



Office of the
Saskatchewan Information
and Privacy Commissioner

Guide to LA FOIP

The Local Authority Freedom of Information and Protection of Privacy Act

Chapter 2

Administration of LA FOIP

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OVERVIEW

This chapter explains the administration of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

What follows is non-binding guidance. Every matter should be considered on a case-by-case basis. This guidance is not intended to be an exhaustive authority on the interpretation of these provisions. Local authorities may wish to seek legal advice when deciding on how to interpret the Act. Local authorities should keep section 51 of LA FOIP in mind. Section 51 places the burden of proof for establishing that access to a record may or must be refused on the local authority. For more on the burden of proof, see [Section 51: Burden of Proof](#) later in this Chapter.

This is a guide.

This chapter covers:

- **Minister of Justice & Attorney General**
 - Access & Privacy Branch

- **Local Authorities – Roles & Responsibilities**
 - Head of a Local Authority
 - The LA FOIP Coordinator or Privacy Officer
 - Section 50: Delegation of LA FOIP Responsibilities
 - Notices and the Manner of Giving Notice
 - Protection from Liability
 - Routine Disclosure & Active Dissemination
 - Proactive Reporting of Privacy Breaches

- **Information and Privacy Commissioner – Roles & Authorities**
 - Section 38: Appointment
 - Procedural Fairness
 - Section 32: Privacy Powers
 - Section 42: Conduct of Review
 - Section 43: Powers of Commissioner
 - Section 43.1: Power to Authorize a Local Authority to Disregard Applications or Requests

- Section 44: Report of Commissioner
- Section 45 (FOIP): Confidentiality
- Section 47 (FOIP): Non-compellability
- Section 48: Certain Provisions Adopted
- Section 52: Annual Report
- **Court of Queen’s Bench – Role & Responsibilities**
 - Section 46: Appeal to Court
 - Section 47: Powers of Court on Appeal
- **Section 51: Burden of Proof**
 - Standard Required to Meet Burden of Proof
 - Who has the Burden of Proof
 - Affidavit Evidence
- **Offences and Penalties under LA FOIP**
 - Section 54: Proceedings Prohibited
 - Section 55: Immunity from Prosecution
 - Section 56: Summary Offences
 - Section 66(3) (FOIP): Proceedings Prohibited

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’ (IPC) and equivalents’ Orders, Reports and/or other relevant resources. In addition, court decisions from across the country are relied upon where appropriate.

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

MINISTER OF JUSTICE AND ATTORNEY GENERAL

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

Access & Privacy Branch

On an ongoing basis, the Ministry of Justice, Access and Privacy Branch (APB) provides direction and support to local authorities as it relates to LA FOIP. The APB:

- Plays a leadership role on access and privacy in government;
- Provides or supports training and awareness of access and privacy within government and local authorities; and
- Provides privacy and access officers in government and local authorities with tools to help with compliance and consistency.²

LOCAL AUTHORITIES – ROLES & RESPONSIBILITIES

LA FOIP applies to all “*local authorities*” as defined by subsection 2(f) of LA FOIP. This includes Boards, Commissions and other bodies prescribed as local authorities in the Appendix, Parts I and II of the *LA FOIP Regulations*. See *Chapter 1, Purposes and Scope of LA FOIP*, for more on the definition of a local authority.

Local authorities that are subject to LA FOIP have statutory duties with regards to providing access to information and protection of personal information in its possession or control.

¹ Ministry of Justice, *Annual Report 2001-2002, The Freedom of Information and Protection of Privacy Act* at p. 4. See also Publications Saskatchewan at <https://publications.saskatchewan.ca/#/categories/329>.

² Ministry of Justice, *Annual Report 2001-2002, The Freedom of Information and Protection of Privacy Act* at p. 5. See also Publications Saskatchewan at <https://publications.saskatchewan.ca/#/categories/329>.

The head of a particular organization may claim that the organization is not covered by LA FOIP³ and consequently refuses a request for information on that basis. Such a refusal will likely be subject to review, at the request of the applicant, in the same way as a refusal based on a disclosure exemption. The applicability of LA FOIP to particular organizations may be resolved in this manner or through ultimate resort by the courts.⁴

Head of a Local Authority

Interpretation

2 In this Act:

...

(e) “head” means:

- (i) in the case of a municipality, the mayor, reeve or chairperson of the local authority committee, as the case may be;
- (i.1) in the case of a police service, the chief as defined in *The Police Act, 1990*; or
- (ii) in the case of any other local authority
 - (A) the chairperson of the governing body of the local authority; or
 - (B) the individual designated as the head by the governing body of the local authority;

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

Subsection 2(e) of LA FOIP defines the “head” of a local authority. The head of a local authority can delegate some or all of the responsibilities to another individual. Such delegation should be done in compliance with section 50 of LA FOIP. For more on delegation, see [Section 50: Delegation](#), later in this Chapter.

³ Local authorities should consider the definition of a “local authority” at subsection 2(f) of LA FOIP and the Appendix, Parts I and II, of the LA FOIP *Regulations* for additional prescribed “local authorities”.

⁴ McNairn and Woodbury, *Government Information: Access and Privacy*, (2009), Carswell: Toronto at p. 2-7.

IPC Findings

In [Review Report LA-2012-003](#), the Commissioner considered an access request made by the Mayor of the Village of Buena Vista. The Mayor was the designated head with responsibility under LA FOIP. However, the elected Council and Village Administrator did not agree and did not recognize this designation. The Commissioner found that the Mayor was the designated head of the local authority.

In [Review Report LA-2010-002](#), the Commissioner dealt with a request for access to a report resulting from a harassment investigation. In that report at footnote [3], the Commissioner noted that although the City Clerk had referred to herself as the “head” in correspondence this was inaccurate. The Mayor of Saskatoon had delegated to the City Clerk his rights and powers under LA FOIP pursuant to section 50 of LA FOIP. However, the delegation did not change the status of the Mayor as the “head”. Further, the Commissioner noted that the City Clerk was for purposes of LA FOIP, in the role of the LA FOIP Coordinator.

In [Review Report LA-2013-004](#), the Commissioner clarified for the Northern Village of Pinehouse, that the designation of the Mayor as “head” is a statutory provision designed to ensure accountability to the public. The Mayor had no power to designate someone else as the head, although the Mayor was permitted to delegate some or all of the duties to another by reason of section 50 of LA FOIP.⁵

In [Review Report LA-2014-001](#), the Commissioner recommended to the Village of Killaly that, within 15 days of the Commissioner’s report, it clarify whether the Mayor would retain responsibility for LA FOIP or if some or all responsibility would be formally delegated to other officers of the Village pursuant to section 50. The Commissioner also noted that it appeared that the Village was laboring under the misapprehension that it was the Village Council that was vested with responsibility for LA FOIP compliance. The Commissioner clarified that it was the Mayor who was the designated “head” for all purposes of LA FOIP unless there was evidence of a section 50 delegation.

In [Review Report 143-2017](#), the Commissioner considered whether the Reeve was the head of the Rural Municipality of Blaine Lake #434 for purposes of LA FOIP. The Reeve had argued that according to [The Municipalities Act](#), the Reeve did not have any authority or power to provide written notice to the applicant under LA FOIP. The Reeve indicated that he only represented council and decisions made by council. The Commissioner found that subsection 93(1)(b) of [The Municipalities Act](#) reinforced that the Reeve must meet his duties under LA FOIP. Finally,

⁵ Office of the Saskatchewan Information and Privacy Commissioner (SK OIPC) Review Report LA-2013-004 at [25].

that the powers and duties are vested in the head under LA FOIP, not council. The powers and duties are the head's responsibilities until he or she delegates them pursuant to section 50 of LA FOIP.

The LA FOIP Coordinator or Privacy Officer

Probably the most important person in managing access and privacy issues in any local authority is the designated LA FOIP Coordinator or Privacy Officer. The LA FOIP Coordinator may have different titles such as Access Coordinator. It is also possible the title does not appear to relate to access and privacy yet the individual also carries these duties. For example, the local authority's Administrator.

LA FOIP places responsibility on the "head" of the local authority. The head may delegate some or all of those powers to someone else in the organization pursuant to section 50 of LA FOIP.

The LA FOIP Coordinator or Privacy Officer is responsible for the overall management of access to information and protection of personal information within the organization.⁶

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

1. Information (general records should be available to the public);
2. Individuals should have access to their own personal information;
3. Exemptions to access should be limited and specific; and
4. Institutions should protect the privacy of individuals with respect to their personal information.⁷

An LA FOIP Coordinator or Privacy Officer should:

- respond to access requests and privacy complaints;
- raise awareness of access and privacy issues on a regular and proactive basis within their organization;

⁶ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, p. 24.

⁷ SK OIPC, *FOIP FOLIO*, January 2004 at p. 3.

- be aware of operations of the organization, the types of records and record-management systems in the department;
- quickly identify what units within the department are likely to have the records responsive to an access request and which employees should be consulted;
- be senior enough to be able to provide access and privacy advice to the Mayor or head of the organization on a regular basis;
- monitor decisions and recommendations of the IPC and ensure those decisions are integrated into the orientation and in-service training of staff in the department;
- be involved in the design of new programs that may impact access or privacy rights;
- provide timely advice to the department to ensure that LA FOIP will be complied with; and
- improve general awareness about the legislation through training sessions and materials within the department. In large organizations, newsletters, notices, FAQs, or a column in an intradepartmental bulletin may be helpful. The LA FOIP Coordinator or Privacy Officer may undertake internal audits to identify areas where more work is required to ensure full compliance.⁸

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

Section 50: Delegation

Delegation

50(1) A head may delegate to one or more officers or employees of the local authority a power granted to the head or a duty vested in the head.

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

(a) is to be in writing; and

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

⁸ SK OIPC, *FOIP FOLIO*, January 2004 at p. 3-4.

Delegation means entrusting someone else to act in one's place.⁹

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

- be in writing; and
- contain any limitations, restrictions, conditions or requirements the head considers necessary.

The **head**, for purposes of LA FOIP, includes the mayor, reeve or chairman of the local advisory committee or the chairperson of the governing body or the individual designated as the head by the governing body of the local authority.¹⁰

Here are some important things regarding a delegation:

- The delegation should identify the position, not the individual, to which the powers are delegated. When delegation is to the position, a new delegation is not required when a new appointee assumes the position;
- The delegation can cover a wide variety of duties, powers and functions;
- It remains in effect until replaced by an updated version;
- It is important to review the delegation periodically for any changes that may be needed, especially if the local authority is restructured or a new head is elected;
- The delegation should specifically refer to handling access to information requests including the processing of requests and the power to make decisions whether or not to disclose all or part of a record;
- A delegation relating to the handling of privacy can be more general and center on the delegated responsibility for collection, handling and protection of personal information;
- Delegated authority empowers certain officials and employees to make decisions or take action;

⁹ British Columbia Government Services, *FOIPPA Policy Definitions* at <https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foipppa-manual/policy-definitions>. Accessed April 23, 2020.

¹⁰ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 at s.s. 2(e).

- In general, delegation should be considered for all provisions of LA FOIP that state that the head may or must do something;¹¹ and
- The person delegating the authority remains responsible and accountable for all actions and decisions made under that delegation.¹²

The LA FOIP Coordinator or Privacy Officer normally prepares the delegation instrument and submits it to the head for approval.¹³

It is important that all delegated officers or employees know and understand their delegated responsibilities. It is also important that others in the organization understand that only those with delegated responsibilities under LA FOIP should be carrying out those duties and functions.¹⁴

If the individual with delegated authority does not actually make the decisions that they were delegated to make, the delegation is not being properly exercised.¹⁵ In other words, in order to be a true delegation, the individual needs to actually be given the authority to make the decisions as per the delegation.

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

IPC Findings

In [Review Report LA-2013-004](#), the Commissioner clarified for the Northern Village of Pinehouse, that the designation of the Mayor as "head" is a statutory provision designed to ensure accountability to the public. The Mayor had power to designate someone else as the head, although the Mayor was permitted to delegate some or all of the duties to another by reason of section 50 of LA FOIP.¹⁶

In [Review Report LA-2014-001](#), the Commissioner recommended to the Village of Killaly that, within 15 days of the Commissioner's report, it clarify whether the Mayor would retain responsibility for LA FOIP or if some or all responsibility would be formally delegated to other

¹¹ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, p. 27.

¹² "Delegate" 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.

¹³ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, p. 27.

¹⁴ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, p. 28.

¹⁵ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2, p. 29.

¹⁶ SK OIPC Review Report LA-2013-004 at [25].

officers of the Village pursuant to section 50. The Commissioner also noted that it appeared that the Village was laboring under the misapprehension that it was the Village Council that was vested with responsibility for LA FOIP compliance. The Commissioner clarified that it was the Mayor who was the designated "head" for all purposes of LA FOIP unless there was evidence of a section 50 delegation.

Notices and the Manner of Giving Notice

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

- Section 7 notice of the head's decision regarding access is to be provided to an applicant within 30 days after an application is received by a local authority;
- Subsection 7.1(2) notice is to be provided to applicants when applications are deemed abandoned;
- Subsection 11(1)(b) notice is to be provided to applicants when a record responsive to an access request is transferred to another local authority or government institution for processing;
- Subsections 12(2) and (3) require a notice to be provided to applicants when the head extends the 30-day response time. Notice of the extension is to be given within the first 30 days after an application is made. Within the period of extension, the head shall give notice in accordance with section 7;
- Subsection 25(2) requires the local authority to inform an individual of the purpose for the direct collection of the individual's personal information;
- Section 33 notice is to be given to third parties where a head intends to give access to third party information (see section 18) or personal information that may be disclosed pursuant to subsection 28(2)(n). This notice requirement can be waived by the third party (see section 34);
- Section 36 notice of the head's decision regarding whether access to the third party information will be given is to be provided to the third parties within 30 days after the third party was provided notice pursuant to section 33;

- Section 41 notice is to be given to third parties that a review by the IPC is occurring. The head shall provide this notice to any third party that was or would have been given notice under section 33. This notice shall be given immediately upon learning of the IPC's review. The head must also immediately provide notice of a review to an applicant where the review is requested by the third party;
- Section 45 notice of the head's decision regarding the Commissioner's report must be given to the Commissioner, applicant or individual and third party within 30 days of receiving the Commissioner's report; and
- Subsections 46(2) and (3) require notice to be given to any third party that was or would have been given notice under section 33 advising them that an appeal to the Court of Queen's Bench has been made by an applicant. If it is the third party that is appealing to the Court of Queen's Bench, then the head must give notice to the applicant.

Subsection 54(1)(c) of LA FOIP provides that no proceeding lies or shall be instituted against a local authority or the head or other officer or employee of a local authority if it fails to give any notice required under LA FOIP provided reasonable care was taken to give the notice.

Subsection 54(2) of LA FOIP provides that **reasonable care** is deemed to have been taken if the notice was sent to the applicant's address that was provided on the access to information form.

IPC Findings

In [Review Report LA-2013-004](#), the Commissioner found that the Northern Village of Pinehouse failed to provide a proper section 7 notice in accordance with LA FOIP. The Commissioner also found that it failed to respond appropriately to the Commissioner when notified that a formal review was underway. The Commissioner recommended the Village issue a compliant section 7 response to the applicant. Further, the Commissioner recommended the Ministry of Justice, which had administrative responsibility for LA FOIP, in consultation with the Ministry of Government Relations ensure the Village had proper delegation powers for a Privacy Officer, the Privacy Officer receive a clear job description and appropriate training and that appropriate policies and procedures be implemented for compliance with LA FOIP. The former Commissioner also recommended the Minister of Justice and Attorney-General consider prosecution pursuant to subsection 56(3) of LA FOIP.

In [Review Report LA-2014-001](#), the Commissioner found the Village of Killaly was in contravention of LA FOIP as it failed to provide a proper section 7 response to the applicant. Further, the Commissioner found that the Village failed to respond appropriately to the Commissioner when notified that a formal review was underway. The Commissioner

recommended that, within 15 days, the Village clarify if the Mayor will retain responsibility for LA FOIP or if some or all responsibility would be formally delegated to other officers of the Village pursuant to section 50. The Commissioner also recommended the Village issue a compliant section 7 response to the applicant and ensure that those individuals with responsibility for LA FOIP receive a clear job description and appropriate training. Further, the Commissioner recommended the Village ensure that appropriate policies and procedures are implemented for compliance with LA FOIP. Finally, the Commissioner recommended that the Minister of Justice and Attorney-General consider prosecution pursuant to subsection 56(3) of LA FOIP with respect to the refusal of the Village to comply with a lawful requirement of the Commissioner.

In [Review Report 036-2016](#), the Commissioner found that the Northern Village of Pinehouse did not comply with section 7 of LA FOIP and therefore, pursuant to subsection 7(5) of LA FOIP, the Village was deemed to have refused access to the records requested. The Commissioner recommended that the Village release the responsive records. The Commissioner noted that there were six other reviews underway involving similar issues with the Village (See 106-2016, 171-2016, 040-2016 and 037-2016).

In [Review Report 143-2017](#), the Commissioner found that the Reeve (as head) of the Rural Municipality of Blaine Lake #434 did not respond to the applicant within the legislated timeline of 30 days and as such failed to meet the obligations under section 7 of LA FOIP. The Commissioner recommended the R.M. release the records to the applicant within 15 days of issuance of the Commissioner's report. Further, the Commissioner recommended that the Reeve contact the Ministry of Government Relations, the Ministry of Justice (Access and Privacy Branch) and the Saskatchewan Association of Rural Municipalities (SARM) for assistance on how to meet its obligations as the head under LA FOIP.

Routine Disclosure & Active Dissemination

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

1. Routine disclosure in response to inquiries and requests for information; and
2. Active dissemination of information.

Routine disclosure and active dissemination will likely satisfy many of the information needs of members of the public. There are numerous advantages of using routine disclosure and active dissemination processes. The public will be better served and better informed through the planned and targeted release of information in support of overall program objectives. As well,

making information available outside the LA FOIP process can promote cost-effective management of public information resources.¹⁷

Personal information and personal health information must be handled differently. For more on handling personal information, see Chapter 6, *Protection of Privacy*. For more on handling personal health information, see the IPC *Guide to HIPA*.

For more on routine disclosure and active dissemination, see *Section 53.1: Access to Manuals* and *Section 53.2: Records Available Without an Application*, in **Chapter 3**.

Proactive Reporting of Privacy Breaches

A **privacy breach** occurs when there is an unauthorized collection, use or disclosure of personal information.¹⁸

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

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

Some of the benefits of proactively reporting privacy breaches include:

- The local authority may inform the media that it has alerted the IPC of the breach and is working with the IPC to address it;
- If the media contacts the IPC, the IPC would inform the media that it was working with the local authority to address the breach;
- The local authority may inform affected individuals that it has alerted the IPC of the breach and is working with the IPC to address it;
- Many proactively reported breaches are closed informally by the IPC without the issuance of a report; and
- If affected individuals contact the IPC, the IPC would inform the individual that it is working with the local authority to address the breach. Affected individuals also have

¹⁷ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 2 at p. 31.

¹⁸ SK OIPC Dictionary available at <https://oipc.sk.ca/resources/dictionary/>.

the option to file a complaint with the IPC and a separate file would be opened. The IPC would issue a report in such instances.¹⁹

When a local authority proactively reports a privacy breach to the IPC, the IPC will request a copy of the following to be provided within a certain timeframe:

- The local authority's internal investigation report, which outlines how the four best practices recommended by the IPC were addressed. The IPC will also provide its *Privacy Breach Investigation Questionnaire* to be completed.
- Details of the breach; and
- Copies of relevant documents including written policies, procedures or agreements.

Upon receipt, the focus of the IPC is on whether the local authority appropriately handled the breach. This is based on whether the local authority adequately addressed each of the four best practices recommended by the IPC. The four best practices include:

1. Contain the breach;
2. Notify affected individuals and/or appropriate organizations;
3. Investigate the breach; and
4. Prevent future breaches.²⁰

The local authority's internal investigation report should address each of these four best practices.

There are two possible outcomes for proactively reported breaches:

1. Informal resolution and file closure;

This would occur if the IPC is satisfied with how the breach was handled and the reasons for issuing a report below do not exist. Informal resolution may include some recommendations from our office. This is the most common outcome for many proactively reported privacy breaches.
2. Investigation Report is issued
 - a. Despite being satisfied with how the breach was handled, the IPC decides to issue a report. This may occur where an affected individual files a complaint with our

¹⁹ SK OIPC Resource, *Privacy Breach Guidelines for Government Institutions and Local Authorities* at p. 11.

²⁰ SK OIPC Resource, *Privacy Breach Guidelines for Government Institutions and Local Authorities* at pp. 6 to 9.

office, where a breach is egregious or where it involves a large number of affected individuals; **or**

- b. The IPC is not satisfied with how the breach was handled and the IPC shifts the matter to a formal investigation and issues a report. A formal investigation would be conducted pursuant to section 33 of FOIP.²¹

Local authorities should be aware of section 28.1 of LA FOIP. It requires local authorities to notify an individual of an unauthorized use or disclosure of the individual's personal information by the local authority if it is reasonable in the circumstances to believe that the incident creates a real risk of significant harm to the individual. For more on this, see Chapter 6, *Protection of Privacy*.

INFORMATION & PRIVACY COMMISSIONER - ROLES & RESPONSIBILITIES

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

Commencing November 1, 2003, the Commissioner became a full-time position and resources were provided to enable a stand-alone office. Prior to this, the Commissioner was a part-time position and there was no office.²²

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

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

1. The Commissioner responds to requests for review of decisions made by local authorities in response to access requests and makes recommendations to local authorities.

²¹ SK OIPC Resource, *Privacy Breach Guidelines for Government Institutions and Local Authorities* at p. 11.

²² SK OIPC *Annual Report - 2003-2004* at p. 7.

2. The Commissioner responds to complaints from individuals who believe their privacy has not been respected by local authorities and makes recommendations to those local authorities.
3. The Commissioner provides advice to local authorities on legislation, policies or practices that may impact access or privacy rights.
4. The Commissioner undertakes public education with respect to information rights including both access to information and protection of privacy.²³

The Commissioner prepares a report on the completion of a review or investigation that includes findings and recommendations for the local authority. The local authority has a responsibility to respond to the Commissioner's report under section 45 of LA FOIP indicating whether it will comply with the recommendations.

If not satisfied with the section 45 response from the local authority, an applicant can pursue an appeal to the Court of Queen's Bench for Saskatchewan. The Court of Queen'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.²⁴

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

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

Section 38: Appointment

Appointment of commissioner

- 38(1)** The office of the Information and Privacy Commissioner is continued.
- (2) The commissioner is an Officer of the Legislative Assembly.
- (3) The commissioner shall be appointed by order of the Legislative Assembly.

²³ SK OIPC *Annual Report 2010-2011* at p. 7.

²⁴ Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 837.

(4) Subject to sections 39 and 40, unless he or she resigns, dies or is removed from office, the commissioner holds office for a term of five years.

(5) The commissioner may be reappointed for one additional term of five years.

(6) The commissioner may resign the office at any time by giving written notice to the Speaker.

The provision that provides for the appointment of the Commissioner can be found at section 38 of *The Freedom of Information and Protection of Privacy Act* (FOIP).

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

- is appointed by order of the Legislative Assembly;
- is appointed for a term of five years; and
- can be extended an additional term of five years.

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

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

Procedural Fairness

Procedural fairness is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. It requires a fair and proper procedure be used when making a decision. It is highly likely that a decision-maker who follows a fair procedure will reach a fair and correct decision.²⁵

Procedural fairness involves decision-makers:

- informing parties of the case against them;
- giving parties the opportunity to be heard;
- remaining neutral; and

²⁵ Ombudsman Western Australia, *Guidelines, Procedural Fairness (natural justice)*, May 2009.

- acting only on the basis of logically probative evidence.²⁶

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

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

A fair trial must not...be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.²⁷

The duty of procedural fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected in a given set of circumstances (i.e. “the specific context of each case”).²⁸

The Commissioner conducts reviews and investigations following the principles of procedural fairness within the limits of LA FOIP. For example, while sharing submissions amongst parties is procedurally fair, section 42 (conduct of a review) of LA FOIP and section 46 (confidentiality) of *The Freedom of Information and Protection of Privacy Act* (FOIP)²⁹ limit what the Commissioner can share with other parties during a review. Further, while LA FOIP provides the opportunity to make submissions to the Commissioner, it specifically limits the “right to be present during a review” or to have access to submissions by other parties made to the Commissioner before or after a review.³⁰

All parties to a review or investigation are given the opportunity to provide representations (submissions) to the Commissioner. The Commissioner considers those representations in a neutral non-biased manner and makes decisions based on a balance of probabilities or a

²⁶ SK OIPC, Presentation, *Procedural Fairness: Factors that contribute to making an administratively fair decision*.

²⁷ *R. v. Harrer, 1995 CanLII 70 (SCC), [1995] 3 SCR 562* at [45]. Also cited in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595 (CanLII) at [57].

²⁸ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at [21] and [22]. Also cited in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595 (CanLII) at [59].

²⁹ Section 46 of FOIP is adopted by LA FOIP pursuant to section 48 of LA FOIP. Therefore, this provision applies in the context of LA FOIP as well.

³⁰ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 at s.s. 42(3).

preponderance of the evidence presented by the parties. For more on this, see *Section 51: Burden of Proof*, later in this chapter.

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

To assist parties in understanding the procedures used by the IPC, the Commissioner issued, *The Rules of Procedure*.

Section 32: Privacy Powers

Privacy powers of commissioner

32 The commissioner may:

- (a) offer comment on the implications for privacy protection of proposed programs of local authorities;
- (b) after hearing the head, recommend that a local authority:
 - (i) cease or modify a specified practice of collecting, using or disclosing information that contravenes this Act; and
 - (ii) destroy collections of personal information that is collected in contravention of this Act;
- (c) in appropriate circumstances, authorize the collection of personal information in a manner other than directly from the individual to whom it relates;
- (d) from time to time, carry out investigations with respect to personal information in the possession or under the control of local authorities to ensure compliance with this Part.

Section 32 of LA FOIP enables the Commissioner to monitor compliance with LA FOIP and carry out investigations with respect to the handling of personal information in the possession or under the control of local authority.

The Commissioner may:

- Offer comment on the implications for privacy protection of proposed programs of local authorities [s.s.32(a)];
- Make recommendations to local authorities:

- to cease or modify a practice for collecting, using or disclosing personal information that contravenes LA FOIP;
- to destroy collections of personal information that are collected in contravention of LA FOIP [s.s.32(b)];
- Where appropriate, authorize a local authority to collect personal information in a manner other than directly from the individual to whom it relates [s.s.32(c)]; and
- Carry out investigations with respect to personal information in the possession or under the control of local authorities to ensure compliance with LA FOIP [s.s.32(d)].

A **privacy breach** happens when there is an unauthorized collection, use or disclosure of personal information, regardless of whether the personal information ends up in a third party's possession.³¹

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

- A complaint is received from an individual;
- A local authority proactively reports a privacy breach to the Commissioner; or
- A privacy matter comes to the attention of the Commissioner and the Commissioner initiates an investigation.

For more on privacy, see Chapter 6, *Protection of Privacy*.

For more on the IPC's procedures during an investigation, see *The Rules of Procedure*.

Section 39: Review or Refusal to Review

Refusal to review

39(1) Where the commissioner is satisfied that there are reasonable grounds to review any matter set out in an application pursuant to section 38, the commissioner shall review the matter.

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

(a) is frivolous or vexatious;

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

³¹ SK OIPC *Annual Report 2012-2013* at Appendix 3.

- (a.2) has not moved forward as the applicant or individual has failed to respond to the requests of the commissioner;
- (a.3) concerns a local authority that has an internal review process that has not been used;
- (a.4) concerns a professional who is governed by a professional body that regulates its members pursuant to an Act, and a complaints procedure available through the professional body has not been used;
- (a.5) may be considered pursuant to another Act that provides a review or other mechanism to challenge a local authority's decision with respect to the collection, amendment, use or disclosure of personal information and that review or mechanism has not been used;
- (a.6) does not contain sufficient evidence;
- (a.7) has already been the subject of a report pursuant to section 44 by the commissioner;
- (b) is not made in good faith; or
- (c) concerns a trivial matter.

Subsection 39(2) of LA FOIP permits the Commissioner to dismiss or discontinue a review under certain circumstances.

A local authority can request the Commissioner dismiss or discontinue a review based on subsection 39(2). The local authority should provide its arguments in support of its position to the IPC.

For more on dismissing or discontinuing reviews, see *Section 39: Review or Refusal to Review* in [Chapter 3, Access to Records](#).

Section 42: Conduct of Review

Conduct of review

42(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 41; 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 42(1) of LA FOIP provides that the Commissioner shall “conduct every review in private.” However, the Commissioner also has some discretion to disclose what the Commissioner deems necessary pursuant to subsection 46(3) of *The Freedom of Information and Protection of Privacy Act* (FOIP).³² For more on this, see *Section 46: Confidentiality*, later in this Chapter. Further, the Commissioner has the authority to determine the procedure to be followed for reviews pursuant to subsection 45(2)(d) of FOIP.³³

Subsection 42(2) of LA FOIP provides that applicants, local authorities, and third parties (given notice under section 41) are entitled to make submissions to the Commissioner in the course of a review.

Subsection 42(3) of LA FOIP provides that no person is entitled to be present during a review. Further, no person is entitled to have access to or comment on submissions made to the Commissioner before or after a review.

IPC Findings

In *Review Report 339-2017*, the Commissioner considered the City of Regina’s application of subsection 7(4) of LA FOIP. In its response to the Commissioner’s preliminary analysis, the City asserted that if the Commissioner identified the exemptions the City was relying on to invoke subsection 7(4) of LA FOIP, the Commissioner would be in breach of section 42 of LA FOIP. The City also asserted the Commissioner should consider not issuing a review report. However, the Commissioner disagreed with the City’s assertions, saying the suggestions were tantamount to total secrecy. The Commissioner found that subsection 46(3) of FOIP (via s. 48 of LA FOIP) provided the Commissioner discretion to disclose what was considered necessary to establish grounds for the Commissioner’s findings and recommendations. Further, the Commissioner

³² Section 46 of FOIP is adopted by LA FOIP pursuant to section 48 of LA FOIP. Therefore, this provision applies in the context of LA FOIP as well.

³³ Section 45 of FOIP is adopted by LA FOIP pursuant to section 48 of LA FOIP. Therefore, this provision applies in the context of LA FOIP as well.

found that during a review, the Commissioner will identify what exemptions a local authority is relying on when it invokes subsection 7(4) of LA FOIP.

Section 43: Powers of Commissioner

Powers of commissioner

43(1) Notwithstanding any other Act or any privilege available at law, the commissioner may, in a review:

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

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

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

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

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

Section 43 of LA FOIP also lays out other powers the Commissioner has including in the course of a review:

- The power to compel a local authority to produce records in its possession or control and examine them [s.s.43(1)(a)];
- The power to enter and inspect any premises occupied by a local authority [s.s.43(1)(b)];
- The power to summon and enforce the appearance of persons before the Commissioner and compel them to:
 - Give oral or written evidence on oath or affirmation; and
 - To produce any documents or things [s.s.43(2)].

In Court of Appeal for Saskatchewan decision, *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner), (2018)*, the Honourable Chief Justice Richards confirmed the Commissioner's power to compel production of records:

[47] In the end, therefore, I see nothing in the statutory context in which s. 43(1) of LA FOIPA is found to suggest it should be given anything other than its ordinary and grammatical meaning. As a result, I conclude that s. 43(1) empowers the Commissioner to require the production of records subject to, or said to be subject to, solicitor-client privilege. The Chambers judge made no error in his conclusion on this front.³⁴

Section 43.1: Power to Authorize a Local Authority to Disregard Applications or Requests

Power to authorize a local authority to disregard applications or requests

43.1(1) The head may apply to the commissioner to disregard one or more applications pursuant to section 6 or requests pursuant to section 31.

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

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

(3) The application pursuant to subsection 6(1) or the request pursuant to clause 31(1)(a) is suspended until the commissioner notifies the head of the commissioner's decision with respect to an application or request mentioned in subsection (1).

(4) If the commissioner grants an application or request mentioned in subsection (1), the application pursuant to subsection 6(1) or the request pursuant to clause 31(1)(a) is deemed to not have been made.

(5) If the commissioner refuses an application or request mentioned in subsection (1), the 30-day period mentioned in subsection 7(2) or subsection 31(2) resumes.

Section 43.1 of LA FOIP provides local authorities the ability to apply to the Commissioner requesting authorization to disregard an access request (section 6 application) or a correction request (section 31 request) made by an applicant.

³⁴ *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34 (CanLII) at [47].

Subsection 43.1(1) requires a local authority to make an application to the Commissioner. Details of how to make an application are contained in *The Rules of Procedure*. Additional guidance is available in IPC resource, *Application to Disregard an Access to Information Request or Request for Correction*.

A request to disregard is a serious matter as it could have the effect of removing an applicant's express right to seek access to information in a particular case. It is important for a local authority to remember that a request to disregard must present a sound basis for consideration and should be prepared with this in mind.³⁵ The Commissioner sets a high standard when considering applications to disregard.

For more on disregarding applications or requests, see *Chapter 3, Access to Records* at *Section 43.1: Power to Authorize a Local Authority to Disregard Applications or Requests*.

Section 44: Report of Commissioner

Report of commissioner

44(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 41; and

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

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

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

³⁵ Office of the New Brunswick Information and Privacy Commissioner (NB IPC), *Interpretation Bulletin – Section 15 – Permission to disregard access request*.

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

All reports are generally posted to the Commissioner's website three to five 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.

Local authorities are required, pursuant to section 45 of LA FOIP, to respond to a report of the Commissioner within 30 days indicating whether it will comply with the Commissioner's recommendations or any other decision the head considers appropriate. The head's response should be provided to the other parties to the review or investigation and to the Commissioner. The response should be in writing.

Once an applicant, individual, or third party receives the head's section 45 response, it has 30 days to make an application to the Court of Queen's Bench if not satisfied pursuant to section 46 of LA FOIP. For more information on the Court of Queen's Bench see *Courts of Saskatchewan*. See also *Court of Queen's Bench – Role & Responsibilities*, later in this chapter.

In the recent Court of Appeal for Saskatchewan decision, *Leo v Global Transportation Hub Authority, 2020 SKCA 91 (CanLII)*, the court clarified the de novo nature of an appeal pursuant to [section 46 of LA FOIP]. Part VI of LA FOIP does not in any way contemplate that, on an appeal to the Court of Queen's Bench, parties can raise any and all provisions of the Act that bear on the question of whether the record in issue may be released. The system of the Act offers no room for a direct appeal to the Court of Queen's Bench from the decision of a head, i.e., an appeal that circumvents the application to the Commissioner for a review.³⁶

For more on the IPC's procedures for reviews, investigations and issuing reports, see *The Rules of Procedure*.

³⁶ *Leo v Global Transportation Hub Authority, 2020 SKCA 91 (CanLII)* at [41] and [47]. Although this matter dealt with *The Freedom of Information and Protection of Privacy Act*, it is relevant as substantially similar provisions can be found in LA FOIP.

Section 45 (FOIP): General Powers of Commissioner

General powers of commissioner

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

(2) The commissioner may:

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

Section 48 of LA FOIP provides that subsections 43(1), 45, 46, 47 and 66(3) of *The Freedom of Information and Protection of Privacy Act* (FOIP) are adopted, with any necessary modification, for purposes of LA FOIP.

The provision that provides for the general powers of the Commissioner can be found at section 45 of FOIP.

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

- Engage in or commission research into matters affecting the carrying out of the purposes of LA FOIP [s.s.45(2)(a)];
- Conduct public education programs and provide information concerning LA FOIP and the Commissioner’s role and activities [s.s.45(2)(b)];
- Receive representations concerning the operation of LA FOIP [s.s.45(2)(c)];
- Determine the procedures to be followed in the exercise of the powers or performance of any duties the Commissioner has under LA FOIP [s.s.45(2)(d)]; and

- Exchange personal information with other information and privacy commissioners in Canada for the purpose of conducting investigations with respect to personal information in the possession or under the control of a government institution or to conduct a review involving a local authority and at least one other jurisdiction [s.s.45(2)(e)].

Section 46 (FOIP): Confidentiality

Confidentiality

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

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

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

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

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

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

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

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

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

(a) an Act or a regulation; or

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

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

Section 48 of LA FOIP provides that subsections 43(1), 45, 46, 47 and 66(3) of *The Freedom of Information and Protection of Privacy Act* (FOIP) are adopted, with any necessary modification, for purposes of LA FOIP.

Before entering the duties of office, the Commissioner takes an oath of office before the Speaker of the Legislative Assembly or the Clerk of the Assembly (see subsection 44(1) of FOIP). See also section 19 of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations).

All staff of the Commissioner sign an oath of office on an annual basis. This oath is sworn before the Commissioner affirming that, except as provided for under LA FOIP, staff will not divulge any information received in the exercise of their powers or performance of their duties and functions at the IPC (see subsection 44(2) of FOIP). See also section 19 of the *FOIP Regulations*.

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

However, the Commissioner may disclose:

- In the course of a review - any matter the Commissioner considers necessary to disclose to facilitate a review (s.s.46(3)(a) of FOIP); or
- In the Commissioner's report - any matter the Commissioner considers necessary to disclose to establish grounds for the findings and recommendations (s.s. 46(3)(b) of FOIP).

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

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

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

The Commissioner and the Commissioner's staff do not release records to applicants that have been withheld by a local authority. Decisions to release are made by the head under LA FOIP.

The Commissioner may recommend release of certain records or information, however, that release must be done by the local authority.

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

In camera, in this context, means only the IPC will see the submission and it will not be shared with the other parties to the review.

The objective of sharing submissions is to facilitate an informal resolution to a review and to keep in line with procedural fairness. However, the IPC does not consider the Index of Records to be part of the representations of the local authority and will share the Index of Records with applicants. This facilitates fairness and transparency as far as what records are at issue in a review. In addition, it may lead to informal resolution or a narrowed scope of issues in a review.

Section 47 (FOIP): Non-compellability

Non-compellability

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

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

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

Section 48 of LA FOIP provides that subsections 43(1), 45, 46, 47 and 66(3) of *The Freedom of Information and Protection of Privacy Act* (FOIP) are adopted, with any necessary modification, for purposes of LA FOIP.

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

However, in cases where there is a prosecution under LA FOIP pursuant to section 56, the Commissioner, the Commissioner's staff or contracted employees of the Commissioner may participate in the proceeding as a witness or may produce documents relevant to the prosecution (47(3)).

Section 48: Certain Provisions Adopted

Certain provisions adopted

48 Subsection 43(1), sections 45 to 47 and subsection 66(3) of *The Freedom of Information and Protection of Privacy Act* are adopted, with any necessary modification, for the purposes of this Act.

Section 48 of LA FOIP provides that subsections 43(1), 45, 46, 47 and 66(3) of FOIP are adopted, with any necessary modification, for purposes of LA FOIP.

These sections of FOIP cover:

- staff of the commissioner (s.s.43(1));
- general powers of the commissioner (s.45);
- confidentiality (s.46);
- non-compellability (s.47); and
- proceedings prohibited (s.s.66(3)).

Section 52: Annual Report

Annual report

52(1) Within three months after the end of each fiscal year, the commissioner shall prepare and submit an annual report to the Speaker of the Assembly, and the Speaker shall cause the report to be laid before the Assembly in accordance with section 13 of *The Executive Government Administration Act*.

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

As an independent Officer of the Legislature, the Commissioner reports annually to the Legislative Assembly, describing the work of the Commissioner's office and any instances where the Commissioner's recommendations to local authorities were not complied with. This annual report is required pursuant to section 52 of LA FOIP.

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

COURT OF QUEEN'S BENCH - ROLES & RESPONSIBILITIES

Section 46: Appeal to Court

Appeal to court

46(1) Within 30 days after receiving a decision of the head pursuant to section 45, 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 33(1); or

(b) would have notified pursuant to subsection 33(1) if the head had intended to give access to the record or part of the record.

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

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

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

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

An appeal to the court begins with an application to the Court of Queen's Bench for Saskatchewan and may be appealed further by any party. For more on the process of appealing to the Court of Queen's Bench see [Chapter 3, Access to Records](#) or IPC resource, [Guide to](#)

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

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

1. Court of Queen's Bench for Saskatchewan;
2. Court of Appeal for Saskatchewan; and
3. Supreme Court of Canada.³⁷

Judges are required to give reasons for their decisions. These reasons may be contained in a written judgement of the court or may be given orally in court. Sometimes judges may do both – giving their decision orally in court with written reasons for the decision following at a later date.³⁸ These judgments or orders are binding on the parties. Section 10-22 of *The Queen's Bench Rules* states:

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

The Court of Queen's Bench for Saskatchewan consists of a Chief Justice of the Queen's Bench and currently 31³⁹ other judges. Each Queen's Bench judge is assigned to a specific judicial centre, but because the Court is an itinerant⁴⁰ court, the judges also travel to and sit in other judicial centres.⁴¹

In Saskatchewan, there are court locations in:

- Battleford;
- Estevan;
- La Ronge;
- Meadow Lake;
- Melfort;
- Moose Jaw;
- Prince Albert;
- Regina;

³⁷ Courts of Saskatchewan, Resources, Court Structure. Available at <https://sasklawcourts.ca/index.php/home/resources/learn-about-the-courts-resources/court-structure>.

³⁸ Courts of Saskatchewan at <https://sasklawcourts.ca/index.php/home/decisions>.

³⁹ Courts of Saskatchewan at <https://sasklawcourts.ca/index.php/home/court-of-queen-s-bench/judges>. Accessed February 4, 2020.

⁴⁰ "Itinerant" (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.

⁴¹ 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.

- Saskatoon;
- Swift Current;
- Weyburn; and
- Yorkton.

Section 47: Powers of Court on Appeal

Powers of court on appeal

47(1) On an appeal, the court:

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

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

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

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

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

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

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

(a) an Act or a regulation; or

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

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

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

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

(b) make any other order that the court considers appropriate.

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

(7) If, with respect to an appeal of a decision of the head regarding the matters mentioned in clauses 38(1)(a.1) to (a.4), the court determines that the decision of the head was not authorized pursuant to this Act, the court may:

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

(b) make any other order that the court considers appropriate.

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

The court's function is to consider the matter *de novo*, including, if necessary, a detailed review of the records in issue document by document. The review of records would be *in camera*.⁴²

De novo means a review of a matter anew, as if the original hearing had not taken place.⁴³

On an appeal *de novo*, the court is not constrained by the standard of review. It finds the facts and the law.⁴⁴

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 46 of LA FOIP]. Part VI of LA FOIP does not in any way contemplate that, on an appeal to the Court of Queen's Bench, parties can raise any and all provisions of the Act that bear on the question of whether the record in issue may be released. The system of the Act offers no room for a direct appeal to the Court of Queen's Bench from the decision of a head, i.e., an appeal that circumvents the application to the Commissioner for a review.⁴⁵

In camera, in this context, means in the judge's private chambers.⁴⁶ In general terms, it means in private (not open to the public). For a case involving both the examination of records *in*

⁴² *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 at s.s. 47(1)(b).

⁴³ Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 837.

⁴⁴ *Gordon v Regina Qu'Appelle Regional Health Authority*, 2017 SKQB 291 (CanLII) at [37].

⁴⁵ *Leo v Global Transportation Hub Authority*, 2020 SKCA 91 (CanLII) at [41] and [47]. Although this matter dealt with *The Freedom of Information and Protection of Privacy Act*, it is relevant as substantially similar provisions can be found in LA FOIP.

⁴⁶ Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 909.

camera by the judge and an *in camera* hearing, see *Leo v Global Transportation Hub Authority*, 2018 SKQB 323 (CanLII).

In order to avoid disclosure of withheld information or the existence of records (i.e. where subsection 7(2)(f) of LA FOIP has been applied), the court will take every reasonable precaution including, where appropriate, receiving representations *ex parte* and/or conducting hearings *in camera*.⁴⁷

Ex parte, in this context, means receiving representations from one party only, usually without notice to or argument from the adverse party.⁴⁸

The Information and Privacy Commissioner cannot be a party to an appeal.⁴⁹ Further, the Commissioner and the staff of the Commissioner are not compellable to give evidence in a court.

Where the court finds evidence of an offence by an officer or employee of a local authority under section 56 of LA FOIP or any Act or regulation provincially or federally, the court may disclose information to the Attorney General for Saskatchewan or the Attorney General of Canada.⁵⁰

Unlike the review of many other local authority actions that must generally be upheld if supported by evidence and not arbitrary or capricious, the burden rests on the local authority to justify its action. Section 51 of LA FOIP provides that "[i]n any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned."⁵¹

The court is required to determine whether the local authority was authorized to refuse access.

Where its refusal was not authorized, the court is given the authority to order a local authority to give an applicant access to a record, subject to any conditions the court considers appropriate. Alternatively, the court may make any other order it considers appropriate.⁵²

⁴⁷ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 at s.s. 47(3).

⁴⁸ Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 722.

⁴⁹ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 at s.s. 47(5).

⁵⁰ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 at s.s. 47(4).

⁵¹ *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance*, 1993 CanLII 9128 (SK CA) at [12].

⁵² *Evenson v Kelsey Trail Regional Health Authority*, 2012 SKQB 382 (CanLII) at [6]. See also, *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 at s.s. 47(5).

If the court finds that refusal was authorized (i.e. an exemption under LA FOIP applies), the court will not order the local authority to provide access regardless of whether the exemption was a mandatory or discretionary exemption. To elaborate further, this means that the court will not exercise the heads discretion for any applicable discretionary exemptions.⁵³ For more on mandatory and discretionary exemptions, see Chapter 4, *Exemptions from the Right of Access*.

For appeals of fee estimates, fee waivers, transfers of requests and privacy matters, if the court determines that the decision made by the local authority was not authorized under LA FOIP, the court may order the local authority to reconsider its decision and proceed in accordance with LA FOIP subject to any conditions the court considers appropriate. The court may also make any order the court considers appropriate.⁵⁴ Alternatively, if the court finds the decision made by the local authority was authorized, it will not order the local authority to reconsider.⁵⁵

Several access to information and privacy matters have been appealed to the Court of Queen's Bench for Saskatchewan. Some cases have gone further to the Court of Appeal for Saskatchewan. However, to date, no Saskatchewan access to information or privacy matters have reached the Supreme Court of Canada. Some notable cases are as follows:

Court of Queen's Bench for Saskatchewan:

Liick v. Saskatchewan (Minister of Health), 1994 CanLII 4934 (SK QB)

Weidlich v. Saskatchewan Power Corp., 1998 CanLII 14047 (SK QB)

Fogal v. Regina School Division No. 4, 2002 SKQB 92 (CanLII)

Germain v. Automobile Injury Appeal Commission, 2009 SKQB 106 (CanLII)

Evenson v Kelsey Trail Regional Health Authority, 2012 SKQB 382 (CanLII)

Evenson v Saskatchewan (Ministry of Justice), 2013 SKQB 296 (CanLII)

Canadian Bank Note Limited v Saskatchewan Government Insurance, 2016 SKQB 362 (CanLII)

Consumers' Co-operative Refineries Limited v Regina (City), 2016 SKQB 335 (CanLII)

Shook Legal, Ltd v Saskatchewan (Government Insurance), 2018 SKQB 238 (CanLII)

D'Arcy Hande v University of Saskatchewan, QBG 1222 of 2018 (unreported)

⁵³ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 at s.s. 47(6).

⁵⁴ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 at s.s. 47(7).

⁵⁵ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 at s.s. 47(8).

Britto v University of Saskatchewan, 2018 SKQB 92 (CanLII)

Leo v Global Transportation Hub Authority, 2018 SKQB 323 (CanLII)

Leo v. Global Transportation Hub Authority, 2019 SKQB 150 (CanLII)

Court of Appeal for Saskatchewan:

City Collection Co. Ltd. et al v. Saskatchewan Government Insurance, 1993 CanLII 6654 (SK CA)

General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance, 1993 CanLII 9128 (SK CA)

University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner), 2018 SKCA 34 (CanLII)

Leo v Global Transportation Hub Authority, 2020 SKCA 91 (CanLII)

SECTION 51: BURDEN OF PROOF

Burden of proof

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

Section 51 of LA FOIP provides that the local authority has the burden of proof if it claims that access should or must be refused under LA FOIP. The burden is not on the applicant to establish that an exemption does not apply.

Burden of proof is the obligation of one of the parties in a review to persuade the Commissioner to decide an issue in its favour.⁵⁶

When it is said that a party has the “burden of proof”, what is meant is that one party has a duty in law first to bring forward evidence that a particular fact or situation exists, and then to persuade the Commissioner that the evidence meets the necessary standard of proof.⁵⁷

⁵⁶ Service Alberta, *FOIP Guidelines and Practice: 2009 Edition*, Appendix 1, Definitions.

⁵⁷ SK OIPC Review Report F-2013-005 at [20].

Standard Required to Meet Burden of Proof

In law there are different standards that must be met in order to satisfy the burden of proof. These standards are applied in different situations. The one most people are familiar with is the standard of proof “beyond a reasonable doubt.” This standard applies in criminal cases. Civil cases, such as cases involving contractual disputes, have a lesser standard. That standard is proof “on a balance of probabilities” or “on a preponderance of evidence.” For matters before the Commissioner, this lesser standard applies.⁵⁸

The term **balance of probabilities** is difficult to define, but it is more than a mere possibility. It has been taken to mean that the person deciding a case must find that it is more probable than not that a contested fact exists. In the LA FOIP context, a party will have proven its case on a balance of probabilities if the Commissioner can say “I think it is more likely, or more probable, than not.”⁵⁹

The term **preponderance of evidence** means the same thing as “balance of probabilities.” If the Commissioner reaches a conclusion based on a preponderance of evidence, this means that the Commissioner has considered and weighed the evidence presented by both parties and the Commissioner is convinced by the persuasiveness or accuracy of one party’s evidence over the other party’s evidence. A party to a matter before the Commissioner is only required to prove something on a balance of probabilities when the party has the burden of proof.⁶⁰

Evidence is the material that parties must submit in reviews/investigations to establish the facts on which they are relying.⁶¹

Arguments are the reasons why a party thinks that the evidence shows certain facts to be true, or why the Commissioner should interpret the law in a particular way, so as to make the decision that the party wants the Commissioner to make.⁶²

Parties may not succeed in a review or investigation if they do not provide evidence to support their arguments. If the success of an argument depends on underlying facts, providing the argument alone is not sufficient.⁶³ Examples of evidence include affidavits, expert reports, news articles, meeting minutes, policy documents or contracts. In a review, the records at issue are

⁵⁸ Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 2.

⁵⁹ Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 2.

⁶⁰ Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 2.

⁶¹ Office of the Information and Privacy Commissioner of Alberta (AB IPC) Adjudication Practice Note 2, *Evidence and Arguments for Inquiries* at p. 1.

⁶² AB IPC Adjudication Practice Note 2, *Evidence and Arguments for Inquiries* at p. 1.

⁶³ AB IPC Adjudication Practice Note 2, *Evidence and Arguments for Inquiries* at p. 1.

treated as evidence.⁶⁴ Although news articles are not generally thought of as reliable evidence, they may be relevant in cases such as where a party is trying to demonstrate that something is publicly available, or where personal information has been disclosed without authority.

It would not be sufficient to provide the Commissioner with records and leave it up to the Commissioner to draw from the records the facts on which the decisions will be based.⁶⁵

It would not be sufficient to simply state “access is denied because of section 18.” It is up to the local authority to ‘make the case’ that a particular exemption applies. That means presenting reasons why the exemption is appropriate for the part of the record that has been withheld. This is usually done in the form of written representations, commonly called a submission.⁶⁶

Representation means the documents, other evidence and/statements or affidavits provided by a party to the commissioner’s office setting out its position with respect to a review or investigation and often referred to as a submission.⁶⁷

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

Applicants are not required to submit evidence or arguments in the form of written representations (submission) in a review because the Commissioner can make a determination as to whether the local authority correctly applied LA FOIP without an applicant’s submission. However, applicants are always invited to provide submissions. There may be circumstances where the Commissioner may need an applicant to provide evidence or argument such as where an applicant claims a party has waived legal privilege, that information should be disclosed in the public interest, or that an applicant is unable to pay a fee.

⁶⁴ Office of the Information and Privacy Commissioner of British Columbia (BC IPC), *Instructions for Written Inquiries*, May 2017 at p. 6.

⁶⁵ AB IPC Adjudication Practice Note 2, *Evidence and Arguments for Inquiries* at p. 1.

⁶⁶ SK OIPC Review Report F-2013-005 at [20].

⁶⁷ SK OIPC *Rules of Procedure* at p. 7.

IPC Findings

In [Review Report LA-2012-004](#), the Commissioner found that the Board of Education of the Saskatoon School Division No. 13 had not met the burden of proof in demonstrating that any of the exemptions it claimed applied to the record. The Commissioner found that the Board did not provide anything to satisfy the three-part test for subsection 17(1)(d) of LA FOIP including identifying contractual or other negotiations in which disclosure of the information would interfere. It also did not provide enough to support the application of subsections 17(1)(f), (g) or 18(1)(c).

In [Review Report 156-2017 & 264-2017](#), the Commissioner found that the Rural Municipality of Manitou Lake No. 442 did not meet its obligations under section 51 of LA FOIP.

Who has the Burden of Proof

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

- Who raised the issue; and
- Who is in the best position to meet the burden of proof.⁶⁸

LA FOIP does not define burden of proof in a breach of privacy investigation. Since a complainant raises the issue, the complainant has the initial burden to establish that a privacy breach has occurred involving the complainant's personal information. If a collection, use or disclosure is established, the burden then shifts to the local authority to justify its authority under LA FOIP for the data transaction.⁶⁹ Only the local authority would have intimate knowledge of the circumstances surrounding a breach. The burden of proof is assessed on a balance of probabilities.⁷⁰

LA FOIP does not define burden of proof in a review of a fee estimate. However, having regard for the purpose of the Act and the practice in other Canadian jurisdictions, the head of the local

⁶⁸ Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 4.

⁶⁹ Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 4.

⁷⁰ SK OIPC Investigation Report LA-2010-001 at [26]. This is also consistent with Alberta – see Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 4.

authority should also bear the burden of establishing the reasonableness of the fee under the Act.⁷¹

LA FOIP does not define burden of proof in a review of a transfer of an access request (section 11). However, the local authority that transfers the request is in the best position to explain why it transferred it.⁷²

LA FOIP does not define burden of proof in a review involving an extension of time (section 12). However, the burden of proof of establishing an appropriate basis to extend the time to respond to an applicant under LA FOIP should be borne by the local authority.⁷³

LA FOIP does not define burden of proof in a review of a request for correction (section 31). However, the applicant has the initial burden to establish that there are errors or omissions in the personal information that are subject to correction.⁷⁴ Once an error or omission is established, the burden of proof shifts to the local authority to justify its decision to not correct the personal information.

IPC Findings

In [Investigation Report LA-2010-001](#), the Commissioner investigated a complaint involving the City of Saskatoon disclosing an employee's personal information to the Canada Revenue Agency (CRA). To meet its burden of proof, the Commissioner determined that the City would likely have had to provide a copy of its agreement with the CRA and/or identify which laws, and its specific sections, the CRA was seeking to administer or enforce. The City did not provide such details. Therefore, the Commissioner was not persuaded that the City had authority to disclose the complainant's personal information to CRA.

Affidavit Evidence

An **affidavit** is a declaration of facts written down and sworn or affirmed to be true by a party who has personal knowledge of the records or matters at issue in a review or investigation.⁷⁵

⁷¹ SK OIPC Review Report F-2005-005 at [29]. This is also consistent with Alberta – see Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 4.

⁷² SK OIPC Review Report F-2013-005 at [21].

⁷³ SK OIPC Review Report F-2008-001 at [14] and F-2006-005 at [27].

⁷⁴ SK OIPC Review Report F-2014-004 at [21].

⁷⁵ Service Alberta, *FOIP Bulletin No. 9, Burden of Proof*, November 2009 at p. 9.

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

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

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

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

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

OFFENCES & PENALTIES

Section 54: Proceedings Prohibited

Proceedings prohibited

54(1) No proceeding lies or shall be instituted against a local authority or the head or other officer or employee of a local authority for:

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

There will undoubtedly be instances in which local authorities release information that is protected from disclosure by a mandatory exemption under LA FOIP. This is likely to be the result of a misinterpretation or misapplication of the statute or simply inadvertence. A person who is injured by such action may well look to the local authority for recovery of the amount of any damages suffered.⁷⁶ It is also possible that injury could occur from a decision to withhold a record. However, subsections 54(1)(a) and (b) protect the local authority and its officials from civil liability in these circumstances, if the decision to disclose or withhold was made in good faith.

Good faith means that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. Good faith is an intangible quality encompassing honest belief, the absence of malice and the absence of design to defraud or take advantage of something.⁷⁷

Subsection 54(1)(c) also confers immunity from suit for failure to give any notice required under LA FOIP, if reasonable care was taken to give the notice.

Reasonable care means the degree of care that a prudent and competent person engaged in the same endeavor would exercise under similar circumstances.⁷⁸ Subsection 54(2) of LA FOIP provides that reasonable care is deemed to have taken place if notice required to be sent to an applicant is sent to the address of the applicant given on the access to information form.⁷⁹

An injured party will usually find it extremely difficult to mount a successful case against the government or its agents in the face of these provisions.⁸⁰

The Information and Privacy Commissioner and staff of the Commissioner are also protected from civil liability when acting in good faith when exercising any authority granted under LA FOIP or the LA FOIP *Regulations*.⁸¹

⁷⁶ McNairn and Woodbury, *Government Information: Access and Privacy*, (2009), Carswell: Toronto at p. 6-34.

⁷⁷ 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.

⁷⁸ Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 263.

⁷⁹ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 at s.s. 54(2).

⁸⁰ McNairn and Woodbury, *Government Information: Access and Privacy*, (2009), Carswell: Toronto at p. 6-34.

⁸¹ Section 48 of *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 provides that subsection 66(3) of *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 is adopted, with any necessary modification for the purposes of LA FOIP.

Section 55: Immunity from Prosecution

Immunity from prosecution

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

As the provision states, no person is liable to prosecution for an offence where the person was following a requirement of the Commissioner under LA FOIP.

Section 56: Summary Offences

Offence

56(1) Every person who knowingly collects, uses or discloses personal information in contravention of this Act or the regulations is guilty of an offence and liable on summary conviction to a fine of not more than \$50,000, to imprisonment for not more than one year or to both.

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

(3) Any person who:

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

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

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

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

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

(4) No employee of a local authority or of an information management service provider shall knowingly disclose or direct another person to disclose personal information in

circumstances that would constitute an offence by the local authority or an information management service provider pursuant to this Act.

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

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

(7) Every employee of a local authority who contravenes subsection (6) is guilty of an offence and is liable on summary conviction to a fine of not more than \$50,000, to imprisonment for not more than one year or to both, whether or not the local authority has been prosecuted or convicted.

(8) No employee of an information management service provider shall wilfully access or use or direct another person to access or use personal information for a purpose that is not authorized by subsection 23.2(1).

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

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

Section 56 of LA FOIP lists a number of contraventions, which may give rise to criminal liability.

Offences under section 56 are summary offences. *The Summary Offences Procedures Act, 1990* gives jurisdiction to the Provincial Court of Saskatchewan to decide whether a person has committed an offence under section 56 of LA FOIP and to assess an appropriate penalty.⁸² Subsections 4(1) and (2) of *The Summary Offences Procedures Act, 1990* provides that:

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

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

⁸² Adapted from Alberta IPC Order P2006-005 at [100].

A prosecution may only be commenced under LA FOIP with the consent of the Attorney General of Saskatchewan.⁸³

Attorney General is the chief law officer of Saskatchewan responsible for advising the government on legal matters and representing it in litigation.⁸⁴

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

Possible penalties for an offence under section 56 include:

- A fine of not more than \$50,000;
- Imprisonment for not more than 1 year; or
- Both fine and imprisonment.⁸⁵

A prosecution cannot be commenced pursuant to section 56 after two years from the date of the discovery of the alleged offence.⁸⁶ **Discovery** is the act or process of finding or learning something that was previously unknown.⁸⁷

Summary offences begin with an appearance in the Provincial Court of Saskatchewan. The Court of Queen's Bench for Saskatchewan hears appeals of summary conviction matters that have been dealt with at Provincial Court. Matters that have been decided at the Court of Queen's Bench may be appealed to the Court of Appeal for Saskatchewan.⁸⁸

To date, there have been no prosecutions in Saskatchewan for offences pursuant to section 56 of LA FOIP.

There are two categories of possible offences:

1. Privacy and access related offences; and

⁸³ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 s.s. 56(2).

⁸⁴ Modified from Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 154.

⁸⁵ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1, s.s. 56(1), (3), (9).

⁸⁶ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1, s.s. 56(10).

⁸⁷ Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 584.

⁸⁸ *Courts of Saskatchewan* available at <https://sasklawcourts.ca/index.php/home/court-of-queen-s-bench/criminal>.

2. Offences arising from not cooperating with the Commissioner or another person performing the duties of the Commissioner.

Privacy and Access Offences

Section 56 provides that it is an offence:

- To collect, use or disclose personal information in contravention of LA FOIP or the LA FOIP *Regulations* [s.s.56(1)];
- To willfully destroy any record that is governed by LA FOIP with the intent to evade a request for access to the record [s.s.56(3)(d)];
- For an employee of either a local authority or an information management service provider to knowingly disclose or direct another person to disclose personal information in contravention of LA FOIP or the LA FOIP *Regulations* [s.s.56(4)];
- For an employee of a local authority to willfully access, use or direct another person to access or use personal information that is not reasonably required to carry out a purpose authorized under LA FOIP. In other words, if it is not needed to do the job, it is likely snooping and snooping is an offence [s.s.56(6)]; and
- For an employee of an information management service provider to willfully access, use or direct another person to access or use personal information in contravention of subsection 23.2(1) of LA FOIP. In other words, if it is not needed to do the job of an IMSP as outlined at subsection 23.2(1), it is likely snooping and snooping is an offence [s.s.56(8)].

The penalties for doing any of the above is a fine of up to \$50,000, imprisonment of up to one year, or both.⁸⁹

Subsections 56(5), 56(7), and 56(9) provide that an employee who contravenes subsections 56(4), 56(6) and 56(8) are liable on summary conviction to the above fine or imprisonment even where the local authority or information service provider has not been prosecuted or convicted under LA FOIP. In other words, employees of local authorities or information service providers can be prosecuted independently from their employers.

⁸⁹ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1, s.s. 56(1), (3), (9).

IPC Findings

In [Review Report LA-2004-001](#), the Commissioner considered the Lloydminster Public School Division's denial of access to records involving meeting minutes and documents related to a complaint made against the applicant. The Commissioner noted that this was the first case in which he had to consider the destruction/disposal of records that would otherwise be responsive to an access request under LA FOIP. The Commissioner stated that the consequences of improper destruction of records must be serious and must be communicated to all local authorities in an impactful way. The Commissioner recommended that the Legislative Assembly consider an amendment to LA FOIP that would make it an offence to destroy any records subject to LA FOIP or to direct another person to do so, with the intent to evade a request for access to records. That amendment was made and is now subsection 56(3)(d) of LA FOIP. This amendment took effect on January 1, 2018.

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

Not Cooperating with the Commissioner

Subsections 56(3)(a) through (c) set out other offences and require individuals to cooperate with the Commissioner or any other person performing the duties of the Commissioner.

Subsections 56(3)(a) through (c) provide that it is an offence to:

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

The powers, duties and functions of the Commissioner are laid out in LA FOIP.⁹⁰ The penalties for doing any of the above is a fine of up to \$50,000, imprisonment of up to one year, or both.⁹¹

IPC Findings

In [Review Report LA-2013-004](#), the Commissioner found that the Northern Village of Pinehouse failed to comply with a lawful requirement of the Commissioner. The Commissioner recommended that the Minister of Justice and Attorney General consider prosecution pursuant to subsection 56(3) of LA FOIP. In the postscript of that report, the Commissioner noted that the offence provision in LA FOIP would never be the most appropriate way to encourage compliance by rural municipalities and that he was reluctant to make such a recommendation. Yet, if rural municipalities are unfamiliar with LA FOIP and fail to utilize the resources created by the IPC and the Access and Privacy Branch at the Ministry of Justice to assist them in their compliance efforts, and fail to respond appropriately to the oversight office, it is citizens who live in those municipalities who are prejudiced. Given the quasi-constitutional status of LA FOIP and the importance of the principles of transparency and accountability, there needs to be serious consequences for non-compliance.

In [Review Report LA-2012-003](#), the Commissioner dealt with the Village of Buena Vista Council and the Administrator preventing the Mayor as “head” to do what the head was required to do under sections 7 and 50 of LA FOIP. The Commissioner recommended that the Minister of Justice consider whether an offence had been committed pursuant to subsection 56 of LA FOIP.

Section 66(3) (FOIP): Proceedings Prohibited

Proceedings prohibited

66(3) No proceeding lies or shall be instituted against the commissioner or any employee or agent of the commissioner, where the commissioner, employee or agent is acting pursuant to the authority of this Act or the regulations made pursuant to this Act, for any loss or damage suffered by a person by reason of anything in good faith done, caused, permitted or authorized to be done, attempted to be done or omitted to be done, by any of them, pursuant to or in the exercise of or supposed exercise of any power conferred by this Act or the regulations or in the carrying out or supposed carrying out of any order made pursuant to this Act or any duty imposed by this Act or the regulations.

⁹⁰ Additional powers and duties outlined in *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, are adopted by LA FOIP pursuant to subsection 48 of LA FOIP.

⁹¹ *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1, s.s. 56(3).

As noted earlier, section 48 of LA FOIP provides that subsection 66(3) of FOIP is adopted, with any necessary modification, for purposes of LA FOIP. Subsection 66(3) of FOIP covers non-compellability.

Subsection 66(3) of FOIP provides that the Information and Privacy Commissioner and staff of the Commissioner are protected from civil liability when acting in good faith pursuant to any authority granted under LA FOIP or the LA FOIP *Regulations*.⁹²

Good faith means that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. Good faith is an intangible quality encompassing honest belief, the absence of malice and the absence of design to defraud or take advantage of something.⁹³

Some protection is also provided for government institutions and its employees at subsection 54(1) of LA FOIP. See *Section 54: Proceedings Prohibited*, earlier in this Chapter.

⁹² *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 at s.s. 66(3).

⁹³ 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.



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