • Contractors setting out to win government contracts through a confidential bidding process should not expect that the monetary terms will remain confidential if the bid succeeds. The public's right to know how government spends public funds as a means of holding government accountable for its expenditures is a fundamental notion of responsible government that is known to all.[5]
Contracts	• Third parties and businesses need to know when they deal with government institutions supported by tax

[4] Office of the Saskatchewan Information and Privacy Commissioner (SK OIPC) Review Reports 031-2015 at [10] to [28], 020-2016 at [4] to [12].
[5] *Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc.*, 2004 FCA 99 (CanLII) at [37] and [42].

	dollars that their contract will probably be released. No confidentiality clause, however well drafted, can override the law (i.e., FOIP).[6] • An agreement where the government institution contributed significantly to its terms would not qualify under this exemption because it is the result of negotiation between the parties and was also largely based on the criteria set out by the government institution in its request for proposals.[7]
Subsection 19(1)(a)	In *Canadian Bank Note Limited v. Saskatchewan Government Insurance, (2016)*, Justice Zarzeczny found that unit prices in a contract between Saskatchewan Government Insurance and a third party did not qualify as a trade secret.
Subsection 19(1)(c)(ii)	Asserting disclosure would create a more competitive environment does not give rise to a reasonable expectation of a material financial loss or prejudice to a third party's competitive position.[8]
Subsection 19(1)(c)(iii)	• Once a contract is executed, negotiation is concluded. The exemption would generally not apply unless, for instance, the same negotiation strategy will be used again, and it has not been publicly disclosed.[9] • The Federal Court in *Société Gamma Inc. v. Canada (Department of the Secretary of State)* (1994), 56 C.P.R. (3d) 58, interpreted the equivalent provision in the federal *Access to Information Act* as requiring that "it must refer to an obstruction to those negotiations and not merely the heightening of competition for the

[6] SK OIPC blog by Commissioner Kruzeniski, *Confidentiality Clauses in Contracts*, September 5, 2017.
[7] SK OIPC Review Reports F-2005-003 at [17] to [19] and LA-2011-001 at [97].
[8] *Canadian Pacific Hotels Corp. v. Canada (Attorney General)*, 2004 FC 444 (CanLII) at [35]. See also SK OIPC Review Report 020-2016 at [19] to [22].
[9] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 19, 2019. Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 107.

	third party which might flow from disclosure".[10] Further, a distinction must be drawn between actual contractual negotiations and the daily business operations of a third party.[11]

IPC Findings

In Review Report 007-2015, the Commissioner considered subsections 19(1)(b) and (c) of FOIP. An applicant had made an access to information request to the Ministry of Central Services (Central Services) for the Statement of Work attached to Information Technology Consulting Services Agreement ITO-12023. Central Services responded to the applicant advising that it was withholding portions of the Statement of Work pursuant to several provisions of FOIP including subsections 19(1)(b) and (c). For subsection 19(1)(b) of FOIP, the Commissioner found that the estimated hours, hourly rate, and estimated cost per consultant was the financial and commercial information of the third party. However, the Commissioner found that the estimated hours, hourly rate and estimated cost per consultant were not supplied by the third party because they were part of the contract between Central Services and the third party and the result of negotiation between the parties. As all three parts of the test were not met, the Commissioner found that subsection 19(1)(b) of FOIP did not apply and recommended the information be released. For subsection 19(1)(c) of FOIP, Central Services and the third party asserted that releasing the estimated hours, hourly rate and estimated cost per consultant would result in a competitor having the ability to provide a lower rate for future contracts, which would cause the third party to experience a competitive disadvantage. However, neither Central Services nor the third party provided anything further to support this assertion. The Commissioner also stated that the winning contractor would have access to the internal cost estimates in question as it is part of the current contract and that keeping these figures from the public, including other future bidders, would jeopardize competitive bidding processes. The Commissioner found that subsection 19(1)(c) of FOIP was also not properly applied by Central Services.

In Review Report 031-2015, the Commissioner considered subsection 19(1)(b) of FOIP. An applicant had made an access to information request to Saskatchewan Government

[10] *Société Gamma Inc. v. Canada (Department of the Secretary of State)*, (April 27, 1994), T-1587-93, T-1588-93 (F.C.T.D.) at [10].
[11] *Canada (Information Commissioner) v. Canada (Minister of External Affairs)* (T.D.), [1990] 3 FC 665, 1990 CanLII 7951 (FC) at [24].

Insurance (SGI) for all records relating to a Request for Proposals (RFP). SGI responded to the applicant indicating that access was partially granted to some records, but others were withheld pursuant to several exemptions including subsection 19(1)(b). The records at issue under subsection 19(1)(b) were hundreds of pages that constituted the actual proposals submitted to SGI by two separate third parties. There were also 87 pages worth of emails. Upon review, the Commissioner found that the records contained financial, commercial, scientific, technical and labour relations information of the third parties. The Commissioner further found that the entire proposal packages of the two third parties constituted commercial information because the proposals were related to the buying or selling of goods and services. This approach was consistent with other jurisdictions including British Columbia (Order F09-22) and Ontario (MO-3179). The Commissioner went on to find that all the records were supplied by the third parties, including emails sent to SGI by the third parties. Finally, the Commissioner found that the records were supplied explicitly in confidence. This was based on the submissions of all the parties which indicated all the parties agreed on this fact (mutual understanding). Furthermore, the RFP included a confidentiality clause. As all three parts of the test were met, the Commissioner found that subsection 19(1)(b) of FOIP was appropriately applied by SGI to the proposals and the severed information in the emails.

In Review Report 054-2015 and 055-2015, the Commissioner considered the equivalent provision, subsection 18(1)(b), in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). An applicant had made an access to information request to the City of Regina (City) for a tender and contract related to a street infrastructure project. The records involved were two documents titled, *Form of Tender*. The applicant was only interested in the unit prices and total prices severed from the two documents. The City withheld this information in part under subsection 18(1)(b) of LA FOIP. The City asserted that the unit prices disclosed pricing and pricing practices of the third parties involved in a competitive contract award process. The Commissioner found the unit prices and total prices constituted commercial and financial information of the third parties. The City asserted that the tender package supplied by the City to bidders contained a blank *Form of Tender*. Bidders entered their specific data in Schedule A of the form and returned it to the City as part of their bid package. Based on this, the Commissioner found that the third parties supplied the unit prices and total prices. The City asserted that clause 19 of the Instructions to Bidders issued by the City indicated that financial and commercial information supplied by bidders would be supplied in confidence. Based on this, the Commissioner found that the unit pricing and total prices were supplied explicitly in confidence. As all three parts of the test were met, the Commissioner found that subsection 18(1)(b) of LA FOIP was appropriately applied.

In Review Report 195-2015 and 196-2015, the Commissioner considered subsections 19(1)(b) and (c) of FOIP. An applicant made two access to information requests to the Ministry of Central Services (Central Services) for all current active information technology service contracts with a maximum value of over $1 million and any between Central Services and Solvera Solutions over $1 million. Central Services responded to the applicant advising that some of the information in the contracts was being withheld under various provisions of FOIP including withholding the hourly rates for contracted services pursuant to subsections 19(1)(b) and (c) of FOIP. Upon review, the Commissioner found that the hourly rates for contracted services qualified as commercial information of the third party. However, the Commissioner found that the third party did not supply the hourly rates for contracted services because they were provisions of a contract that were mutually generated through negotiation. As all three parts of the test were not met, the Commissioner found that subsection 19(1)(b) of FOIP did not apply. For subsection 19(1)(c) of FOIP, Central Services and the third party asserted that releasing the hourly rates could result in competitors having the ability to provide a lower rate for future contracts and result in undue loss to Solvera Solutions and prejudice its competitive position. The Commissioner found that the bids were evaluated based on several criteria and laid out the three stages used by Central Services at paragraph [44] of the report. As such, the selection was not based on price alone. Finally, the Commissioner found that releasing costs would increase the chances that a public body would, in the future, obtain fair bids and a competitive bidding process. The Commissioner found that subsection 19(1)(c) did not apply to the hourly rates.

In Review Report 229-2015, the Commissioner considered subsection 19(1)(b) of FOIP. An applicant made an access to information request to Saskatchewan Government Insurance (SGI) for information related to a contract for Centralized Driver License and Identification Card Production and Facial Recognition Services including contract price, price per card components, lump sum price components and card volume and contract term. SGI responded to the applicant indicating that some of the information was being withheld pursuant to several provisions of FOIP including subsection 19(1)(b). The Commissioner found that the price per unit and lump sum prices constituted the commercial information of the third party. Furthermore, the Commissioner found that the price per unit and lump sum prices were terms of the contract that had been agreed to by both the third party and SGI and as such were mutually generated as part of the negotiation process. The Commissioner distinguished this case from Review Report 054-2015 and 055-2015, where the unit prices were provided on a blank *Form of Tender* provided by the City of Regina to bidders. The Commissioner noted that unlike the other case, the bidding process was concluded, the successful bidder was selected and a contract was already awarded. The Commissioner found

that the unit prices and lump sum prices were not supplied by the third party but were negotiated terms of the contract that both parties agreed to. As the second part of the test was not met, the Commissioner found that subsection 19(1)(b) of FOIP was not appropriately applied. The third party appealed the Commissioner's decision to the Court of King's Bench where Justice Zarzeczny in *Canadian Bank Note Limited v Saskatchewan Government Insurance*, considered the facts and circumstances in the de novo appeal, agreed that the information was commercial information of the third party but found that the unit prices were supplied to SGI by the third party.[12]

Section 2: Definition of a third party

Third party information

2(1) In this Act:

...

(j) **"third party"** means a person, including an unincorporated entity, other than an applicant or a government institution.

FOIP defines a **third party** as a person, including an unincorporated entity, other than an applicant or a government institution.[13] This definition is broad and can include an individual, private business (e.g., sole proprietorship, partnership, corporation, unincorporated association, or organization), non-profit group, trade union, syndicate or trust.

However, it does not include applicants or government institutions[14] which are defined by subsections 2(1)(a) and (d) of FOIP which provide:

2(1) In this Act:

(a) **"applicant"** means a person who makes an application for access to a record pursuant to section 6;

[12] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [36] to [39].
[13] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 at section 2(1)(j).
[14] In SK OIPC Review Report 244-2018 at [94], the Commissioner found that the Ministry of Health was a government institution so could not be a third party for purposes of FOIP.

...

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

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

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

(A) by the Lieutenant Governor in Council;
(B) by a member of the Executive Council; or
(C) in the case of:
(I) a board, commission or other body, by a Crown corporation; or
(II) a Crown corporation, by another Crown corporation;

The definition of a third party under FOIP can also include a "local authority", as defined by subsection 2(f) of *The Local Authority Freedom of Information and Protection of Privacy Act* for purposes of FOIP.[15]

IPC Findings

In Review Report 080-2018, the Commissioner determined, for the first time, that the Saskatchewan Health Authority (a local authority as defined by subsection 2(f) of *The Local Authority Freedom of Information and Protection of Privacy Act*) could qualify as a "third party" for purposes of FOIP.

In Review Report 244-2018, the Commissioner considered whether the Ministry of Health and the pan-Canadian Pharmaceutical Alliance (pCPA) qualified as third parties pursuant to subsection 2(1)(j) of FOIP. The Commissioner found that the Ministry of Health did not qualify as a third party because it was a government institution. Furthermore, the Commissioner found that the pCPA did not qualify as a third party. This was in part because the Ministry of

[15] SK OIPC Review Report 080-2018 at [51] and [52]. In addition, see SK OIPC blog, *Can Public Bodies be a Third Party?*. This replaces earlier interpretations by the SK OIPC that government institutions and local authorities could not qualify as third parties under FOIP and *The Local Authority Freedom of Information and Protection of Privacy Act* – for old precedent see SK OIPC F-2012-001/LA-2012-001 at [40] to [53].

Health had some control over the governance of the pCPA. As a result, the Commissioner found that subsection 19(1)(b) of FOIP did not apply to the records at issue. In *West v Saskatchewan (Health)*, 2020 SKQB 244 (CanLII), the court stated at paragraph [65] that "pCPA does not appear to be either a "government institution" nor a "third party", as defined by s. 1 of the *Act*." The court noted that the origin of the documents is still relevant when considering the application of section 13(1)(b) of FOIP.

Section 19: Third party information

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

(a) trade secrets of a third party;

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

(iii) interfere with the contractual or other negotiations of;

a third party;

(d) a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution;

(e) a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution; or

(f) information supplied by a third party to support an application for financial assistance mentioned in clause (e).

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Section 19 of FOIP is a mandatory, class-based and harm-based provision, meaning it contains both class and harm-based exemptions. As a mandatory provision, the government institution has no, or more limited, discretion regarding whether or not to apply the exemption. That is, if the information is covered by the exemption and the conditions for the exercise of discretion do not exist, then it must not be disclosed.

The provision is intended to protect the business interests of third parties and to ensure that government institutions are able to maintain the confidentiality necessary to effectively carry-on business with the private sector.[16]

The Government of Saskatchewan collects a wide range of information from third parties. This information may be submitted voluntarily, such as in a bid for a government contract, or submitted as required by law, such as for proof of regulatory compliance. There is a compelling need to protect information that is provided to the government by third parties if the information falls within one of the enumerated exemptions under section 19 of FOIP.[17]

Some common examples where government institutions may have possession or control of third party records include:

- Records that have been provided under legislated or regulatory requirements.
- Records including the personal information of individuals applying for benefits or services.
- Records collected as part of a procurement of products or services.

[16] Office of the Nunavut Information and Privacy Commissioner (NU IPC) Review Report 03-08 at p. 7.
[17] Adapted from the Information Commissioner of Canada's *2017-2018 Annual Report, Investigation Highlights*, *Section 20 – Third Party Information*. Available at https://www.oic-ci.gc.ca/en/resources/reports-publications/2017-2018-investigation-highlights#h3. Accessed July 22, 2019.

- Records containing expert advice.
- Records gathered during public consultations.
- Records created through public-private sector partnerships.[18]

Although government institutions need to be open and accountable, they also need to conduct business and enter into business relationships; in doing so, they must be able to assure their private sector partners that their trade secrets and commercial and financial secrets will not be readily disclosed to competitors and the public.[19]

The leading case authority in terms of third party information is *Merck Frosst Canada Ltd. v. Canada (Health)*, (2012). At paragraph [23], the court recognized that a balance must be struck between the private interests of third parties and the public interest in the disclosure of information. The court commented:

> [23] Nonetheless, when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development. The Act strikes this balance between the demands of openness and commercial confidentiality in two main ways. First, it affords substantive protection of the information by specifying that certain categories of third party information are exempt from disclosure. Second, it provides procedural protection. The third party whose information is being sought has the opportunity, before disclosure, to persuade the institution that exemptions to disclosure apply…[20]

Third parties doing business with public institutions must understand that certain information detailing the expenditure of public funds might be disclosed.[21]

Third parties should be aware that the right of access to information under government control is available to every member of the public and cannot be restricted by considerations

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[18] Ontario Ministry of Public and Business Service Delivery resource, *Freedom of Information and Protection of Privacy Manual* at Chapter 4: Access Fundamentals, Records of Third Parties. Accessed Sept. 6, 2022.
[19] Office of the Northwest Territories Information and Privacy Commissioner (NWT IPC) Review Report 04-043 at p. 4.
[20] Quoted by Justice Zarzeczny in *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [28].
[21] Office of the Ontario Information and Privacy Commissioner (ON IPC) Order PO-3845 at [62].

of motive or occupation. The only way motivation could be relevant is to establish a reasonable expectation of harm to third parties [subsection 19(1)(c) of FOIP].[22]

The information below is reproduced for ease of reference from Chapter 4: *Exemptions from the Right of Access*.

Subsection 19(1)(a)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

(a) trade secrets of a third party;

...

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(a) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains the trade secrets of a third party.

The following test can be applied:

[22] *Intercontinental Packers Ltd. v. Canada (Minister of Agriculture)* (1987), 14 F.T.R. 142 (T.D.), affirmed (1988), 87 N.R. 99 (Fed. C.A.) at [145].

Does the record contain trade secrets of a third p*arty*

Trade secret is defined as information, including a plan or process, tool, mechanism or compound, which possesses each of the four following characteristics:

i) The information must be secret in an absolute or relative sense (is known only by one or a relatively small number of people);

ii) The possessor of the information must demonstrate he/she has acted with the intention to treat the information as secret;

iii) The information must be capable of industrial or commercial application; and

iv) The possessor must have an interest (e.g., an economic interest) worthy of legal protection.[23]

The information must meet all the above criteria to be considered a trade secret.

The types of information that could potentially fall in this class include the chemical composition of a product and the manufacturing processes used. However, not every process or test would fall into this class, particularly when the process or test is common in a particular industry.[24]

If the government institution determines that the information qualifies as a trade secret and it intends to withhold it, it should ask the third party if it consents to the release of the information pursuant to subsection 19(2). Consent should be in writing.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest *and* the information relates to public health, public safety, or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to

[23] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at p. 7. Definition relied on by Justice Zarzeczny in *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [32].
[24] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed July 22, 2019.

competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 19(3)* of this Chapter.

In *Canadian Bank Note Limited v. Saskatchewan Government Insurance, (2016)*, Justice Zarzeczny found that unit prices in a contract between Saskatchewan Government Insurance and a third party (Veridos Canada Ltd.) did not qualify as a trade secret.

Subsection 19(1)(b)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

…

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

…

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(b) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains financial, commercial, scientific, technical or

labour relations information that was supplied in confidence to a government institution by a third party.

The following three-part test can be applied:[25]

1. **Is the information financial, commercial, scientific, technical, or labour relations information of a third party**

Financial information is information regarding monetary resources, such as financial capabilities, assets, and liabilities, past or present. Common examples are financial forecasts, investment strategies, budgets, and profit and loss statements. The financial information must be specific to a third party.[26]

Commercial information is information relating to the buying, selling or exchange of merchandise or services. This can include third party associations, past history, references and insurance policies and pricing structures, market research, business plans, and customer records.[27]

Types of information included in the definition of commercial information can include:

- Offers of products and services a third party business proposes to supply or perform;
- A third party business' experiences in commercial activities where this information has commercial value;
- Terms and conditions for providing services and products by a third party;
- Lists of customers, suppliers or sub-contractors compiled by a third party business for its use in its commercial activities or enterprises - such lists may take time and effort to compile, if not skill;
- Methods a third party business proposes to use to supply goods and services; and
- Number of hours a third party business proposes to take to complete contracted work or tasks.[28]

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[25] MCCreary J. used this three-part test in *Seon v Board of Education of the Regina Roman Catholic School Division NO. 81*, 2018 SKKB 166 at [9] for the equivalent provision (subsection 18(1)(b)) in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
[26] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 103. Definition first relied on in SK OIPC Review Report F-2005-003 at [23].
[27] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 102.
[28] Office of the British Columbia Information and Privacy Commissioner (BC IPC) Order F05-09 at [9]. First cited in SK OIPC Review Report 019-2014 at [35].

Scientific information is information exhibiting the principles or methods of science. The information could include designs for a product and testing procedures or methodologies.[29] It is information belonging to an organized field of knowledge in the natural, biological, or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information.[30]

Technical information is information relating to a particular subject, craft or technique. Examples are system design specifications and the plans for an engineering project.[31] It is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering, or electronics. It will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.[32]

Labour relations information is information that relates to the management of personnel by a person or organization, whether or not the personnel are organized into bargaining units. It includes relationships within and between workers, working groups and their organizations as well as managers, employers and their organizations. Labour relations information also includes collective relations between a public body and its employees. Common examples of labour relations information are hourly wage rates, personnel contracts, and information on negotiations regarding collective agreements.[33]

In the decision *Merck Frosst Canada Ltd. v. Canada (Health)*, (2012), the Supreme Court of Canada recognized that administrative details such as page and volume numbering, dates

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[29] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 191. Definition first relied on for third party exemption in SK OIPC Review Report F-2006-002 at [85].
[30] Definition originated from ON IPC Order P-454 at p. 4. Adopted in SK OIPC Review Report F-2006-002 at [87].
[31] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 191. Definition first relied on for third party exemption in SK OIPC Review Report F-2006-002 at [85].
[32] Definition originated from ON IPC Order P-454 at p. 4. Adopted in SK OIPC Review Report F-2005-003 at [26]. Definition endorsed in *Consumers' Co-operative Refineries Limited v Regina (City)*, 2016 SKKB 335 (CanLII) at [20].
[33] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 103. Definition first relied on in SK OIPC Review Report 019-2014 at [37].

and location of information within records do not constitute financial, commercial, scientific or technical information.[34]

2. Was the information supplied by the third party to a government institution

Supplied means provided or furnished.[35]

Information may qualify as "supplied" if it was directly supplied to a government institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[36]

Information gathered by government inspectors via their own observations does not qualify as information "supplied" to the government institution. Judgements or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.[37]

Records can still be "supplied" even when they originate with the government institution (i.e., the records still may contain or repeat information extracted from documents supplied by the third party). However, the third party objecting to disclosure will have to prove that the information originated with it and that it is confidential.[38]

Whether confidential information has been "supplied" to a government institution by a third party is a question of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a government document does not, on its own, resolve the issue.[39]

The following are examples of information not supplied by a third party:

- Information that reflects the viewpoints, opinions or comments of government officials;
- Reports resulting from factual observations made by government inspectors; and

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[34] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [141].
[35] 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#supplied. Accessed August 21, 2019.
[36] SK OIPC Review Reports F-2005-003 at [17], F-2006-002 at [40].
[37] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [156] and [158].
[38] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [157].
[39] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [158].

- The terms of a lease negotiated between a third party and a government institution.[40]

The contents of a contract involving a government institution and a third party will not normally qualify as having been supplied by a third party. The provisions of a contract, in general, have been treated as **mutually generated**, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[41]

An agreement where the government institution contributed significantly to its terms would not qualify under this exemption because it is the result of negotiation between the parties and was also largely based on the criteria set out by the government institution in its request for proposals.[42]

There are two exceptions to the general rule of "mutually generated" information in contracts.[43] If one of these exceptions apply, the information in a contract could be found to have been supplied by the third party:

i) *Inferred disclosure* – where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the public body;[44] and

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[40] *Halifax Developments Ltd. v. Minister of Public Works* (994), F.C.J. No. 2035 (QL) (F.C.T.D.). Also, in Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.3*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 21, 2019.

[41] Originated in 2002 ON IPC Order PO-2018. The language above is drawn from the most recent 2019 ON Order PO-3974 at [42]. First relied on in SK OIPC Review Report F-2005-003 at [17]. Several court decisions support this approach. See *Boeing C. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), [2005] O.J. 2851, *Canadian Medical Protective Association v. John Doe*, 2008 CanLII 45005 (ON SCDC), [2008] O.J. No. 3475, *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 (CanLII), *Canada Post Corp. v. National Capital Commission,*(2002), 2002 FCT 700 (CanLII), *Halifax Development Ltd. v. Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035. Similar position taken by other IPC offices including BC, AB, NFLD and Labrador and PEI.

[42] SK OIPC Review Reports F-2005-003 at [17] to [19] and LA-2011-001 at [97].

[43] Base case was BC IPC Order 01-20 at [86]. This Order was later discussed in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848 at [72] to [79]. See also ON IPC Orders MO-1706 at p. 12, PO-2371 at pp. 6 to 9, PO-2528 at p. 12. Included for the first time in SK IPC Review Report 084-2015 at [22].

[44] An example of "inferred disclosure" can be found at [25] of *Aventis Pasteur Ltd. v. Canada (Attorney General)*, 2004 FC 1371 (CanLII). See also BC IPC Order 01-20 at [86].

ii) *Immutability* – information the third party provided that is immutable or not open or susceptible to change and was incorporated into the contract without change, such as the operating philosophy of a business, or a sample of its products.[45]

3. Was the information supplied in confidence implicitly or explicitly

Supplied means provided or furnished.[46]

In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained *in confidence* means that the supplier of the information has stipulated how the information can be disseminated.[47] 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 third party providing the information.[48]

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.[49]

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 supplied on the understanding that it would be kept confidential.[50]

In order for subsection 19(1)(b) of FOIP to apply, a government institution must show that both parties intended the information be held in confidence at the time the information was supplied.[51]

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[45] The Ontario Superior Court of Justice, in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC) and [55], considered "immutability" as a factor in its determination that the information was not "supplied" by the third party.
[46] 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#supplied. Accessed August 21, 2019.
[47] 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.
[48] SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [57], ON IPC Order MO-1896 at p. 8.
[49] 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].
[50] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at pp. 104 and 105.
[51] SK OIPC Review Reports 158-2016 at [37] and 203-2016 at [28].

The expectation of confidentiality must be reasonable and must have an objective basis.[52] Whether the information is confidential will depend upon its content, its purposes and the circumstances in which it was compiled or communicated (*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland, Gary Kachanoski, (2014)*).

Factors considered when determining whether a document was supplied 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 third party or the government institution.[53]
- Was the information treated consistently in a manner that indicated a concern for its protection by the third party and the government institution from the point at which it was supplied until the present time.[54]
- Is the information available from sources to which the public has access.[55]
- Does the government institution have any internal policies or procedures that speak to how records such as the one 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 third party both had the same understanding regarding the confidentiality of the information at the time it was supplied. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been supplied in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist in addition.[56]

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[52] SK OIPC Review Reports F-2012-001/LA-2012-001 at [32], LA-2013-002 at [49], ON IPC Orders PO-2273 at p. 7 and PO-2283 at p. 10.
[53] BC IPC Orders 331-1999 at [8], F13-01 at [23]; Office of the Prince Edward Island Information and Privacy Commissioner (PEI IPC) Order FI-16-006 at [19]; Office of the Nova Scotia Information and Privacy Commissioner (NS IPC) Review Reports 16-09 at [44], 17-03 at [34].
[54] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[55] ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.
[56] *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 supplied implicitly in confidence would not be sufficient.[57]

Factors to consider when determining if a document was supplied in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the government institution and the third party;[58]
- The fact that the government institution requested the information be supplied in a sealed envelope and/or outlined its confidentiality intentions to the third party prior to the information being supplied.[59]

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 Federal Court has summarized the following in terms of what is considered confidential:

- It is an objective standard (based on facts).
- It is not sufficient that the third party state, without further evidence, that the information is confidential.
- Information has not been held to be confidential even if the third party considered it so, where it has been available to the public from other sources or where it has been available at an earlier time or in another form from government.
- Information is not confidential where it could be obtained by observation albeit with more effort by the applicant.[60]

Compulsory supply means there is a compulsory legislative requirement to supply information. Where supply is compulsory, it will not ordinarily be confidential. In some cases,

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[57] SK OIPC Review Report LA-2013-002 at [60].
[58] 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, Office of the Alberta Information and Privacy Commissioner (AB IPC) Orders 97-013 at [23] to [24], 2001-008 at [54].
[59] 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].
[60] *Air Atonabee Ltd. v. Minister of Transport*, (1989), 27 C.P.R. (3d) 180 (F.C.T.D.) at p.11. *Stenotran Services v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15464 (FC) at [9] citing Air Atonabee. It is important to note that subsection 20(1)(b) of the federal ATIA places the focus on the confidential nature of the information itself. SK's subsection 19(1)(b) of FOIP places the focus on the confidential nature of the supply. However, *Air Atonabee* may still be instructive with interpreting SK's subsection 19(1)(b) of FOIP.

there may be indications in the legislation relevant to the compulsory supply that establish confidentiality. The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.[61] Where information is required to be provided, unless otherwise provided by statute, confidentiality cannot be built in by agreement, informally or formally.[62]

> *Example:* In Review Report 043-2015, the Commissioner found that subsection 19(1)(b) of FOIP did not apply because the third party was required to provide the information in question to the Ministry of Environment pursuant to *The Environmental Management and Protection Act, 2002*, *The Water Regulations* and *The Clean Air Act*. As such, this constituted compulsory supply. In addition, these statutes did not have any confidentiality provisions related to the types of information in question.

In the decision *Merck Frosst Canada Ltd. v. Canada (Health)*, (2012), the Supreme Court of Canada established that information is not confidential if it is in the public domain, including being publicly available through another source. To be confidential, the information must not be available from sources otherwise accessible by the public or obtainable by observation or independent study by a member of the public acting on his or her own. Information that has been published is not confidential. Further, information, which merely reveals the existence of publicly available information, cannot generally be confidential.[63]

Contractors setting out to win government contracts through a confidential bidding process should not expect that the monetary terms will remain confidential if the bid succeeds. The public's right to know how government spends public funds as a means of holding government accountable for its expenditures is a fundamental notion of responsible government that is known to all.[64]

Simply labelling documents as "confidential" does not, on its own, make the documents confidential (i.e., confidentiality stamps or standard automatic confidentiality statements at the end of emails). It is just one factor that we consider when determining whether the information was explicitly supplied in confidence.[65] The typical bottom of email

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[61] *Chesal v. Nova Scotia (Attorney General) et al.*, 2003 NSCA 124 (CanLII) at [72] and [73] and *Stevens v. Canada (Prime Minister)*, [1997] 2 FC 759, 1997 CanLII 4805 (FC) at p. 1. Also, see NS IPC Review Report 17-03 at [98] and SK OIPC Review Reports F-2006-001 at [76] to [78].
[62] SK OIPC Review Report F-2006-001 at [78].
[63] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [146].
[64] *Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc.,* 2004 FCA 99 (CanLII) at [37] and [42].
[65] SK OIPC Review Report F-2012-001/LA-2012-001 at [43].

"confidentiality" note is not sufficient to establish that information was supplied in confidence. Such notes are largely format and platitudes.[66]

Government institutions cannot be relieved of their responsibilities under FOIP merely by agreeing via a confidentiality clause in a contract/agreement to keep matters confidential.[67] Since a government institution cannot guarantee confidentiality if FOIP mandates disclosure, it should frame any contract provisions, representations or policies accordingly so third parties are informed prior to providing information to the government institution. This includes tenders, requests for proposals and other processes.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see subsection 19(3) of this Chapter.

IPC Findings

In Review Report 007-2015, the Commissioner considered subsection 19(1)(b) of FOIP. An applicant had made an access to information request to the Ministry of Central Services (Central Services) for the Statement of Work attached to Information Technology Consulting Services Agreement ITO-12023. Central Services responded to the applicant advising that it was withholding portions of the Statement of Work pursuant to several provisions of FOIP including subsection 19(1)(b). The Commissioner found that the estimated hours, hourly rate and estimated cost per consultant was the financial and commercial information of the third party. However, the Commissioner found that the estimated hours, hourly rate and estimated cost per consultant were not supplied by the third party because they were part of the

[66] *Brewster Inc. v. Canada (Environment)*, 2016 FC 339 (CanLII) at [22].
[67] *St. Joseph Corp. v. Canada (Public Works & Government Services)* [2002] FCT 274 at [53] and [54], Brookfield *LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services),* [2003] FCT 254 at [16], SK OIPC Review Reports 159-2016 at [39], 052-2017 at [55] and Review Report 311-2017, 312-2017, 313-2017, 316-2017, 340-2017, 341-2017, 342-2017 at [63].

contract between Central Services and the third party and the result of negotiation between the parties. As all three parts of the test were not met, the Commissioner found that subsection 19(1)(b) of FOIP did not apply.

In Review Report 031-2015, the Commissioner considered subsection 19(1)(b) of FOIP. An applicant had made an access to information request to Saskatchewan Government Insurance (SGI) for all records relating to a Request for Proposals. SGI responded to the applicant indicating that access was partially granted to some records, but others were withheld pursuant to several exemptions including subsection 19(1)(b). The records at issue under subsection 19(1)(b) were hundreds of pages that constituted the actual proposals submitted by two separate third parties to SGI. There were also 87 pages worth of emails. Upon review, the Commissioner found that the records contained financial, commercial, scientific, technical and labour relations information. The Commissioner further found that the entire proposal packages of the two third parties constituted commercial information because the proposals related to the buying or selling of goods and services. This approach was consistent with other jurisdictions including British Columbia (Order F09-22) and Ontario (MO-3179). The Commissioner went on to find that all the records were supplied by the third parties, including emails sent to SGI by the third parties. Finally, the Commissioner found that the records were supplied explicitly in confidence. This was based on the submissions of all the parties which indicated all the parties agreed on this fact (mutual understanding). Furthermore, the RFP included a confidentiality clause. As all three parts of the test were met, the Commissioner found that subsection 19(1)(b) of FOIP was appropriately applied by SGI to the proposals and the severed information in the emails.

In Review Report 054-2015 and 055-2015, the Commissioner considered the equivalent provision, subsection 18(1)(b), in LA FOIP. An applicant had made an access to information request to the City of Regina (City) for a tender and contract related to a street infrastructure project. The records involved were two documents titled, *Form of Tender*. The applicant was only interested in the unit prices and total prices severed from the two documents. The City withheld this information in part under subsection 18(1)(b). The City asserted that the unit prices disclosed pricing and pricing practices of the third parties involved in a competitive contract award process. The Commissioner found the unit prices and total prices constituted commercial and financial information of the third parties. The City asserted that the tender package supplied by the City to bidders contained a blank *Form of Tender*. Bidders entered their specific data in Schedule A of the form and returned it to the City as part of their bid package. Based on this, the Commissioner found that the third parties supplied the unit prices and total prices. The City asserted that clause 19 of the Instructions to Bidders issued by the City indicated that financial and commercial information supplied by bidders would be

supplied in confidence. Based on this, the Commissioner found that the unit pricing and total prices were supplied explicitly in confidence. As all three parts of the test were met, the Commissioner found that subsection 18(1)(b) of LA FOIP was appropriately applied.

In Review Report 195-2015 and 196-2015, the Commissioner considered subsection 19(1)(b) of FOIP. An applicant made two access to information requests to the Ministry of Central Services (Central Services) for all current active information technology service contracts with a maximum value of over $1 million and any between Central Services and Solvera Solutions over $1 million. Central Services responded to the applicant advising that some of the information in the contracts was being withheld under various provisions of FOIP including withholding the hourly rates for contracted services pursuant to subsection 19(1)(b). Upon review, the Commissioner found that the hourly rates for contracted services qualified as commercial information of the third party. However, the Commissioner found that the third party did not supply the hourly rates for contracted services because they were provisions of a contract that were mutually generated through negotiation. As all three parts of the test were not met, the Commissioner found that subsection 19(1)(b) of FOIP did not apply.

In Review Report 229-2015, the Commissioner considered subsection 19(1)(b) of FOIP. An applicant made an access to information request to Saskatchewan Government Insurance (SGI) for information related to a contract for Centralized Driver License and Identification Card Production and Facial Recognition Services including contract price, price per card components, lump sum price components and card volume and contract term. SGI responded to the applicant indicating that some of the information was being withheld pursuant to several provisions of FOIP including subsection 19(1)(b). The Commissioner found that the price per unit and lump sum prices constituted the commercial information of the third party. Furthermore, the Commissioner found that the price per unit and lump sum prices were terms of the contract that had been agreed to by both the third party and SGI and as such were mutually generated as part of the negotiation process. The Commissioner distinguished this case from Review Report 054-2015 and 055-2015, where the unit prices were provided on a blank *Form of Tender* provided by the City of Regina to bidders. The Commissioner noted that unlike the other case, the bidding process was concluded, the successful bidder was selected and a contract was already awarded. The Commissioner found that the unit prices and lump sum prices were not supplied by the third party but were negotiated terms of the contract that both parties agreed to. As the second part of the test was not met, the Commissioner found that subsection 19(1)(b) of FOIP was not appropriately applied. The third party appealed the Commissioner's decision to the Court of King's Bench where Justice Zarzeczny in *Canadian Bank Note Limited v Saskatchewan Government Insurance*, considered the facts and circumstances in the de novo appeal, agreed that the

information was commercial information of the third party but found that the unit prices were supplied to SGI by the third party.[68]

In Review Report 052-2017, the Commissioner considered subsection 19(1)(b). An applicant made an access to information request to Saskatchewan Power Corporation (SaskPower) for a copy of an appraisal related to SaskPower's purchase of land from the Global Transportation Hub. SaskPower responded to the applicant denying access to the appraisal citing subsections 19(1)(b) and (c) of FOIP. The third party responsible for developing the appraisal provided a submission to the Commissioner for consideration. The third party asserted, in part, that release of the appraisal would infringe on the third party's copyright to the integrity of its work in accordance with the *Copyright Act*, RSC 1985 c. C-42. The Commissioner did not agree with this line of reasoning. The Commissioner referred to subsection 32.1(1)(a) of the *Copyright Act* which provided that disclosing under access to information legislation is not an infringement of copyright. The Commissioner could not find that the information was technical information as asserted by the third party as insufficient evidence was provided. As the first part of the test was not met, the Commissioner found that subsection 19(1)(b) of FOIP did not apply to the appraisal.

Subsection 19(1)(c)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

…

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

(iii) interfere with the contractual or other negotiations of;

a third party;

…

[68] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [36] to [39].

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(c) of FOIP is a mandatory, harm-based provision. It permits refusal of access in situations where disclosure could reasonably be expected to result in the harms outlined at subsections 19(1)(c)(i), (ii) and (iii) of FOIP.

Government institutions and third parties should not assume that the harms are self-evident. The harm must be described in a precise and specific way to support the application of the provision.

Subsection 19(1)(c)(i)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

…

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

…

a third party;

…

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(c)(i) of FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to result in financial loss or gain to a third party.

The following two-part test can be applied:

1. What is the financial loss or gain being claimed

Financial loss or gain must be monetary, have a monetary equivalent or value (e.g., loss of revenue or loss of corporate reputation).[69]

2. Could release of the record reasonably be expected to result in financial loss or gain to a third party

For this exemption to apply there must be objective grounds for believing that disclosing the information could result in loss or gain to a third party measured in monetary terms (e.g., loss of revenue).[70]

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[69] Adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions#undue_fin_gain. Accessed August 29, 2019.
[70] Adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions#undue_fin_gain and Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 108.

The disclosure of information that is not already in the public domain that is shown to give competitors a head start in developing competing products, or to give them a competitive advantage in future transactions may, in principle, meet the requirements. The evidence would have to demonstrate that there is a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure.[71] However, asserting disclosure would create a more competitive environment does not give rise to a reasonable expectation of a material financial loss or prejudice to a third party's competitive position.[72]

"Could reasonably be expected to" means there must be a reasonable expectation that disclosure could result in financial loss or gain to a third party. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[73]

The government institution and third party do not have to prove that a harm is probable but need to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012)*, Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way to support the application of the provision.

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[71] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [55] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [219].
[72] *Canadian Pacific Hotels Corp. v. Canada (Attorney General)*, 2004 FC 444 (CanLII) at [35].
[73] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[74]

Exemption from disclosure should not be granted based on fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason…the words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively"…[75]

Some relevant questions that may assist are:[76]

- What kind of harm is expected from disclosure.
- How will the loss or gain specifically occur.
- How much money is involved.
- Will the loss or gain affect the financial performance of the third party? How? To what degree.
- How old is the information. If the information is not current, why would disclosure still adversely affect the third party.
- Has similar information about the third party been made public in the past. If so, what was the impact. Was the impact quantifiable (e.g., lost sales or revenues).
- Is information of this nature available about competitors of the third party.
- Are there examples in other businesses where disclosure of similar information led to material financial loss or gain. If so, describe and quantify the financial loss or gain. Why is the situation parallel to that of this third party.
- What actions could the third party take to counteract potential financial loss or gain knowing the information would be disclosed.

In *Astrazeneca Canada Inc. v. Canada (Minister of Health)*, the Federal Court stated that proof of harm for the equivalent provisions in the federal *Access to Information Act*, required

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[74] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[75] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [49] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [204].
[76] Adapted from Information Commissioner of Canada resource, *FOIPPA Policy Definitions*. Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions. Accessed August 28, 2019.

reasonable speculation because "in many circumstances a party cannot rely on harm from past disclosures as evidence of reasonably expected harm because past disclosures of that type of evidence may never have occurred". Nonetheless, the party seeking to exempt the information must put forward something more than internally held beliefs and fears. Forecasting evidence, expert evidence and evidence of treatment of similar elements of proof or similar situations are frequently accepted as a logical basis for the expectation of harm.[77]

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see subsection 19(3) of this Chapter.

IPC Findings

In Review Report 007-2015, the Commissioner considered subsection 19(1)(c). An applicant had made an access to information request to the Ministry of Central Services (Central Services) for the *Statement of Work* attached to *Information Technology Consulting Services Agreement ITO-12023*. Central Services responded to the applicant advising that it was withholding portions of the *Statement of Work* pursuant to several provisions of FOIP including subsection 19(1)(c). During the review, Central Services and the third party asserted that releasing the estimated hours, hourly rate and estimated cost per consultant would result in a competitor having the ability to provide a lower rate for future contracts, which would cause the third party to experience a competitive disadvantage. However, neither Central Services nor the third party provided anything further to support this assertion. The Commissioner also stated that the winning contractor would have access to the internal cost estimates in question as it is part of the current contract and that keeping these figures from the public, including other future bidders, would jeopardize competitive bidding processes. The Commissioner found that subsection 19(1)(c) of FOIP was not properly applied by Central Services.

[77] *Astrazeneca Canada Inc. v. Canada (Minister of Health)*, 2005 FC 189 (CanLII) at [44] to [47].

In Review Report 195-2015 and 196-2015, the Commissioner considered subsection 19(1)(c) of FOIP. An applicant made two access to information requests to the Ministry of Central Services (Central Services) for all current active information technology service contracts with a maximum value of over $1 million and any between Central Services and Solvera Solutions that were over $1 million. Central Services responded to the applicant advising that some of the information in the contracts was being withheld under various provisions of FOIP including subsection 19(1)(c). Specifically, Central Services withheld the hourly rates for contracted services pursuant to subsection 19(1)(c). Upon review, both Central Services and the third party asserted that releasing the hourly rates could result in competitors having the ability to provide a lower rate for future contracts and result in undue loss to Solvera Solutions and prejudice its competitive position. The Commissioner found that the bids were evaluated based on several criteria and laid out the three stages used by Central Services at paragraph [44] of the report. As such, the selection was not based on price alone. Finally, the Commissioner found that releasing costs would increase the chances that a public body would, in the future, obtain fair bids and a competitive bidding process. The Commissioner found that subsection 19(1)(c) did not apply to the hourly rates.

In Review Report 236-2017, the Commissioner considered subsection 19(1)(c) of FOIP. An applicant made an access to information request to the Water Security Agency (WSA) for copies of a report of the standing of each firm who submitted quotes to WSA in response to a Request for Quotes. Upon review, the WSA asserted that if the quotes were released to the applicant, it would result in financial loss for the third parties and result in a competitive advantage. Relying on Review Reports 007-2015 and 195-2015 and 196-2015, the Commissioner found that the risk of being underbid by competitors for future contracts did not meet the threshold for this provision. Releasing costs would increase the chances that the public body would obtain fair bids and a competitive bidding process.

Subsection 19(1)(c)(ii)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

…

(c) information, the disclosure of which could reasonably be expected to:

…

(ii) prejudice the competitive position of;

…

a third party;

…

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(c)(ii) of FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to prejudice the competitive position of a third party.

The following two-part test can be applied:

1. **What is the prejudice to a third party's competitive position that is being claimed**

Prejudice in this context refers to detriment to the competitive position of a third party.[78]

Competitive position means the information must be capable of use by an existing or potential business competitor, whether or not that competitor currently competes for the same market share. For example:

- Information that discloses the profit margin on a private company's operations;
- Marketing plans, including market research surveys, polls; or
- Information that reveals the internal workings of a private company.[79]

2. Could release of the record reasonably be expected to result in the prejudice

The disclosure of information that is not already in the public domain that is shown to give competitors a head start in developing competing products, or to give them a competitive advantage in future transactions may, in principle, meet the requirements. The evidence would have to demonstrate that there is a direct link between the disclosure and the harm. Further, that the harm could reasonably be expected to ensue from disclosure.[80] However, asserting disclosure would create a more competitive environment does not give rise to a reasonable expectation of a material financial loss or prejudice to a third party's competitive position.[81]

"Could reasonably be expected to" means there must be a reasonable expectation that disclosure could prejudice the competitive position of a third party. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle

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[78] Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 149.
[79] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-business-interests-third party. Accessed August 28, 2019.
[80] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [55] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [219].
[81] *Canadian Pacific Hotels Corp. v. Canada (Attorney General)*, 2004 FC 444 (CanLII) at [35].

ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[82]

The government institution and third party do not have to prove that a harm is probable but need to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012),* Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

Government institutions should not assume that the harm is self-evident. The harm must be described in a precise and specific way to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[83]

Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason…the words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively"…[84]

Some relevant questions that may assist are: [85]

- Does the third party perceive that disclosure would likely prejudice its competitive position.
- How would disclosure impact on the competitive position of the third party.

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[82] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].
[83] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[84] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [49] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [204].
[85] Adapted from Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(1)(c) & (d): Questions*. Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions. Accessed August 28, 2019.

- Would it have an adverse effect on sales or marketing. How.
- Would disclosure reveal plans or strategy. If so, what kind of plans or strategy.
    - Product launch
    - Product approvals
    - Marketing plans
    - Business acquisitions
    - Asset acquisitions
    - Others
- How would knowledge of these plans specifically prejudice the third party's competitive position.
- Is there an indication of how a competitor could use the information to its advantage, i.e., by developing competing pricing strategies.
- Has the information or same subject matter been disclosed elsewhere.
    - Publications
    - In applications to government that are public
    - In the press
    - In annual reports, government filings
    - In public registries
- How old is the information. If the information is not current, why would disclosure still adversely affect the third party.
- Has similar information about the third party been made public in the past. If so, what was the impact. Was the impact quantifiable (e.g., lost sales or revenues).
- Is information of this nature available about competitors of the third party.
- Are there examples in other businesses where disclosure of similar information led to competitive prejudice. If so, describe and quantify the financial loss or gain. Why is the situation parallel to that of this third party.
- What actions could the third party take to counteract potential competitive prejudice knowing the information would be disclosed.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety, or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to

competitive position or interference with contractual negotiations of the third party. For further guidance, see subsection 19(3) of later in this Chapter.

IPC Findings

In Review Report 007-2015, the Commissioner considered subsection 19(1)(c). An applicant made an access to information request to the Ministry of Central Services (Central Services) for the *Statement of Work* attached to *Information Technology Consulting Services Agreement ITO-12023*. Central Services responded to the applicant advising that it was withholding portions of the *Statement of Work* pursuant to several provisions of FOIP including subsection 19(1)(c). During the review, Central Services and the third party asserted that releasing the estimated hours, hourly rate and estimated cost per consultant would result in a competitor having the ability to provide a lower rate for future contracts, which would cause the third party to experience a competitive disadvantage. However, neither Central Services nor the third party provided anything further to support this assertion. The Commissioner also stated that the winning contractor would have access to the internal cost estimates in question as it is part of the current contract and that keeping these figures from the public, including other future bidders, would jeopardize competitive bidding processes. The Commissioner found that subsection 19(1)(c) of FOIP was not properly applied by Central Services.

In Review Report 195-2015 and 196-2015, the Commissioner considered subsection 19(1)(c) of FOIP. An applicant made two access to information requests to the Ministry of Central Services (Central Services) for all current active information technology service contracts with a maximum value of over $1 million and any between Central Services and Solvera Solutions that were over $1 million. Central Services responded to the applicant advising that some of the information in the contracts was being withheld under various provisions of FOIP including subsection 19(1)(c). Specifically, Central Services withheld the hourly rates for contracted services pursuant to subsection 19(1)(c). Upon review, both Central Services and the third party asserted that releasing the hourly rates could result in competitors having the ability to provide a lower rate for future contracts and result in undue loss to Solvera Solutions and prejudice its competitive position. The Commissioner found that the bids were evaluated based on several criteria and laid out the three stages used by Central Services at paragraph [44] of the report. As such, the selection was not based on price alone. Finally, the Commissioner found that releasing costs would increase the chances that a public body would, in the future, obtain fair bids and a competitive bidding process. The Commissioner found that subsection 19(1)(c) did not apply to the hourly rates.

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Subsection 19(1)(c)(iii)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

…

(c) information, the disclosure of which could reasonably be expected to:

…

(iii) interfere with the contractual or other negotiations of;

a third party;

…

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(c)(iii) of FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to interfere with the contractual or other negotiations of a third party.

The following two-part test can be applied:

1. Are there contractual or other negotiations occurring involving a third party

A **negotiation** is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding.[86] It connotes a more robust relationship than "consultation". It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion.[87]

Prospective or future negotiations could be included within this exemption, if they are foreseeable.[88] It may be applied even though negotiations have not yet started at the time of the access to information request, including when there has not been any direct contact with the other party or their agent. However, a vague possibility of future negotiations is not sufficient. There must be a reasonable fact-based expectation that the future negotiations will take place.[89]

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[86] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at pp. 1248 and 1249. Relied on in SK OIPC Review Report 112-2018 at [37].
[87] *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 (CanLII) at [107]. Relied on in SK OIPC Review Report 112-2018 at [37].
[88] SK OIPC Review Report 019-2014 at [27]. Equivalent provision in LA FOIP was being considered (subsection 17(1)(d)). Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 107.
[89] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.11.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 19, 2019.

Once a contract is executed, negotiation is concluded. The exemption would generally not apply unless, for instance, the same strategy will be used again, and it has not been publicly disclosed.[90]

2. Could release of the record reasonably be expected to interfere with the contractual or other negotiations of a third party

Interfere means to hinder or hamper.[91]

"Could reasonably be expected to" means there must be a reasonable expectation that disclosure could interfere with the contractual or other negotiations of a third party. The Supreme Court of Canada set out the standard of proof for harms-based provisions as follows:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…[92]

The government institution and third party do not have to prove that a harm is probable but need to show that there is a "reasonable expectation of harm" if any of the information were to be released. In *British Columbia (Minister of Citizens' Service) v. British Columbia (Information and Privacy Commissioner), (2012)*, Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm.

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[90] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests. Accessed July 19, 2019. Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 107.
[91] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 152.
[92] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].

Government institutions and third parties should not assume that the harm is self-evident. The harm must be described in a precise and specific way to support the application of the provision.

The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.[93]

Exemption from disclosure should not be granted based on fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason…the words "could reasonably be expected" "refer to an expectation for which real and substantial grounds exist when looked at objectively"…[94]

The Federal Court in *Société Gamma Inc. v. Canada (Department of the Secretary of State)* (1994), 56 C.P.R. (3d) 58, interpreted the equivalent provision in the federal *Access to Information Act* as requiring that "it must refer to an obstruction to those negotiations and not merely the heightening of competition for the third party which might flow from disclosure".[95] Furthermore, a distinction must be drawn between actual contractual negotiations and the daily business operations of a third party.[96]

When determining whether disclosure could interfere with contractual or other negotiations of a third party, the following questions can be asked to assist:[97]

- What negotiations would be affected by disclosure.
- Are these negotiations ongoing.
- Have the negotiations been concluded.

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[93] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.4*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.
[94] *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [49] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [204].
[95] *Société Gamma Inc. v. Canada (Department of the Secretary of State)*, (April 27, 1994), T-1587-93, T-1588-93 (F.C.T.D.) at [10].
[96] *Canada (Information Commissioner) v. Canada (Minister of External Affairs)* (T.D.), [1990] 3 FC 665, 1990 CanLII 7951 (FC) at [24].
[97] Adapted from Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(1)(c) & (d): Questions*. Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions. Accessed August 29, 2019.

- What stage are the negotiations at.
- How long have they been going on.
- What is the subject matter of the negotiations.
- How would disclosure specifically interfere with the negotiations.
- Does the information relate to an outstanding issue in the negotiations. If so, how would disclosure interfere with negotiations on this issue.
- Does the information relate to issues already resolved in the negotiations.
- Would disclosure cause the issue to be reopened. Why.
- Would it otherwise interfere with negotiations. How.
- Is the information current. How old is the information.
- Does it relate to events prior to the negotiations.
- Does the other side of the negotiations already have this information. If not, have they asked for it.
- Is the information commonly known in the industry.
- Is the information reasonably available elsewhere. If so, how would disclosure interfere with negotiations.[98]

Examples of information to which this exemption may apply include negotiating positions, options, instructions, pricing criteria and points used in negotiations.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see subsection 19(3) later in this Chapter.

[98] Information Commissioner of Canada, *Investigator's Guide to Interpreting the Act, Section 20(1)(c)&(d): Questions*, available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions. Accessed July 19, 2019.

Subsection 19(1)(d)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

…

(d) a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution;

…

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(d) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution.

FOIP contains a unique exemption for accounts for routine services rendered by a government institution to a third party.[99] Only the Northwest Territories and Nunavut's *Access to Information and Protection of Privacy Act,* S.N.W.T. 1994, c-20, has a similarly worded provision.

[99] McNairn, C., Woodbury, C., 2009, *Government Information: Access and Privacy*, Carswell: Toronto, p. 4-17.

The following two-part test can be applied:

1. **Is the record a statement of a financial account relating to a third party with respect to the provision of routine services**

A **statement** is a formal written or oral account, setting down facts, a document setting out the items of debit and credit between two parties.[100]

A **"statement of a financial account"** is not defined in FOIP. However, the following is helpful in interpreting what the Legislative Assembly intended by this phrase:

> A **statement of account** is a report issued periodically (usually monthly) by a creditor to a customer, providing certain information on the customer's account, including the amounts billed, credits given, and the balance due;[101] a document setting out the items of debit and credit between two parties.[102]
>
> An **accounting** means a detailed statement of the debits and credits between parties to a contract or to a fiduciary relationship; a reckoning of monetary dealings.[103]
>
> An **account** means a record of financial expenditure and receipts; a bill taking the form of such a record.[104]
>
> **Financial** means of or pertaining to revenue or money matters.[105]

Relating to should be given a plain but expansive meaning.[106] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the

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[100] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 3006.
[101] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1699.
[102] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 3006.
[103] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 21.
[104] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 8.
[105] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 964.
[106] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].

plain unambiguous meaning of the words of the statute.[107] "*Relating to*" requires some connection between the information and the provision of routine services.[108]

With respect to are words of the widest possible scope; the phrase is probably the widest of any expression intended to convey some connection between two related subject matters.[109]

Routine means a regular course of procedure; an unvarying performance of certain acts; regular or unvarying procedure or performance.[110]

Services means labour performed in the interest or under the direction of others; the performance of some useful act or series of acts for the benefit of another, usually for a fee; an intangible commodity in the form of human effort, such as labour, skill or advice.[111]

FOIP defines a **third party** as a person, including an unincorporated entity, other than an applicant or a government institution.[112] A "local authority", as defined under subsection 2(f) of *The Local Authority Freedom of Information and Protection of Privacy Act*, can also qualify as a third party for purposes of FOIP.[113]

2. Is the statement from a government institution

FOIP defines a **government institution** at subsection 2(1)(d).

The statement must be from the government institution to meet the second part of the test.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

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[107] *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45]. This case dealt specifically with an appeal regarding Ontario's FOIP legislation.
[108] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[109] The Supreme Court of Canada (SCC) established the meaning of the phrase "*in respect of*" in *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39]. The SCC later applied the same interpretation to the phrase "*with respect to*" in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743, 1999 CanLII 680 (SCC) at [15] to [17]. Summary of this can be found in Gardner, J., and Gardner K. (2016) *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 5, S to Z at p. w-97.
[110] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 2620.
[111] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1643.
[112] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 at section 2(1)(j).
[113] SK OIPC Review Report 080-2018 at [51] and [52].

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see subsection 19(3) later in this Chapter.

IPC Findings

In Review Report 020-2016, the Commissioner considered the equivalent provision in LA FOIP. An applicant made an access to information request to the City of Lloydminster (City) for a copy of a proposal submitted by a third party for waste disposal services. The City withheld the proposal in full citing several provisions of LA FOIP including subsection 18(1)(d). Upon review, the Commissioner found that the portions being considered under subsection 18(1)(d) of LA FOIP was background information about the third party. The information did not relate to a specific financial account and did not appear to be a statement of any kind. Therefore, the Commissioner found that subsection 18(1)(d) of LA FOIP did not apply.

Subsection 19(1)(e)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

…

(e) a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution; or

…

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(1)(e) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution.

FOIP contains a unique exemption for statements of financial assistance from a prescribed Crown corporation to a third party.[114] Only the Northwest Territories and Nunavut *Access to Information and Protection of Privacy Act,* S.N.W.T. 1994, c-20, have a similarly worded provision.

The following two-part test can be applied:

1. Is the record a statement of financial assistance

A **statement** is a formal written or oral account, setting down facts, a document setting out the items of debit and credit between two parties.[115]

Financial assistance means any economic benefit, such as a scholarship or stipend, given by one person or entity to another.[116]

The exemption does not include records that merely list a company as having received a loan. It must include other details such as credits and debits to meet the definition of a statement of financial assistance.[117]

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[114] McNairn, C., Woodbury, C., 2009, *Government Information: Access and Privacy*, Carswell: Toronto, p. 4-17.
[115] *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 3006.
[116] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 774.
[117] Originated from NWT IPC Review Report 05-049 *Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 3006.

2. Was the statement provided to a third party by a prescribed Crown corporation that is a government institution

See the Appendix, Part I of the FOIP *Regulations* for prescribed Crown corporations.

When considering subsection 19(1)(e), section 11 of the FOIP *Regulations* should be considered. Section 11 of the FOIP *Regulations* provides:

> **Third party statements**
>
> **11** For the purposes of clause 19(1)(e) of the Act, the Agricultural Credit Corporation is prescribed as a Crown corporation the head of which is required to refuse to give access to a record that contains a statement of financial assistance provided to a third party.

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see subsection 19(3) of this Chapter.

IPC Findings

In Review Report F-2013-003, the Commissioner considered subsection 19(1)(e) of FOIP for the first time. An applicant made an access to information request to the Ministry of Agriculture for records related to the planning, share purchase and takeover of two businesses by Agri-Food Equity Fund in 1998. The Ministry responded to the applicant advising that the records were being withheld in full citing several provisions under FOIP including subsection 19(1)(e). Upon review, the Ministry asserted that the correspondence and documents related to the provision of financial assistance to a business through the sale of the AgriFood Equity Fund (AFEF) shares. Furthermore, that the AFEF was part of the

[117] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 774.
[117] Originated from NWT IPC Review Report 05-049. Adopted in SK OIPC Review Report F-2013-003 at [56] and [57].

Agricultural Corporation of Saskatchewan (ACS), which was a prescribed Crown corporation under FOIP at the time. Finally, that the records detailed proposed shares for debt transactions, as well as the loans owed AFEF by two third parties. The Commissioner found that although some of the records qualified as a statement of financial assistance, the Ministry did not identify which third party benefited from the financial assistance. As such, the Commissioner found that the Ministry had not met the burden of proof in demonstrating that subsection 19(1)(e) of FOIP applied to the records.

In Review Report F-2014-002, the Commissioner considered subsection 19(1)(e) of FOIP. An applicant made an access to information request to Saskatchewan Crop Insurance Corporation (SCIC) for cultivated and seeded acres claimed by tenants on the applicant's land between 2001 and 2010 SCIC responded to the applicant indicating that the information was being withheld citing several provisions including subsection 19(1)(e) of FOIP. Upon review, the SCIC asserted that the SCIC was a prescribed Crown corporation. Furthermore, the information related to financial assistance provided by SCIC to an Operator. The Commissioner found that no portion of the Seeded Acreage Reports appeared to be a statement of financial assistance. As such, the Commissioner found that subsection 19(1)(e) of FOIP did not apply.

Subsection 19(1)(f)

Third party information

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(f) information supplied by a third party to support an application for financial assistance mentioned in clause (e).

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party;

Subsection 19(1)(f) of FOIP is a mandatory class-based exemption. It permits refusal of access in situations where a record contains information supplied by a third party to support an application for financial assistance mentioned in clause (e).

FOIP contains a unique exemption for applications for financial assistance from a prescribed Crown corporation to a third party.[118] Only the Northwest Territories and Nunavut *Access to Information and Protection of Privacy Act,* S.N.W.T. 1994, c-20, have a similarly worded provision.

The following two-part test can be applied:

1. Was the information to support an application for financial assistance

The provision is intended to protect information that a third party provides to a Crown corporation, which supports its application for financial assistance.

Support means to corroborate.[119]

Application means a formal request to an authority.[120]

Financial assistance means any economic benefit, such as a scholarship or stipend, given by one person or entity to another.[121]

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[118] McNairn, C., Woodbury, C., 2009, *Government Information: Access and Privacy*, Carswell: Toronto, p. 4-17.
[119] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1440.
[120] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 64.
[121] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 774.

2. Was the information supplied by a third party

Supplied means provided or furnished.[122]

Information may qualify as "supplied" if it was directly supplied to a government institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[123]

Information gathered by government inspectors via their own observations does not qualify as information "supplied" to the government institution. Judgements or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.[124]

Records can still be "supplied" even when they originate with the government institution (i.e., the records still may contain or repeat information extracted from documents supplied by the third party). However, the third party objecting to disclosure will have to prove that the information originated with it and that it is confidential.[125]

Whether confidential information has been "supplied" to a government institution by a third party is a question of fact. The content rather than the form of the information must be considered; the mere fact that the information appears in a government document does not, on its own, resolve the issue.[126]

Pursuant to subsection 19(2) of FOIP, where a record contains third party information, the government institution can release it with the written consent of the third party.

Pursuant to subsection 19(3) of FOIP, where a record contains third party information, the government institution can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see subsection 19(3) of this Chapter.

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[122] 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#supplied. Accessed August 21, 2019.
[123] SK OIPC Review Reports F-2005-003 at [17], F-2006-002 at [40].
[124] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [156] and [158].
[125] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [157].
[126] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [158].

IPC Findings

In Review Report F-2013-003, the Commissioner considered subsection 19(1)(f) of FOIP for the first time. An applicant made an access to information request to the Ministry of Agriculture for records related to the planning, share purchase and takeover of two businesses by Agri-Food Equity Fund in 1998. The Ministry responded to the applicant advising that the records were being withheld in full citing several provisions under FOIP including subsection 19(1)(f). Upon review, the Ministry asserted that subsection 19(1)(f) applied to the project submissions provided by the third party which outlined proposals, plans, amount of debt, marketing plans, financial analysis statements etc. Furthermore, that the third party supplied sales figures, sales projections, losses incurred by the third party, projected losses, as well as information related to inspections and improvements. The Ministry asserted that this information was provided to request additional investment in the third party by AgriFood Equity Fund (AFEF). The Ministry asserted that the AFEF was part of the Agricultural Corporation of Saskatchewan (ACS), which was a prescribed Crown corporation under FOIP at the time. The Commissioner found that although the Ministry claimed the records were provided by the third party, it appeared the record was created by AFEF. Furthermore, that the record appeared to be commenting and making recommendations with respect to the third party's need for financial assistance. AFEF was apparently a business unit of the Crown corporation. The Commissioner found that the record was supplied to the Ministry by another government institution. As such, the Commissioner found that the burden of proof was not met in establishing that subsection 19(1)(f) of FOIP applied.

In Review Report F-2014-002, the Commissioner considered subsection 19(1)(f) of FOIP. An applicant made an access to information request to Saskatchewan Crop Insurance Corporation (SCIC) for cultivated and seeded acres claimed by tenants on the applicant's land between 2001 and 2010. SCIC responded to the applicant indicating that the information was being withheld citing several provisions including subsection 19(1)(f) of FOIP. Upon review, the SCIC asserted that the SCIC was a prescribed Crown corporation. Furthermore, the information related to financial assistance provided by SCIC to an Operator. The Commissioner found that SCIC did not offer any evidence that the third party supplied the information in the Seeded Acreage Reports for the purposes of financial assistance. Due to the lack of persuasive argument and lack of evidence offered, the Commissioner found that subsection 19(1)(f) of FOIP did not apply.

Subsection 19(2)

Third party information

19(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

Subsection 19(2) of FOIP provides that the government institution may give access to a record that contains third party information if the third party consents in writing to disclosure. The provision is intended to prevent situations where the government institution would be under an obligation to withhold a record when the third party agreed to disclosure.[127]

If the government institution determines that the information qualifies as third party information, it should make a reasonable effort to seek the consent of the third party to disclose the requested information.[128]

IPC Findings

In Review Report 133-2020, the Commissioner considered subsection 19(1)(b) of FOIP. The Ministry of Highways and Infrastructure (Highways) withheld third party information from the applicant pursuant to this provision. The third party had indicated to Highways that it objected to the release of the information. However, upon review, the third party indicted to the Commissioner that it had "reviewed the records and [did] not object to the release of the records." The Commissioner cited section 19(2) of FOIP, and recommended Highways release specific records related to that third party.

[127] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.10*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed November 19, 2019.
[128] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.10*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed September 4, 2019.

Subsection 19(3)

Third party information

19(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 19(3) of FOIP is a discretionary provision for the release of third party information in circumstances where the head of the government institution forms the opinion that disclosure "could reasonably be in the public interest as it relates to public health, public safety or protection of the environment".

A government institution should consider subsection 19(3) when dealing with third party information. A government institution should first determine that the information is indeed third party information pursuant to one of the subsections outlined at subsection 19(1) of FOIP. If it is, then consider subsection 19(3).

To properly apply the provision, government institutions should do the following:[129]

i) Determine whether the information qualifies or might qualify for exemption pursuant to subsection 19(1).

The public interest "override" comes into play only when all or part of a record falls within one or more of the classes of records described in subsection 19(1).

[129] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.11*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed September 4, 2019.

ii) Determine whether the record is related to public health, public safety or protection of the environment.

When undertaking the initial review of records, consider immediately whether a public interest "override" may come into play.

iii) Consider whether disclosure of the record related to public health, public safety or protection of the environment may be in the public interest.

iv) Send a notice to the third party pursuant to section 34 of FOIP.

If the records are related to public health, public safety or protection of the environment, government institutions should ask the third party to provide not only representations as to why they consider the information to be exempted from disclosure, but also reasons why disclosure in the public interest should not outweigh in importance the injury involved. The government institution should be very clear about the type of information needed from the third party to decide.

v) Analyze the representations of the third party.

Once the representations have been received, government institutions should thoroughly analyze the arguments presented by the third party to justify subsection 19(1) exemptions.

If the government institution accepts the third party's representations as substantiating an exemption under subsection 19(1) of FOIP, it must then consider the representations made against disclosure in the public interest.

Once a decision is made, the government institution should provide notification procedures as set out in section 37 of FOIP.

The following three-part test can be applied:

1. Does the information relate to public health, public safety or protection of the environment

Relates to should be given a plain but expansive meaning.[130] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.[131] "*Relating to*" requires some

[130] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].
[131] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45].

connection between the information and public health, public safety or protection of the environment.[132]

Public health means the health of the community at large, the healthful or sanitary condition of the general body of people or the community collectively; especially the methods of maintaining the health of the community, as by preventative medicine an organized care for the sick.[133] Public health refers to the well-being of the public at large. This may include physical, mental or emotional health.[134]

Public safety means the welfare and protection of the general public, usually expressed as a governmental responsibility.[135]

Protection of the environment refers to guarding or defending natural surroundings, i.e., plants and animals. For example, it may be necessary to disclose the information of an industrial plant that is discharging toxic wastes into a waterway.[136]

2. Could disclosure of the information reasonably be expected to be in the public interest

There must be a public interest in disclosure of the information, not a private interest.

Public interest is not black and white; it is a matter of degree. There is always a balance to be struck.[137] In determining if there is a public interest, the following can be considered:[138]

- Whose interests would be affected by disclosure other than the third party.
    - Individual
    - General

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[132] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[133] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 864.
[134] Government of Newfoundland and Labrador resource, *Access to Information: Policy and Procedures Manual, October 2017* at p. 103.
[135] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1488.
[136] 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.
[137] AB IPC Order 096-002 at p. 17.
[138] Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(2), (5), (6): Questions – Disclosure Authorized in Public Interest*. Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-20256-questions-disclosure-authorized-public-interest. Accessed September 4, 2019.

    - Describe affected group
- Does the information concern an event/proposal/incident/condition involving health, safety or protection of the environment.
    - If so, what group in the public is affected by the event/proposal/incident/condition.
- Is the event/proposal/incident/condition one which requires government approval.
- Did it result in government enforcement activity or investigation.
- Did it involve contravention or violation of standards in health, safety, and environmental protection.
    - Describe the extent of the danger or risk.
    - Who is affected by the danger or risk.
- Has the danger or risk been alleviated.
    - To what extent.
    - When.
    - What was the degree of exposure to the danger or risk before it was alleviated.
    - For how long.
- What was the impact of any past event/incident described in the record.
    - Describe the degree or extent.
- What are the remaining effects or impacts.
- Are people, animals or environment currently exposed to the dangers or risks arising from the event described in the information.
    - To what degree.
- Have the issues described in the information been publicly examined elsewhere.
    - In an ongoing process.
- Will the process likely result in disclosure of the information to the public or in public discussion of the information.
- What are the dangers, if any, that would be caused by disclosure (aside from 19(1) harm).
    - What are they.

- Why would they arise.

Subsection 19(3) includes the requirement that the information "*could reasonably be expected*" to be in the public interest. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*. Although this part of the provision does not contemplate harm, the threshold proposed by the Supreme Court is instructive:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"…

3. Could the public interest in disclosure reasonably be expected to clearly outweigh the importance of the financial loss or gain, prejudice to competitive positions or interference with contractual relationships relating to a third party

Clear means free from doubt; sure; unambiguous.[139]

Use of the word "*clearly*" means the test is rigorous, limiting the applicability of the public interest "override".[140]

Outweigh means to be of more importance or value than something else.[141]

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[139] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 317.
[140] Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.11*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed September 4, 2019.
[141] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1330.

In determining if the public interest clearly outweighs in importance the financial loss or gain, competitive prejudice, or interference in negotiations of a third party, the following can be considered:[142]

- Quantify the financial loss or gain, prejudice to competitive position or degree of interference in negotiations of the third party.
- In the case of information described in subsection 19(1), what degree of importance is attached to keeping the information confidential.
- What is the nature of the relationship between the government institution and the third party, i.e., why did the third party supply the information to the government.
    - Voluntary
        - If so, what were the circumstances
    - Mandatory
- Describe any chilling effect of disclosure, if any.
- Describe any impact on the government relationship or duty to third party to maintain information in a confidential fashion.
- What factors did the government institution consider in assessing whether subsection 19(3) applies.
- Why did the government institution decide not to disclose pursuant to subsection 19(3).
- Did the government institution consider the purposes of FOIP in its decision. For example, that it:
    - Provides for the right of access;
    - Government information should be available to the public; and
    - Necessary exemptions should be limited and specific.
- Did the government institution consider:
    - The value of public education with respect to the subject matter of the information;
    - Public confidence in regulatory, enforcement or investigatory systems;
    - Need for public awareness of successes or failures of regulatory enforcement or investigatory systems; and

[142] Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(2), (5), (6): Questions – Disclosure Authorized in Public Interest*. Available at https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-20256-questions-disclosure-authorized-public-interest. Accessed September 4, 2019.

    - The need for public awareness of legislative or regulatory gaps or inadequacies in the areas of public health, safety, or environmental protection.
- Were the interests of all groups interested in disclosure of the information considered.
    - How
- What is the danger of further disclosure.
- Was the decision not to apply subsection 19(3) based in part on a fear of public confusion.
    - If so, what would give rise to or cause the confusion.
- Could the government institution take measures to reduce or eliminate the dangers.
    - Are there public relations measures.
    - Are there explanations that can be given.
    - Why could no other measures be taken.
- Could the third party take measures (with respect to subsection 19(1) information) that could reduce the impact on them of disclosure.
    - What measures.
    - Why could no measures be taken.
- Was the government's own performance an issue in the consideration leading to a decision to not apply subsection 19(3).
- Have there been any allegations of impropriety, negligence, cover-up or inadequacy about the government institution arising from the matters described in the records.
- Has the government institution responded to these allegations.

Subsection 19(3) includes the requirement that the public interest in disclosure "*could reasonably be expected*" to clearly outweigh in importance the harms listed. The meaning of the phrase **"could reasonably be expected to"** in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner), (2014)*:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well

beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"...

IPC Findings

The Commissioner considered subsection 19(3) of FOIP in Review Report 043-2015. An applicant made an access to information request to the Ministry of Environment for the "2012 and 2013 Water and Air Quality Compliance Reports". The Ministry withheld portions of the two reports citing subsections 19(1)(b) and (c) of FOIP (third party information). Upon review, the Commissioner found that subsection 19(1)(c) of FOIP applied to portions of the reports. Furthermore, the Commissioner found that the public interest resulting from disclosure of the information would outweigh in importance, any financial loss or prejudice to the competitive position of the third party. As such, the Commissioner recommended the reports be released pursuant to subsection 19(3) of FOIP.

Section 29: Disclosure of Personal Information

Subsection 29(2)(o): Disclosure of personal information

Disclosure of personal information

29(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:

…

(o) for any purpose where, in the opinion of the head:

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or

(ii) disclosure would clearly benefit the individual to whom the information relates;

Subsection 29(2)(o) of FOIP is a discretionary provision for the release of personal information without consent in circumstances where the head of the government institution forms the opinion that the public interest "clearly outweighs any invasion of privacy" or where disclosure would "clearly benefit the individual to whom the information relates."

The provision provides government institutions with a tool to help them effectively balance an individual's right to privacy with other important contextual interests.

This provision is relevant for this Chapter as subsection 34(1)(b) of FOIP provides that notice must be given to a third party individual where their personal information is being released pursuant to subsection 29(2)(o) of FOIP.

Subsection 29(2)(o)(i)

Disclosure of personal information

29(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:

…

(o) for any purpose where, in the opinion of the head:

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or

The head can disclose personal information in a record without the consent of the individual to whom it relates when it is deemed to be in the public interest to do so, more specifically, where the public interest in releasing outweighs any invasion of privacy.

All three parts of the following test must be met:

1. Is the information 'personal information'

In order for subsection 29(2)(o) of FOIP to be engaged, there must be "personal information" involved as defined by subsection 24(1) of FOIP. Subsection 24(1) of FOIP starts with the following:

> **24**(1) Subject to subsections (1.1) and (2), **"personal information"** means personal information about an identifiable individual that is recorded in any form, and includes:
> …

Including means that the list of information that follows is incomplete (non-exhaustive). The examples in the provision are the types of information that could be presumed to qualify as personal information.[143] As the provision uses the word "including", the list of examples provided for at subsection 24(1) of FOIP (i.e., (a) through (k)) are not meant to be exhaustive. This means there can be other types of information that could qualify as personal information.

So more broadly, to constitute personal information, two elements must be present:

i. The information must be about an identifiable individual; and

ii. The information must be personal in nature.[144]

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[143] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019. Definition of "including" same as SK OIPC *Guide to FOIP*, Chapter 4: *Exemptions from the Right of Access*, for subsections 16(1), 17(1)(g) and 22(a) of FOIP.
[144] SK OIPC Review Report F-2010-001 at [118] to [128].

Information is about an identifiable individual if:

- The individual can be identified from the information (e.g., name, where they live); or
- The information, when combined with information otherwise available, could reasonably be expected to allow the individual to be identified.[145]

About means on the subject of or concerning.[146] *About* an identifiable individual means the information is not just the subject of something but also relates to or concerns the subject.[147]

Identifiable means that it must be reasonable to expect that an individual may be identified if the information were disclosed.[148] The information must reasonably be capable of identifying particular individuals because it either directly identifies a person or enables an accurate inference to be made as to their identity when combined with other available sources of information (data linking) or due to the context of the information in the record.[149]

FOIP uses the words "person" and "individual" in various sections of the Act. Each word has different meanings. Subsection 24(1) of FOIP uses "individual".

Individual means natural persons (human beings).[150] Use of the word *individual* in this provision makes it clear that the protection provided relates only to a natural person or

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[145] Adapted from Government of Manitoba, *FIPPA for Public Bodies – Resource Manual,* Chapter 2*, Scope of FIPPA – Who and What Falls under FIPPA* at p. 44. Available at https://www.gov.mb.ca/fippa/public_bodies/resource_manual/pdfs/chap_2.pdf. Accessed on April 24, 2020.

[146] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed.* at p. 4, (Oxford University Press).

[147] *Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board)*, 2006 FCA 157 (CanLII), [2007] 1 FCR 203. Also see the Office of the Privacy Commissioner of Canada resource, *PIPEDA Interpretation Bulletin: Personal Information*, 2013, available at https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-interpretation-bulletins/interpretations_02/.

[148] ON IPC Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.). See also SK OIPC Review Report LA-2013-001 at [57].

[149] Originated and adapted from BC IPC Order P14-03 at [16].

[150] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at pp. 924, 1238 and 1378.

human being.[151] Therefore, a business or corporation would not constitute an "individual" for purposes of subsection 24(1) of FOIP.

Person is the broader term and means individual but also includes a corporation and their heirs, executors, administrators or other legal representatives of a person.[152]

Personal in nature means of, affecting or belonging to a particular person; of or concerning a person's private rather than professional life.[153]

For more on what constitutes personal information, see Chapter 6: *Protection of Privacy* for a detailed breakdown of subsections 24(1)(a) through (k) of FOIP.

2. Is there a public interest in the information

Public Interest – the government institution should first ask - is there a relationship between the record and the Act's central purpose of shedding light on the operations of government? Consider whether the information in the record serves the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information it has to make effective use of when expressing public opinion or making political choices.[154]

Some further things to consider regarding public interest:

- Is there another public process or forum established to address public interest considerations.[155]
- Has a significant amount of information already been disclosed, and it is adequate to address any public interest considerations.[156]

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[151] ON IPC Order 16 at p. 19. See also Government of Manitoba, *FIPPA for Public Bodies – Resource Manual,* Chapter 2*, Scope of FIPPA – Who and What Falls under FIPPA* at p. 44. Available at https://www.gov.mb.ca/fippa/public_bodies/resource_manual/pdfs/chap_2.pdf. Accessed on April 24, 2020.
[152] *The Legislation Act*, SS 2019, c L-10.2 at s 2-29.
[153] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed*., (Oxford University Press) at p. 1065. This definition was also relied on in SK OIPC Review Report 082-2019, 083-2019 at [94].
[154] ON IPC resource, *Public Interest Disclosure*, September 2021, at p. 5. Also cited in SK OIPC Review Report 082-2017 at [29].
[155] ON IPC Orders P-123/124, P-391 at p. 7, M-539 at p. 6 and PO-2472 at p. 10.
[156] ON IPC Orders P-532 at p. 10, P-568 at p. 5, PO-2626 at p. 19 and PO-2614 at p. 24.

- Is there already wide public coverage or debate of the issue and disclosing the records would not shed further light on the matter.[157]

A public interest does not exist where the interests being advanced are essentially private in nature. However, where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[158]

A public interest may not exist where a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding.[159]

A public interest is not automatically established where the applicant is a member of the media.[160]

The government institution should be able to clearly identify what the public interest would be.

3. Does the public interest clearly outweigh any invasion of privacy

Public interest is not black and white; it is a matter of degree. There is always a balance to be struck.[161]

If a public interest is found to exist, the government institution must weigh that public interest against the personal privacy interests of the individuals whose personal information appears in the record. The public interest must be found to "clearly outweigh" any invasion of privacy that would result from disclosure.

Clear means free from doubt; sure; unambiguous.[162]

Clearly outweigh: If a public interest is established, it must then be balanced against the purpose of the exemption that has been found to apply to determine whether it clearly outweighs that purpose. The public interest override provision recognizes that while

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[157] ON IPC Order P-613 at p. 9.
[158] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773. See also ON IPC Orders PO-4277 at [86] and PO-2472 at p. 10.
[159] ON IPC Orders PO-2626 at p. 17 and PO-2472 at p. 10.
[160] ON IPC Orders M-773 at p. 7 and PO-4277 at [87].
[161] Originated from AB IPC Order 096-002 at p. 17. Also cited in SK OIPC resource, *Guide to FOIP*, Chapter 4: *Exemptions from the Right of Access* for section 19(3) at p. 235.
[162] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 317.

exemptions serve to protect valid interests, they must occasionally yield to an overriding public interest to access the information that has been requested.[163]

An important consideration when determining whether the public interest in releasing the information clearly outweighs the purpose of the exemption is the extent to which denying access to the information in the circumstances would be consistent with the very purpose of the exemption.[164]

Some things to consider regarding any invasion of privacy:

- Consider the representations made by the affected individuals arguing against disclosure.
- Should the affected individuals' privacy rights be given preference over the public interest that exists in disclosing the record.

The federal *Privacy Act* has a substantially similar provision. Subsection 8(2)(m)(i) of the *Privacy Act* also considers whether "the public interest in disclosure clearly outweighs any invasion of privacy". The federal Privacy Commissioner established an *invasion of privacy* test. Government institutions can apply this test to determine the level of privacy risk in the disclosure.[165] The test involves three interrelated risk factors that will help government institutions determine whether the public interest in disclosure clearly outweighs any invasion of privacy:

a. Sensitivity of the information

- Consider whether the type of information is of a detailed (e.g., name and address) or highly personal (e.g., health information) nature.
- Evaluate the context in which the information was collected and determine whether any contextual sensitivities apply to the information. For example, a list of public servants may not be considered particularly sensitive, but that same list, if collected to identify employees having a specific illness would be considered sensitive based on the context.

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[163] ON IPC resource, *Public Interest Disclosure*, September 2021, at p. 6.
[164] ON IPC resource, *Public Interest Disclosure*, September 2021, at p. 7.
[165] Office of the Privacy Commissioner of Canada, *Public interest disclosures by federal institutions under the Privacy Act*, June 2022, available http://Public interest disclosures by federal institutions under the Privacy Act - Office of the Privacy Commissioner of Canada. Accessed Sept. 1, 2022.

b. Expectations of the individual

- Evaluate the conditions under which the personal information was collected and consider what expectations the collecting institution may have established for its confidentiality, including whether the possibility of disclosure is conveyed in an applicable Privacy Notice Statement.
- Consider the reasonable expectations of privacy that apply to the context in which the information was collected. To determine what constitutes a reasonable expectation of privacy, courts will look at the totality of circumstances. This could include location of collection (e.g., in a private conversation as compared to a public town hall), context of collection (e.g., in a routine application for services as compared to a letter sent to several government ministers), etc.

c. Probability and degree of injury

- Consider the probability and degree or gravity of injury relative to the benefits of the disclosure to the public. This could include personal or physical injury, or damage to the reputation of an individual or others, which causes adverse consequences (e.g., any harm or embarrassment that negatively affects an individual's career, reputation, financial position, safety, health or well-being).
- Determine the potential of injury if the receiving party wrongfully disclosed the information further.[166]

If disclosing under this provision, government institutions should be careful not to disclose more personal information than is necessary for the purpose (i.e., abide by the data minimization principle, see Chapter 6: *Protection of Privacy* for more information).

Where the government institution intends to rely on this provision to release personal information in response to an access to information request, notification is required to the individual(s) pursuant to the third party notification requirements outlined at section 34 of FOIP. See *Section 34: Notice to third party* later in this Chapter for more on notification requirements.

[166] Office of the Privacy Commissioner of Canada, *Public interest disclosures by federal institutions under the Privacy Act*, June 2022, available http://Public interest disclosures by federal institutions under the Privacy Act - Office of the Privacy Commissioner of Canada. Accessed Sept. 1, 2022.

IPC Findings

The Commissioner considered the equivalent subsection in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) in Investigation Report 092-2015 to 095-2015. The investigation involved the collection and disclosure of a care aide's personal information. The Commissioner found that there was a public interest in the release of the information and that the public interest outweighed any invasion of privacy.

In Review Report LA-2013-001, the Commissioner considered whether opinion evidence that was integral to an overall record of a harassment investigation should be released to the applicant. The record included opinions of individuals other than the applicant and the applicant was the alleged harasser. The Commissioner, bound by the decision in *Liick v. Saskatchewan (Minister of Health)*, 1994 CanLII 4934 (SK QB), found that the personal information of the other individuals in the investigation record should be released to the applicant because release would clearly benefit the applicant and the public interest in disclosure clearly outweighed any invasion of privacy that could result from disclosure. The Commissioner recommended release of the entire record with the exception of the personal health information of other individuals and information subject to subsection 14(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act*.

Subsection 29(2)(o)(ii)

Disclosure of personal information

29(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:

...

(o) for any purpose where, in the opinion of the head:

...

(ii) disclosure would clearly benefit the individual to whom the information relates;

The head can disclose personal information in a record without the consent of the individual to whom it relates when it is deemed disclosure would clearly benefit the individual.

All three parts of the following test must be met:

1. Is the information 'personal information'

In order for subsection 29(2)(o) of FOIP to be engaged, there must be "personal information" involved as defined by subsection 24(1) of FOIP. Subsection 24(1) of FOIP starts with the following:

> **24**(1) Subject to subsections (1.1) and (2), **"personal information"** means personal information about an identifiable individual that is recorded in any form, and includes:
>
> …

Including means that the list of information that follows is incomplete (non-exhaustive). The examples in the provision are the types of information that could be presumed to qualify as personal information.[167] As the provision uses the word "including", the list of examples provided for at subsection 24(1) of FOIP (i.e., (a) through (k)) are not meant to be exhaustive. This means there can be other types of information that could qualify as personal information.

So more broadly, to constitute personal information, two elements must be present:[168]

i. The information must be about an identifiable individual; and

ii. The information must be personal in nature.

Information is about an identifiable individual if:

- The individual can be identified from the information (e.g., name, where they live); or
- The information, when combined with information otherwise available, could reasonably be expected to allow the individual to be identified.[169]

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[167] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/cabinet-local-public-body-confidences. Accessed June 26, 2019. Definition of "including" as included in SK OIPC *Guide to FOIP*, Chapter 4: *Exemptions from the Right of Access*, for subsections 16(1) and 17(1)(g) of FOIP.

[168] SK OIPC Review Report F-2010-001 at [118] to [128].

[169] Adapted from Government of Manitoba, *FIPPA for Public Bodies – Resource Manual,* Chapter 2, *Scope of FIPPA – Who and What Falls under FIPPA* at p. 44. Available at https://www.gov.mb.ca/fippa/public_bodies/resource_manual/pdfs/chap_2.pdf. Accessed on April 24, 2020.

About means on the subject of or concerning.[170] *About* an identifiable individual means the information is not just the subject of something but also relates to or concerns the subject.[171]

Identifiable means that it must be reasonable to expect that an individual may be identified if the information were disclosed.[172] The information must reasonably be capable of identifying particular individuals because it either directly identifies a person or enables an accurate inference to be made as to their identity when combined with other available sources of information (data linking) or due to the context of the information in the record.[173]

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Individual means natural persons (human beings).[174] Use of the word *individual* in this provision makes it clear that the protection provided relates only to a natural person or human being.[175] Therefore, a business or corporation would not constitute an individual for purposes of subsection 24(1) of FOIP.

Person is the broader term and means individual but also includes a corporation and their heirs, executors, administrators or other legal representatives of a person.[176]

Personal in nature means of, affecting or belonging to a particular person; of or concerning a person's private rather than professional life.[177]

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[170] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed.* at p. 4, (Oxford University Press).
[171] *Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board)*, 2006 FCA 157 (CanLII), [2007] 1 FCR 203. Also see the Office of the Privacy Commissioner of Canada resource, *PIPEDA Interpretation Bulletin: Personal Information*, 2013, available at https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-interpretation-bulletins/interpretations_02/.
[172] ON IPC Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.). See also SK OIPC Review Report LA-2013-001 at [57].
[173] Originated and adapted from BC IPC Order P14-03 at [16].
[174] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at pp. 924, 1238 and 1378.
[175] ON IPC Order 16 at p. 19. See also Government of Manitoba, *FIPPA for Public Bodies – Resource Manual*, Chapter 2, *Scope of FIPPA – Who and What Falls under FIPPA* at p. 44. Available at https://www.gov.mb.ca/fippa/public_bodies/resource_manual/pdfs/chap_2.pdf. Accessed on April 24, 2020.
[176] *The Legislation Act*, SS 2019, c L-10.2 at s 2-29.
[177] Pearsall, Judy, *Concise Oxford Dictionary*, *10th Ed.*, (Oxford University Press) at p. 1065. This definition was also relied on in SK OIPC Review Report 082-2019, 083-2019 at [94].

For more on what constitutes personal information, see Chapter 6: *Protection of Privacy* for a detailed breakdown of subsections 24(1)(a) through (k) of FOIP.

2. Does the personal information relate to the individual

To **relate** to means connected in some way; having relationship to or with something else.[178]

Relating to should be given a plain but expansive meaning.[179] The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as "substantial connection") for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.[180] "*To whom the information relates*" requires some connection between the individual and the personal information in the record.[181]

Generally, the information at issue would be the personal information of the individual for it to relate to them under Part IV of FOIP.

3. Would disclosure clearly benefit the individual

Clear means free from doubt; sure; unambiguous.[182]

Benefit means a favourable or helpful factor or circumstance; advantage, profit.[183]

Government institutions should be careful not to disclose more personal information than is necessary for the purpose (i.e., abide by the data minimization principle, see Chapter 6: *Protection of Privacy* for more information).

Where a government institution intends to rely on this provision to release personal information, notification is required to the individual to whom the information relates pursuant to the third party notification requirements outlined at subsection 34(1)(b) of FOIP.

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[178] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1541.
[179] *Gertner v. Lawyers' Professional Indemnity Company,* 2011 ONSC 6121 (CanLII) at [32].
[180] *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45]. This case dealt specifically with an appeal regarding Ontario's FOIP legislation.
[181] Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].
[182] Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 317.
[183] 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.

IPC Findings

The Commissioner considered the equivalent subsection in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) in Investigation Report 092-2015 to 095-2015. The investigation involved the collection and disclosure of a care aide's personal information. The Commissioner found that there was a public interest in the release of the information and that the public interest outweighed any invasion of privacy.

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Section 34: Notice to third party

Notice to third party

34(1) Where a head intends to give access to a record that the head has reason to believe may contain:

(a) information described in subsection 19(1) that affects the interest of a third party; or

(b) personal information that may be disclosed pursuant to clause 29(2)(o) and that relates to a third party;

and in the opinion of the head, the third party can reasonably be located, the head shall give written notice to the third party in accordance with subsection (2).

(2) The notice mentioned in subsection (1):

(a) is to include:

(i) a statement that:

(A) an application for access to a record described in subsection (1) has been made; and

(B) the head intends to give access to the record or to part of it;

(ii) a description of the record that the head has reason to believe may contain:

(A) information described in subsection 19(1) that affects the interest of the third party; or
(B) personal information that may be disclosed pursuant to clause 29(2)(o) and that relates to the third party; and

(iii) a statement that the third party may, within 20 days after the notice is given, make representations to the head as to why access to the record or part of the record should not be given; and

(b) subject to subsection (3), is to be given within 30 days after the application is made.

(3) Section 12 applies, with any necessary modification, to the extension of the period set out in clause (2)(b).

(4) Where, in the opinion of the head, it is not reasonable to provide a notice to a third party pursuant to subsection (1), the head may dispense with the giving of notice.

When reviewing a responsive record, government institutions may encounter information that appears to be about a third party. This includes third party information as described in

subsection 19(1) of FOIP and personal information the government institution intends to disclose pursuant to subsection 29(2)(o) of FOIP.

Section 34 of FOIP lays out who should receive notice and what the notice should include.

In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23, the Supreme Court of Canada summarized the requirement to provide notice and the nature of the review to be performed by the head of a government institution. In that case, the Court was considering the third party notice provision in the federal *Access to Information Act* (s. 27(1)) which has similar wording to section 34 of FOIP. In the court's view, the head must conduct a sufficient review of the requested material in order to decide if the threshold for notice has been met:

> [84] To sum up my conclusions on s. 27(1):
>
> (i) With respect to third party information, the institutional head has equally important duties to disclose and not to disclose and must take both duties equally seriously.
>
> (ii) The institutional head:
>
> - should *disclose* third party information *without notice* only where the information is clearly subject to disclosure, that is, there is *no reason to believe that it is exempt;*
>
> - should *refuse to disclose* third party information *without notice* where the information is clearly exempt, that is, where there is no reason to believe that the information is subject to disclosure.
>
> (iii) The institutional head must give notice if he or she:
>
> - Is in doubt about whether the information is exempt, in other words if the case does not fall under the situations set out in point (ii);
>
> - Intends to disclose exempted material to serve the public interest pursuant to s. 20(6) [disclosure in the public interest]; or
>
> - Intends to disclose severed material pursuant to s. 25 [severability].[184]

Subsection 34(1)(a)

[184] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23 at [84].

Notice to third party

34(1) Where a head intends to give access to a record that the head has reason to believe may contain:

(a) information described in subsection 19(1) that affects the interest of a third party; or

...

and in the opinion of the head, the third party can reasonably be located, the head shall give written notice to the third party in accordance with subsection (2).

Subsection 34(1)(a) of FOIP requires that where a government institution intends to release information that might constitute third party information pursuant to subsection 19(1) of FOIP, the third party must be informed if the third party can reasonably be located.

It is important to note that if the government institution does not intend to release the third party information, no notice is required to the third party. If the government institution intends to withhold, then it is inappropriate practice to give third party notice as it causes unnecessary delay in the process.

The following steps can be taken for subsection 34(1)(a) of FOIP:

1. Is the information third party information

Determine if the information at issue constitutes third party information pursuant to subsection 19(1) of FOIP. For assistance with section 19, see Chapter 4: *Exemptions from the Right of Access* for more information on the interpretation and tests to apply for subsections 19(1)(a), (b), (c), (d), (e), and (f) of FOIP.

a. No, it is not third party information...

Where the head of the institution concludes that the information at issue does not fit the circumstances in subsection 19(1) of FOIP, notice to a third party is not required and the information can be released or considered for exemption under another provision of FOIP. A third party would not have a right to apply to the Commissioner for review under subsection

49(3) of FOIP where the head of the government institution determined the information at issue was not third party information under subsection 19(1) of FOIP.[185]

The absence of standing

If a government institution concludes that a particular request is not likely to involve third party information, it is not required to give notice to anyone before deciding in favour of disclosure. A person potentially affected by the release of the requested information might maintain:

- That the institution was wrong in its preliminary conclusion about the nature of the information, and
- That the decision to disclose was in error.

However, that person, for lack of third party status, will usually be without standing to obtain a review of any determination made by the government institution. The institution may have erred in not recognizing a third party interest, yet there is no statutory remedy in those circumstances. Review is generally open only to someone whom the institution was prepared to treat as a third party entitled to make representations in the context of its consideration of the request for information.[186]

b. Yes (or maybe), it is third party information…

If subsection 19(1) of FOIP appears to apply, the head of the government institution must decide whether to release the third party information or withhold it from release. It may not have a decision made yet on whether it will release, or it may not be sure it is third party information so it may want to hear from the third party first (i.e., representations as per s. 36).

Make sure to identify all potential third parties. If the records engage the interests of multiple third parties, the most practical method of working with the time limits is to ensure that all

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[185] See *Sawridge Indian Band v. Canada (Minister of Indian Affairs and Northern Development) (1987), 10 F.T.R. 48*, aff'd sub nom and *Twinn v. Minister of Indian Affairs and Northern Development (1987), 80 N.R. 263* (F.C.A.) at p. 373. These decisions dealt with the federal *Access to Information Act* but are relevant for FOIP. The court held that the right to seek a review was not available to the third party because notice was not required because the information was not deemed third party information.
[186] *Government Information Access and Privacy*, McNairn and Woodbury, Carswell, 2008, at pp. 6-15 to 6-16. See also SK OIPC Review Report LA-2009-001 at [101].

third parties have been identified before beginning the notification process, then to send out all the notices at the same time.[187]

If releasing, notice to the third party is required

- Additional time for third party notice may be permitted under subsection 12(1)(c) of FOIP where the government institution intends to release the third party information. Applicants must be advised of this extension within the initial 30-day period pursuant to subsection 12(2) of FOIP and the entire process must be completed within a maximum of 60 days from the date the access to information request was received (i.e., the section 7 decision and/or section 37 decision to the applicant must be sent by the 60th day at the latest). For more information on extensions of time for third party notice, see Chapter 3: *Access to Records* at section 12.
- Consider whether subsection 19(2) of FOIP can be relied upon for release. In other words, does the government institution have written consent from the third party to release the information? A request for consent should be included when drafting the notice to the third party. See subsection 34(2) below for more information on what to include in the notice. The third party may consent to release of the information, or it may wish to make representations to the government institution pursuant to section 36 of FOIP on why the information should be withheld.
- Consider if subsection 19(3) of FOIP has any application. Subsection 19(3) of FOIP provides that third party information can be released if the circumstances described in subsections 19(3)(a) and (b) of FOIP apply. The notice to the third party can include notice that subsection 19(3)(a) and (b) of FOIP has been found to apply. The third party may consent to release of the information, or it may wish to make representations to the government institution pursuant to section 36 of FOIP on why the information should be withheld. See below for more on section 36 of FOIP.

To receive notice, the third party must be able to be located with reasonable effort by the government institution. A **reasonable effort** is the level of effort you would expect of any fair, sensible person. What is reasonable depends on the information at issue and related

[187] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 216.

circumstances.[188] If the individual cannot reasonably be located; the government institution may dispense with giving notice pursuant to subsection 34(4) of FOIP. See below for more information on subsection 34(4) of FOIP.

A government institution is expected to use only its own records and publicly available resources to locate an address for a third party.[189]

If there is any doubt as to the third party's contact information, the government institution may need to adapt its notification process to ensure there is no breach of privacy or confidentiality during the notification process.[190]

Government institutions should choose a delivery method that is expeditious and convenient for the third party, but which is also efficient and cost effective for the government institution. Regular mail is not recommended. Government institutions should consider sending notice and a copy of the third party information at issue via courier or priority post. Prompt delivery will allow the third party as much time as possible to respond. If sending notice and records by fax or email, care should be taken to prevent unauthorized disclosure of third party personal information.[191]

Government institutions should let the applicant know that third party notification is required pursuant to section 34 of FOIP. The letter to the applicant should advise them of the timelines involved. For a sample model letter see the Ministry of Justice, Access and Privacy Branch's sample titled, *12 Advising Applicant of Third Party Notification – Response Records May Contain Third Party Information*.

If withholding the third party information, no notice is required

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[188] See SK IPC resource, *Guide to FOIP*, Chapter 3: *Access to Records* under heading *"Search for Records"* – definition for a "reasonable search" has been relied upon and modified for what is considered reasonable effort for locating a third party. A "reasonable search" was defined in SK OIPC Review Reports F-2008-001 at [38] and F-2012-002 at [26].
[189] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at pp. 214 to 215.
[190] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 215.
[191] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 217.

Subsection 34(1)(b)

Notice to third party

34(1) Where a head intends to give access to a record that the head has reason to believe may contain:

...

(b) personal information that may be disclosed pursuant to clause 29(2)(o) and that relates to a third party;

and in the opinion of the head, the third party can reasonably be located, the head shall give written notice to the third party in accordance with subsection (2).

Subsection 34(1)(b) of FOIP requires that where a government institution intends to disclose personal information that relates to a third party individual (someone other than the applicant) under subsection 29(2)(o) of FOIP, the third party individual must be informed if they can reasonably be located. Subsection 29(2)(o) of FOIP provides as follows:

29(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:

...

(o) for any purpose where, in the opinion of the head:

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or

(ii) disclosure would clearly benefit the individual to whom the information relates;

The following steps can be taken for subsection 34(1)(b) of FOIP:

1. Is the information third party personal information

Determine if the information at issue constitutes third party (someone other than the applicant) "personal information" as defined by subsection 24(1) of FOIP. For assistance with subsection 24(1) of FOIP, see Chapter 6: *Protection of Privacy* for the interpretation of and tests to apply for subsection 24(1) of FOIP.

a. No, it is not third party personal information…

Where the head of the government institution concludes that the information at issue does not qualify as the personal information of a third party individual, subsection 34(1)(b) of FOIP does not apply. The information can be released or considered for exemption under another provision of FOIP. A third party would not have a right to apply to the Commissioner for review under subsection 49(3) of FOIP where the head of the government institution determined the information at issue was not third party personal information under subsection 24(1) of FOIP.[192]

The absence of standing

If a government institution concludes that a particular request is not likely to involve third party personal information, it is not required to give notice to anyone before deciding in favour of disclosure. A person potentially affected by the release of the requested information might maintain:

- That the institution was wrong in its preliminary conclusion about the nature of the information, and
- That the decision to disclose was in error.

However, that person, for lack of third party status, will usually be without standing to obtain a review of any determination made by the government institution. The institution may have erred in not recognizing a third party interest, yet there is no statutory remedy in those circumstances. Review is generally open only to someone whom the institution was prepared to treat as a third party entitled to make representations in the context of its consideration of the request for information.[193]

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[192] See *Sawridge Indian Band v. Canada (Minister of Indian Affairs and Northern Development) (1987), 10 F.T.R. 48*, aff'd sub nom and *Twinn v. Minister of Indian Affairs and Northern Development (1987), 80 N.R. 263* (F.C.A.) at p. 373. These decisions dealt with the federal *Access to Information Act* but are relevant for FOIP. The court held that the right to seek a review was not available to the third party because notice was not required because the information was not deemed third party information.
[193] *Government Information Access and Privacy*, McNairn and Woodbury, Carswell, 2008, at pp. 6-15 to 6-16. See also SK OIPC Review Report LA-2009-001 at [101].

b. Yes, it is third party personal information…

If the information is found to constitute the personal information of a third party individual (someone other than the applicant), the government institution can consider whether to disclose it pursuant to subsection 29(2)(o) of FOIP.

Make sure to identify all potential third parties. If the records engage the interests of multiple third parties, the most practical method of working with the time limits is to ensure that all third parties have been identified before beginning the notification process, then to send out all the notices at the same time.[194]

Subsection 29(2)(o) of FOIP permits disclosure of personal information without the consent of the individual where the government institution has determined it is in the public interest to do so and the public interest outweighs any invasion of the individual's privacy or where the government institution has determined that disclosure of the information would benefit the individual whom the information relates. For assistance with subsection 29(2)(o) of FOIP, see Chapter 6: *Protection of Privacy* for the interpretation of and tests to apply for subsection 29(2)(o) of FOIP.

If subsection 29(2)(o) of FOIP applies and the government institution intends to disclose the personal information, notice to the individual is required

- Consider whether obtaining written consent from the individual is possible for the release of the information. With the written consent of the individual, personal information can be released without the need for reliance on subsection 29(2)(o) of FOIP. It also reduces the likelihood of a review by the Commissioner.

  A request for consent could be included when drafting the notice to the individual. See subsection 34(2) below for more information on what to include in the notice. The individual may consent to release of the personal information, or they may wish to make representations to the government institution pursuant to section 36 of FOIP on why the personal information should be withheld. See below for more on section 36.

[194] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 216.

Any consent received should be compliant with section 18 of *The Freedom of Information and Protection of Privacy Regulations*.

To receive notice, the individual must be able to be located with reasonable effort by the government institution. A **reasonable effort** is the level of effort you would expect of any fair, sensible person. What is reasonable depends on the information at issue and related circumstances.[195] If the individual cannot reasonably be located; the government institution may dispense with giving notice pursuant to subsection 34(4) of FOIP. See below for more information on subsection 34(4) of FOIP.

Government institutions should choose a delivery method that is expeditious and convenient for the third party, but which is also efficient and cost effective for the government institution. Regular mail is not recommended. Government institutions should consider sending notice and a copy of the third party information at issue via courier or priority post. Prompt delivery will allow the third party as much time as possible to respond. If sending notice and records by fax, care should be taken to prevent unauthorized disclosure of third party personal information.[196]

If withholding the third party personal information, no notice is required

- In other words, if the government institution has decided it will not disclose the personal information pursuant to subsection 29(2)(o) of FOIP, no notice is required to be provided to the individual.
- It should be noted that withholding an applicant's own personal information can produce an absurd result [197] and is contrary to subsection 31(1) of FOIP. There are limited

[195] See SK IPC resource, *Guide to FOIP*, Chapter 3: *Access to Records* under heading "*Search for Records*" – definition for a "reasonable search" has been relied upon and modified for what is considered reasonable effort for locating a third party. A "reasonable search" was defined in SK OIPC Review Reports F-2008-001 at [38] and F-2012-002 at [26].
[196] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 217.
[197] It is a principle of statutory interpretation that "interpretations that result in a lack of fit between conduct and consequences may be rejected as absurd." In this context an "absurd" result signifies "a result that is so unreasonable, as to be unacceptable." From *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 1, A - B at p. A-36. Originates from Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes,* 4th ed. (Toronto: Butterworths, 2002), at p. 247. See also SK OIPC Review Reports 027-2016 at [14], 044-2017 at [19] 059-2017 at [40], 176-2019, 177-2019, 262-2019, 263-2019 at [38], and 187-2019 at [39].

circumstances where this type of information can be withheld (see subsection 31(2) of FOIP). For assistance with section 31, see Chapter 3: *Access to Records*.

Subsection 34(2)

Notice to third party

34(2) The notice mentioned in subsection (1):

(a) is to include:

(i) a statement that:

(A) an application for access to a record described in subsection (1) has been made; and

(B) the head intends to give access to the record or to part of it;

(ii) a description of the record that the head has reason to believe may contain:

(A) information described in subsection 19(1) that affects the interest of the third party; or
(B) personal information that may be disclosed pursuant to clause 29(2)(o) and that relates to the third party; and

(iii) a statement that the third party may, within 20 days after the notice is given, make representations to the head as to why access to the record or part of the record should not be given; and

(b) subject to subsection (3), is to be given within 30 days after the application is made.

Subsection 34(2) of FOIP provides that the notice provided to third parties must contain specific elements and the timeline that the notice must be provided by. This is broken down further below.

Subsection 34(2)(a)

Notice to third party

34(2) The notice mentioned in subsection (1):

(a) is to include:

(i) a statement that:

(A) an application for access to a record described in subsection (1) has been made; and

(B) the head intends to give access to the record or to part of it;

(ii) a description of the record that the head has reason to believe may contain:

(A) information described in subsection 19(1) that affects the interest of the third party; or

(B) personal information that may be disclosed pursuant to clause 29(2)(o) and that relates to the third party; and

(iii) a statement that the third party may, within 20 days after the notice is given, make representations to the head as to why access to the record or part of the record should not be given; and

Where notice is required under subsection 34(1) of FOIP, the notice should be in writing and contain the elements outlined at subsection 34(2)(a) of FOIP. This includes the following elements:

1. A statement advising the third party that an application for access has been made. This provides some context for a third party as to why it is receiving the notice (s. 34(2)(a)(i)(A)).

2. A statement advising the third party that the government institution intends to give access to the information (s. 34(2)(a)(i)(B)). This tells the third party what the government institution's intentions are.

3. A description of the record containing the third party information (s. 34(2)(a)(ii)(A) or the third party personal information (s. 34(2)(a)(ii)(B)). This tells the third party what information pertains to them.

   Although FOIP requires a description of the record, the IPC recommends the government institution provide a copy of the records containing the third party information. This is considered best practice and would make it easier for a third party to understand what information is at issue and what decision it should make in terms of consent to release. If a record that is the subject of a third party notice contains personal information of other third parties, it may be best to simply describe the record in the notice. If a government institution sends a third party a record that

contains personal information of other third parties, the government institution risks the unintentional and unauthorized disclosure of that personal information.[198]

4. A statement that the third party may, within 20 days, make representations (arguments) to the government institution as to why access to the information should not be given (s 34(2)(a)(iii) of FOIP. This tells the third party what it can do if it does not agree with the government institution's intentions.

5. The government institution should include a sentence requesting the third party advise it if it consents to the release of the information or personal information. If the third party does decide to consent to release, this saves the government institution from waiting for 20 days to see if representations arrive. **NOTE:** this is not required by subsection 34(2) of FOIP. However, it is efficient and a good practice to cover subsections 19(2) (third party information) and 29(1) (personal information) of FOIP.

For a sample model letter[199] see the Ministry of Justice, Access and Privacy Branch's sample titled, *14 Notification under Section 34 to Third Party Regarding Section 19 [ss 19(3)] – Records Contain Third Party Information*.

For release of personal information pursuant to subsection 29(2)(o) of FOIP, see the Ministry of Justice, Access and Privacy Branch's sample letter titled, *15 Notification under Section 34 to Third Party Regarding Disclosure of Personal Information under Clause 29(2)(o)*.

The identity of the applicant should **never** be revealed to a third party.[200]

Subsection 34(2)(b)

Notice to third party

34(2) The notice mentioned in subsection (1):

…

(b) subject to subsection (3), is to be given within 30 days after the application is made.

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[198] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 218.
[199] For other samples of model letters by the Access and Privacy Branch, Ministry of Justice see publications. Saskatchewan.ca/#/categories/340.
[200] *Les Viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency)*, 2006 FC 1075 (CanLII) at [13] and [19].

Unless an extension is applied pursuant to section 12 of FOIP, a government institution must provide notice to the third party within 30 days of receiving an access to information request. See subsection 34(3) of FOIP below for more information or Chapter 3: *Access to Records* for more on section 12.

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 business is extended to include the next day the place is open during its regular hours of business.[201]

Based on this, the following can be applied for calculating "within 30 days after the application is made" 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)]; and

[201] *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.

- 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.[202]

IPC Findings

In Review Report 171-2018, 189-2018, the Commissioner considered whether eHealth Saskatchewan met its timelines when providing notice to the third party pursuant to section 34 of FOIP. The Commissioner found that as eHealth had missed providing the notice within the initial 30 days following receipt of the access to information request, it should not have provided third party notification.

In Review Report 021-2021, 022-2021, 023-2021, the Commissioner considered the extension provision at subsection 12(1)(c) of FOIP which permits up to an additional 30 days to provide a response to applicants where a section 34 notice to third parties is required. The Ministry of Highways (Highways) applied the time extension citing subsection 12(1)(c) of FOIP. However, the Commissioner found that the extension was not authorized as Highways did not provide any arguments regarding third parties or that it required time to notify them. As well, Highways did not indicate in its initial response to the Commissioner and the applicant that any third parties were even involved. The Commissioner recommended that within 15 days of the issuance of the Review Report, Highways complete processing of the applicant's three access to information requests, provide properly executed section 7 responses and refund the deposits already paid by the applicant.

[202] 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.

Subsection 34(3)

Notice to third party

34(3) Section 12 applies, with any necessary modification, to the extension of the period set out in clause (2)(b).

Subsection 34(3) of FOIP provides further clarification for subsection 34(2)(b) of FOIP above.

If an extension is authorized by section 12 of FOIP, the notice to the third party must be provided within the extension period (a total of 60 days from date access to information request was received). This is consistent with subsection 12(1)(c) of FOIP. For more on section 12, see Chapter 3: *Access to Records*.

For assistance on calculating the initial 30 days, see *The Legislation Act* which 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

business is extended to include the next day the place is open during its regular hours of business.[203]

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

- The first day the access request is received is excluded in the calculation of time [s 2-28(3)];
- 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)]; and
- 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.[204]

IPC Findings

In Review Report 171-2018, 189-2018, the Commissioner considered whether eHealth Saskatchewan met its timelines when providing notice to the third party pursuant to section 34 of FOIP. The Commissioner found that as eHealth had missed providing the notice within the initial 30 days following receipt of the access to information request, it should not have provided third party notification.

In Review Report 112-2021, the Commissioner found that the extension of the response deadline applied by the Ministry of Highways (Highways) pursuant to subsection 12(1)(c) of FOIP did not satisfy the criteria set out in section 12 of FOIP. This finding was partly due to third party notice being provided to the third party 84 days after Highways received the applicant's access to information request.

In Review Report 021-2021, 022-2021, 023-2021, the Commissioner considered the extension provision at subsection 12(1)(c) of FOIP which permits up to an additional 30 days to provide a response to applicants where a section 34 notice to third parties is required. The Ministry of Highways (Highways) applied the time extension citing subsection 12(1)(c) of FOIP. However,

[203] *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.
[204] 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.

the Commissioner found that the extension was not authorized as Highways did not provide any arguments regarding third parties or that it required time to notify them. As well, Highways did not indicate in its initial response to the Commissioner and the applicant that any third parties were even involved. The Commissioner recommended that within 15 days of the issuance of the Review Report, Highways complete processing of the applicant's three access to information requests, provide properly executed section 7 responses and refund the deposits already paid by the applicant.

Subsection 34(4)

Notice to third party

34(4) Where, in the opinion of the head, it is not reasonable to provide a notice to a third party pursuant to subsection (1), the head may dispense with the giving of notice.

To receive notice, the third party must be able to be located with reasonable effort by the government institution.

A **reasonable effort** is the level of effort you would expect of any fair, sensible person. What is reasonable depends on the information at issue and related circumstances.[205]

If the third party cannot reasonably be located, the government institution may dispense with giving notice pursuant to subsection 34(4) of FOIP.

A government institution is expected to use only its own records and publicly available resources to locate an address for a third party.[206]

If there is any doubt as to the third party's contact information, the government institution may need to adapt its notification process to ensure there is no breach of privacy or confidentiality during the notification process.[207]

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[205] See SK OIPC resource, *Guide to FOIP*, Chapter 3: *Access to Records,* under heading "*Search for Records"* – definition for a "reasonable search" has been relied upon and modified for what is considered reasonable effort for locating a third party. A "reasonable search" was defined in SK OIPC Review Reports F-2008-001 at [38] and F-2012-002 at [26].
[206] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at pp. 214 to 215.
[207] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 215.

Section 35: Waiver of notice

Waiver of notice

35(1) A third party to whom a notice is required to be given pursuant to subsection 34(1) may waive the requirement for notice.

(2) A third party who consents to the giving of access to a record containing information described in subsection 34(1) is deemed to have waived the requirement for notice.

Subsection 35(1) of FOIP provides that a third party that would receive notice under subsection 34(1) of FOIP, can waive the requirement for notice.

Subsection 35(2) of FOIP provides that a third party that has consented to the release of the third party information is deemed to have waived the requirement to receive notice.

No response to the notice by the 21st day after the notice is given does not imply that the third party has consented to the disclosure of the information. The government institution should document its efforts to contact the third party. This is helpful in the event of a review by the Commissioner.[208]

Section 36: Right to make representations

Right to make representations

36(1) A third party who is given notice pursuant to subsection 34(1):

(a) is entitled to make representations to the head as to why access to the record or part of the record should not be given; and
(b) within 20 days after the notice is given, shall be given the opportunity to make those representations.

(2) Representations made by a third party pursuant to clause (1)(b) shall be made in writing unless the head waives that requirement, in which case they may be made orally.

[208] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 220.

Subsection 36(1)(a)

Right to make representations

36(1) A third party who is given notice pursuant to subsection 34(1):

(a) is entitled to make representations to the head as to why access to the record or part of the record should not be given; and

…

A third party that has received notice from the government institution has the right to make representations to the government institution. The government institution will take into consideration written representations received from third parties when deciding whether to withhold or release information from records.

Representation means the documents, other evidence and/statements or affidavits provided by a party setting out its position with respect to the information at issue and often referred to as a submission.[209]

A submission informs the government institution of the third party's main arguments and presents supporting information to make its case.[210]

Written submissions may be made in the form of a letter, fax, email or other written communication submitted to the government institution in which the third party clearly states:

- What specific information the third party considers to be subject to section 19 of FOIP.
- Which specific subsection of section 19 of FOIP applies (i.e., (a) through (f)).
- Why that subsection applies (provide any supporting evidence).
  OR
- That it does not oppose release of the information.

The submissions must be in writing unless the head of the government institution waives that requirement in certain circumstances as per subsection 36(2) of FOIP – see below.

The fact that a third party has objected to the release of information is not sufficient grounds for information to be withheld under FOIP. The purpose of third party representations is to

[209] SK OIPC *Rules of Procedure* at p. 3.
[210] SK OIPC resource, *What to Expect During a Review with the IPC* at p. 8.

assist the government institution by providing additional information and context to aid the government institution's decision-making.[211]

The IPC has issued several guides, blogs, and other resources on how to prepare an effective submission:

- *A Guide to Submissions: Increasing your chances of success*
- IPC *Guide to FOIP*, Chapters 1 to 6
- IPC *Guide to LA FOIP*, Chapters 1 to 6
- IPC *Guide to HIPA*
- *What Makes a Good Submission?*
- *Tips for a Good Submission*

Third parties should focus their arguments and supporting information on how section 19 applies or why personal information should not be released pursuant to subsection 29(2)(o) of FOIP. The discretion to apply other discretionary exemptions under Part III of FOIP is reserved for the "head" [212] of the government institution only.[213]

Subsection 36(1)(b)

Right to make representations

36(1) A third party who is given notice pursuant to subsection 34(1):

...

(b) within 20 days after the notice is given, shall be given the opportunity to make those representations

The third party must submit its arguments and supporting information to the government institution within 20 days of receiving notice. The 20-day time period allowed for a third party to provide representations begins on the day after the third party notice is given (i.e., the day after the government institution sends the notice), not the date the third party receives it. The

[211] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at Section 24 - Time limit and notice of decision - Province of British Columbia (gov.bc.ca). Accessed Sept. 1, 2022.
[212] The "head" is defined at section 2(1)(e) of *The Freedom of Information and Protection of Privacy Act*.
[213] SK OIPC Review Reports F-2014-006 at [41] to [43], 205-2019, 255-2019 at [11]. See also *SNC Lavalin Inc. v. Canada (Minister for International Cooperation)*, 2003 FCT 681 (CanLII), [2003] 4 FC 900 at [19] to [24].

date on which the notice is sent should be marked on the notice indicating posting or electronic transmission (e.g., the postmark for regular mail, the transmission date for email or facsimile). Government institutions should choose a delivery method that ensures that notice is given promptly.[214] Contacting a third party prior to giving written notice is a good practice. It enables the government institution to explain the process, the importance of responding, the consequences of not responding and the timelines.[215]

There is no provision within FOIP that permits an extension of the 20-day deadline on third parties to provide representations. However, if the third party requests a few extra days to respond and the government institution agrees, these additional days would be subtracted from the 10 days remaining which the government institution has to issue its notice of decision pursuant to section 37 of FOIP.[216] See *Overview of third party timelines* earlier in this Chapter.

Government institutions are not required to accept a late submission from a third party (i.e., outside of the 20-day window contemplated by subsection 36(1)(b) of FOIP), but they may elect to do so, if the government institution is still able to make its decision within the 30 days allowed by subsection 37(1) of FOIP.[217]

No response to the notice by the 21st day after the notice is given does not imply that the third party has consented to the disclosure of the information. It is good practice to contact the third party prior to sending the section 34 notice to the third party to ensure the third party understands the process and consequences of not responding. The government institution should document its efforts to contact the third party. This is helpful in the event of a review by the Commissioner.[218]

For calculating "20 days of receiving notice", *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:

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[214] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 216.
[215] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 216.
[216] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 220.
[217] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at Section 24 - Time limit and notice of decision - Province of British Columbia (gov.bc.ca). Accessed Sept. 1, 2022.
[218] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 220.

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 business is extended to include the next day the place is open during its regular hours of business.[219]

Based on this, the following can be applied for calculating "within 20 days after the notice is given" under FOIP:

- The first day the notice is given 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)]; and
- As FOIP expresses the time in a number of days, this is interpreted as 20 calendar days, not business days.

[219] *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.

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.[220]

Subsection 36(2)

Right to make representations

36(2) Representations made by a third party pursuant to clause (1)(b) shall be made in writing unless the head waives that requirement, in which case they may be made orally.

A third party's representations to the government institution must be in writing. There is good reason for this. In the interest of transparency, government institutions should have a written record of a decision-making process.

There are unique situations where the "head"[221] may waive the requirement and accept oral representations. A government institution may choose to record the oral representation which can be transcribed afterward or take detailed notes.

Section 37: Decision

Decision

37(1) After a third party has been given an opportunity to make representations pursuant to clause 36(1)(b), the head shall, within 30 days after notice is given:

(a) decide whether or not to give access to the record or part of the record; and
(b) give written notice of the decision to the third party and the applicant.

(2) A notice given pursuant to clause (1)(b) is to include:

(a) a statement that the third party and applicant are entitled to request a review pursuant to section 49 within 20 days after the notice is given; and

[220] 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.
[221] The "head" is defined at section 2(1)(e) of *The Freedom of Information and Protection of Privacy Act.*

(b) in the case of a decision to give access, a statement that the application will be given access to the record or to the part of it specified unless, within 20 days after the notice is given, the third party requests a review pursuant to section 49.

(3) Where, pursuant to clause (1)(a), the head decides to give access to the record or a specified part of it, the head shall give the applicant access to the record or the specified part unless, within 20 days after a notice is given pursuant to clause (1)(b), a third party requests a review pursuant to section 49.

(4) A head who fails to give notice pursuant to clause (1)(b) is deemed to have given notice, on the last day of the period set out in subsection (1), of a decision to refuse to give access to the record.

Government institutions are required to decide whether or not to give access to all or part of the third party information within 30 days after the section 34 notice to the third party was given. The section 37 notice of decision is to be given to both the third party and the applicant.

Government institutions are not required to accept a late submission from a third party (i.e., outside of the 20-day window contemplated by subsection 36(1)(b) of FOIP), but they may elect to do so, if the government institution is still able to make its decision within the 30 days allowed by subsection 37(1) of FOIP.[222]

Generally, there are three types of third party responses:

- No Response: If no response is received within 20 days after the notice to the third party is given, the government institution decides, based on the information available, whether to release the information or not.
- Consent to disclosure of information: If the third party responds by consenting in writing to disclosure of information, the government institution should disclose the information unless another one of the Act's exemptions applies.
- Representations about why information should not be disclosed: If the third party makes representations on why the information should not be disclosed, the government institution shall consider these representations in reaching a decision on access.

[222] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at Section 24 - Time limit and notice of decision - Province of British Columbia (gov.bc.ca). Accessed Sept. 1, 2022.

- The third party's representations may address only issues related to the applicability of section 19 or subsection 29(2)(o) of FOIP. Representations related to other exemptions must not be considered by the head in reaching a decision on access.[223]

Government institutions can combine a section 7 decision with the section 37 notice to an applicant.[224] This is an efficient way to meet the timelines imposed by FOIP. For more on section 7 responses, see Chapter 3: *Access to Records*.

Subsection 37(1)(a)

Decision

37(1) After a third party has been given an opportunity to make representations pursuant to clause 36(1)(b), the head shall, within 30 days after notice is given:

(a) decide whether or not to give access to the record or part of the record; and

The government institution must decide whether to withhold or release the third party information within 30 days of having given its section 34 notice to the third party.

However, if a third party consented to disclosure of the third party information, the information or record should not be withheld unless another exemption applies to it.

The government institution should consider all exemptions to disclosure within the Act, not just section 19(1) of FOIP.

The fact that a third party has objected to the release of information is not sufficient grounds for information to be withheld under FOIP. The purpose of third party representations is to assist the government institution by providing additional information and context to aid the government institution's decision-making.[225] The decision to withhold information must always be in accordance with the Act and the government institution has the burden of proof

[223] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at Section 24 - Time limit and notice of decision - Province of British Columbia (gov.bc.ca). Accessed Sept. 1, 2022.
[224] SK OIPC Review Report 082-201-, 083-2019 at [12] to [17] and [121].
[225] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at Section 24 - Time limit and notice of decision - Province of British Columbia (gov.bc.ca). Accessed Sept. 1, 2022.

in demonstrating to the Commissioner that the exemption applies (see section 61 of FOIP or Chapter 2: *Administration of FOIP* under the heading *Burden of Proof* for more guidance).

Subsection 37(1)(b)

Decision

37(1) After a third party has been given an opportunity to make representations pursuant to clause 36(1)(b), the head shall, within 30 days after notice is given:

...

(b) give written notice of the decision to the third party and the applicant.

Notice of the decision must be given to both the third party and the applicant that has requested the information.

Third parties should **not** be told who the applicant is at any point in the process. [226]

Government institutions can combine a section 7 decision with the section 37 notice to an applicant.[227] This is an efficient way to meet the timelines imposed by FOIP. For more on section 7 responses, see Chapter 3: *Access to Records*.

When determining the 30-day timeline for sending the section 37 notice of decision, *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.

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[226] *Les Viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency)*, 2006 FC 1075 (CanLII) at [13] and [19].
[227] SK OIPC Review Report 082-201-, 083-2019 at [12] to [17] and [121].

(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 business is extended to include the next day the place is open during its regular hours of business.[228]

Based on this, the following can be applied for calculating "within 30 days after the notice is given" under FOIP:

- The first day the notice is sent 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.[229]

[228] *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.
[229] 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.

IPC Findings

In Review Report 082-2019, 083-2019, the Commissioner considered whether the Ministry of Health (Health) met the timelines required by subsection 37(1) of FOIP. The Commissioner noted that the section 37 notice was provided past the extended 60-day deadline. The section 7 decision should have already been provided to the applicant by the time the section 37 notice was issued. However, the section 37 notice issued by Health to the applicant appeared to contain all the required elements for a section 7 decision. The Commissioner determined that there was nothing in FOIP that prevented a government institution from combining its section 7 decision with its section 37 response. The Commissioner indicated that procedurally, this process makes sense as the applicant can end up requesting a review within 20 days, as the applicant did in this case, before the final section 7 decision is issued.

Subsection 37(2)

Decision

37(2) A notice given pursuant to clause (1)(b) is to include:

(a) a statement that the third party and applicant are entitled to request a review pursuant to section 49 within 20 days after the notice is given; and

(b) in the case of a decision to give access, a statement that the applicant will be given access to the record or to the part of it specified unless, within 20 days after the notice is given, the third party requests a review pursuant to section 49.

When the government institution has made the decision on access to the record, written notice is sent to both the applicant and the third party and should contain the following:

1) Government institution decides to **deny access**. The notices must:

- State that the government institution has decided to deny access to the record in full or in part.
- Include information about the applicant's right to request a review by the Commissioner within one year of the notice of decision being given pursuant to section 49 of FOIP.

2) Government institution decides to give **full or partial access**. The notices must:

- State that the government institution has decided to grant full or partial access to the record.
- Include information about the third party's right to request a review by the Commissioner within 20 days of the notice of decision being given pursuant to section 49 of FOIP.
- State that the applicant will be given access within 20 days from when the notice of decision is given unless a review is requested by the third party.[230]

For a sample model letter[231] see the Ministry of Justice, Access and Privacy Branch's sample titled, *16 Notification to Third Party under Sec 37 – Decision of Government Institution* and *17 Notification to Applicant under section 37 – Decision of Government Institution*.

Third parties should **not** be told who the applicant is at any point in the process.[232]

Subsection 37(2)(a)

Decision

37(2) A notice given pursuant to clause(1)(b) is to include:

(a) a statement that the third party and applicant are entitled to request a review pursuant to section 49 within 20 days after the notice is given; and

...

The notice of decision should contain the following elements:

1. A statement that the third party and the applicant are entitled to request a review by the Commissioner pursuant to section 49 of FOIP within 20 days after the notice of decision is given (s 37(2)(a)); and

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[230] Adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at Section 24 - Time limit and notice of decision - Province of British Columbia (gov.bc.ca). Accessed Sept. 1, 2022.
[231] For other samples of model letters by the Access and Privacy Branch, Ministry of Justice see publications. Saskatchewan.ca/#/categories/340.
[232] *Les Viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency)*, 2006 FC 1075 (CanLII) at [13] and [19].

2. …

For a sample model letter[233] see the Ministry of Justice, Access and Privacy Branch's sample titled, *16 Notification to Third Party under Sec 37 – Decision of Government Institution* and *17 Notification to Applicant under section 37 – Decision of Government Institution*.

If the head of the government institution concerned, having considered the representations, decides to release the information requested, the third party may apply to the IPC for a review of that decision.[234] The 20-day timeline on third parties to request a review is a requirement as subsection 49(4) of FOIP reiterates the 20-day timeline on third parties. If the 20-day timeline is missed, a review will not be commenced.

If the head of the government institution concerned decides to withhold the third party information requested, the applicant may apply to the IPC for a review of that decision. However, the 20-day timeline to request a review noted at subsection 37(2)(a) of FOIP is not a requirement of applicants, but rather an option – applicants are "entitled" to request the review - it is a right. Unlike third parties, applicants have one year to request a review of a section 37 decision of a government institution pursuant to subsection 49(2) of FOIP. If the one-year timeline is missed, a review will not be commenced.

Section 49 of FOIP provides the circumstances under which an applicant or third party can request a review by the Commissioner.

Third parties and applicants who wish to make a request for review can do so using Form B found in *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 section 37 notice of decision. 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 more, see section 49 later in this Chapter.

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[233] For other samples of model letters by the Access and Privacy Branch, Ministry of Justice see publications. Saskatchewan.ca/#/categories/340.

[234] *Air Atonabee Ltd. v. Canada (Minister of Transport),* [1989] F.C.J. No. 453 at p. 2.

Subsection 37(2)(b)

Decision

37(2) A notice given pursuant to clause (1)(b) is to include:

...

(b) in the case of a decision to give access, a statement that the applicant will be given access to the record or to the part of it specified unless, within 20 days after the notice is given, the third party requests a review pursuant to section 49.

The notice of decision should contain the following elements:

1. ...

2. where the decision is to permit access, a statement that the applicant will be given access (and what portions will be given) within 20 days after the notice of decision is given, unless the third party requests a review by the Commissioner pursuant to section 49 of FOIP (s 37(2)(b)).

The 20-day time period for a government institution to release the third party information begins on the day after the section 37 notice of decision is sent (i.e., the day after the government institution sends the notice, the clock starts), not the date the third party receives it. The date on which the notice of decision is sent should be marked on the notice indicating posting or electronic transmission (e.g., the postmark for regular mail, the transmission date for email or facsimile). Government institutions should choose a delivery method that ensures that notice is given promptly (e.g., courier, email, or priority post).[235]

If the third party has consented to the release of the third party information, the government institution should release the information unless another exemption in the Act applies to it.

For a sample model letter[236] see the Ministry of Justice, Access and Privacy Branch's sample titled, *16 Notification to Third Party under Sec 37 – Decision of Government Institution* and *17 Notification to Applicant under section 37 – Decision of Government Institution*.

[235] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 216.
[236] For other samples of model letters by the Access and Privacy Branch, Ministry of Justice see publications. Saskatchewan.ca/#/categories/340.

Subsection 37(3)

Decision

37(3) Where, pursuant to clause (1)(a), the head decides to give access to the record or a specified part of it, the head shall give the applicant access to the record or the specified part unless, within 20 days after a notice is given pursuant to clause (1)(b), a third party requests a review pursuant to section 49.

Subsection 37(3) of FOIP provides that if the government institution decides to give access to the record, it must do so within 20 days after notice is given unless the third party requests a review pursuant to section 49 of FOIP.

The government institution should contact the IPC to determine whether a request for review has been submitted. Contact intake@oipc.sk.ca to request this information.

If the review requested by a third party affects only some of the records proposed for disclosure, the government institution should release the remainder of the records to the applicant, unless they are subject to other exemptions at which point the applicant may want a review of those exemptions also.[237]

For calculating "20 days after a notice is given", *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.

[237] Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 222.

(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 business is extended to include the next day the place is open during its regular hours of business.[238]

Based on this, the following can be applied for calculating "20 days after a notice is given" under FOIP:

- The first day the notice is given 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)]; and
- As FOIP expresses the time in a number of days, this is interpreted as 20 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.[239]

IPC Findings

In Review Report 012-2018, the Commissioner considered whether a third party met the 20-day timeline to request a review under subsection 36(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner received the third party's request for review seven days past the 20-day deadline. In its representations to the Commissioner, the third party asserted that there was confusion on how to request a review by the Commissioner. However, upon review, the Commissioner found that the City of Regina's notice of decision to the third party instructed it on how and where to request a review by the Commissioner. As a result, the Commissioner found that the City of Regina met its duty to assist under section 5.1 of LA FOIP. Furthermore, the Commissioner found that the third party did not request a review within the legislated timeline of 20 days after receiving the City's notice pursuant to section 36 of LA FOIP. Since subsection 36(3) of LA FOIP

[238] *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.
[239] 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.

provides that the head of the City of Regina "shall" provide access to a record (or specified part of it), after 20 days, the Commissioner recommended the City of Regina release the record to the applicant.

Subsection 37(4)

Decision

37(4) A head who fails to give notice pursuant to clause (1)(b) is deemed to have given notice, on the last day of the period set out in subsection (1), of a decision to refuse to give access to the record.

Subsection 37(4) of FOIP provides that where a government institution has failed to give notice to an applicant (or third party) that access to the third party information is denied is deemed to have given notice of this decision on the 30th day after the section 34 notice is sent.

This provision is similar to subsection 7(5) of FOIP and has similar intent. The IPC refers to this lack of response or notice as a "deemed refusal". In the absence of providing notice, the government institution is deemed to have refused access.

Government institutions should be aware that a subsection 7(2) decision for an access to information request is still required and exemptions applied to other information (besides the third party information) must be addressed in the subsection 7(2) decision.

Applicants who have failed to receive a section 37 notice that access to the third party information is denied, can proceed to request a review by the Commissioner pursuant to section 49 of FOIP. In addition, applicants who have failed to receive a subsection 7(2) decision, can proceed to request a review by the Commissioner pursuant to section 49 of FOIP. Applicants have up to one year to request a review (see section 49 later in this Chapter).

IPC Findings

In Review Report 066-2019, the Commissioner considered subsection 7(5) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Northern Village of Pinehouse (Village) failed to provide a section 7 response to the applicant within the 30-day deadline. Therefore, it is deemed to have responded on the 30th day with a refusal

to provide access pursuant to subsection 7(5) of LA FOIP. The Commissioner stated that this is referred to as a "deemed refusal". The Village was then 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 failed to inform the applicant and the Commissioner of what exemptions it was relying on to withhold the records, the Commissioner found there was not authority to withhold them and recommended the records be released to the applicant.

In *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 1999 CanLII 7857 (FCA), the Federal Court of Appeal found that the federal Information Commissioner may use his power of subpoena to require a government institution to respond to a request by a date set by the Commissioner. Specifically, the Court found that once a request is deemed to have been refused, the Commissioner has the power to compel the head of the government institution (or delegate) to specify the exemptions used to justify refusal of the record and to defend the applicability of those exemptions. This decision is in relation to the *Access to Information Act*. There has not been a similar case before the courts in Saskatchewan yet.

In the decision, *Statham v. Canadian Broadcasting Corporation*, 2010 FCA 315 (CanLII), the Federal Court of Appeal confirmed that there was no distinction between a true refusal and a deemed refusal. This decision is in relation to the *Access to Information Act*. There has not been a similar case before the courts in Saskatchewan yet.

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 or third party can request a review by the Commissioner.

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, an applicant or a third party in a review.

The Commissioner prepares a report on the completion of a review, 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 or third party 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.[240]

For more on the IPC review process, see *The Rules of Procedure*.

For more on the role of the Commissioner, see *Information and Privacy Commissioner – Roles and Responsibilities* in Chapter 2.

For more on section 49, see Chapter 3: *Access to Records*.

Subsection 49(1)

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);

[240] Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 837.

(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.

Subsection 49(1) of FOIP provides that an applicant can request a review by the Commissioner under several circumstances including when they are not satisfied with the decisions of the government institution in sections 7, 12 or 37 notices or responses. Therefore, if applicants receive a section 37 decision from the government institution that denies access to the third party information, applicants have a right to request a review by the Commissioner of that decision.

For more on subsection 49(1), see Chapter 3: *Access to Records*.

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 (i.e., after receiving the section 37 notice).

For calculating "one year after being given written notice of the decision of the head" or of the deemed refusal, *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 business is extended to include the next day the place is open during its regular hours of business.

…

(8) A period expressed as one or more consecutive years beginning or ending on, at, with, before, after or from a specified day is counted to the same date as the specified day in the last or first year of the period, as the case requires.

(9) If a period would end on a date in a month that has no date numerically corresponding to the first date in the period, the period ends on the first day of the next month.[241]

Based on this, the following can be applied for calculating "one year after being given written notice of the decision of the head" or of the deemed refusal:

- The first day the notice is given is excluded in the calculation of time [s. 2-28(2)].

[241] *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.

- 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 as one year, this is interpreted as 365 calendar days, not business days [s. 2-28(8)].

If an applicant did not receive a response from the government institution, the applicant still has one year from the 30th day under which the government institution was deemed to have responded.[242] The same rules around the computation of time noted above from *The Legislation Act* apply in this circumstance also.

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 pursuant to subsection 49(3) of FOIP when they are not satisfied with the government institution's section 37 notice of decision. For example, the government institution provides notice that it has decided to release the third party information. This request for review must be made within **20 days** after being given the section 37 notice of decision from the government institution.

Third parties who wish to make a request for review can do so using Form B found in *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 section 37 notice of decision. 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

[242] Section 49(2) of FOIP provides that the one year also includes the date as of which the government institution is deemed to have responded – see sections 7(5) and 37(4) of FOIP.

are not on Form B provided the request is in writing and contains the same elements of information as Form B.

If the third party requests a review, government institutions should release any portions of the records that are not in dispute. Apply relevant severing to any information in dispute, and to any information that attracts any other exemptions to disclosure, but the remainder should be released to the applicant while the IPC review is pending.[243]

For more on section 49, see Chapter 3: *Access to Records*.

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 being given the government institution's decision.

For calculating "20 days after being given" the government institution's decision, *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.

[243] British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at Section 24 - Time limit and notice of decision - Province of British Columbia (gov.bc.ca). Accessed Sept. 1, 2022.

(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 business is extended to include the next day the place is open during its regular hours of business.[244]

Based on this, the following can be applied for calculating "20 days after being given" the government institution's decision under FOIP:

- The first day the notice is given 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 20 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.[245]

Third parties who wish to make a request for review can do so using Form B found in *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 section 37 notice of decision. 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

[244] *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.
[245] 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.

are not on Form B provided the request is in writing and contains the same elements of information as Form B.

For more on section 49, see Chapter 3: *Access to Records*.

IPC Findings

In Review Report 012-2018, the Commissioner considered whether a third party met the 20-day timeline to request a review under subsection 36(3) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner received the third party's request for review 7 days past the 20-day deadline. In its representations to the Commissioner, the third party asserted that there was confusion on how to request a review by the Commissioner. However, upon review, the Commissioner found that the City of Regina's notice of decision to the third party instructed it on how and where to request a review by the Commissioner. As a result, the Commissioner found that the City of Regina met its duty to assist under section 5.1 of LA FOIP. Furthermore, the Commissioner found that the third party did not request a review within the legislated timeline of 20 days after receiving the City's notice of decision pursuant to section 36 of LA FOIP. Since subsection 36(3) of LA FOIP provides that the head of the City of Regina "shall" provide access to a record (or specified part of it), after 20 days, the Commissioner recommended the City of Regina release the record to the applicant.

Section 52: Notice of application for review

Notice of application for review

52(1) 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 review pursuant to section 49, give written notice of the review 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.

(2) A head shall, immediately on receipt of a notice of review pursuant to section 49 by a third party, give written notice of the review to the applicant.

It is a requirement of the Act that government institutions notify third parties that an application for a review has been made as per section 52 of FOIP. The IPC will invite third parties to provide representations to the Commissioner's office once a review has been commenced so this notice by the government institution is important.

If a government institution has applied section 19(1) of FOIP to information in records but has failed to provide notice pursuant to section 52 and is unable to identify third parties for the Commissioner, the burden of proof will not be met, and section 19(1) of FOIP may be found to not apply.[246]

Third parties should **not** be told who the applicant is at any point in the process. To do so, may constitute a breach of the applicant's privacy pursuant to Part IV of FOIP.[247]

IPC Findings

In Review Report F-2013-003, the Commissioner considered the Ministry of Agriculture's (Agriculture) failure to provide a section 52 notice of application for review to third parties with apparent interests in the records at issue. When the Commissioner's office requested the contact information for the third parties so they could be informed of the review and invited to provide representations to the Commissioner regarding the application of section 19 of FOIP, Agriculture was unable to provide contact information. Failure to provide a section 52

[246] SK OIPC Review Report F-2013-003 at [19], [25], [26] and [67] to [73].
[247] *Les Viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency)*, 2006 FC 1075 (CanLII) at [13] and [19].

notice to the third parties and inability to identify the third parties factored into the Commissioner's decision that Agriculture did not meet the burden of proof in demonstrating that section 19 applied to the records. By not providing notice, the Commissioner stated, it prejudices the rights of both the third parties and the applicant in the review. The third parties were not afforded the opportunity to make representations. If the third parties were notified and indicated they did not object to release, the failure to notify prejudices the applicant in such a scenario. Given that section 19 was a mandatory exemption, the Commissioner still considered the application of the exemption and attempted to identify the third parties. However, partly due to the lack of supporting arguments from Agriculture, the Commissioner found that subsections 19(a), (b), (c), (e) and (f) of FOIP did not apply and recommended release of the records.

Section 53: Conduct of review

Conduct of review

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

(2) The:

(a) person who applies for a review;

(b) third party or applicant who is entitled to notice pursuant to section 52; and

(c) head whose decision is the subject of a review;

are entitled to make representations to the commissioner in the course of the review.

(3) No one is entitled as of right:

(a) to be present during a review; or

(b) before or after a review:

(i) to have access to; or

(ii) to comment on;

representations made to the commissioner by any other person.

Subsection 53(1) of FOIP provides that third parties (and applicants and government institutions) that are a party in a review by the Commissioner have a right to make representations to the Commissioner on the matter. This is an entitlement or a right and not

a requirement. If a third party does not wish to make representation to the Commissioner, the review will continue without it.

At the beginning of a review, the IPC will request the contact information for the third party from the government institution. The IPC will then send a notification to the third party inviting them to provide representations for section 19 of FOIP (or subsection 29(2)(o) of FOIP if applicable in the circumstances). The third party will generally be given 30 days to provide its representations to the Commissioner.[248]

Representation means the documents, other evidence and/statements or affidavits provided by a party setting out its position with respect to the information at issue and often referred to as a submission.[249]

A submission informs the Commissioner of the third party's main arguments and presents supporting information to make its case.[250]

The IPC has issued several guides, blogs, and other resources on how to prepare an effective submission:

- *A Guide to Submissions: Increasing your chances of success*
- IPC *Guide to FOIP*, Chapters 1 to 6
- IPC *Guide to LA FOIP*, Chapters 1 to 6
- IPC *Guide to HIPA*
- *What Makes a Good Submission?*
- *Tips for a Good Submission*

Third parties should focus their arguments and supporting information on how section 19 applies (or why personal information should not be released pursuant to subsection 29(2)(o) of FOIP if that is the issue subject to review). The discretion to apply other discretionary exemptions under Part III of FOIP is reserved for the "head" of the government institution

[248] SK OIPC resource, *The Rules of Procedure* at sections 2-5 and 2-6.
[249] SK OIPC *Rules of Procedure* at p. 3.
[250] SK OIPC resource, *What to Expect During a Review with the IPC* at p. 8.

only.[251] As such, the Commissioner will not consider other discretionary exemptions unless raised by the government institution.[252]

Subsection 53(3) of FOIP provides that no one is entitled, as of right, to be present during the Commissioner's review or to have access to, or comment on, representations made to the Commissioner by any other person. The Commissioner issued *The Rules of Procedure* which set out the process for reviews. *The Rules of Procedure* state that representations made to the Commissioner will not be disclosed to another party unless the party submitting the representation agrees that the representation, or a portion thereof, can be shared with another party. Third parties should indicate in their representations whether they consent to the sharing of the representation amongst the parties to the review (applicant and government institution).

Section 55: Report of commissioner

Report of commissioner

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

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

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

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

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

[251] The "head" is defined at section 2(1)(e) of *The Freedom of Information and Protection of Privacy Act*.
[252] SK OIPC Review Reports F-2014-006 at [41] to [43], 205-2019, 255-2019 at [11]. See also *SNC Lavalin Inc. v. Canada (Minister for International Cooperation)*, 2003 FCT 681 (CanLII), [2003] 4 FC 900 at [19] to [24].

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

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

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

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

Once an applicant, individual or third party receives the head's section 56 response, if not satisfied, it has 30 days to make an application to the Court of King's Bench if not satisfied pursuant to section 57 of FOIP. For more information on the Court of King's Bench see *Courts of Saskatchewan*.

In the recent Court of Appeal for Saskatchewan decision, *Leo v Global Transportation Hub Authority*, 2020 SKCA 91 (CanLII), the court clarified the de novo nature of an appeal pursuant to section 57 of FOIP. Part VII of FOIP does not in any way contemplate that, on an appeal to the Court of King's Bench, parties can raise any and all provisions of the Act that bear on the 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.[253]

For more on the IPC's procedures for reviews, investigations and issuing reports, see *Rules of Procedure*. See also *Guide to Appealing the Decision of a Head of a Government Institution, or a Local Authority, or a Health Trustee*.

[253] *Leo v Global Transportation Hub Authority*, 2020 SKCA 91 (CanLII) at [41] and [47].

Section 56: Decision of head

Decision of head

56(1) Within 30 days after receiving a report of the commissioner pursuant to subsection 55(1), a head shall:

(a) make a decision to follow the recommendation of the commissioner or any other decision that the head considers appropriate; and

(b) give written notice of the decision to the commissioner and the persons mentioned in subsection 55(2).

Section 56 of FOIP provides that 30 days after receiving the Commissioner's report, the government institution will provide its decision regarding the Commissioner's recommendations (or any other decision it intends to make) to the Commissioner, applicant, and third parties involved in the review.

For calculating "within 30 days after receiving a report of the commissioner", *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 business is extended to include the next day the place is open during its regular hours of business.[254]

Based on this, the following can be applied for calculating "within 30 days after receiving a report of the commissioner" under FOIP:

- The first day the report 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.[255]

[254] *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.
[255] 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.

Section 57: Appeal to 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.

Section 57 of FOIP provides that within 30 days of receiving a decision of the head, an applicant or third party can appeal the decision of the head to the court if not satisfied with the decision.

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; and
3. Supreme Court of Canada.[256]

The Court of King's Bench for Saskatchewan consists of a Chief Justice of the King's Bench and currently 36[257] other judges. Each King's Bench judge is assigned to a specific judicial

[256] Courts of Saskatchewan, Resources, Court Structure. Available at https://sasklawcourts.ca/index.php/home/resources/learn-about-the-courts-resources/court-structure.
[257] Courts of Saskatchewan at https://sasklawcourts.ca/index.php/home/court-of-queen-s-bench/judges. Accessed February 21, 2023.

centre, but because the Court is an itinerant[258] court, the judges also travel to and sit in other judicial centres.[259]

In Saskatchewan, there are court locations in:

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

The steps for making an appeal are as follows:[260]

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

[258] "*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.
[259] 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.
[260] 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.

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.

    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.[261]

    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.[262]

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 section 57 of FOIP. Part VII of FOIP does not in any way contemplate that, on an appeal to the Court of King's Bench, parties can raise any and all provisions of the Act that bear on the 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.[263] Although heard

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[261] Adapted from Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 909.
[262] 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.
[263] *Leo v Global Transportation Hub Authority*, 2020 SKCA 91 (CanLII) at [41] and [47].

de novo, as a fresh application to be decided anew, the scope of the appeal is confined to those exemptions considered by the Commissioner on his review.[264]

[264] *West v Saskatchewan (Health)*, 2020 SKKB 244 (CanLII) at [13].

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