



Office of the
Saskatchewan Information
and Privacy Commissioner

GUIDE TO LA FOIP

The Local Authority Freedom of Information and Protection of Privacy Act

Chapter 5

Third Party Information

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Overview

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

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

What follows is non-binding guidance. Every matter should be considered on a case-by-case basis. This guidance is not intended to be an exhaustive authority on the interpretation of these provisions. Local authorities may wish to seek legal advice. 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 Chapter 2: *Administration of LA FOIP*. **This is a guide.**

This Chapter covers:

- Who qualifies as a third party.
- What qualifies as third party information.
- When is third party notice required.
- The notice process for third parties and applicants.
- The response from the third party to the local authority.
- The decision by the local authority.
- Time limits involving third party information.
- Applications for review involving third parties.
- The review process and report of the Commissioner.
- The decision of the local authority.

¹ Service Alberta, *FOIP Bulletin No. 10: Third Party Notice* at p. 1.

² *Government Information Access and Privacy*, McNairn and Woodbury, Carswell, 2008, at p. 4-1.

- Appealing to the Court of King's Bench.

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 Local Authority Freedom of Information and Protection of Privacy Act (LA FOIP) will be followed. Where this office has not previously considered a section of LA FOIP, the Commissioner looked to other jurisdictions for guidance. This includes other Information and Privacy Commissioners' Orders, Reports and/or other relevant resources. In addition, court decisions from across the country are relied upon where appropriate.

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

Quick Reference 1: Third Party Timelines

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

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

The timelines set out in subsections 33(2), 35(1)(b), 36(1), 36(2), 36(3), 38(2), 38(4), and sections 45, and 46 of LA FOIP are fixed and there is no mechanism established within LA FOIP to formally modify or extend them.

³ The above table was adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at [Section 24 - Time limit and notice of decision - Province of British Columbia \(gov.bc.ca\)](#). Accessed Sept. 1, 2022. For a more detailed reference document on timelines and procedures, see the Access and Privacy Branch, Ministry of Justice resource, [Help with FOIP!!, Access Request Checklist, Third Party Notification Required](#). Although this resource uses section numbers of *The Freedom of Information and Protection of Privacy Act*, the process is the same, but the section numbers are different.

Step	Step Description	Time Limit
1.	<p><i>Notice to Third Party</i> (section 33)</p> <p><i>Wavier of Notice</i> (section 34)</p> <p><i>Extension of Time</i> (section 12)</p>	As soon as possible, but at least within 30 days of receipt of the access to information request (unless time limit is extended by section 12).
2.	<i>Right to Make Representations</i> (section 35)	Local authority must have received representation from the third party within 20 days after <i>Notice to Third Party</i> is sent.
3.	<i>Notice of Decision</i> (section 36)	<p>Within 30 days after <i>Notice to Third Party</i> is sent.</p> <p>(Can also be articulated as 10 days after expiry of the 20 days for third party representation)</p> <p>The section 7 decision to the applicant can be combined with the section 37 response for efficiency.</p>
4.	<i>Request for Review of Decision</i> (subsections 36(2)(b), 38(3) & 38(4))	<p>Within 20 days after <i>Notice of Decision</i> for third party.</p> <p>Within one year after <i>Notice of Decision</i> for applicant.</p>
5.	Access to the Record (subsection 36(3))	20 days after <i>Notice of Decision</i> , if no request for review by third party, the records may be released to the applicant. Check with IPC to see if a request for review has been received

		by the IPC.
6.	Report of Commissioner (section 44)	If a review is requested by the applicant, a Review Report by the Commissioner will be issued. This may take several months to be issued.
7.	Decision of Head (section 45)	30 days after issuance of Commissioner's Review Report.
8.	Appeal to Court (section 46)	30 days after receipt of <i>Decision of the Head</i> .
9.	Access to the Record	If no appeal to the Court of King's Bench after 30 days of the <i>Decision of the Head</i> , the head can release the records to the applicant.

Quick Reference 2: Contracting with Local Authorities

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

Topic	Precedent
Tender/bidding or proposal documents	<ul style="list-style-type: none"> Entire proposal packages submitted by third parties to a "local authority" in response to a Request for

	<p>Proposals (RFPs) could constitute commercial information and be supplied explicitly in confidence if the RFP included a confidentiality clause.⁴</p> <ul style="list-style-type: none"> Contractors setting out to win government contracts through a confidential bidding process should not expect that the monetary terms will remain confidential if the bid succeeds. The public's right to know how government spends public funds as a means of holding government accountable for its expenditures is a fundamental notion of responsible government that is known to all.⁵
Contracts	<ul style="list-style-type: none"> Third parties and businesses need to know when they deal with local authorities, supported by tax dollars, that their contract will probably be released. No confidentiality clause, however well drafted, can override the law (i.e., LA FOIP).⁶ An agreement where the local authority contributed significantly to its terms would not qualify under for exemption from release under subsection 18(1) of LA FOIP because it is the result of negotiation between the parties and was also largely based on the criteria set out by the local authority in its request for proposals.⁷
Subsection 18(1)(a)	In <i>Canadian Bank Note Limited v. Saskatchewan Government Insurance, (2016)</i> , Justice Zarzeczny found that unit prices in a contract between Saskatchewan Government Insurance and a third party did not qualify as a trade secret.
Subsection 18(1)(c)(ii)	Asserting disclosure would create a more competitive environment does not give rise to a reasonable expectation

⁴ Office of the Saskatchewan Information and Privacy Commissioner (SK OIPC) Review Reports 011-2018 at [21], 103-2022 at [34] to [41], 031-2015 at [10] to [28], and 020-2016 at [4] to [12].

⁵ *Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc.*, 2004 FCA 99 (CanLII) at [37] and [42].

⁶ SK OIPC blog by Commissioner Kruzeniski, *Confidentiality Clauses in Contracts*, September 5, 2017.

⁷ Adapted from SK OIPC Review Reports F-2005-003 at [17] to [19] and LA-2011-001 at [97].

	of a material financial loss or prejudice to a third party's competitive position. ⁸
Subsection 18(1)(c)(iii)	<ul style="list-style-type: none"> Once a contract is executed, negotiation is concluded. The exemption would generally not apply unless, for instance, the same negotiation strategy will be used again, and it has not been publicly disclosed.⁹ The Federal Court in <i>Société Gamma Inc. v. Canada (Department of the Secretary of State)</i> (1994), 56 C.P.R. (3d) 58, interpreted the equivalent provision in the federal <i>Access to Information Act</i> as requiring that "it must refer to an obstruction to those negotiations and not merely the heightening of competition for the third party which might flow from disclosure".¹⁰ Further, a distinction must be drawn between actual contractual negotiations and the daily business operations of a third party.¹¹

IPC Findings

In [Review Report LA-2012-004](#), the Commissioner considered a denial of access by the Board of Education of the Saskatoon School Division No. 13 (Board). An applicant made a request for access to a contract between the Board and a taxi company. The Board released the majority of the contract to the applicant but withheld portions pursuant to sections 17(1)(d), (f), (g) and 18(1)(c) of LA FOIP. The Commissioner found that in all cases the Board did not meet the burden of proof in demonstrating the exemptions applied and recommended release of the whole contract.

⁸ *Canadian Pacific Hotels Corp. v. Canada (Attorney General)*, 2004 FC 444 (CanLII) at [35]. See also SK OIPC Review Report 020-2016 at [19] to [22].

⁹ British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at <https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-economic-interests>. Accessed July 19, 2019. Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 107.

¹⁰ *Société Gamma Inc. v. Canada (Department of the Secretary of State)*, (April 27, 1994), T-1587-93, T-1588-93 (F.C.T.D.) at [10].

¹¹ *Canada (Information Commissioner) v. Canada (Minister of External Affairs)* (T.D.), [1990] 3 FC 665, 1990 CanLII 7951 (FC) at [24].

In [Review Report 082-2015](#), the Commissioner considered a denial of access by the former Sunrise Regional Health Authority (Sunrise). An applicant requested access to a Master Services Agreement signed by 3sHealth and K-Bro Linen Systems in December 2013. Sunrise intended to release the agreement but the third party, 3sHealth objected to release and raised subsections 18(1)(a), (b), and (c) of LA FOIP. 3sHealth had 20 days to request a review by the Commissioner. The Commissioner determined that subsections 18(1)(a), (b) and (c) did not apply. The Commissioner recommended the agreement be released to the applicant. The Commissioner also recommended that Sunrise and 3sHealth update the Master Service agreement to clarify that Sunrise has obligations under LA FOIP and that it has the right to require unredacted copies of records pertaining to it in the possession of 3sHealth.

Section 2: Definition of a third party

Third party information

2 In this Act:

...

(k) **“third party”** means a person, including an unincorporated entity, other than an applicant or a local authority.

LA FOIP defines a **third party** as a person, including an unincorporated entity, other than an applicant or a local authority.¹² This definition is broad and can include an individual, private business (e.g., sole proprietorship, partnership, corporation, unincorporated association, or organization), non-profit group, trade union, syndicate or trust.

However, it does not include applicants or local authorities which are defined by subsections 2(a) and (f) of LA FOIP which provide:

2 In this Act:

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

¹² *The Local Authority Freedom of Information and Protection of Privacy Act, SS 1990-91, c. L-27.1 at subsection 2(k).*

...

(f) **“local authority”** means:

- (i) a municipality;
- (ii) Repealed. 2002, c.C-11.1, s.389.
- (iii) Repealed. 2002, c.C-11.1, s.389.
- (iv) a committee of a council of a municipality;
- (v) any board, commission or other body that:
 - (A) is appointed pursuant to *The Cities Act*, *The Municipalities Act* or *The Northern Municipalities Act, 2010*; and
 - (B) is prescribed;
- (vi) the board of a public library within the meaning of *The Public Libraries Act, 1984*;
- (vii) the Northern Library Office established pursuant to *The Public Libraries Act, 1984*;
- (viii) any board of education or conseil scolaire within the meaning of *The Education Act*;
- (viii.1) a police service or regional police service as defined in *The Police Act, 1990*;
- (ix) a regional college within the meaning of *The Regional Colleges Act*, other than the Saskatchewan Indian Community College;
- (x) the Saskatchewan Polytechnic;
- (xi) the University of Saskatchewan, including Saint Thomas More College;
- (xii) the University of Regina, including:
 - (A) Campion College; and
 - (B) Luther College with respect to its post-secondary level activities;
- (xiii) the provincial health authority or an affiliate, as defined in *The Provincial Health Authority Act*;
- (xiii) Repealed. 2002
- (xiv) Repealed. 2002, c.R-8.2, s.120.
- (xv) Repealed. 2002, c.R-8.2, s.83.
- (xvi) any board, commission or other body that:
 - (A) receives more than 50% of its annual budget from the Government of Saskatchewan or a government institution; and
 - (B) is prescribed;

The definition of a third party under LA FOIP can also include a “government institution”, as defined by subsection 2(1)(d) of *The Freedom of Information and Protection of Privacy Act* for purposes of LA FOIP.¹³

IPC Findings

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

Section 18: Third Party Information

Third party information

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

- (a) trade secrets of a third party;
- (b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to the local authority by a third party;
- (c) information, the disclosure of which could reasonably be expected to:
 - (i) result in financial loss or gain to;
 - (ii) prejudice the competitive position of; or
 - (iii) interfere with the contractual or other negotiations of;a third party; or
- (d) a statement of a financial account relating to a third party with respect to the provision of routine services from a local authority.

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

¹³ SK OIPC Review Report 080-2018 at [51] and [52]. In addition, see SK OIPC blog, [Can Public Bodies be a Third Party?](#). This replaces earlier interpretations by the SK OIPC that government institutions and local authorities could not qualify as third parties under LA FOIP and *The Freedom of Information and Protection of Privacy Act* – for old precedent see SK OIPC F-2012-001/LA-2012-001 at [40] to [53].

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

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

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

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Section 18 of LA FOIP is a mandatory, class-based and harm-based provision, meaning, it contains both class and harm based exemptions. As a mandatory provision, the local authority has no, or more limited, discretion regarding whether or not to apply the exemption. That is, if the information is covered by the exemption and the conditions for the exercise of discretion do not exist, then it must not be disclosed.

LA FOIP defines a **third party** as a person, including an unincorporated entity, other than an applicant or a local authority.¹⁴ A “government institution”, as defined under subsection 2(1)(d) of *The Freedom of Information and Protection of Privacy Act*, can also qualify as a third party for purposes of LA FOIP.¹⁵

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

Local authorities often collect a wide range of information from third parties. This information may be submitted voluntarily, such as in a bid for a contract, or submitted as required by law, such as for proof of regulatory compliance. There is a compelling need to protect information

¹⁴ *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1 at subsection 2(k).

¹⁵ SK OIPC Review Report 080-2018 at [51] and [52].

¹⁶ Office of the Nunavut Information and Privacy Commissioner (NU IPC) Review Report 03-08 at p. 7.

that is provided to the local authority by third parties if the information falls within one of the enumerated exemptions under section 18 of LA FOIP.¹⁷

Although local authorities need to be open and accountable, they also need to conduct business and enter into business relationships; in so doing, they must be able to assure their private sector partners that their trade secrets and commercial and financial secrets will not be readily disclosed to competitors and the public.¹⁸

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

[23] Nonetheless, when the information at stake is third party, confidential commercial and related information, the important goal of broad disclosure must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development. The Act strikes this balance between the demands of openness and commercial confidentiality in two main ways. First, it affords substantive protection of the information by specifying that certain categories of third party information are exempt from disclosure. Second, it provides procedural protection. The third party whose information is being sought has the opportunity, before disclosure, to persuade the institution that exemptions to disclosure apply...¹⁹

Third parties doing business with public institutions must understand that certain information detailing the expenditure of public funds might be disclosed.²⁰

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

¹⁷ Adapted from the Information Commissioner of Canada's 2017-2018 Annual Report, *Investigation Highlights*, Section 20 – Third Party Information. Available at <https://www.oic-ci.gc.ca/en/resources/reports-publications/2017-2018-investigation-highlights#h3>. Accessed July 22, 2019.

¹⁸ Office of the Northwest Territories Information and Privacy Commissioner (NWT IPC) Review Report 04-043 at p. 4.

¹⁹ Quoted by Justice Zarzeczny in *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [28].

²⁰ Office of the Ontario Information and Privacy Commissioner (ON IPC) Order PO-3845 at [62].

of motive or occupation. The only way motivation could be relevant is to establish a reasonable expectation of harm to third parties [subsection 18(1)(c)].²¹

The information below is reproduced for ease of reference from the *Guide to LA FOIP*, Chapter 4: “Exemptions from the Right of Access”.

Subsection 18(1)(a)

Third party information

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

(a) trade secrets of a third party;

...

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

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

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

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

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 18(1)(a) of LA FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains the trade secrets of a third party.

The following test can be applied:

1. Does the record contain trade secrets of a third party?

²¹ *Intercontinental Packers Ltd. v. Canada (Minister of Agriculture)* (1987), 14 F.T.R. 142 (T.D.), affirmed (1988), 87 N.R. 99 (Fed. C.A.) at [145].

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

- i) the information must be secret in an absolute or relative sense (is known only by one or a relatively small number of people);
- ii) the possessor of the information must demonstrate he/she has acted with the intention to treat the information as secret;
- iii) the information must be capable of industrial or commercial application; and
- iv) the possessor must have an interest (e.g., an economic interest) worthy of legal protection.²²

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

The types of information that could potentially fall in this class include the chemical composition of a product and the manufacturing processes used. However, not every process or test would fall into this class, particularly when the process or test is common in a particular industry.²³

If the local authority determines that the information qualifies as a trade secret and it intends to withhold it, it should ask the third party if it consents to the release of the information pursuant to subsection 18(2). Consent should be in writing.

Pursuant to subsection 18(2) of LA FOIP, where a record contains third party information, the local authority can release it with the written consent of the third party.

Pursuant to subsection 18(3) of LA FOIP, where a record contains third party information, the local authority can release it if disclosure is in the public interest *and* the information relates to public health, public safety, or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 18(3)* later in this Chapter.

²² *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at p. 7. Definition relied on by Justice Zarzeczny in *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [32].

²³ Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed July 22, 2019.

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

Subsection 18(1)(b)

Third party information

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

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

...

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

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

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

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

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 18(1)(b) of LA FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains financial, commercial, scientific, technical, or labour relations information that was supplied in confidence to a local authority by a third party.

The following three-part test can be applied:²⁴

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

Financial information is information regarding monetary resources, such as financial capabilities, assets, and liabilities, past or present. Common examples are financial forecasts, investment strategies, budgets, and profit and loss statements. The financial information must be specific to a third party.²⁵

Commercial information is information relating to the buying, selling or exchange of merchandise or services. This can include third party associations, past history, references and insurance policies and pricing structures, market research, business plans, and customer records.²⁶

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

- Offers of products and services a third-party business proposes to supply or perform;
- A third-party business' experiences in commercial activities where this information has commercial value;
- Terms and conditions for providing services and products by a third party;
- Lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises - such lists may take time and effort to compile, if not skill;
- Methods a third-party business proposes to use to supply goods and services; and
- Number of hours a third-party business proposes to take to complete contracted work or tasks.²⁷

Scientific information is information exhibiting the principles or methods of science. The information could include designs for a product and testing procedures or methodologies.²⁸ It is information belonging to an organized field of knowledge in the natural, biological, or

²⁴ MCreary J. used this three-part test in *Seon v Board of Education of the Regina Roman Catholic School Division NO. 81*, 2018 SKKB 166 at [9].

²⁵ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4, p. 103. Definition first relied on in SK OIPC Review Report F-2005-003 at [23].

²⁶ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4, p. 102.

²⁷ Office of the British Columbia Information and Privacy Commissioner (BC IPC) Order F05-09 at [9]. First cited in SK OIPC Review Report 019-2014 at [35].

²⁸ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4, p. 191. Definition first relied on for third party exemption in SK OIPC Review Report F-2006-002 at [85].

social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information.²⁹

Technical information is information relating to a particular subject, craft, or technique. Examples are system design specifications and the plans for an engineering project.³⁰ It is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering, or electronics. It will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.³¹

Labour relations information is information that relates to the management of personnel by a person or organization, whether or not the personnel are organized into bargaining units. It includes relationships within and between workers, working groups and their organizations as well as managers, employers, and their organizations. Labour relations information also includes collective relations between a public body and its employees. Common examples of labour relations information are hourly wage rates, personnel contracts, and information on negotiations regarding collective agreements.³²

In the decision *Merck Frosst Canada Ltd. v. Canada (Health)*, (2012), the Supreme Court of Canada recognized that administrative details such as page and volume numbering, dates, and location of information within records do not constitute financial, commercial, scientific, or technical information.³³

²⁹ Definition originated from ON IPC Order P-454 at p. 4. Adopted in SK OIPC Review Report F-2006-002 at [87].

³⁰ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4, p. 191. Definition first relied on for third party exemption in SK OIPC Review Report F-2006-002 at [85].

³¹ Definition originated from ON IPC Order P-454 at p. 4. Adopted in SK OIPC Review Report F-2005-003 at [26]. Definition endorsed in *Consumers' Co-operative Refineries Limited v Regina (City)*, 2016 SKKB 335 (CanLII) at [20].

³² Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4, p. 103. Definition first relied on in SK OIPC Review Report 019-2014 at [37].

³³ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [141].

2. Was the information supplied by the third party to a local authority?

Supplied means provided or furnished.³⁴

Information may qualify as “supplied” if it was directly supplied to a local authority by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.³⁵

Information gathered by local authority inspectors via their own observations does not qualify as information “supplied” to the local authority. Judgements or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party.³⁶

Records can still be “supplied” even when they originate with the local authority (i.e., the records still may contain or repeat information extracted from documents supplied by the third party). However, the third party objecting to disclosure will have to prove that the information originated with it and that it is confidential.³⁷

Whether confidential information has been “supplied” to a local authority by a third party is a question of fact. The content rather than the form of the information must be considered: the mere fact that the information appears in a local authority document does not, on its own, resolve the issue.³⁸

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

- Information that reflects the viewpoints, opinions, or comments of local authority officials;
- Reports resulting from factual observations made by local authority inspectors; and
- The terms of a lease negotiated between a third party and a local authority.³⁹

³⁴ 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#supplied>. Accessed August 21, 2019.

³⁵ SK OIPC Review Reports F-2005-003 at [17], F-2006-002 at [40].

³⁶ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [156] and [158].

³⁷ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [157].

³⁸ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [158].

³⁹ *Halifax Developments Ltd. v. Minister of Public Works* (1994), F.C.J. No. 2035 (QL) (F.C.T.D.). Also, in Treasury Board of Canada Secretariat, *Access to Information Manual*, Chapter 11.14.3. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 21, 2019.

The contents of a contract involving a local authority and a third party will not normally qualify as having been supplied by a third party. The provisions of a contract, in general, have been treated as **mutually generated**, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.⁴⁰

An agreement where the local authority contributed significantly to its terms would not qualify under this exemption because it is the result of negotiation between the parties and was also largely based on the criteria set out by the local authority in its request for proposals.⁴¹

There are two exceptions to the general rule of “mutually generated” information in contracts.⁴² If one of these exceptions apply, the information in a contract could be found to have been supplied by the third party:

- i) *Inferred disclosure* – where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the public body;⁴³ and
- ii) *Immutability* – information the third party provided that is immutable or not open or susceptible to change and was incorporated into the contract without change, such as the operating philosophy of a business, or a sample of its products.⁴⁴

⁴⁰ Originated in 2002 ON IPC Order PO-2018. The language above is drawn from the most recent 2019 ON Order PO-3974 at [42]. First relied on in SK OIPC Review Report F-2005-003 at [17]. Several court decisions support this approach. See *Boeing C. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), [2005] O.J. 2851, *Canadian Medical Protective Association v. John Doe*, 2008 CanLII 45005 (ON SCDC), [2008] O.J. No. 3475, *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 (CanLII), *Canada Post Corp. v. National Capital Commission*, (2002), 2002 FCT 700 (CanLII), *Halifax Development Ltd. v. Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035. Similar position taken by other IPC offices including BC, AB, NFLD and Labrador and PEI.

⁴¹ SK OIPC Review Reports F-2005-003 at [17] to [19] and LA-2011-001 at [97].

⁴² Base case was BC IPC Order 01-20 at [86]. This Order was later discussed in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848 at [72] to [79]. See also ON IPC Orders MO-1706 at p. 12, PO-2371 at pp. 6-9, PO-2528 at p. 12. Included for the first time in SK IPC Review Report 084-2015 at [22].

⁴³ An example of “inferred disclosure” can be found at [25] of *Aventis Pasteur Ltd. v. Canada (Attorney General)*, 2004 FC 1371 (CanLII). See also BC IPC Order 01-20 at [86].

⁴⁴ The Ontario Superior Court of Justice, in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC) and [55], considered “immutability” as a factor in its determination that the information was not “supplied” by the third party.

3. Was the information supplied in confidence implicitly or explicitly?

Supplied means provided or furnished.⁴⁵

In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained *in confidence* means that the supplier of the information has stipulated how the information can be disseminated.⁴⁶ In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the local authority and the third party providing the information.⁴⁷

Implicitly means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential.⁴⁸

Explicitly means that the request for confidentiality has been clearly expressed, distinctly stated or made definite. There may be documentary evidence that shows that the information was supplied on the understanding that it would be kept confidential.⁴⁹

For subsection 18(1)(b) of LA FOIP to apply, a local authority must show that both parties intended the information be held in confidence at the time the information was supplied.⁵⁰

The expectation of confidentiality must be reasonable and must have an objective basis.⁵¹ Whether the information is confidential will depend upon its content, its purposes and the circumstances in which it was compiled or communicated (*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland, Gary Kachanoski, (2014)*).

⁴⁵ British Columbia Government Services, *FOIPPA Policy Definitions* at <https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions#supplied>. Accessed August 21, 2019.

⁴⁶ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4, p. 104, SK OIPC Review Reports F-2006-002 at [51], H-2008-002 at [73], ON IPC Order MO-1896 at p. 8.

⁴⁷ SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [57], ON IPC Order MO-1896 at p. 8.

⁴⁸ SK OIPC Review Reports F-2006-002 at [57], F-2009-001 at [62], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], F-2014-002 at [47].

⁴⁹ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4, pp. 104 to 105.

⁵⁰ SK OIPC Review Reports 158-2016 at [37] and 203-2016 at [28].

⁵¹ SK OIPC Review Reports F-2012-001/LA-2012-001 at [32], LA-2013-002 at [49], ON IPC Orders PO-2273 at p. 7 and PO-2283 at p. 10.

Factors considered when determining whether a document was supplied in confidence *implicitly* include (not exhaustive):

- What is the nature of the information. Would a reasonable person regard it as confidential. Would it ordinarily be kept confidential by the third party or the local authority.⁵²
- Was the information treated consistently in a manner that indicated a concern for its protection by the third party and the local authority from the point at which it was supplied until the present time.⁵³
- Is the information available from sources to which the public has access.⁵⁴
- Does the local authority have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially.
- Was there a mutual understanding that the information would be held in confidence.

Mutual understanding means that the local authority and the third party both had the same understanding regarding the confidentiality of the information at the time it was supplied. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been supplied in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist in addition.⁵⁵

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was supplied implicitly in confidence would not be sufficient.⁵⁶

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

- The existence of an express condition of confidentiality between the local authority and the third party;⁵⁷

⁵² BC IPC Orders 331-1999 at [8], F13-01 at [23]; Office of the Prince Edward Island Information and Privacy Commissioner (PEI IPC) Order FI-16-006 at [19]; Office of the Nova Scotia Information and Privacy Commissioner (NS IPC) Review Reports 16-09 at [44], 17-03 at [34].

⁵³ ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.

⁵⁴ ON IPC Orders PO-2273 at p. 8, PO-2283 at p. 10.

⁵⁵ *Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence)*, 2001 FCT 556 at [40], SK OIPC Review Reports F-2006-002 at [52], LA-2013-002 at [58] to [59], ON IPC Order MO-1896 at p. 8, BC IPC Order F-11-08 at [32].

⁵⁶ SK OIPC Review Report LA-2013-002 at [60].

⁵⁷ SK OIPC Review Reports F-2006-002 at [56], LA-2013-003 at [113], F-2014-002 at [47], PEI IPC Order 03-006 at p. 5, AB IPC Orders 97-013 at [23] to [24], 2001-008 at [54].

- The fact that the local authority requested the information be supplied in a sealed envelope and/or outlined its confidentiality intentions to the third party prior to the information being supplied.⁵⁸

The preceding factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments.

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

- It is an objective standard (based on facts);
- It is not sufficient that the third party state, without further evidence, that the information is confidential;
- Information has not been held to be confidential even if the third party considered it so, where it has been available to the public from other sources or where it has been available at an earlier time or in another form from government; and
- Information is not confidential where it could be obtained by observation albeit with more effort by the applicant.⁵⁹

Compulsory supply means there is a compulsory legislative requirement to supply information. Where supply is compulsory, it will not ordinarily be confidential. In some cases, there may be indications in the legislation relevant to the compulsory supply that establish confidentiality. The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.⁶⁰ Where information is required to be provided, unless otherwise provided by statute, confidentiality cannot be built in by agreement, informally or formally.⁶¹

Example: In [Review Report 043-2015](#), the Commissioner found that the equivalent provision in [The Freedom of Information and Protection of Privacy Act](#) did not apply

⁵⁸ SK OIPC Review Reports F-2006-002 at [56], F-2012-001/LA-2012-001 at [29], LA-2013-002 at [49], LA-2013-003 at [113], F-2014-002 at [47]; PEI IPC Order 03-006 at p. 5; Office of the Alberta Information and Privacy Commissioner (AB IPC) Order 97-013 at [25].

⁵⁹ *Air Atonabee Ltd. v. Minister of Transport*, (1989), 27 C.P.R. (3d) 180 (F.C.T.D.) at p.11. *Stenotran Services v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15464 (FC) at [9] citing *Air Atonabee*. It is important to note that subsection 20(1)(b) of the federal ATIA places the focus on the confidential nature of the information itself. SK's subsection 19(1)(b) of FOIP places the focus on the confidential nature of the supply. However, *Air Atonabee* may still be instructive with interpreting SK's subsection 19(1)(b) of FOIP.

⁶⁰ *Chesal v. Nova Scotia (Attorney General) et al.*, 2003 NSCA 124 (CanLII) at [72] and [73] and *Stevens v. Canada (Prime Minister)*, [1997] 2 FC 759, 1997 CanLII 4805 (FC) at p. 1. Also, see NS IPC Review Report 17-03 at [98] and SK OIPC Review Reports F-2006-001 at [76] to [78].

⁶¹ SK OIPC Review Report F-2006-001 at [78].

because the third party was required to provide the information in question to the Ministry of Environment pursuant to *The Environmental Management and Protection Act, 2002*, *The Water Regulations* and *The Clean Air Act*. As such, this constituted compulsory supply. In addition, these statutes did not have any confidentiality provisions related to the types of information in question.

In the decision *Merck Frosst Canada Ltd. v. Canada (Health)*, (2012), the Supreme Court of Canada established that information is not confidential if it is in the public domain, including being publicly available through another source. To be confidential, the information must not be available from sources otherwise accessible by the public or obtainable by observation or independent study by a member of the public acting on his or her own. Information that has been published is not confidential. Further, information, which merely reveals the existence of publicly available information, cannot generally be confidential.⁶²

Contractors setting out to win local authority contracts through a confidential bidding process should not expect that the monetary terms, if the bid succeeds, will remain confidential. The public's right to know how a local authority spends public funds as a means of holding the local authority accountable for its expenditures is a fundamental notion of responsible government that is known to all.⁶³

Simply labelling documents as "confidential" does not, on its own, make the documents confidential (i.e., confidentiality stamps or standard automatic confidentiality statements at the end of emails). It is just one factor that we consider when determining whether the information was explicitly supplied in confidence.⁶⁴ The typical bottom of e-mail "confidentiality" note is not sufficient to establish that information was supplied in confidence. Such notes are largely format and platitudes.⁶⁵

Local authorities cannot be relieved of their responsibilities under LA FOIP merely by agreeing via a confidentiality clause in a contract/agreement to keep matters confidential.⁶⁶

⁶² *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [146].

⁶³ *Canada (Minister of Public Works and Government Services) v. Hi-Rise Group Inc.*, 2004 FCA 99 (CanLII) at [37] and [42].

⁶⁴ SK OIPC Review Report F-2012-001/LA-2012-001 at [43].

⁶⁵ *Brewster Inc. v. Canada (Environment)*, 2016 FC 339 (CanLII) at [22].

⁶⁶ *St. Joseph Corp. v. Canada (Public Works & Government Services)* [2002] FCT 274 at [53] and [54], *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, [2003] FCT 254 at [16], SK OIPC Review Reports 159-2016 at [39], 052-2017

Since a local authority cannot guarantee confidentiality if LA FOIP mandates disclosure, it should frame any contract provisions, representations or policies accordingly so third parties are informed prior to providing information to the local authority. This includes tenders, requests for proposals and other processes.

Pursuant to subsection 18(2) of LA FOIP, where a record contains third party information, the authority can release it with the written consent of the third party.

Pursuant to subsection 18(3) of LA FOIP, where a record contains third party information, the local authority can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 18(3)* later in this Chapter.

IPC Findings

In [Review Report 156-2019, 006-2020](#), the Commissioner considered subsection 18(1)(b) of LA FOIP. An applicant made a request to the Rural Municipality of Enniskillen (RM) for official survey plans submitted to council. The RM withheld portions of the record pursuant to subsection 18(1)(b) of LA FOIP. While the RM stated that the record in question was supplied to it in confidence by the third party, the third party indicated that it consented to the release of the record. Because the RM did not explain how the information was supplied to it in confidence, the Commissioner determined that he was not persuaded that the third party was precluded from waiving any confidentiality.

In [Review Report 108-2019](#), the applicant submitted an access to information request to the City of Regina (City) regarding a certain parcel of land. The City applied subsection 18(1)(b) of LA FOIP to portions of the record, citing two third parties. The City and the third party submitted that the information at question qualified as commercial information. Both the City and the third party asserted the information had been supplied implicitly in confidence because of ongoing commercial negotiations, but the third parties involved did not provide specific information with respect to the ongoing negotiations. As well, the City did not provide a timeline indicating at what point in the application process each record was

at [55] and Review Report 311-2017, 312-2017, 313-2017, 316-2017, 340-2017, 341-2017, 342-2017 at [63].

received. Thus, while the Commissioner found that some of the information in the records qualified as commercial information, the Commissioner was not persuaded that the information was supplied in confidence based on a lack of supporting evidence by the third parties and the City.

Subsection 18(1)(c)

Third party information

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

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

- (i) result in financial loss or gain to;
- (ii) prejudice the competitive position of; or
- (iii) interfere with the contractual or other negotiations of;

a third party; or

...

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

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

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

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

- (i) financial loss or gain to;
- (ii) prejudice to the competitive position of; or
- (iii) interference with contractual or other negotiations of;

a third party.

Subsection 18(1)(c) of LA FOIP is a mandatory, harm-based provision. It permits refusal of access in situations where disclosure could reasonably be expected to result in the harms outlined at subsections 18(1)(c)(i), (ii) and (iii) of LA FOIP.

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

Subsection 18(1)(c)(i)

Third party information

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

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

(i) result in financial loss or gain to;

...

a third party;

...

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

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

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

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

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subclause 18(1)(c)(i) of LA FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to result in financial loss or gain to a third party.

The following two-part test can be applied:

1. What is the financial loss or gain being claimed?

Financial loss or gain must be monetary, have a monetary equivalent or value (e.g., loss of revenue or loss of corporate reputation).⁶⁷

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

For this exemption to apply there must be objective grounds for believing that disclosing the information could result in loss or gain to a third party measured in monetary terms (e.g., loss of revenue).⁶⁸

The disclosure of information that is not already in the public domain that is shown to give competitors a head start in developing competing products, or to give them a competitive advantage in future transactions may, in principle, meet the requirements. The evidence would have to demonstrate that there is a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure.⁶⁹ However, asserting disclosure would create a more competitive environment does not give rise to a reasonable expectation of a material financial loss or prejudice to a third party's competitive position.⁷⁰

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

⁶⁷ Adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions#undue_fin_gain. Accessed August 29, 2019.

⁶⁸ Adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/policy-definitions#undue_fin_gain and Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 108.

⁶⁹ *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [55] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [219].

⁷⁰ *Canadian Pacific Hotels Corp. v. Canada (Attorney General)*, 2004 FC 444 (CanLII) at [35].

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation, and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”...⁷¹

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

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

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

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.⁷²

Exemption from disclosure should not be granted based on fear of harm that is fanciful, imaginary, or contrived. Such fears of harm are not reasonable because they are not based on reason...the words “could reasonably be expected” “refer to an expectation for which real and substantial grounds exist when looked at objectively”...⁷³

⁷¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].

⁷² Treasury Board of Canada Secretariat, *Access to Information Manual*, Chapter 11.14.4. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.

⁷³ *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [49] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [204].

Some relevant questions that may assist are:⁷⁴

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

In *Astrazeneca Canada Inc. v. Canada (Minister of Health)*, the Federal Court stated that proof of harm for the equivalent provisions in the federal *Access to Information Act*, required reasonable speculation because “in many circumstances a party cannot rely on harm from past disclosures as evidence of reasonably expected harm because past disclosures of that type of evidence may never have occurred”. Nonetheless, the party seeking to exempt the information must put forward something more than internally held beliefs and fears. Forecasting evidence, expert evidence, and evidence of treatment of similar elements of proof or similar situations are frequently accepted as a logical basis for the expectation of harm.⁷⁵

Pursuant to subsection 18(2) of LA FOIP, where a record contains third party information, the local authority can release it with the written consent of the third party.

Pursuant to subsection 18(3) of LA FOIP, where a record contains third party information, the local authority can release it if disclosure is in the public interest and the information relates to public health, public safety, or protection of the environment. In addition, the public

⁷⁴ Adapted from Information Commissioner of Canada resource, *FOIPPA Policy Definitions*. Available at <https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions>. Accessed August 28, 2019.

⁷⁵ *Astrazeneca Canada Inc. v. Canada (Minister of Health)*, 2005 FC 189 (CanLII) at [44] to [47].

interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 18(3)* later in this Chapter.

IPC Findings

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

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

body would, in the future, obtain fair bids and a competitive bidding process. The Commissioner found that subsection 19(1)(c) did not apply to the hourly rates.

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

Subsection 18(1)(c)(ii)

Third party information

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

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

(ii) prejudice the competitive position of;

...

a third party;

...

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

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

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

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

- (i) financial loss or gain to;
 - (ii) prejudice to the competitive position of; or
 - (iii) interference with contractual or other negotiations of;
- a third party.

Subsection 18(1)(c)(ii) of LA FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to prejudice the competitive position of a third party.

The following two-part test can be applied:

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

Prejudice in this context refers to detriment to the competitive position of a third party.⁷⁶

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

- Information that discloses the profit margin on a private company's operations;
- Marketing plans, including market research surveys, polls; or
- Information that reveals the internal workings of a private company.⁷⁷

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

The disclosure of information that is not already in the public domain that is shown to give competitors a head start in developing competing products, or to give them a competitive advantage in future transactions may, in principle, meet the requirements. The evidence would have to demonstrate that there is a direct link between the disclosure and the harm. Further, that the harm could reasonably be expected to ensue from disclosure.⁷⁸ However, asserting disclosure would create a more competitive environment does not give rise to a

⁷⁶ Adapted from Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4, p. 149.

⁷⁷ British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at <https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foippa-manual/disclosure-harmful-business-interests-third-party>. Accessed August 28, 2019.

⁷⁸ *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [55] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [219].

reasonable expectation of a material financial loss or prejudice to a third party's competitive position.⁷⁹

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

This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences" ...⁸⁰

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

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

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

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.⁸¹

⁷⁹ *Canadian Pacific Hotels Corp. v. Canada (Attorney General)*, 2004 FC 444 (CanLII) at [35].

⁸⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].

⁸¹ Treasury Board of Canada Secretariat, *Access to Information Manual*, Chapter 11.14.4. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.

Exemption from disclosure should not be granted based on fear of harm that is fanciful, imaginary, or contrived. Such fears of harm are not reasonable because they are not based on reason...the words “could reasonably be expected” “refer to an expectation for which real and substantial grounds exist when looked at objectively”...⁸²

Some relevant questions that may assist are: ⁸³

- Does the third party perceive that disclosure would likely prejudice its competitive position.
- How would disclosure impact on the competitive position of the third party.
- Would it have an adverse effect on sales or marketing. How.
- Would disclosure reveal plans or strategy. If so, what kind of plans or strategy.
 - Product launch
 - Product approvals
 - Marketing plans
 - Business acquisitions
 - Asset acquisitions
 - Others
- How would knowledge of these plans specifically prejudice the third party's competitive position.
- Is there an indication of how a competitor could use the information to its advantage, i.e., by developing competing pricing strategies.
- Has the information or same subject matter been disclosed elsewhere.
 - Publications
 - In applications to government that are public
 - In the press
 - In annual reports, government filings
 - In public registries
- How old is the information. If the information is not current, why would disclosure still adversely affect the third party.

⁸² *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [49] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [204].

⁸³ Adapted from Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(1)(c) & (d): Questions*. Available at <https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions>. Accessed August 28, 2019.

- Has similar information about the third party been made public in the past. If so, what was the impact. Was the impact quantifiable (e.g., lost sales or revenues).
- Is information of this nature available about competitors of the third party.
- Are there examples in other businesses where disclosure of similar information led to competitive prejudice. If so, describe and quantify the financial loss or gain. Why is the situation parallel to that of this third party.
- What actions could the third party take to counteract potential competitive prejudice knowing the information would be disclosed.

Pursuant to subsection 18(2) of LA FOIP, where a record contains third party information, the local authority can release it with the written consent of the third party.

Pursuant to subsection 18(3) of LA FOIP, where a record contains third party information, the local authority can release it if disclosure is in the public interest and the information relates to public health, public safety, or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 18(3)* later in this Chapter.

IPC Findings

In [Review Report 158-2018](#), the applicant requested records from the University of Regina (the University) regarding the elimination of varsity teams. The University relied on subsection 18(1)(c)(ii) of LA FOIP on portions of the record; there was no third-party submission. The Commissioner found that subsection 18(1)(c)(i) of LA FOIP did not apply to the record because the University did not describe how release would harm the competitive position of a third-party; rather, the University appeared to focus on how release of the information would harm its *own* competitive position.

In [Review Report 007-2015](#), the Commissioner considered the equivalent provision in *The Freedom of Information and Protection of Privacy Act* (subsection 19(1)(c)). An applicant made an access to information request to the Ministry of Central Services (Central Services) for the *Statement of Work* attached to *Information Technology Consulting Services Agreement ITO-12023*. Central Services responded to the applicant advising that it was withholding portions of the *Statement of Work* pursuant to several provisions of FOIP including subsection 19(1)(c). During the review, Central Services and the third party asserted that releasing the estimated hours, hourly rate and estimated cost per consultant would result in a competitor having the

ability to provide a lower rate for future contracts, which would cause the third party to experience a competitive disadvantage. However, neither Central Services nor the third party provided anything further to support this assertion. The Commissioner also stated that the winning contractor would have access to the internal cost estimates in question as it is part of the current contract and that keeping these figures from the public, including other future bidders, would jeopardize competitive bidding processes. The Commissioner found that subsection 19(1)(c) of FOIP was not properly applied by Central Services.

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

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

Subsection 18(1)(c)(iii)

Third party information

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

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

...

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

a third party; or

...

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

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

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

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

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 18(1)(c)(iii) of LA FOIP is a mandatory, harm-based exemption. It permits refusal of access in situations where disclosure of information could reasonably be expected to interfere with the contractual or other negotiations of a third party.

The following two-part test can be applied:

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

A **negotiation** is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings

conducted between two or more parties for the purpose of reaching an understanding.⁸⁴ It connotes a more robust relationship than “consultation”. It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion.⁸⁵

Prospective or future negotiations could be included within this exemption, if they are foreseeable.⁸⁶ It may be applied even though negotiations have not yet started at the time of the access to information request, including when there has not been any direct contact with the other party or their agent. However, a vague possibility of future negotiations is not sufficient. There must be a reasonable fact-based expectation that the future negotiations will take place.⁸⁷

Once a contract is executed, negotiation is concluded. The exemption would generally not apply unless, for instance, the same strategy will be used again, and it has not been publicly disclosed.⁸⁸

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

Interfere means to hinder or hamper.⁸⁹

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

This Court in *Merck Frosst* adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to”

⁸⁴ Garner, Bryan A., 2019. *Black’s Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at pp. 1248 and 1249. Relied on in SK OIPC Review Report 112-2018 at [37].

⁸⁵ *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 (CanLII) at [107]. Relied on in SK OIPC Review Report 112-2018 at [37].

⁸⁶ SK OIPC Review Report 019-2014 at [27]. Equivalent provision in LA FOIP was being considered (subsection 17(1)(d)). Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4, p. 107.

⁸⁷ Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.11.2*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_11. Accessed July 19, 2019.

⁸⁸ British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at <https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foipppa-manual/disclosure-harmful-economic-interests>. Accessed July 19, 2019. Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4, p. 107.

⁸⁹ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 4 at p. 152.

language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”...⁹⁰

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

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

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

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and
- Provide facts to support the assertions made.⁹¹

Exemption from disclosure should not be granted based on fear of harm that is fanciful, imaginary, or contrived. Such fears of harm are not reasonable because they are not based on reason...the words “could reasonably be expected” “refer to an expectation for which real and substantial grounds exist when looked at objectively”...⁹²

The Federal Court in *Société Gamma Inc. v. Canada (Department of the Secretary of State)*, interpreted the equivalent provision in the federal *Access to Information Act* as requiring that “it must refer to an obstruction to those negotiations and not merely the heightening of

⁹⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at [54].

⁹¹ Treasury Board of Canada Secretariat, *Access to Information Manual*, Chapter 11.14.4. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed August 29, 2019.

⁹² *Canadian Bank Note Limited v Saskatchewan Government Insurance*, 2016 SKKB 362 (CanLII) at [49] relying on *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at [204].

competition for the third party which might flow from disclosure".⁹³ Further, a distinction must be drawn between actual contractual negotiations and the daily business operations of a third party.⁹⁴

When determining whether disclosure could interfere with contractual or other negotiations of a third party, the following questions can be asked to assist:⁹⁵

- What negotiations would be affected by disclosure.
- Are these negotiations ongoing.
- Have the negotiations been concluded.
- What stage are the negotiations at.
- How long have they been going on.
- What is the subject matter of the negotiations.
- How would disclosure specifically interfere with the negotiations.
- Does the information relate to an outstanding issue in the negotiations. If so, how would disclosure interfere with negotiations on this issue.
- Does the information relate to issues already resolved in the negotiations.
- Would disclosure cause the issue to be reopened. Why.
- Would it otherwise interfere with negotiations How.
- Is the information current. How old is the information.
- Does it relate to events prior to the negotiations.
- Does the other side of the negotiations already have this information. If not, have they asked for it.
- Is the information commonly known in the industry.
- Is the information reasonably available elsewhere. If so, how would disclosure interfere with negotiations.⁹⁶

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

⁹³ *Société Gamma Inc. v. Canada (Department of the Secretary of State)*, (April 27, 1994), T-1587-93, T-1588-93 (F.C.T.D.) at [10].

⁹⁴ *Canada (Information Commissioner) v. Canada (Minister of External Affairs)* (T.D.), [1990] 3 FC 665, 1990 CanLII 7951 (FC) at [24].

⁹⁵ Adapted from Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(1)(c) & (d): Questions*. Available at <https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions>. Accessed August 29, 2019.

⁹⁶ Information Commissioner of Canada, *Investigator's Guide to Interpreting the Act, Section 20(1)(c)&(d): Questions*, available at <https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-201cd-questions>. Accessed July 19, 2019.

Pursuant to subsection 18(2) of LA FOIP, where a record contains third party information, the local authority can release it with the written consent of the third party.

Pursuant to subsection 18(3) of LA FOIP, where a record contains third party information, the local authority can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 18(3)* later in this Chapter.

Subsection 18(1)(d)

Third party information

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(d) a statement of a financial account relating to a third party with respect to the provision of routine services from a local authority.

...

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

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

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

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

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of;

a third party.

Subsection 18(1)(d) of LA FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains a statement of a financial account relating to a third party with respect to the provision of routine services from a local authority.

LA FOIP contains a unique exemption for accounts for routine services rendered by a local authority to a third party.⁹⁷ Only the Northwest Territories and Nunavut's [Access to Information and Protection of Privacy Act, S.N.W.T. 1994, c-20](#), has a similarly worded provision.

The following two-part test can be applied:

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

A **statement** is a formal written or oral account, setting down facts, a document setting out the items of debit and credit between two parties.⁹⁸

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

A **statement of account** is a report issued periodically (usually monthly) by a creditor to a customer, providing certain information on the customer's account, including the amounts billed, credits given, and the balance due;⁹⁹ a document setting out the items of debit and credit between two parties.¹⁰⁰

An **accounting** means a detailed statement of the debits and credits between parties to a contract or to a fiduciary relationship; a reckoning of monetary dealings.¹⁰¹

An **account** means a record of financial expenditure and receipts; a bill taking the form of such a record.¹⁰²

Financial means of or pertaining to revenue or money matters.¹⁰³

⁹⁷ McNairn, C., Woodbury, C., 2009, *Government Information: Access and Privacy*, Carswell: Toronto, p. 4-17.

⁹⁸ *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 3006.

⁹⁹ Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1699.

¹⁰⁰ *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 2 at p. 3006.

¹⁰¹ Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 21.

¹⁰² Pearsall, Judy, *Concise Oxford Dictionary, 10th Edition* at p. 8 (Oxford University Press).

¹⁰³ *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 964.

Relating to should be given a plain but expansive meaning.¹⁰⁴ The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as “substantial connection”) for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.¹⁰⁵ “*Relating to*” requires some connection between the information and the provision of routine services.¹⁰⁶

With respect to are words of the widest possible scope; the phrase is probably the widest of any expression intended to convey some connection between two related subject matters.¹⁰⁷

Routine means a regular course of procedure; an unvarying performance of certain acts; regular or unvarying procedure or performance.¹⁰⁸

Services means labour performed in the interest or under the direction of others; the performance of some useful act or series of acts for the benefit of another, usually for a fee; an intangible commodity in the form of human effort, such as labour, skill or advice.¹⁰⁹

LA FOIP defines a **third party** as a person, including an unincorporated entity, other than an applicant or a local authority.¹¹⁰ A “government institution”, as defined under subsection 2(1)(d) of *The Freedom of Information and Protection of Privacy Act*, can also qualify as a third party for purposes of FOIP.¹¹¹

2. Is the statement from a local authority?

LA FOIP defines a **local authority** at subsection 2(f).

¹⁰⁴ *Gertner v. Lawyers’ Professional Indemnity Company*, 2011 ONSC 6121 (CanLII) at [32].

¹⁰⁵ *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45]. This case dealt specifically with an appeal regarding Ontario’s FOIP legislation.

¹⁰⁶ Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].

¹⁰⁷ The Supreme Court of Canada (SCC) established the meaning of the phrase “*in respect of*” in *Nowegijick v. The Queen*, [1983] 1 SCR 29, 1983 CanLII 18 (SCC) at [39]. The SCC later applied the same interpretation to the phrase “*with respect to*” in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743, 1999 CanLII 680 (SCC) at [15] to [17]. Summary of this can be found in Gardner, J., and Gardner K. (2016) *Sangan’s Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 5, S to Z at p. w-97.

¹⁰⁸ *The Shorter Oxford English Dictionary on Historical Principles*, Oxford University Press 1973, Volume 1 at p. 2620.

¹⁰⁹ Garner, Bryan A., 2019. *Black’s Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1643.

¹¹⁰ *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1 at subsection 2(k).

¹¹¹ SK OIPC Review Report 080-2018 at [51] and [52].

The statement must be from the local authority to meet the second part of the test.

Pursuant to subsection 18(2) of LA FOIP, where a record contains third party information, the local authority can release it with the written consent of the third party.

Pursuant to subsection 18(3) of LA FOIP, where a record contains third party information, the local authority can release it if disclosure is in the public interest and the information relates to public health, public safety or protection of the environment. In addition, the public interest clearly outweighs in importance any financial loss or gain, prejudice to competitive position or interference with contractual negotiations of the third party. For further guidance, see *Subsection 18(3)* later in this Chapter.

IPC Findings

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

Subsection 18(2)

Third party information

18(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

Subsection 18(2) of LA FOIP provides that the local authority may give access to a record that contains third party information if the third party consents in writing to disclosure. The

provision is intended to prevent situations where the local authority would be under an obligation to withhold a record when the third party agreed to disclosure.¹¹²

If the local authority determines that the information qualifies as third party information, it should make a reasonable effort to seek the consent of the third party to disclose the requested information.¹¹³

Subsection 18(3)

Third party information

18(3) Subject to Part V, a head may give access to a record that contains information described in clauses (1)(b) to (d) if:

- (a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and
- (b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:
 - (i) financial loss or gain to;
 - (ii) prejudice to the competitive position of; or
 - (iii) interference with contractual or other negotiations of;a third party.

Subsection 18(3) of LA FOIP is a discretionary provision for the release of third party information in circumstances where the head of the local authority forms the opinion that disclosure “could reasonably be in the public interest as it relates to public health, public safety or protection of the environment”.

A local authority should consider subsection 18(3) of LA FOIP when dealing with third party information. A local authority should first determine that the information is indeed third party

¹¹² Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.10*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed November 19, 2019.

¹¹³ Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.10*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed September 4, 2019.

information pursuant to one of the subsections outlined at 18(1) of LA FOIP. If it is, then consider subsection 18(3).

To properly apply the provision, local authorities should do the following:¹¹⁴

- i) Determine whether the information qualifies or might qualify for exemption pursuant to subsection 18(1).

The public interest “override” comes into play only when all or part of a record falls within one or more of the classes of records described in subsection 18(1).

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

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

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

- iv) Send a notice to the third party pursuant to section 33 of LA FOIP.

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

- v) Analyze the representations of the third party.

Once the representations have been received, local authorities should thoroughly analyze the arguments presented by the third party to justify subsection 18(1) exemptions.

If the local authority accepts the third party’s representations as substantiating an exemption under subsection 18(1) of LA FOIP, it must then consider the representations made against disclosure in the public interest.

¹¹⁴ Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.11*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed September 4, 2019.

Once a decision is made, the local authority should provide notification procedures as set out in section 36 of LA FOIP.

The following three-part test can be applied:

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

Relates to should be given a plain but expansive meaning.¹¹⁵ The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as “substantial connection”) for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.¹¹⁶ “Relating to” requires some connection between the information and public health, public safety or protection of the environment.¹¹⁷

Public health means the health of the community at large, the healthful or sanitary condition of the general body of people or the community collectively; especially the methods of maintaining the health of the community, as by preventative medicine an organized care for the sick.¹¹⁸ Public health refers to the well-being of the public at large. This may include physical, mental or emotional health.¹¹⁹

Public safety means the welfare and protection of the general public, usually expressed as a governmental responsibility.¹²⁰

Protection of the environment refers to guarding or defending natural surroundings; i.e., plants and animals. For example, it may be necessary to disclose the information of an industrial plant that is discharging toxic wastes into a waterway.¹²¹

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

¹¹⁵ *Gertner v. Lawyers’ Professional Indemnity Company*, 2011 ONSC 6121 (CanLII) at [32].

¹¹⁶ Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45].

¹¹⁷ Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].

¹¹⁸ Garner, Bryan A., 2019. *Black’s Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 864.

¹¹⁹ Government of Newfoundland and Labrador resource, *Access to Information: Policy and Procedures Manual*, October 2017 at p. 103.

¹²⁰ Garner, Bryan A., 2019. *Black’s Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1488.

¹²¹ 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.

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

Public interest is not black and white; it is a matter of degree. There is always a balance to be struck.¹²² In determining if there is a public interest, the following can be considered:¹²³

- Whose interests would be affected by disclosure other than the third party.
 - Individual
 - General
 - Describe affected group
- Does the information concern an event/proposal/incident/condition involving health, safety, or protection of the environment.
 - If so, what group in the public is affected by the event/proposal/incident/condition.
- Is the event/proposal/incident/condition one which requires government approval.
- Did it result in government enforcement activity or investigation.
- Did it involve contravention or violation of standards in health, safety, and environmental protection.
 - Describe the extent of the danger or risk.
 - Who is affected by the danger or risk.
- Has the danger or risk been alleviated.
 - To what extent
 - When
 - What was the degree of exposure to the danger or risk before it was alleviated
 - For how long
- What was the impact of any past event/incident described in the record.
 - Describe the degree or extent.
- What are the remaining effects or impacts.

¹²² AB IPC Order 096-002 at p. 17.

¹²³ Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(2), (5), (6): Questions – Disclosure Authorized in Public Interest*. Available at <https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-20256-questions-disclosure-authorized-public-interest>. Accessed September 4, 2019.

- Are people, animals or environment currently exposed to the dangers or risks arising from the event described in the information.
 - To what degree
- Have the issues described in the information been publicly examined elsewhere.
 - In an ongoing process
- Will the process likely result in disclosure of the information to the public or in public discussion of the information.
- What are the dangers, if any, that would be caused by disclosure (aside from 19(1) harm).
 - What are they
 - Why would they arise

Subsection 18(3) of LA FOIP includes the requirement that the information “*could reasonably be expected*” to be in the public interest. The meaning of the phrase “**could reasonably be expected to**” in terms of harm-based exemptions was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner)*, (2014). Although this part of the provision does not contemplate harm, the threshold proposed by the Supreme Court is instructive:

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

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

Clearly means visible, unmistakable...beyond a question or beyond a reasonable doubt; honestly, straightforwardly, and frankly; plainly.¹²⁴

Use of the word “*clearly*” means the test is rigorous, limiting the applicability of the public interest “override”.¹²⁵

Outweigh means to be of more importance or value than something else.¹²⁶

In determining if the public interest clearly outweighs in importance the financial loss or gain, competitive prejudice or interference in negotiations of a third party, the following can be considered:¹²⁷

- Quantify the financial loss or gain, prejudice to competitive position or degree of interference in negotiations of the third party.
- In the case of information described in subsection 18(1) of LA FOIP, what degree of importance is attached to keeping the information confidential.
- What is the nature of the relationship between the local authority and the third party; i.e., why did the third party supply the information to the local authority.
 - Voluntary
 - If so, what were the circumstances
 - Mandatory
- Describe any chilling effect of disclosure, if any.
- Describe any impact on the local authority or duty it has to maintain information in a confidential fashion.
- What factors did the local authority consider in assessing whether subsection 18(3) applies.
- Why did the local authority decide not to disclose pursuant to subsection 18(3).

¹²⁴ 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.

¹²⁵ Treasury Board of Canada Secretariat, *Access to Information Manual, Chapter 11.14.11*. Available at https://www.canada.ca/en/treasury-board-secretariat/services/access-information-privacy/access-information/access-information-manual.html#cha11_14. Accessed September 4, 2019.

¹²⁶ Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1330.

¹²⁷ Information Commissioner of Canada resource, *Investigator's Guide to Interpreting the Act, Section 20(2), (5), (6): Questions – Disclosure Authorized in Public Interest*. Available at <https://www.oic-ci.gc.ca/en/investigators-guide-interpreting-act/section-20256-questions-disclosure-authorized-public-interest>. Accessed September 4, 2019.

- Did the local authority consider the purposes of LA FOIP in its decision? For example, that it:
 - Provides for the right of access;
 - Local authority information should be available to the public; and
 - Necessary exemptions should be limited and specific.
- Did the local authority consider:
 - The value of public education with respect to the subject matter of the information;
 - Public confidence in regulatory, enforcement or investigatory systems;
 - Need for public awareness of successes or failures of regulatory enforcement or investigatory systems; and
 - The need for public awareness of legislative or regulatory gaps or inadequacies in the areas of public health, safety or environmental protection.
- Were the interests of all groups interested in disclosure of the information taken into account.
 - How
- What is the danger of further disclosure.
- Was the decision not to apply subsection 18(3) based in part on a fear of public confusion.
 - If so, what would give rise to or cause the confusion.
- Could the local authority take measures to reduce or eliminate the dangers.
 - Are there public relations measures.
 - Are there explanations that can be given.
 - Why could no other measures be taken.
- Could the third party take measures (with respect to subsection 18(1) information) that could reduce the impact on them of disclosure.
 - What measures
 - Why could no measures be taken
- Was the local authority's own performance an issue in the consideration leading to a decision to not apply subsection 18(3).

- Have there been any allegations of impropriety, negligence, cover-up, or inadequacy about the local authority arising from the matters described in the records.
- Has the local authority responded to these allegations.

Subsection 18(3) of LA FOIP includes the requirement that the public interest in disclosure “could reasonably be expected” to clearly outweigh in importance the harms listed. The meaning of the phrase “**could reasonably be expected to**” in terms of harm-based exemptions was considered by the Supreme Court of Canada in [Ontario \(Community Safety and Correctional Service\) v. Ontario \(Information and Privacy Commissioner\), \(2014\)](#):

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

IPC Findings

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

Section 28: Disclosure of Personal Information

Subsection 28(2)(n): Disclosure of Personal Information

Disclosure of personal information

28(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:

...

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

- (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or
- (ii) disclosure would clearly benefit the individual to whom the information relates;

Subsection 28(2)(n) of LA FOIP is a discretionary provision for the release of personal information without consent in circumstances where the head of the local authority forms the opinion that the public interest “clearly outweighs any invasion of privacy” or where disclosure would “clearly benefit the individual to whom the information relates.”

The provision provides local authorities with a tool to help them effectively balance an individual’s right to privacy with other important contextual interests.

This provision is relevant for this Chapter as subsection 33(1)(b) of LA FOIP provides that notice must be given to a third party individual where their personal information is being released pursuant to subsection 28(2)(n) of LA FOIP.

For more on the application of subsection 28(2)(n) of LA FOIP, see the *Guide to LA FOIP*, Chapter 6: “Protection of Privacy”.

Subsection 28(2)(n)(i)

Disclosure of personal information

28(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:

...

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

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

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

All three parts of the following test must be met:

1. Is the information 'personal information'

In order for subsection 28(2)(n) of LA FOIP to be engaged, there must be "personal information" involved as defined by subsection 23(1) of LA FOIP. Subsection 23(1) of LA FOIP starts with the following:

23(1) Subject to subsections (1.1) and (2), "**personal information**" means personal information about an identifiable individual that is recorded in any form, and includes:

...

Including means that the list of information that follows is incomplete (non-exhaustive). The examples in the provision are the types of information that could be presumed to qualify as personal information.¹²⁸ As the provision uses the word "including", the list of examples provided for at subsection 23(1) of LA FOIP (i.e., (a) through (k)) are not meant to be

¹²⁸ British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at <https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foipppa-manual/cabinet-local-public-body-confidences>. Accessed June 26, 2019. Definition of "including" same as SK OIPC *Guide to LA FOIP*, Chapter 4: *Exemptions from the Right of Access*, for subsections 16(1)(e) and 21(a) of LA FOIP.

exhaustive. This means there can be other types of information that could qualify as personal information.

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

- i. The information must be about an identifiable individual; and
- ii. The information must be personal in nature.¹²⁹

Information is about an identifiable individual if:

- The individual can be identified from the information (e.g., name, where they live); or
- The information, when combined with information otherwise available, could reasonably be expected to allow the individual to be identified.¹³⁰

About means on the subject of or concerning.¹³¹ *About* an identifiable individual means the information is not just the subject of something but also relates to or concerns the subject.¹³²

Identifiable means that it must be reasonable to expect that an individual may be identified if the information were disclosed.¹³³ The information must reasonably be capable of identifying particular individuals because it either directly identifies a person or enables an accurate inference to be made as to their identity when combined with other available sources of information (data linking) or due to the context of the information in the record.¹³⁴

LA FOIP uses the words “person” and “individual” in various sections of the Act. Each word has different meanings. Subsection 23(1) of LA FOIP uses “individual”.

¹²⁹ SK OIPC Review Report F-2010-001 at [118] to [128].

¹³⁰ Adapted from Government of Manitoba, *FIPPA for Public Bodies – Resource Manual*, Chapter 2, *Scope of FIPPA – Who and What Falls under FIPPA* at p. 44. Available at https://www.gov.mb.ca/fippa/public_bodies/resource_manual/pdfs/chap_2.pdf. Accessed on April 24, 2020.

¹³¹ Pearsall, Judy, *Concise Oxford Dictionary*, 10th Ed. at p. 4, (Oxford University Press).

¹³² *Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board)*, 2006 FCA 157 (CanLII), [2007] 1 FCR 203. Also see the Office of the Privacy Commissioner of Canada resource, *PIPEDA Interpretation Bulletin: Personal Information*, 2013, available at https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-interpretation-bulletins/interpretations_02/.

¹³³ ON IPC Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.). See also SK OIPC Review Report LA-2013-001 at [57].

¹³⁴ Originated and adapted from BC IPC Order P14-03 at [16].

Individual means natural persons (human beings).¹³⁵ Use of the word *individual* in this provision makes it clear that the protection provided relates only to a natural person or human being.¹³⁶ Therefore, a business or corporation would not constitute an “individual” for purposes of subsection 23(1) of LA FOIP.

Person is the broader term and means individual but also includes a corporation and their heirs, executors, administrators, or other legal representatives of a person.¹³⁷

Personal in nature means of, affecting or belonging to a particular person; of or concerning a person’s private rather than professional life.¹³⁸

For more on what constitutes personal information, see the *Guide to LA FOIP*, Chapter 6: “Protection of Privacy” for a detailed breakdown of subsections 23(1)(a) through (k) of LA FOIP.

2. Is there a public interest in the information

Public Interest – the local authority should first ask - is there a relationship between the record and the Act’s central purpose of shedding light on the operations of government? Consider whether the information in the record serves the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information it has to make effective use of when expressing public opinion or making political choices.¹³⁹

Some further things to consider regarding public interest:

- Is there another public process or forum established to address public interest considerations.¹⁴⁰

¹³⁵ Garner, Bryan A., 2019. *Black’s Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at pp. 924, 1238 and 1378.

¹³⁶ ON IPC Order 16 at p. 19. See also Government of Manitoba, *FIPPA for Public Bodies – Resource Manual*, Chapter 2, *Scope of FIPPA – Who and What Falls under FIPPA* at p. 44. Available at https://www.gov.mb.ca/fippa/public_bodies/resource_manual/pdfs/chap_2.pdf. Accessed on April 24, 2020.

¹³⁷ *The Legislation Act*, SS 2019, c L-10.2 at s. 2-29.

¹³⁸ Pearsall, Judy, *Concise Oxford Dictionary, 10th Ed.*, (Oxford University Press) at p. 1065. This definition was also relied on in SK OIPC Review Report 082-2019, 083-2019 at [94].

¹³⁹ ON IPC resource, *Public Interest Disclosure*, September 2021, at p. 5. Also cited in SK OIPC Review Report 082-2017 at [29].

¹⁴⁰ ON IPC Orders P-123/124, P-391 at p. 7, M-539 at p. 6 and PO-2472 at p. 10.

- Has a significant amount of information already been disclosed, and it is adequate to address any public interest considerations.¹⁴¹
- Is there already wide public coverage or debate of the issue and disclosing the records would not shed further light on the matter.¹⁴²

A public interest does not exist where the interests being advanced are essentially private in nature. However, where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.¹⁴³

A public interest may not exist where a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding.¹⁴⁴

A public interest is not automatically established where the applicant is a member of the media.¹⁴⁵

The local authority should be able to clearly identify what the public interest would be.

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

Public interest is not black and white; it is a matter of degree. There is always a balance to be struck.¹⁴⁶

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

Clear means free from doubt; sure; unambiguous.¹⁴⁷

¹⁴¹ ON IPC Orders P-532 at p. 10, P-568 at p. 5, PO-2626 at p. 19 and PO-2614 at p. 24.

¹⁴² ON IPC Order P-613 at p. 9.

¹⁴³ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773. See also ON IPC Orders PO-4277 at [86] and PO-2472 at p. 10.

¹⁴⁴ ON IPC Orders PO-2626 at p. 17 and PO-2472 at p. 10.

¹⁴⁵ ON IPC Orders M-773 at p. 7 and PO-4277 at [87].

¹⁴⁶ Originated from AB IPC Order 096-002 at p. 17. Also cited in SK OIPC resource, *Guide to LA FOIP*, Chapter 4: “Exemptions from the Right of Access” for subsection 18(3) at p. 202.

¹⁴⁷ Garner, Bryan A., 2019. *Black’s Law Dictionary*, 11th Edition. St. Paul, Minn.: West Group at p. 317.

Clearly outweigh: If a public interest is established, it must then be balanced against the purpose of the exemption that has been found to apply to determine whether it clearly outweighs that purpose. The public interest override provision recognizes that while exemptions serve to protect valid interests, they must occasionally yield to an overriding public interest to access the information that has been requested.¹⁴⁸

An important consideration when determining whether the public interest in releasing the information clearly outweighs the purpose of the exemption is the extent to which denying access to the information in the circumstances would be consistent with the very purpose of the exemption.¹⁴⁹

Some things to consider regarding any invasion of privacy:

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

The federal *Privacy Act* has a substantially similar provision. Subsection 8(2)(m)(i) of the *Privacy Act* also considers whether "the public interest in disclosure clearly outweighs any invasion of privacy". The federal Privacy Commissioner established an *invasion of privacy* test. Local authorities can apply this test to determine the level of privacy risk in the disclosure.¹⁵⁰ The test involves three interrelated risk factors that will help local authorities determine whether the public interest in disclosure clearly outweighs any invasion of privacy:

a. Sensitivity of the information

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

¹⁴⁸ ON IPC resource, *Public Interest Disclosure*, September 2021, at p. 6.

¹⁴⁹ ON IPC resource, *Public Interest Disclosure*, September 2021, at p. 7.

¹⁵⁰ Office of the Privacy Commissioner of Canada, *Public interest disclosures by federal institutions under the Privacy Act*, June 2022, available <http://Public interest disclosures by federal institutions under the Privacy Act - Office of the Privacy Commissioner of Canada>. Accessed Sept. 1, 2022.

b. Expectations of the individual

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

c. Probability and degree of injury

- Consider the probability and degree or gravity of injury relative to the benefits of the disclosure to the public. This could include personal or physical injury, or damage to the reputation of an individual or others, which causes adverse consequences (e.g., any harm or embarrassment that negatively affects an individual's career, reputation, financial position, safety, health, or well-being).
- Determine the potential of injury if the receiving party wrongfully disclosed the information further.¹⁵¹

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

Where the local authority intends to rely on this provision to release personal information in response to an access to information request, notification is required to the individual(s) pursuant to the third party notification requirements outlined at section 33 of LA FOIP. See *Section 33: Notice to third party* later in this Chapter for more on notification requirements.

¹⁵¹ Office of the Privacy Commissioner of Canada, *Public interest disclosures by federal institutions under the Privacy Act*, June 2022, available [http://Public interest disclosures by federal institutions under the Privacy Act - Office of the Privacy Commissioner of Canada](http://Public%20interest%20disclosures%20by%20federal%20institutions%20under%20the%20Privacy%20Act). Accessed Sept. 1, 2022.

IPC Findings

In [Investigation Report 092-2015 to 095-2015](#), the Commissioner investigated a complaint involving the collection and disclosure of a care aide's personal information. The Commissioner found that there was a public interest in the release of the information and that the public interest outweighed any invasion of privacy.

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

Subsection 28(2)(n)(ii)

Disclosure of personal information

28(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:

...

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

...

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

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

All three parts of the following test must be met:

1. Is the information ‘personal information’

For subsection 28(2)(n) of LA FOIP to be engaged, there must be “personal information” involved as defined by subsection 23(1) of LA FOIP. Subsection 23(1) of LA FOIP starts with the following:

23(1) Subject to subsections (1.1) and (2), “**personal information**” means personal information about an identifiable individual that is recorded in any form, and includes:

...

Including means that the list of information that follows is incomplete (non-exhaustive). The examples in the provision are the types of information that could be presumed to qualify as personal information.¹⁵² As the provision uses the word “including”, the list of examples provided for at subsection 23(1) of LA FOIP (i.e., (a) through (k)) are not meant to be exhaustive. This means there can be other types of information that could qualify as personal information.

So more broadly, to constitute personal information, two elements must be present:¹⁵³

- i. The information must be about an identifiable individual; and
- ii. The information must be personal in nature.

Information is about an identifiable individual if:

- The individual can be identified from the information (e.g., name, where they live); or
- The information, when combined with information otherwise available, could reasonably be expected to allow the individual to be identified.¹⁵⁴

¹⁵² British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at <https://www2.gov.bc.ca/gov/content/governments/services-for-government/policies-procedures/foipppa-manual/cabinet-local-public-body-confidences>. Accessed June 26, 2019. Definition of “including” same as SK OIPC *Guide to LA FOIP*, Chapter 4: “Exemptions from the Right of Access”, for subsections 16(1)(e) and 21(a) of LA FOIP.

¹⁵³ SK OIPC Review Report F-2010-001 at [118] to [128].

¹⁵⁴ Adapted from Government of Manitoba, *FIPPA for Public Bodies – Resource Manual*, Chapter 2, *Scope of FIPPA – Who and What Falls under FIPPA* at p. 44. Available at https://www.gov.mb.ca/fipppa/public_bodies/resource_manual/pdfs/chap_2.pdf. Accessed on April 24, 2020.

About means on the subject of or concerning.¹⁵⁵ *About* an identifiable individual means the information is not just the subject of something but also relates to or concerns the subject.¹⁵⁶

Identifiable means that it must be reasonable to expect that an individual may be identified if the information were disclosed.¹⁵⁷ The information must reasonably be capable of identifying particular individuals because it either directly identifies a person or enables an accurate inference to be made as to their identity when combined with other available sources of information (data linking) or due to the context of the information in the record.¹⁵⁸

LA FOIP uses the words “person” and “individual” in various sections of the Act. Each word has different meanings. Subsection 23(1) of LA FOIP uses “individual”.

Individual means natural persons (human beings).¹⁵⁹ Use of the word *individual* in this provision makes it clear that the protection provided relates only to a natural person or human being.¹⁶⁰ Therefore, a business or corporation would not constitute an individual for purposes of subsection 23(1) of LA FOIP.

Person is the broader term and means individual but also includes a corporation and their heirs, executors, administrators, or other legal representatives of a person.¹⁶¹

Personal in nature means of, affecting or belonging to a particular person; of or concerning a person’s private rather than professional life.¹⁶²

¹⁵⁵ Pearsall, Judy, *Concise Oxford Dictionary*, 10th Ed. at p. 4, (Oxford University Press).

¹⁵⁶ *Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board)*, 2006 FCA 157 (CanLII), [2007] 1 FCR 203. Also see the Office of the Privacy Commissioner of Canada resource, *PIPEDA Interpretation Bulletin: Personal Information*, 2013, available at https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-interpretation-bulletins/interpretations_02/.

¹⁵⁷ ON IPC Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.). See also SK OIPC Review Report LA-2013-001 at [57].

¹⁵⁸ Originated and adapted from BC IPC Order P14-03 at [16].

¹⁵⁹ Garner, Bryan A., 2019. *Black’s Law Dictionary*, 11th Edition. St. Paul, Minn.: West Group at pp. 924, 1238 and 1378.

¹⁶⁰ ON IPC Order 16 at p. 19. See also Government of Manitoba, *FIPPA for Public Bodies – Resource Manual*, Chapter 2, *Scope of FIPPA – Who and What Falls under FIPPA* at p. 44. Available at https://www.gov.mb.ca/fippa/public_bodies/resource_manual/pdfs/chap_2.pdf. Accessed on April 24, 2020.

¹⁶¹ *The Legislation Act*, SS 2019, c L-10.2 at s. 2-29.

¹⁶² Pearsall, Judy, *Concise Oxford Dictionary*, 10th Ed., (Oxford University Press) at p. 1065. This definition was also relied on in SK OIPC Review Report 082-2019, 083-2019 at [94].

For more on what constitutes personal information, see the *Guide to LA FOIP*, Chapter 6: “Protection of Privacy” for a detailed breakdown of subsections 23(1)(a) through (k) of LA FOIP.

2. Does the personal information relate to the individual

To **relate** to means connected in some way; having relationship to or with something else.¹⁶³

Relating to should be given a plain but expansive meaning.¹⁶⁴ The phrase should be read in its grammatical and ordinary sense. There is no need to incorporate complex requirements (such as “substantial connection”) for its application, which would be inconsistent with the plain unambiguous meaning of the words of the statute.¹⁶⁵ “*To whom the information relates*” requires some connection between the individual and the personal information in the record.¹⁶⁶

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

3. Would disclosure clearly benefit the individual

Clear means free from doubt; sure; unambiguous.¹⁶⁷

Benefit means a favourable or helpful factor or circumstance; advantage, profit.¹⁶⁸

Local authorities should be careful not to disclose more personal information than is necessary for the purpose (i.e., abide by the data minimization principle, see the *Guide to LA FOIP*, Chapter 6: “Protection of Privacy” for more information).

¹⁶³ Garner, Bryan A., 2019. *Black’s Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 1541.

¹⁶⁴ *Gertner v. Lawyers’ Professional Indemnity Company*, 2011 ONSC 6121 (CanLII) at [32].

¹⁶⁵ *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [45]. This case dealt specifically with an appeal regarding Ontario’s FOIP legislation.

¹⁶⁶ Adapted from *Ministry of Attorney General and Toronto Star*, 2010 ONSC 991 (CanLII) at [43].

¹⁶⁷ Garner, Bryan A., 2019. *Black’s Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 317.

¹⁶⁸ 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.

Where a local authority intends to rely on this provision to release personal information, notification is required to the individual to whom the information relates pursuant to the third party notification requirements outlined at subsection 33(1)(b) of LA FOIP.

IPC Findings

In [Investigation Report 092-2015 to 095-2015](#), the Commissioner investigated a complaint involving the collection and disclosure of a care aide's personal information. The Commissioner found that there was a public interest in the release of the information and that the public interest outweighed any invasion of privacy.

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

Section 33: Notice to third party

Notice to third party

33(1) Where a head intends to give access to a record that the head has reason to believe may contain:

- (a) information described in subsection 18(1) that affects the interest of a third party; or
- (b) personal information that may be disclosed pursuant to clause 28(2)(n) and that relates to a third party;

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

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

(a) is to include:

(i) a statement that:

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

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

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

(A) information described in subsection 18(1) that affects the interest of the third party; or

(B) personal information that may be disclosed pursuant to clause 28(2)(n) and that relates to the third party; and

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

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

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

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

When reviewing a responsive record, local authorities may encounter information that appears to be about a third party. This includes third party information as described in subsection 18(1) of LA FOIP and personal information the local authority intends to disclose pursuant to subsection 28(2)(n) of LA FOIP.

Section 33 of LA FOIP lays out who should receive notice and what the notice should include.

In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23, the Supreme Court of Canada summarized the requirement to provide notice and the nature of the review to be performed by the institutional head. In that case, the Court was considering the third party notice provision in the federal *Access to Information Act* (s. 27(1)) which has similar wording to section 33 of LA FOIP. In the court's view, the head must conduct a sufficient review of the requested material to decide if the threshold for notice has been met:

[84] To sum up my conclusions on s. 27(1):

(i) With respect to third party information, the institutional head has equally important duties to disclose and not to disclose and must take both duties equally seriously.

(ii) The institutional head:

- should *disclose* third party information *without notice* only where the information is clearly subject to disclosure, that is, there is *no reason to believe that it is exempt*;
- should *refuse to disclose* third party information *without notice* where the information is clearly exempt, that is, where there is no reason to believe that the information is subject to disclosure.

(vi) The institutional head must give notice if he or she:

- Is in doubt about whether the information is exempt, in other words if the case does not fall under the situations set out in point (ii);
- Intends to disclose exempted material to serve the public interest pursuant to s. 20(6) [disclosure in the public interest]; or
- Intends to disclose severed material pursuant to s. 25 [severability].¹⁶⁹

Subsection 33(1)(a)

Notice to third party

33(1) Where a head intends to give access to a record that the head has reason to believe may contain:

- (a) information described in subsection 18(1) that affects the interest of a third party;
or
...

¹⁶⁹ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23 at [84].

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

Subsection 33(1)(a) of LA FOIP requires that where a local authority intends to release information that might constitute third party information pursuant to subsection 18(1) of LA FOIP, the third party must be informed if the third party can reasonably be located.

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

The following steps can be taken for subsection 33(1)(a) of LA FOIP:

1. *Is the information third party information*

Determine if the information at issue constitutes third party information pursuant to subsection 18(1) of LA FOIP. For assistance with section 18, see the *Guide to LA FOIP*, [Chapter 4: "Exemptions from the Right of Access"](#) for more information on the interpretation and tests to apply for subsections 18(1)(a), (b), (c), (d), (e), and (f) of LA FOIP.

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

Where the head of the local authority concludes that the information at issue does not fit the circumstances in subsection 18(1) of LA FOIP, notice to a third party is not required and the information can be released or considered for exemption under another provision of LA FOIP. A third party would not have a right to apply to the Commissioner for review under subsection 38(3) of LA FOIP where the head of the local authority determined the information at issue was not third party information under subsection 18(1) of LA FOIP.¹⁷⁰

¹⁷⁰ See *Sawridge Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* (1987), 10 F.T.R. 48, aff'd sub nom and *Twinn v. Minister of Indian Affairs and Northern Development* (1987), 80 N.R. 263 (F.C.A.) at p. 373. These decisions dealt with the federal *Access to Information Act* but are relevant for LA FOIP. The court held that the right to seek a review was not available to the third party because notice was not required because the information was not deemed third party information.

The absence of standing

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

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

However, that person, for lack of third party status, will usually be without standing to obtain a review of any determination made by the local authority. The local authority may have erred in not recognizing a third party interest, yet there is no statutory remedy in those circumstances. Review is generally open only to someone whom the local authority was prepared to treat as a third party entitled to make representations in the context of its consideration of the request for information.¹⁷¹

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

If subsection 18(1) of LA FOIP appears to apply, the head of the local authority must decide whether to release the third party information or withhold it from release. It may not have a decision made yet on whether it will release, or it may not be sure it is third party information so it may want to hear from the third party first (i.e., representations as per s. 35).

Make sure to identify all potential third parties. If the records engage the interests of multiple third parties, the most practical method of working with the time limits is to ensure that all third parties have been identified before beginning the notification process, then to send out all the notices at the same time.¹⁷²

If releasing, notice to the third party is required

¹⁷¹ *Government Information Access and Privacy*, McNairn and Woodbury, Carswell, 2008, at pp. 6-15 to 6-16. See also SK OIPC Review Report LA-2009-001 at [101].

¹⁷² Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 216.

- Additional time for third party notice may be permitted under subsection 12(1)(c) of LA FOIP where the local authority intends to release the third party information. Applicants must be advised of this extension within the initial 30-day period pursuant to subsection 12(2) of LA FOIP and the entire process must be completed within a maximum of 60 days from the date the access to information request was received (i.e., the section 7 decision and/or section 36 decision to the applicant must be sent by the 60th day at the latest). For more information on extensions of time for third party notice, see Chapter 3: *Access to Records* at section 12.
- Consider whether subsection 18(2) of LA FOIP can be relied upon for release. In other words, does the local authority have written consent from the third party to release the information? A request for consent should be included when drafting the notice to the third party. See subsection 33(2) below for more information on what to include in the notice. The third party may consent to release of the information, or it may wish to make representations to the local authority pursuant to section 35 of LA FOIP on why the information should be withheld.
- Consider if subsection 18(3) of LA FOIP has any application. Subsection 18(3) of LA FOIP provides that third party information can be released if the circumstances described in subsections 18(3)(a) and (b) of LA FOIP apply. The notice to the third party can include notice that subsection 18(3)(a) and (b) of LA FOIP has been found to apply. The third party may consent to release of the information, or it may wish to make representations to the local authority pursuant to section 35 of LA FOIP on why the information should be withheld. See *Section 35* later in this Chapter.

To receive notice, the third party must be able to be located with reasonable effort by the local authority. A **reasonable effort** is the level of effort you would expect of any fair, sensible person. What is reasonable depends on the information at issue and related circumstances.¹⁷³ If the individual cannot reasonably be located; the local authority may dispense with giving notice pursuant to subsection 33(4) of LA FOIP. See below for more information on subsection 33(4) of LA FOIP.

¹⁷³ See SK IPC resource, *Guide to LA FOIP*, Chapter 3: "Access to Records" under heading "Search for Records" – definition for a "reasonable search" has been relied upon and modified for what is considered reasonable effort for locating a third party. A "reasonable search" was defined in SK OIPC Review Reports F-2008-001 at [38] and F-2012-002 at [26].

Local authorities are expected to use only its own records and publicly available resources to locate an address for a third party.¹⁷⁴

If there is any doubt as to the third party's contact information, the local authority may need to adapt its notification process to ensure there is no breach of privacy or confidentiality during the notification process.¹⁷⁵

Local authorities should choose a delivery method that is expeditious and convenient for the third party, but which is also efficient and cost effective for the local authority. Regular mail is not recommended. Local authorities should consider sending notice and a copy of the third party information at issue via courier or priority post. Prompt delivery will allow the third party as much time as possible to respond. If sending notice and records by fax or email, care should be taken to prevent unauthorized disclosure of third party personal information.¹⁷⁶

Local authorities should let the applicant know that third party notification is required pursuant to section 33 of LA FOIP. The letter to the applicant should advise them of the timelines involved. For a sample model letters see the Ministry of Justice, Access and Privacy Branch's sample titled, [11 Advising Applicant of Third Party Notification – Responsive Records May Contain Third Party Information – LA FOIP](#) or [12 Advising Applicant of Third Party Notification – Responsive Record Contains Third Party Information – LA FOIP](#)

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

Subsection 33(1)(b)

Notice to third party

33(1) Where a head intends to give access to a record that the head has reason to believe may contain:

...

¹⁷⁴ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at pp. 214 to 215.

¹⁷⁵ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 215.

¹⁷⁶ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 217.

- (b) personal information that may be disclosed pursuant to clause 28(2)(n) and that relates to a third party;

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

Subsection 33(1)(b) of LA FOIP requires that where a local authority intends to disclose personal information that relates to a third party individual (someone other than the applicant) under subsection 28(2)(n) of LA FOIP, the third party individual must be informed if they can reasonably be located. Subsection 28(2)(n) of LA FOIP provides as follows:

28(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:

...

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

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

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

The following steps can be taken for subsection 33(1)(b) of LA FOIP:

1. Is the information third party personal information

Determine if the information at issue constitutes third party (someone other than the applicant) "personal information" as defined by subsection 23(1) of LA FOIP. For assistance with subsection 23(1) of LA FOIP, see the *Guide to LA FOIP*, Chapter 6: "Protection of Privacy" for the interpretation of and tests to apply for subsection 23(1) of LA FOIP.

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

Where the head of the local authority concludes that the information at issue does not qualify as the personal information of a third party individual, subsection 33(1)(b) of LA FOIP does not apply. The information can be released or considered for exemption under another provision of LA FOIP. A third party would not have a right to apply to the Commissioner for review under subsection 38(3) of LA FOIP where the head of the local authority determined

the information at issue was not third party personal information under subsection 23(1) of LA FOIP.¹⁷⁷

The absence of standing

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

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

However, that person, for lack of third party status, will usually be without standing to obtain a review of any determination made by the local authority. The local authority may have erred in not recognizing a third party interest, yet there is no statutory remedy in those circumstances. Review is generally open only to someone whom the local authority was prepared to treat as a third party entitled to make representations in the context of its consideration of the request for information.¹⁷⁸

b. Yes, it is third party personal information...

If the information is found to constitute the personal information of a third party individual (someone other than the applicant), the local authority can consider whether to disclose it pursuant to subsection 28(2)(n) of LA FOIP.

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

¹⁷⁷ See *Sawridge Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* (1987), 10 F.T.R. 48, aff'd sub nom and *Twinn v. Minister of Indian Affairs and Northern Development* (1987), 80 N.R. 263 (F.C.A.) at p. 373. These decisions dealt with the federal *Access to Information Act* but are relevant for LA FOIP. The court held that the right to seek a review was not available to the third party because notice was not required because the information was not deemed third party information.

¹⁷⁸ *Government Information Access and Privacy*, McNairn and Woodbury, Carswell, 2008, at pp. 6-15 to 6-16. See also SK OIPC Review Report LA-2009-001 at [101].

third parties have been identified before beginning the notification process, then to send out all the notices at the same time.¹⁷⁹

Subsection 28(2)(n) of LA FOIP permits disclosure of personal information without the consent of the individual where the local authority has determined it is in the public interest to do so and the public interest outweighs any invasion of the individual's privacy or where the local authority has determined that disclosure of the information would benefit the individual whom the information relates. For assistance with subsection 28(2)(n) of LA FOIP, see the *Guide to LA FOIP*, Chapter 6: "Protection of Privacy" for the interpretation of and tests to apply for subsection 28(2)(n) of LA FOIP.

If subsection 28(2)(n) of LA FOIP applies and the local authority intends to disclose the personal information, notice to the individual is required

- Consider whether obtaining written consent from the individual is possible for the release of the information. With the written consent of the individual, personal information can be released without the need for reliance on subsection 28(2)(n) of LA FOIP. It also reduces the likelihood of a review by the Commissioner.

A request for consent could be included when drafting the notice to the individual. See subsection 33(2) below for more information on what to include in the notice. The individual may consent to release of the personal information, or they may wish to make representations to the local authority pursuant to section 35 of LA FOIP on why the personal information should be withheld. See *Section 35* later in this Chapter. Any consent received should be compliant with section 11 of [The Local Authority Freedom of Information and Protection of Privacy Regulations](#).

To receive notice, the individual must be able to be located with reasonable effort by the local authority. A **reasonable effort** is the level of effort you would expect of any fair, sensible person. What is reasonable depends on the information at issue and related circumstances.¹⁸⁰ If the individual cannot reasonably be located; the local authority may

¹⁷⁹ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 216.

¹⁸⁰ See SK IPC resource, *Guide to LA FOIP*, Chapter 3: "Access to Records" under heading "Search for Records" – definition for a "reasonable search" has been relied upon and modified for what is considered reasonable effort for locating a third party. A "reasonable search" was defined in SK OIPC Review Reports F-2008-001 at [38] and F-2012-002 at [26].

dispense with giving notice pursuant to subsection 33(4) of LA FOIP. For more on subsection 33(4) of LA FOIP, see *Subsection 33(4)* later in this Chapter.

Local authorities should choose a delivery method that is expeditious and convenient for the third party, but which is also efficient and cost effective for the local authority. Regular mail is not recommended. Local authorities should consider sending notice and a copy of the third party information at issue via courier or priority post. Prompt delivery will allow the third party as much time as possible to respond. If sending notice and records by fax, care should be taken to prevent unauthorized disclosure of third party personal information.¹⁸¹

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

- In other words, if the local authority has decided it will not disclose the personal information pursuant to subsection 28(2)(n) of LA FOIP, no notice is required to be provided to the individual.
- It should be noted that withholding an applicant's own personal information can produce an absurd result¹⁸² and is contrary to subsection 30(1) of LA FOIP. There are limited circumstances where this type of information can be withheld. For assistance with section 30, see the *Guide to LA FOIP*, Chapter 3: "Access to Records".

Subsection 33(2)

Notice to third party

33(2) The notice mentioned in subsection (1):

(a) is to include:

(i) a statement that:

¹⁸¹ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 217.

¹⁸² It is a principle of statutory interpretation that "interpretations that result in a lack of fit between conduct and consequences may be rejected as absurd." In this context an "absurd" result signifies "a result that is so unreasonable, as to be unacceptable." From *Sangan's Encyclopedia of Words and Phrases Legal Maxims*, Canada, 5th Edition, Volume 1, A - B at p. A-36. Originates from Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), at p. 247. See also SK OIPC Review Reports 027-2016 at [14], 044-2017 at [19] 059-2017 at [40], 176-2019, 177-2019, 262-2019, 263-2019 at [38], and 187-2019 at [39].

- (A) an application for access to a record described in subsection (1) has been made; and
 - (B) the head intends to give access to the record or to part of it;
 - (ii) a description of the record that the head has reason to believe may contain:
 - (A) information described in subsection 18(1) that affects the interest of the third party; or
 - (B) personal information that may be disclosed pursuant to clause 28(2)(n) and that relates to the third party; and
 - (iii) a statement that the third party may, within 20 days after the notice is given, make representations to the head as to why access to the record or part of the record should not be given; and
- (b) subject to subsection (3), is to be given within 30 days after the application is made.

Subsection 33(2) of LA FOIP provides that the notice provided to third parties must contain specific elements and the timeline that the notice must be provided by. This is broken down further below.

Subsection 33(2)(a)

Notice to third party

33(2) The notice mentioned in subsection (1):

- (a) is to include:
 - (i) a statement that:
 - (A) an application for access to a record described in subsection (1) has been made; and
 - (B) the head intends to give access to the record or to part of it;
 - (ii) a description of the record that the head has reason to believe may contain:
 - (A) information described in subsection 18(1) that affects the interest of the third party; or
 - (B) personal information that may be disclosed pursuant to clause 28(2)(n) and that relates to the third party; and

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

Where notice is required under subsection 33(1) of LA FOIP, the notice should be in writing and contain the elements outlined at subsection 33(2)(a) of LA FOIP. This includes the following elements:

1. A statement advising the third party that an application for access has been made. This provides some context for a third party as to why it is receiving the notice (s. 33(2)(a)(i)(A)).
2. A statement advising the third party that the local authority intends to give access to the information (s. 33(2)(a)(i)(B)). This tells the third party what the local authority's intentions are.
3. A description of the record containing the third party information (s. 33(2)(a)(ii)(A) or the third party personal information (s. 33(2)(a)(ii)(B)). This tells the third party what information pertains to them.

Although LA FOIP requires a description of the record, the IPC recommends the local authority provide a copy of the records containing the third party information. This is considered best practice and would make it easier for a third party to understand what information is at issue and what decision it should make in terms of consent to release. If a record that is the subject of a third party notice contains personal information of other third parties, it may be best to simply describe the record in the notice. If a local authority sends a third party a record that contains personal information of other third parties, the local authority risks the unintentional and unauthorized disclosure of that personal information.¹⁸³

4. A statement that the third party may, within 20 days, make representations (arguments) to the local authority as to why access to the information should not be given (s. 33(2)(a)(iii) of LA FOIP. This tells the third party what it can do if it does not agree with the local authority's intentions.

¹⁸³ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 218.

5. The local authority should include a sentence requesting the third party advise it if it consents to the release of the information or personal information. If the third party does decide to consent to release, this saves the local authority from waiting for 20 days to see if representations arrive. **NOTE:** this is not required by subsection 33(2) of LA FOIP. However, it is efficient and a good practice to cover subsections 18(2) (third party information) and 28(1) (personal information) of LA FOIP.

For a sample model letter¹⁸⁴ see the Ministry of Justice, Access and Privacy Branch's sample titled, [14 Notification under Section 33 to Third Party Regarding Section 18 Records – Records Contain Third Party Information – LA FOIP](#).

For release of personal information pursuant to subsection 28(2)(n) of LA FOIP, see the Ministry of Justice, Access and Privacy Branch's sample letter titled, [15 Notification under Section 33 to Third Party Regarding Disclosure of Personal Information under Clause 28\(2\)\(n\) – LA FOIP](#).

The identity of the applicant should **never** be revealed to a third party.¹⁸⁵

Subsection 33(2)(b)

Notice to third party

33(2) The notice mentioned in subsection (1):

...

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

Unless an extension is applied pursuant to section 12 of LA FOIP, a local authority must provide notice to the third party within 30 days of receiving an access to information request. See subsection 33(3) of LA FOIP below for more information or the *Guide to LA FOIP*, [Chapter 3: "Access to Records"](#) for more on section 12.

¹⁸⁴ For other samples of model letters by the Access and Privacy Branch, Ministry of Justice see [publications. Saskatchewan.ca/#/categories/340](https://publications.saskatchewan.ca/#/categories/340).

¹⁸⁵ *Les Viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency)*, 2006 FC 1075 (CanLII) at [13] and [19].

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

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

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

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

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

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

(6) A time limit for registering or filing documents or for doing anything else that falls or expires on a day on which the place for doing so is not open during its regular hours of business is extended to include the next day the place is open during its regular hours of business.¹⁸⁶

Based on this, the following can be applied for calculating “within 30 days after the application is made” under LA FOIP:

- The first day the access request is received is excluded in the calculation of time [s. 2-28(2)].
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday [s. 2-28(5)].

¹⁸⁶ *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.

- If the due date falls on a weekend, the time is extended to the next day the office is open [s. 2-28(6)].
- As LA FOIP expresses the time in a number of days, this is interpreted as 30 calendar days, not business days.

The Legislation Act does not allow for additional time for personal holidays, scheduled days off or if staff are away from the office due to illness.¹⁸⁷

Subsection 33(3)

Notice to third party

33(3) Section 12 applies, with any necessary modification, to the extension of the period set out in clause (2)(b).

Subsection 33(3) of LA FOIP provides further clarification for subsection 33(2)(b) of LA FOIP above.

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

For assistance on calculating the initial 30 days, see [The Legislation Act](#) which establishes general rules that govern the interpretation of all statutory instruments in the province of Saskatchewan. Section 2-28 of *The Legislation Act* provides the following for the computation of time:

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

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

¹⁸⁷ SK OIPC Blog, *The Interpretation Act, 1995 – Things to Know*, June 7, 2017. *The Legislation Act* replaced *The Interpretation Act, 1995*. It came into force on May 15, 2019.

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

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

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

(6) A time limit for registering or filing documents or for doing anything else that falls or expires on a day on which the place for doing so is not open during its regular hours of business is extended to include the next day the place is open during its regular hours of business.¹⁸⁸

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

- The first day the access request is received is excluded in the calculation of time [s. 2-28(3)];
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday [s. 2-28(5)];
- If the due date falls on a weekend, the time is extended to the next day the office is open [s. 2-28(6)]; and
- As LA FOIP expresses the time in a number of days, this is interpreted as 30 calendar days, not business days.

The Legislation Act does not allow for additional time for personal holidays, scheduled days off or if staff are away from the office due to illness.¹⁸⁹

¹⁸⁸ *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.

¹⁸⁹ SK OIPC Blog, *The Interpretation Act, 1995 – Things to Know*, June 7, 2017. *The Legislation Act* replaced *The Interpretation Act, 1995*. It came into force on May 15, 2019.

Subsection 33(4)

Notice to third party

33(4) Where, in the opinion of the head, it is not reasonable to provide a notice to a third party pursuant to subsection (1), the head may dispense with the giving of notice.

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

A **reasonable effort** is the level of effort you would expect of any fair, sensible person. What is reasonable depends on the information at issue and related circumstances.¹⁹⁰

If the third party cannot reasonably be located, the local authority may dispense with giving notice pursuant to subsection 33(4) of LA FOIP.

A local authority is expected to use only its own records and publicly available resources to locate an address for a third party.¹⁹¹

If there is any doubt as to the third party's contact information, the local authority may need to adapt its notification process to ensure there is no breach of privacy or confidentiality during the notification process.¹⁹²

¹⁹⁰ See SK OIPC resource, *Guide to LA FOIP*, Chapter 3: "Access to Records", under heading "Search for Records" – definition for a "reasonable search" has been relied upon and modified for what is considered reasonable effort for locating a third party. A "reasonable search" was defined in SK OIPC Review Reports F-2008-001 at [38] and F-2012-002 at [26].

¹⁹¹ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at pp. 214 to 215.

¹⁹² Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 215.

Section 34: Waiver of notice

Waiver of notice

34(1) A third party to whom a notice is required to be given pursuant to subsection 33(1) may waive the requirement for notice.

(2) A third party who consents to the giving of access to a record containing information described in subsection 33(1) is deemed to have waived the requirement for notice.

Subsection 34(1) of LA FOIP provides that a third party that would receive notice under subsection 33(1) of LA FOIP, can waive the requirement for notice.

Subsection 34(2) of LA FOIP provides that a third party that has consented to the release of the third party information is deemed to have waived the requirement to receive notice.

No response to the notice by the 21st day after the notice is given does not imply that the third party has consented to the disclosure of the information. The local authority should document its efforts to contact the third party. This is helpful in the event of a review by the Commissioner.¹⁹³

Section 35: Right to make representations

Right to make representations

35(1) A third party who is given notice pursuant to subsection 33(1):

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

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

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

¹⁹³ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 220.

Subsection 35(1)(a)

Right to make representations

35(1) A third party who is given notice pursuant to subsection 33(1):

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

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

Representation means the documents, other evidence and/statements or affidavits provided by a party setting out its position with respect to the information at issue and often referred to as a submission.¹⁹⁴

A submission informs the local authority of the third party's main arguments and presents supporting information to make its case.¹⁹⁵

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

- What specific information the third party considers to be subject to section 18 of LA FOIP.
 - Which specific subsection of section 18 of LA FOIP applies (i.e., (a) through (d)).
 - Why that subsection applies (provide any supporting evidence).
- OR
- That it does not oppose release of the information.

The submissions must be in writing unless the head of the local authority waives that requirement in certain circumstances as per subsection 35(2) of LA FOIP – see below.

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

¹⁹⁴ SK OIPC *Rules of Procedure* at p. 3.

¹⁹⁵ SK OIPC resource, *What to Expect During a Review with the IPC* at p. 8.

to assist the local authority by providing additional information and context to aid the local authority's decision-making.¹⁹⁶

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

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

Third parties should focus their arguments and supporting information on how section 18 applies or why personal information should not be released pursuant to subsection 28(2)(n) of LA FOIP. The discretion to apply other discretionary exemptions under Part III of LA FOIP is reserved for the "head"¹⁹⁷ of the local authority only.¹⁹⁸

Subsection 35(1)(b)

Right to make representations

35(1) A third party who is given notice pursuant to subsection 33(1):

...

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

The third party must submit its arguments and supporting information to the local authority within 20 days of receiving notice. The 20-day time period allowed for a third party to provide representations begins on the day after the third party notice is given (i.e., the day

¹⁹⁶ British Columbia Government Services, [FOIPPA Policy and Procedures Manual at Section 24 - Time limit and notice of decision - Province of British Columbia \(gov.bc.ca\)](#). Accessed Sept. 1, 2022.

¹⁹⁷ The "head" is defined at section 2(1)(e) of *The Freedom of Information and Protection of Privacy Act*.

¹⁹⁸ SK OIPC Review Reports F-2014-006 at [41] to [43], 205-2019, 255-2019 at [11]. See also *SNC Lavalin Inc. v. Canada (Minister for International Cooperation)*, 2003 FCT 681 (CanLII), [2003] 4 FC 900 at [19] to [24].

after the local authority sends the notice), not the date the third party receives it. The date on which the notice is sent should be marked on the notice indicating posting or electronic transmission (e.g., the postmark for regular mail, the transmission date for email or facsimile). Local authorities should choose a delivery method that ensures that notice is given promptly.¹⁹⁹ Contacting a third party prior to giving written notice is a good practice. It enables the local authority to explain the process, the importance of responding, the consequences of not responding and the timelines.²⁰⁰

There is no provision within LA FOIP that permits an extension of the 20-day deadline on third parties to provide representations. However, if the third party requests a few extra days to respond and the local authority agrees, these additional days would be subtracted from the 10 days remaining which the local authority has to issue its notice of decision pursuant to section 36 of LA FOIP.²⁰¹ See *Overview of third party timelines* earlier in this Chapter. Local authorities are not required to accept a late submission from a third party (i.e., outside of the 20-day window contemplated by subsection 35(1)(b) of LA FOIP), but they may elect to do so, if the local authority is still able to make its decision within the 30 days allowed by subsection 36(1) of LA FOIP.²⁰²

No response to the notice by the 21st day after the notice is given does not imply that the third party has consented to the disclosure of the information. It is good practice to contact the third party prior to sending the section 33 notice to the third party to ensure the third party understands the process and consequences of not responding. The local authority should document its efforts to contact the third party. This is helpful in the event of a review by the Commissioner.²⁰³

For calculating “20 days of receiving notice”, [The Legislation Act](#) establishes general rules that govern the interpretation of all statutory instruments in the province of Saskatchewan. Section 2-28 of *The Legislation Act* provides the following for the computation of time:

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

¹⁹⁹ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 216.

²⁰⁰ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 216.

²⁰¹ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 220.

²⁰² British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at [Section 24 - Time limit and notice of decision - Province of British Columbia \(gov.bc.ca\)](#). Accessed Sept. 1, 2022.

²⁰³ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 220.

- (2) A period expressed in days and described as occurring before, after or from a specified day excludes the specified day.
- (3) A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens.
- (4) In the calculation of time expressed as a number of clear days, weeks, months or years or as “at least” or “not less than” a number of days, weeks, months or years, the first and last days are excluded.
- (5) A time limit for the doing of anything that falls or expires on a holiday is extended to include the next day that is not a holiday.
- (6) A time limit for registering or filing documents or for doing anything else that falls or expires on a day on which the place for doing so is not open during its regular hours of business is extended to include the next day the place is open during its regular hours of business.²⁰⁴

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

- The first day the notice is given is excluded in the calculation of time [s. 2-28(2)].
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday [s. 2-28(5)].
- If the due date falls on a weekend, the time is extended to the next day the office is open [s. 2-28(6)].
- As LA FOIP expresses the time in a number of days, this is interpreted as 20 calendar days, not business days.

The Legislation Act does not allow for additional time for personal holidays, scheduled days off or if staff are away from the office due to illness.²⁰⁵

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

²⁰⁵ SK OIPC Blog, *The Interpretation Act, 1995 – Things to Know*, June 7, 2017. *The Legislation Act* replaced *The Interpretation Act, 1995*. It came into force on May 15, 2019.

Subsection 35(2)

Right to make representations

35(2) Representations made by a third party pursuant to clause (1)(b) shall be made in writing unless the head waives that requirement, in which case they may be made orally.

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

There are unique situations where the "head"²⁰⁶ may waive the requirement and accept oral representations. A local authority may choose to record the oral representation which can be transcribed afterward or take detailed notes.

Section 36: Decision

Decision

36(1) After a third party has been given an opportunity to make representations pursuant to clause 35(1)(b), the head shall, within 30 days after notice is given:

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

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

- (a) a statement that the third party and applicant are entitled to request a review pursuant to section 38 within 20 days after the notice is given; and
- (b) in the case of a decision to give access, a statement that the application will be given access to the record or to the part of it specified unless, within 20 days after the notice is given, the third party requests a review pursuant to section 38.

(3) Where, pursuant to clause (1)(a), the head decides to give access to the record or a specified part of it, the head shall give the applicant access to the record or the specified part unless, within 20 days after a notice is given pursuant to clause (1)(b), a third party requests a review pursuant to section 38

²⁰⁶ The "head" is defined at subsection 2(e) of *The Local Authority Freedom of Information and Protection of Privacy Act*.

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

Local authorities are required to decide whether or not to give access to all or part of the third party information within 30 days after the section 33 notice to the third party was given. The section 36 notice of decision is to be given to both the third party and the applicant.

Local authorities are not required to accept a late submission from a third party (i.e., outside of the 20-day window contemplated by subsection 35(1)(b) of LA FOIP), but they may elect to do so, if the local authority is still able to make its decision within the 30 days allowed by subsection 36(1) of LA FOIP.²⁰⁷

Generally, there are three types of third party responses:

- No Response: If no response is received within 20 days after the notice to the third party is given, the local authority decides, based on the information available, whether to release the information or not.
- Consent to disclosure of information: If the third party responds by consenting in writing to disclosure of information, the local authority should disclose the information unless another one of the Act's exemptions applies.
- Representations about why information should not be disclosed: If the third party makes representations on why the information should not be disclosed, the local authority shall consider these representations in reaching a decision on access.
 - The third party's representations may address only issues related to the applicability of section 18 or subsection 28(2)(n) of LA FOIP. Representations related to other exemptions must not be considered by the head in reaching a decision on access.²⁰⁸

²⁰⁷ British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at [Section 24 - Time limit and notice of decision - Province of British Columbia \(gov.bc.ca\)](#). Accessed Sept. 1, 2022.

²⁰⁸ British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at [Section 24 - Time limit and notice of decision - Province of British Columbia \(gov.bc.ca\)](#). Accessed Sept. 1, 2022.

Local authorities can combine a section 7 decision with the section 36 notice to an applicant.²⁰⁹ This is an efficient way to meet the timelines imposed by LA FOIP. For more on section 7 responses, see the *Guide to LA FOIP*, Chapter 3: “Access to Records”.

Subsection 36(1)(a)

Decision

36(1) After a third party has been given an opportunity to make representations pursuant to clause 35(1)(b), the head shall, within 30 days after notice is given:

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

The local authority must decide whether to withhold or release the third party information within 30 days of having given its section 33 notice to the third party.

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

The local authority should consider all exemptions to disclosure within the Act, not just section 18(1) of LA FOIP.

The fact that a third party has objected to the release of information is not sufficient grounds for information to be withheld under LA FOIP. The purpose of third party representations is to assist the local authority by providing additional information and context to aid the local authority’s decision-making.²¹⁰ The decision to withhold information must always be in accordance with the Act and the local authority has the burden of proof in demonstrating to the Commissioner that the exemption applies (see section 51 of LA FOIP or the *Guide to LA FOIP*, Chapter 2: “Administration of LA FOIP” under the heading *Burden of Proof* for more guidance).

²⁰⁹ SK OIPC Review Report 082-201-, 083-2019 at [12] to [17] and [121].

²¹⁰ British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at [Section 24 - Time limit and notice of decision - Province of British Columbia \(gov.bc.ca\)](#). Accessed Sept. 1, 2022.

Subsection 36(1)(b)

Decision

36(1) After a third party has been given an opportunity to make representations pursuant to clause 35(1)(b), the head shall, within 30 days after notice is given:

...

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

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

Third parties should **not** be told who the applicant is at any point in the process.²¹¹

Local authorities can combine a section 7 decision with the section 36 notice to an applicant.²¹² This is an efficient way to meet the timelines imposed by LA FOIP. For more on section 7 responses, see the *Guide to LA FOIP*, Chapter 3: “Access to Records”.

When determining the 30-day timeline for sending the section 36 notice of decision, [The Legislation Act](#) establishes general rules that govern the interpretation of all statutory instruments in the province of Saskatchewan. Section 2-28 of *The Legislation Act* provides the following for the computation of time:

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

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

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

²¹¹ *Les Viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency)*, 2006 FC 1075 (CanLII) at [13] and [19].

²¹² SK OIPC Review Report 082-201-, 083-2019 at [12] to [17] and [121].

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

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

(6) A time limit for registering or filing documents or for doing anything else that falls or expires on a day on which the place for doing so is not open during its regular hours of business is extended to include the next day the place is open during its regular hours of business.²¹³

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

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

The Legislation Act does not allow for additional time for personal holidays, scheduled days off or if staff are away from the office due to illness.²¹⁴

IPC Findings

In [Review Report 082-2019, 083-2019](#), the Commissioner considered whether the Ministry of Health (Health) met the timelines required by the equivalent provision in *The Freedom of Information and Protection of Privacy Act* (FOIP) (subsection 37(1)). The Commissioner noted that the section 37 notice was provided past the extended 60-day deadline. The section 7 decision should have already been provided to the applicant by the time the section 37

²¹³ *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.

²¹⁴ SK OIPC Blog, *The Interpretation Act, 1995 – Things to Know*, June 7, 2017. *The Legislation Act* replaced *The Interpretation Act, 1995*. It came into force on May 15, 2019.

notice was issued. However, the section 37 notice issued by Health to the applicant appeared to contain all the required elements for a section 7 decision. The Commissioner determined that there was nothing in FOIP that prevented a government institution from combining its section 7 decision with its section 37 response. The Commissioner indicated that procedurally, this process makes sense as the applicant can end up requesting a review within 20 days, as the applicant did in this case, before the final section 7 decision is issued.

Subsection 36(2)

Decision

36(2) A notice given pursuant to clause (1)(b) is to include:

- (a) a statement that the third party and applicant are entitled to request a review pursuant to section 38 within 20 days after the notice is given; and
- (b) in the case of a decision to give access, a statement that the applicant will be given access to the record or to the part of it specified unless, within 20 days after the notice is given, the third party requests a review pursuant to section 38.

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

- 1) Local authority decides to **deny access**. The notices must:
 - State that the local authority has decided to deny access to the record in full or in part; and
 - Include information about the applicant's right to request a review by the Commissioner within one year of the notice of decision being given pursuant to section 38 of LA FOIP.
- 2) Local authority decides to give **full or partial access**. The notices must:
 - State that the local authority has decided to grant full or partial access to the record; and

- Include information about the third party's right to request a review by the Commissioner within 20 days of the notice of decision being given pursuant to section 38 of LA FOIP.
- State that the applicant will be given access within 20 days from when the notice of decision is given unless a review is requested by the third party.²¹⁵

For a sample model letter²¹⁶ see the Ministry of Justice, Access and Privacy Branch's sample titled, *16 Notification to Third Party Under Section 36 – Decision of Local Authority – LA FOIP* and *17 Notification to Applicant under section 37 – Decision of Local Authority – LA FOIP*.

Third parties should **not** be told who the applicant is at any point in the process.²¹⁷

Subsection 36(2)(a)

Decision

36(2) A notice given pursuant to clause(1)(b) is to include:

- (a) a statement that the third party and applicant are entitled to request a review pursuant to section 38 within 20 days after the notice is given; and
- ...

The notice of decision should contain the following elements:

1. A statement that the third party and the applicant are entitled to request a review by the Commissioner pursuant to section 38 of LA FOIP within 20 days after the notice of decision is given (s 36(2)(a)); and
2. ...[see s. 36(2)(b) below]

²¹⁵ Adapted from British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at [Section 24 - Time limit and notice of decision - Province of British Columbia \(gov.bc.ca\)](#). Accessed Sept. 1, 2022.

²¹⁶ For other samples of model letters by the Access and Privacy Branch, Ministry of Justice see [publications. Saskatchewan.ca/#/categories/340](#).

²¹⁷ *Les Viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency)*, 2006 FC 1075 (CanLII) at [13] and [19].

For a sample model letter²¹⁸ see the Ministry of Justice, Access and Privacy Branch's sample titled, [16 Notification to Third Party Under Section 36 – Decision of Local Authority – LA FOIP](#) and [17 Notification to Applicant under section 37 – Decision of Local Authority – LA FOIP](#).

If the head of the local authority concerned, having considered the representations, decides to release the information requested, the third party may apply to the IPC for a review of that decision.²¹⁹ The 20-day timeline on third parties to request a review is a requirement as subsection 38(4) of LA FOIP reiterates the 20-day timeline on third parties. If the 20-day timeline is missed, a review will not be commenced.

If the head of the local authority concerned decides to withhold the third party information requested, the applicant may apply to the IPC for a review of that decision. However, the 20-day timeline to request a review noted at subsection 36(2)(a) of LA FOIP is not a requirement of applicants, but rather an option – applicants are “entitled” to request the review – it is a right. Unlike third parties, applicants have one year to request a review of a section 36 decision of a local authority pursuant to subsection 38(2) of LA FOIP. If the one-year timeline is missed, a review will not be commenced.

Section 38 of LA FOIP provides the circumstances under which an applicant or third party can request a review by the Commissioner.

Third parties and applicants who wish to make a request for review can do so using **Form B** found in [The Local Authority Freedom of Information and Protection of Privacy Regulations](#). The form should be completed and provided to the IPC along with a copy of the local authority's section 36 notice of decision. Any other relevant information, such as other communications with the local authority, can also be attached. The IPC will also accept requests for review that are not on Form B provided the request is in writing and contains the same elements of information as Form B.

For more, see *Section 38* later in this Chapter.

²¹⁸ For other samples of model letters by the Access and Privacy Branch, Ministry of Justice see [publications. Saskatchewan.ca/#/categories/340](https://publications.saskatchewan.ca/#/categories/340).

²¹⁹ *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1989] F.C.J. No. 453 at p. 2.

Subsection 36(2)(b)

Decision

36(2) A notice given pursuant to clause (1)(b) is to include:

...

(b) in the case of a decision to give access, a statement that the applicant will be given access to the record or to the part of it specified unless, within 20 days after the notice is given, the third party requests a review pursuant to section 38.

The notice of decision should contain the following elements:

1. ...[see s. 36(2)(a) above]
2. where the decision is to permit access, a statement that the applicant will be given access (and what portions will be given) within 20 days after the notice of decision is given, unless the third party requests a review by the Commissioner pursuant to section 38 of LA FOIP (s 36(2)(b)).

The 20-day time period for a local authority to release the third party information begins on the day after the section 36 notice of decision is sent (i.e., the day after the local authority sends the notice, the clock starts), not the date the third party receives it. The date on which the notice of decision is sent should be marked on the notice indicating posting or electronic transmission (e.g., the postmark for regular mail, the transmission date for email or facsimile). Local authorities should choose a delivery method that ensures that notice is given promptly (e.g., courier, email, or priority post).²²⁰

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

For a sample model letter²²¹ see the Ministry of Justice, Access and Privacy Branch's sample titled, *16 Notification to Third Party Under Section 36 – Decision of Local Authority – LA FOIP* and *17 Notification to Applicant under section 37 – Decision of Local Authority – LA FOIP*.

²²⁰ Service Alberta, *FOIP Guidelines and Practices: 2009 Edition*, Chapter 5: Third Party Notice at p. 216.

²²¹ For other samples of model letters by the Access and Privacy Branch, Ministry of Justice see [publications. Saskatchewan.ca/#/categories/340](https://publications.saskatchewan.ca/#/categories/340).

Subsection 36(3)

Decision

36(3) Where, pursuant to clause (1)(a), the head decides to give access to the record or a specified part of it, the head shall give the applicant access to the record or the specified part unless, within 20 days after a notice is given pursuant to clause (1)(b), a third party requests a review pursuant to section 38.

Subsection 36(3) of LA FOIP provides that if the local authority decides to give access to the record, it must do so within 20 days after notice is given unless the third party requests a review pursuant to section 38 of LA FOIP.

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

If the review requested by a third party affects only some of the records proposed for disclosure, the local authority should release the remainder of the records to the applicant, unless they are subject to other exemptions at which point the applicant may want a review of those exemptions also.²²²

For calculating “20 days after a notice is given”, *The Legislation Act* establishes general rules that govern the interpretation of all statutory instruments in the province of Saskatchewan. Section 2-28 of *The Legislation Act* provides the following for the computation of time:

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

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

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

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

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

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

(6) A time limit for registering or filing documents or for doing anything else that falls or expires on a day on which the place for doing so is not open during its regular hours of business is extended to include the next day the place is open during its regular hours of business.²²³

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

- The first day the notice is given is excluded in the calculation of time [s. 2-28(2)].
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday [s. 2-28(5)].
- If the due date falls on a weekend, the time is extended to the next day the office is open [s. 2-28(6)].
- As LA FOIP expresses the time in a number of days, this is interpreted as 20 calendar days, not business days.

The Legislation Act does not allow for additional time for personal holidays, scheduled days off or if staff are away from the office due to illness.²²⁴

IPC Findings

In [Review Report 012-2018](#), the Commissioner considered whether a third party met the 20-day timeline to request a review under subsection 36(3) of LA FOIP. The Commissioner received the third party’s request for review seven days past the 20-day deadline. In its representations to the Commissioner, the third party asserted that there was confusion on how to request a review by the Commissioner. However, upon review, the Commissioner

²²³ *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.

²²⁴ SK OIPC Blog, *The Interpretation Act, 1995 – Things to Know*, June 7, 2017. *The Legislation Act* replaced *The Interpretation Act, 1995*. It came into force on May 15, 2019.

found that the City of Regina's notice of decision to the third party instructed it on how and where to request a review by the Commissioner. As a result, the Commissioner found that the City of Regina met its duty to assist under section 5.1 of LA FOIP. Furthermore, the Commissioner found that the third party did not request a review within the legislated timeline of 20 days after receiving the City's notice pursuant to section 36 of LA FOIP. Since subsection 36(3) of LA FOIP provides that the head of the City of Regina "shall" provide access to a record (or specified part of it), after 20 days, the Commissioner recommended the City of Regina release the record to the applicant.

Subsection 36(4)

Decision

36(4) A head who fails to give notice pursuant to clause (1)(b) is deemed to have given notice, on the last day of the period set out in subsection (1), of a decision to refuse to give access to the record.

Subsection 36(4) of LA FOIP provides that where a local authority has failed to give notice to an applicant (or third party) that access to the third party information is denied is deemed to have given notice of this decision on the 30th day after the section 33 notice is sent.

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

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

Applicants who have failed to receive a section 36 notice that access to the third party information is denied, can proceed to request a review by the Commissioner pursuant to section 38 of LA FOIP. In addition, applicants who have failed to receive a subsection 7(2) decision, can proceed to request a review by the Commissioner pursuant to section 38 of LA FOIP. Applicants have up to one year to request a review (see *Section 38* later in this Chapter).

IPC Findings

In [Review Report 066-2019](#), the Commissioner considered subsection 7(5) of LA FOIP. The Northern Village of Pinehouse (Village) failed to provide a section 7 decision to the applicant within the 30-day deadline. Therefore, it is deemed to have responded on the 30th day with a refusal to provide access pursuant to subsection 7(5) of LA FOIP. The Commissioner stated that this is referred to as a “deemed refusal”. The Village was then required to account for responsive records in its possession and/or control and only deny access to all or part of the records if permitted by the limited and specific exemptions in LA FOIP. As the Village failed to inform the applicant and the Commissioner of what exemptions it was relying on to withhold the records, the Commissioner found there was not authority to withhold them and recommended the records be released to the applicant.

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

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

Section 38: Application for review

Application for review

38(1) Where:

- (a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 36;

- (a.1) an applicant is not satisfied that a reasonable fee was estimated pursuant to subsection 9(2);
- (a.2) an applicant believes that all or part of the fee estimated should be waived pursuant to subsection 9(5);
- (a.3) an applicant believes that an application was transferred to another local authority pursuant to subsection 11(1) and that local authority did not have a greater interest;
- (a.4) an individual believes that his or her personal information has not been collected, used or disclosed in accordance with this Act or the regulations;
- (b) a head fails to respond to an application for access to a record within the required time; or
- (c) an applicant requests a correction of personal information pursuant to clause 31(1)(a) and the correction is not made;

the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

- (2) An applicant or individual may make an application pursuant to subsection (1) within one year after being given written notice of the decision of the head or of the expiration of the time mentioned in clause (1)(b).
- (3) A third party may apply in the prescribed form and manner to the commissioner for a review of a decision pursuant to section 36 to give access to a record that affects the interest of the third party.
- (4) A third party may make an application pursuant to subsection (3) within 20 days after being given notice of the decision.

Section 38 of LA FOIP provides the circumstances under which an applicant or third party can request a review by the Commissioner.

The Commissioner is an independent Officer of the Legislative Assembly. The Commissioner has oversight over LA FOIP and jurisdiction to review compliance with LA FOIP by all local authorities in Saskatchewan subject to it.

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

The Commissioner prepares a report on the completion of a review, which includes findings and recommendations for the 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 response from the local authority,

an applicant or third party can pursue an appeal to the Court of King's Bench for Saskatchewan. The Court of King's Bench will determine the matter *de novo*.

A hearing **de novo** means a review of a matter anew, as if the original hearing had not taken place.²²⁵

For more on the IPC review process, see [The Rules of Procedure](#).

For more on the role of the Commissioner, see the *Guide to LA FOIP*, Chapter 2: "Administration of LA FOIP" at *Information and Privacy Commissioner – Roles and Responsibilities*.

For more on section 38, see the *Guide to LA FOIP*, Chapter 3: "Access to Records".

Subsection 38(1)

Application for review

38(1) Where:

- (a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 36;
- (a.1) an applicant is not satisfied that a reasonable fee was estimated pursuant to subsection 9(2);
- (a.2) an applicant believes that all or part of the fee estimated should be waived pursuant to subsection 9(5);
- (a.3) an applicant believes that an application was transferred to another local authority pursuant to subsection 11(1) and that local authority did not have a greater interest;
- (a.4) an individual believes that his or her personal information has not been collected, used or disclosed in accordance with this Act or the regulations;
- (b) a head fails to respond to an application for access to a record within the required time; or
- (c) an applicant requests a correction of personal information pursuant to clause 31(1)(a) and the correction is not made;

²²⁵ Garner, Bryan A., 2009. *Black's Law Dictionary, Deluxe 10th Edition*. St. Paul, Minn.: West Group at p. 837.

the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

Subsection 38(1) of LA FOIP provides that an applicant can request a review by the Commissioner under several circumstances including when they are not satisfied with the decisions of the local authority in sections 7, 12 or 36 notices or responses. Therefore, if applicants receive a section 36 decision from the local authority that denies access to the third party information, applicants have a right to request a review by the Commissioner of that decision pursuant to subsection 38(1)(a) of LA FOIP.

For more on subsection 38(1), see the *Guide to LA FOIP*, Chapter 3: “Access to Records”.

Subsection 38(2)

Application for review

38(2) An applicant or individual may make an application pursuant to subsection (1) within one year after being given written notice of the decision of the head or of the expiration of the time mentioned in clause (1)(b).

Subsection 38(2) of LA FOIP provides that applicants may make a request for review to the Commissioner within one year after being given written notice of the decision of the local authority (i.e., after receiving the section 36 notice).

For calculating “one year after being given written notice of the decision of the head” or of the deemed refusal, [The Legislation Act](#) establishes general rules that govern the interpretation of all statutory instruments in the province of Saskatchewan. Section 2-28 of *The Legislation Act* provides the following for the computation of time:

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

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

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

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

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

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

...

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

(9) If a period would end on a date in a month that has no date numerically corresponding to the first date in the period, the period ends on the first day of the next month.²²⁶

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

- The first day the notice is given is excluded in the calculation of time [s. 2-28(2)].
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday [s. 2-28(5)].
- If the due date falls on a weekend, the time is extended to the next day the office is open [s. 2-28(6)].
- As LA FOIP expresses the time as one year, this is interpreted as 365 calendar days, not business days [s. 2-28(8)].

²²⁶ *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.

If an applicant did not receive a response from the local authority, the applicant still has one year from the 30th day under which the local authority was deemed to have responded.²²⁷ The same rules around the computation of time noted above from *The Legislation Act* apply in this circumstance also.

Subsection 38(3)

Application for review

38(3) A third party may apply in the prescribed form and manner to the commissioner for a review of a decision pursuant to section 36 to give access to a record that affects the interest of the third party.

Subsection 38(3) of LA FOIP provides that a third party can request a review by the Commissioner.

Third parties can request a review pursuant to subsection 38(3) of LA FOIP when they are not satisfied with the local authority's section 36 notice of decision. For example, the local authority provides notice that it has decided to release the third party information. This request for review must be made within **20 days** after being given the section 36 notice of decision from the local authority.

Third parties who wish to make a request for review can do so using **Form B** found in [The Local Authority Freedom of Information and Protection of Privacy Regulations](#). The form should be completed and provided to the IPC along with a copy of the local authority's section 36 notice of decision. Any other relevant information, such as other communications with the local authority, can also be attached. The IPC will also accept requests for review that are not on Form B provided the request is in writing and contains the same elements of information as Form B.

If the third party requests a review, local authorities should release any portions of the records that are not in dispute. Apply relevant severing to any information in dispute, and to

²²⁷ Subsection 38(2) of LA FOIP provides that the one year also includes the date as of which the local authority is deemed to have responded – see subsections 7(5) and 36(4) of LA FOIP.

any information that attracts any other exemptions to disclosure, but the remainder should be released to the applicant while the IPC review is pending.²²⁸

For more on section 38, see the *Guide to LA FOIP*, Chapter 3: “Access to Records”.

Subsection 38(4)

Application for review

38(4) A third party may make an application pursuant to subsection (3) within 20 days after being given notice of the decision.

Subsection 38(4) of LA FOIP provides that where a third party requests the Commissioner review the decision of the local authority, it must make that request within 20 days after being given the local authority’s decision.

For calculating “20 days after being given” the local authority’s decision, *The Legislation Act* establishes general rules that govern the interpretation of all statutory instruments in the province of Saskatchewan. Section 2-28 of *The Legislation Act* provides the following for the computation of time:

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

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

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

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

²²⁸ British Columbia Government Services, *FOIPPA Policy and Procedures Manual* at [Section 24 - Time limit and notice of decision - Province of British Columbia \(gov.bc.ca\)](#). Accessed Sept. 1, 2022.

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

(6) A time limit for registering or filing documents or for doing anything else that falls or expires on a day on which the place for doing so is not open during its regular hours of business is extended to include the next day the place is open during its regular hours of business.²²⁹

Based on this, the following can be applied for calculating “20 days after being given” the local authority’s decision under LA FOIP:

- The first day the notice is given is excluded in the calculation of time [s. 2-28(2)].
- If the due date falls on a holiday, the time is extended to the next day that is not a holiday [s. 2-28(5)].
- If the due date falls on a weekend, the time is extended to the next day the office is open [s. 2-28(6)].
- As LA FOIP expresses the time in a number of days, this is interpreted as 20 calendar days, not business days.

The Legislation Act does not allow for additional time for personal holidays, scheduled days off or if staff are away from the office due to illness.²³⁰

Third parties who wish to make a request for review can do so using **Form B** found in [The Local Authority Freedom of Information and Protection of Privacy Regulations](#). The form should be completed and provided to the IPC along with a copy of the local authority’s section 36 notice of decision. Any other relevant information, such as other communications with the local authority, can also be attached. The IPC will also accept requests for review that are not on Form B provided the request is in writing and contains the same elements of information as Form B.

For more on section 38, see the *Guide to LA FOIP*, Chapter 3: “Access to Records”.

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

²³⁰ SK OIPC Blog, *The Interpretation Act, 1995 – Things to Know*, June 7, 2017. *The Legislation Act* replaced *The Interpretation Act, 1995*. It came into force on May 15, 2019.

Findings

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

Section 41: Notice of application for review

Notice of application for review

41(1) A head who has refused an application for access to a record or part of a record shall, immediately on receipt of a notice of review pursuant to section 38, give written notice of the review 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.

(2) A head shall, immediately on receipt of a notice of review pursuant to section 38 by a third party, give written notice of the review to the applicant.

It is a requirement of the Act that a local authority notify third parties that an application for a review has been made as per section 41 of LA FOIP. The Office of the Information and Privacy Commissioner will invite third parties to provide representations to the Commissioner's office once a review has been commenced so this notice by the local authority is important.

If a local authority has applied subsection 18(1) of LA FOIP to information in records but has failed to provide notice of a review pursuant to section 41 and is unable to identify third

parties for the Commissioner, the burden of proof will not be met, and subsection 18(1) of LA FOIP may be found to not apply.²³¹

Third parties should **not** be told who the applicant is at any point in the process. To do so, may constitute a breach of the applicant's privacy pursuant to Part IV of LA FOIP.²³²

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

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

(3) No one is entitled as of right:

- (a) to be present during a review; or
- (b) before or after a review:
 - (i) to have access to; or
 - (ii) to comment on;

representations made to the commissioner by any other person.

Subsection 42(1) of LA FOIP provides that third parties (and applicants and local authorities) that are a party in a review by the Commissioner have a right to make representations to the Commissioner on the matter. This is an entitlement or a right and not a requirement. If a third party does not wish to make representation to the Commissioner, the review will continue without it.

²³¹ SK OIPC Review Report F-2013-003 at [19], [25], [26] and [67] to [73].

²³² *Les Viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency)*, 2006 FC 1075 (CanLII) at [13] and [19].

At the beginning of a review, the Office of the Information and Privacy Commissioner will request the contact information for the third party from the local authority. The Office of the Information and Privacy Commissioner will then send a notification to the third party inviting them to provide representations for section 18 of LA FOIP (or subsection 28(2)(n) of LA FOIP if applicable in the circumstances). The third party will generally be given 30 days to provide its representations to the Commissioner.²³³

Representation means the documents, other evidence and/statements or affidavits provided by a party setting out its position with respect to the information at issue and often referred to as a submission.²³⁴

A submission informs the Commissioner of the third party's main arguments and presents supporting information to make its case.²³⁵

The Office of the Information and Privacy Commissioner has issued several guides, blogs, and other resources on how to prepare an effective submission:

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

Third parties should focus their arguments and supporting information on how section 18 applies (or why personal information should not be released pursuant to subsection 28(2)(n) of LA FOIP if that is the issue subject to review). The discretion to apply other discretionary exemptions under Part III of LA FOIP is reserved for the "head" of the local authority only.²³⁶ As such, the Commissioner will not consider other discretionary exemptions unless raised by the local authority.²³⁷

²³³ SK OIPC resource, [The Rules of Procedure](#) at sections 2-5 and 2-6.

²³⁴ SK OIPC *The Rules of Procedure* at p. 3.

²³⁵ SK OIPC resource, *What to Expect During a Review with the IPC* at p. 8.

²³⁶ The "head" is defined at subsection 2(e) of *The Local Authority Freedom of Information and Protection of Privacy Act*.

²³⁷ SK OIPC Review Reports F-2014-006 at [41] to [43], 205-2019, 255-2019 at [11]. See also *SNC Lavalin Inc. v. Canada (Minister for International Cooperation)*, 2003 FCT 681 (CanLII), [2003] 4 FC 900 at [19] to [24].

Subsection 42(3) of LA FOIP provides that no one is entitled, as of right, to be present during the Commissioner's review or to have access to, or comment on, representations made to the Commissioner by any other person. The Commissioner issued *The Rules of Procedure* which set out the process for reviews. *The Rules of Procedure* state that representations made to the Commissioner will not be disclosed to another party unless the party submitting the representation agrees that the representation, or a portion thereof, can be shared with another party. Third parties should indicate in their representations whether they consent to the sharing of the representation amongst the parties to the review (applicant and local authority).

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

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

All reports are generally posted to the Commissioner's website seven days after the report is provided to the parties.²³⁸ Reports may be posted to the website sooner where the Commissioner considers it appropriate. For example, where media coverage is going to occur

²³⁸ SK OIPC *The Rules of Procedure* at 2-12.

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 and to the Commissioner. The response should be in writing.

Once an applicant, individual or third party receives the head's section 45 response, if not satisfied, they have 30 days to make an application to the Court of King's Bench pursuant to section 46 of LA FOIP. For more information on the Court of King's Bench see [Courts of Saskatchewan](#).

In the recent Court of Appeal for Saskatchewan decision, [Leo v Global Transportation Hub Authority, 2020 SKCA 91 \(CanLII\)](#), the court clarified the de novo nature of an appeal pursuant to an equivalent section in [The Freedom of Information and Protection of Privacy Act](#) (FOIP) – section 57 of FOIP. Part VII of FOIP (and LA FOIP) does not in any way contemplate that, on an appeal to the Court of King's Bench, parties can raise any and all provisions of the Act that bear on the question of whether the record in issue may be released. The system of the Act offers no room for a direct appeal to the Court of King's Bench from the decision of a head, i.e., an appeal that circumvents the application to the Commissioner for a review.²³⁹

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

Section 45: Decision of head

Decision of head

45(1) Within 30 days after receiving a report of the commissioner pursuant to subsection 44(1), a head shall:

²³⁹ [Leo v Global Transportation Hub Authority, 2020 SKCA 91 \(CanLII\)](#) at [41] and [47].

- (a) make a decision to follow the recommendation of the commissioner or any other decision that the head considers appropriate; and
- (b) give written notice of the decision to the commissioner and the persons mentioned in subsection 44(2).

Section 45 of LA FOIP provides that 30 days after receiving the Commissioner's report, the local authority will provide its decision regarding the Commissioner's recommendations (or any other decision it intends to make) to the Commissioner, applicant and third parties involved in the review.

For calculating "within 30 days after receiving a report of the commissioner", [The Legislation Act](#) establishes general rules that govern the interpretation of all statutory instruments in the province of Saskatchewan. Section 2-28 of *The Legislation Act* provides the following for the computation of time:

- 2-28(1)** A period expressed in days and described as beginning or ending on, at or with a specified day, or continuing to or until a specified day, includes the specified day.
- (2) A period expressed in days and described as occurring before, after or from a specified day excludes the specified day.
- (3) A period described by reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens.
- (4) In the calculation of time expressed as a number of clear days, weeks, months or years or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days are excluded.
- (5) A time limit for the doing of anything that falls or expires on a holiday is extended to include the next day that is not a holiday.
- (6) A time limit for registering or filing documents or for doing anything else that falls or expires on a day on which the place for doing so is not open during its regular hours of

business is extended to include the next day the place is open during its regular hours of business.²⁴⁰

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

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

The Legislation Act does not allow for additional time for personal holidays, scheduled days off or if staff are away from the office due to illness.²⁴¹

Section 46: Appeal to court

Appeal to courts

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.

²⁴⁰ *The Legislation Act*, SS 2019, c L-10.2 at s. 2-28.

²⁴¹ SK OIPC Blog, *The Interpretation Act, 1995 – Things to Know*, June 7, 2017. *The Legislation Act* replaced *The Interpretation Act, 1995*. It came into force on May 15, 2019.

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

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

Section 46 of LA FOIP provides that within 30 days of receiving a decision of the head, an applicant or third party can appeal the decision of the head to the court if not satisfied with the decision.

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

1. Court of King's Bench for Saskatchewan;
2. Court of Appeal for Saskatchewan; and
3. Supreme Court of Canada.²⁴²

The Court of King's Bench for Saskatchewan consists of a Chief Justice of the King's Bench and currently 36²⁴³ other judges. Each King's Bench judge is assigned to a specific judicial centre, but because the Court is an itinerant²⁴⁴ court, the judges also travel to and sit in other judicial centres.²⁴⁵

In Saskatchewan, there are court locations in:

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

²⁴² Courts of Saskatchewan, Resources, Court Structure. Available at <https://sasklawcourts.ca/index.php/home/resources/learn-about-the-courts-resources/court-structure>.

²⁴³ Courts of Saskatchewan at <https://sasklawcourts.ca/index.php/home/court-of-queen-s-bench/judges>. Accessed February 21, 2023.

²⁴⁴ "Itinerate" (of a judge) means to travel on a circuit for the purpose of holding court - Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 997.

²⁴⁵ 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.

- Swift Current
- Weyburn
- Yorkton

The steps for making an appeal are as follows:²⁴⁶

1. The Commissioner issues report with recommendations.
2. The head of the local authority has 30 days from the date of the Commissioner's report to make a decision in regard to the Commissioner's recommendations or any other decision the head decides. The head's decision must be sent to the applicant (if an access matter), the individual (if a privacy matter), the third party (if applicable) and the Commissioner within those 30 days of the Commissioner's report.
3. Once received, the applicant, individual or third party can launch an appeal of the head's decision to the Court of King's Bench. The application form is called an *Originating Application* (Form 3-49). It should be filed at the Local Registrar's office. There is a fee involved for filing the application. It is around \$200. A sample of an *Originating Application* for an access to information appeal can be found at Appendix A of IPC resource, *Guide to Appealing the Decision of a Head of a Government Institution, or a Local Authority, or a Health Trustee*.
4. The applicant, individual or third party that launches the appeal is responsible for serving the local authority with the *Originating Application* once filed with the court.
5. Once the *Originating Application* is filed and served, the parties are embarking on a two-step procedure:
 - i. The first step involves determining whether the parties can agree or whether the court will have to decide what is filed sealed and what is argued *in camera* or in open court. Because of the nature of the appeal, the local authority will have filed sealed records (both unredacted and redacted) which means they are not seen by the other parties to the appeal.

If the parties agree that submissions need not be filed sealed and the representations can be made in open court, the parties can proceed directly to argue the appeal.

²⁴⁶ Modified from SK OIPC Resource, *Guide to Appealing the Decision of a Head of a Government Institution, or a Local Authority, or a Health Trustee*. Available at <https://oipc.sk.ca/assets/guide-to-appealing-to-the-decision-of-a-head.pdf>.

If the parties cannot agree, a court application will have to be made to determine the procedure to be used, what is filed sealed, what is argued *in camera* and what is argued in open court. The court will determine this procedure and issue an order.

In camera, in private or in the judge's private chambers.²⁴⁷

- ii. The second step will be the actual argument by the parties as has been previously directed by the judge or agreed by the parties.²⁴⁸

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 the equivalent section in [The Freedom of Information and Protection of Privacy Act](#) (FOIP) – section 57. Part VII of FOIP (and LA FOIP) does not in any way contemplate that, on an appeal to the Court of King's Bench, parties can raise any and all provisions of the Act that bear on the question of whether the record in issue may be released. The system of the Act offers no room for a direct appeal to the Court of King's Bench from the decision of a head, i.e., an appeal that circumvents the application to the Commissioner for a review.²⁴⁹

²⁴⁷ Adapted from Garner, Bryan A., 2019. *Black's Law Dictionary, 11th Edition*. St. Paul, Minn.: West Group at p. 909.

²⁴⁸ SK OIPC Resource, *Guide to Appealing the Decision of a Head of a Government Institution, or a Local Authority, or a Health Trustee* at p. 10.

²⁴⁹ *Leo v Global Transportation Hub Authority*, 2020 SKCA 91 (CanLII) at [41] and [47].



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