SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT H-2008–001

Saskatoon Regional Health Authority

Summary: The Applicant requested records (orally and in writing) from the Saskatoon Regional Health Authority (SRHA or Region) at different times. When the Applicant made application in the prescribed form, the Region did not respond as required by *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) apparently due to the anticipated litigation. The Region later denied access by invoking section 20 of LA FOIP, section 38(1)(a) of *The Health Information Protection Act* and sections 3 and 36 of *The Occupational Health and Safety Act*. Through the mediation process, the Region reconsidered and released those withheld documents to the Applicant in full. However, the Region did not provide another document later requested by the Applicant's lawyer from its Clinical Health Psychology department at Royal University Hospital as the fees requested were not paid. During mediation, the Region waived its fees and provided the record sought by the Applicant without charge. The Region also provided the Applicant with a full index of the additional records on his patient file with Clinical Health Psychology. As the Region did not provide timely, adequate responses to the Applicant, and did not adequately search for responsive records, the Commissioner found that the Region did not meet the duty to assist in the circumstances. The Commissioner also found the Region's 'LA FOIP section 7' responses to the Applicant's written requests to be deficient.

Statutes Cited: *The Health Information Protection Act*, [S.S. 1999, C. H-0.021, as amended] ss. 2(m), 2(t), 4, 12, 31(a), 31(b), 32, 33, 34, 35(1), 36(1), 36(3), 38(1)(a), 39; *The Local Authority Freedom of Information and Protection of Privacy Act*, [S.S. 1990-91, c. L-27.1], ss. 2(f), 5, 6, 7, 10, 20, 22, 28; *The Local Authority Freedom of Information and Protection of Privacy Regulations* [S.S. 1993 c. L-27 Reg.1 as amended] ss. 4, 5; *The Mental Health Services Act* [S.S. 1984-85-86 *c.* M-13.1 as amended] ss. 2(h), 2(m), 2(u), 38; *The Mental Health Services Regulations* [S.S. 1986 c. M-13.1 Reg 1 as amended]. ss. 15, 16, 17, 18; *The Occupational Health and*

Safety Act, 1993 [SS. 1993 c. O-1.1 as amended] ss. 3, 36; *Access to Information Act* (R.S., 1985, c. A-1)

Authorities Cited: **Reports & Orders:** Saskatchewan OIPC Report H-2006-001, Report F-2006-002, Report LA-2004-001, Report LA-2007-001, Investigation Report H-2005-002, Report F-2006-003, Report F-2008-001, Investigation Report H-2007-001 (Available online at www.oipc.sk.ca under the *Reports* tab)

Other Sources Cited: Saskatchewan FOIP FOLIO: February 2004, May 2005, February 2006, October 2006 (Available online at www.oipc.sk.ca under the *Newsletters* tab); *Saskatchewan Information and Privacy Commissioner Submission to Workers' Compensation Board Review Committee*, 2006, (Available online: http://www.oipc.sk.ca/Reports/OIPCWCBReviewCommitteeReport.pdf); *Saskatchewan Office of the Information and Privacy Commissioner's Annual Report 2004-2005*, (Available online at http://www.oipc.sk.ca/Reports/AnnualReport04-05.pdf); *The Health Information Regulations: Draft for Consultation* – Sask. Health Policy and Planning Branch 2004; (Available online: http://www.scf.sk.ca/Privacy/mc_hipa_reg_draftforconsultation.pdf); Alberta Health & Wellness, *Health Information Act Guidelines and Practices Manual*, 2007, (Available online: http://www.health.gov.ab.ca/about/HIA_Guidelines-Practices-Manual.pdf); Office of the Information and Privacy Commissioner for British Columbia, *Tips for DMIPS and Freedom of Information and Privacy Coordinators: Conducting an Adequate Search Investigation under the Freedom of Information and Protection of Privacy Act*, 2003, (Available online: http://www.oipcbc.org/advice/GUID-Complaint_Investigation.pdf).

I. BACKGROUND

[1] The Applicant is a former patient of the Saskatoon Regional Health Authority (SRHA or Region).

[2] The Applicant made a number of requests, orally and in writing, to view or obtain copies of certain records/information from the Region as follows:

1. On October 12, 2004, during a visit with his physician, the Applicant asked to view his chart. The physician noted this in a record titled *Physician's Progress Notes*: "*Oct. 12/04 08:00…Pt* [patient] *asking to view his chart this*

a.m." Soon thereafter, the Region arranged for the Applicant to meet with its Client Services Representative (CSR). During a meeting on October 26, 2004, the CSR recorded that,

> *I went over his chart with him….* [The Applicant] *signed a consent* [Consent for Disclosure of Personal Health Information Form] *for release of information form and I provided him with copies of the nursing notes, SW* [Social Worker] *notes, Physician Orders and Progress Notes and Admission notes*.

2. The Applicant submitted the following written application on or about October 28, 2004 to the Minister's Office[1] requesting records and information pertaining to an incident on October 12, 2004 involving himself (the incident):

    1. *All information, notes and reports in regard to* (the incident).
    2. *The names of all staff professional, non professional and there* [sic] *position involvement with patient date and times during hospitalization* […].

[3] We received the Applicant's Request for Review pertaining to the above noted written request on December 20, 2004.

[4] By way of letter dated January 6, 2005, we provided notice to the Region that we intended to undertake a review.

[5] During the review process, the Applicant's lawyer submitted a second written request to the Region for a copy of a neuropsychological assessment (assessment) that the Applicant had undergone.

[6] On August 18, 2005, a Registered Doctoral Psychologist, on behalf of the Region, responded to this request as follows:

> *We received your request for the Psychological Assessment Report pertaining to* [the Applicant]. *It is our department's policy that any neuropsychological reports that are used for legal or insurance purposes are charged a fee of $500.00. We inform patients of this prior to the appointment and in the information provided at time of the appointment …. If you still wish a copy of* [the Applicant's] *report, we would ask that you would issue us a cheque in the amount of $500.00*.

[1] The Applicant initially submitted to the office of the Minister of Health. It was forwarded to the Region by the Minister's Office on or about November 9, 2004.

[7] When the Applicant contacted us, he objected to the above noted fee. The Applicant also alleged that the Region did not inform him that his assessment was on file with the Region's Clinical Health Psychology department (Clinical Health Psychology) at Royal University Hospital. Rather, the Applicant claims to have learned of its existence by accident.

[8] We informed the Region of the Applicant's additional concerns on September 22, 2005.

II. RECORDS AT ISSUE

[9] The records responsive to the Applicant's first written application consisted of: (a) *SDH Security Services Special Report,* 2 pages, and (b) notes contained in the Security Officers' notebooks, 6 pages; both pertaining to the incident.

[10] Through the mediation process, the above records were released in full to the Applicant by the Region.

[11] The Applicant also sought a copy of the assessment on file with Clinical Health Psychology. Though not originally recognized by the Region as responsive records during the review process, the Region provided our office with a list of all records from Clinical Health Psychology containing the Applicant's personal health information. The Index of Records lists 65 records, including two neuropsychological assessment reports dated September 23, 2004 and March 24, 2005.

[12] During mediation, the Region provided a copy of the assessment and the Index of Records to the Applicant without cost.

III. ISSUES

1. Did the Region meet the duty to assist the Applicant?

2. Did the Region meet its section 7 obligations under *The Local Authority Freedom of Information and Protection of Privacy Act* and section 36 obligations under *The Health Information Protection Act* when providing its responses to the Applicant with respect to each application?

IV. DISCUSSION OF THE ISSUES

[13] From the onset and during the review, a number of additional concerns were identified by our office as follows:

1. Did the Region properly assess the fees with respect to the Applicant's request for a copy of the assessment?

2. What if any impact do sections 3 and 36 of *The Occupational Health and Safety Act, 1993*[2] have on this review?

3. Did the Region properly invoke section 38(1)(a) of *The Health Information Protection Act* and section 20 of *The Local Authority Freedom of Information and Protection of Privacy Act*?

4. Does section 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* apply to any of the withheld records in question or portions thereof?

[14] As a result of the excellent cooperation we received from the members of the Region's Privacy and Access Office and the lengths to which these individuals went to accommodate our concerns with respect to the above four issues, we were able to resolve each of these satisfactorily during the review process.

[15] Given the changes made by the Region as a result of this lengthy review process and extensive communication between our office and the Privacy and Access Office, we carefully considered if it was still necessary and appropriate to issue a formal Report. Recognizing that significant positive changes have been made, it nevertheless remains

[2] *The Occupational Health and Safety Act, 1993* [S.S. 1993 c. O-1.1 as amended].

important to identify those areas that require attention and remedial action. This review also raises some questions that our office has not formally addressed in the past. In keeping with our approach to be transparent with trustees in particularizing which information practices are inadequate and fall short of statutory requirements, I believe there is value in assessing and commenting on what I found in this case. This, however, should not detract from the commendable progress made by the Region particularly since the Privacy and Access Office assumed carriage of this file in terms of HIPA implementation. We are also mindful that this applicant, who has experienced considerable frustration in attempting to exercise his legitimate right to access his own personal information and personal health information, deserves a full response from our office. Anything less might be seen as a minimization of the Applicant's information rights.

1. Did the Region meet the duty to assist the Applicant?

[16] In Report H-2006-001, I determined that SRHA qualifies as a trustee[3] for purposes of *The Health Information Protection Act*[4] (HIPA). In addition, SRHA is a local authority for purposes of *The Local Authority Freedom of Information and Protection of Privacy Act*[5] (LA FOIP).

[17] Though the duty on the part of the local authority to make every reasonable effort to assist an applicant and to respond without delay to each applicant openly, accurately and completely is implicit in LA FOIP[6], when HIPA applies, the duty to assist is explicit.[7]

a) The reason for making an access request

[3] *"[16] The Region* [SHRA] *is a "trustee" since it is a regional health authority as that term is used in section 2(t) of HIPA."* Available online: http://www.oipc.sk.ca/Reports/H-2006-001.pdf [hereinafter "SK OIPC Report H-2006-001"].
[4] *The Health Information Protection Act*, [S.S. 1999, C. H-0.021, as amended] [hereinafter "HIPA"];
[5] *The Local Authority Freedom of Information and Protection of Privacy Act*, [S.S. 1990-91, c. L-27.1], section 2(f): "*local authority" means:…(xiii) a regional health authority…as defined in The Regional Health Services Act*;" [hereinafter "LA FOIP"].
[6] See SK OIPC Reports LA-2007-001 and LA-2004-00, available online: www.oipc.sk.ca under the *Reports* tab
[7] HIPA, supra, note 4, section 35.

[18] The day after the Applicant expressed interest to the CSR in accessing the Region's documentation of the incident, the Region's employees contemplated in an email exchange what, if anything, to release to the Applicant based on what the Applicant was seeking and why. This exchange on October 27, 2004 involved its Security Supervisor, Director of Risk Management, Manager of Nursing, and the CSR.

[19] After failing to receive the information he asked for, the Applicant proceeded to submit a written request to the Region requesting the same and in a separate letter of complaint, challenged the Region's compliance with LA FOIP and HIPA.

[20] In response, the CSR advised the Applicant as follows:

> ***I am writing to acknowledge that I have received your letter of concern dated November 29, 2004****. In that letter you outline your concerns around the Security Officers' …. **As I indicated to you in your subsequent visit to my office on December 1, 2004,** your letter of concern was forwarded to the Director of Human Resources & Security Services.*
>
> ***Previously, Security Services for Saskatoon Health Region shared with you documentation that outlines the services they provide and the intervention techniques they use when asked to assist in resolving conflicts****. The Health Region has looked into your concerns and finds that the Security Officers in question….*
>
> *Thank you for bringing your concerns forward as it allows us to look at the services we provide to all of our patients and their families.*
>
> [Emphasis added]

[21] In the above noted response, the CSR did not address the Applicant's concern that the Region had failed to take LA FOIP and HIPA into account in the processing of his request. By not referencing LA FOIP or HIPA in its correspondence and in consideration of the content of the email exchange referenced at [18], the Region appeared to be making its decisions to withhold or release certain records based solely on why the Applicant may want the information.

[22] I commented on this concern in the Saskatchewan FOIP FOLIO in the May 2005[8] and February 2004 issues.[9]

[8] Saskatchewan FOIP FOLIO, available online: http://www.oipc.sk.ca/FOIPFOLIO/May2005.pdf [hereinafter "SK FOIP FOLIO"].

[23] The motive for seeking the information is irrelevant. In our view, it is inappropriate to pressure an applicant to provide reasons as to why he/she is seeking access.

[24] Specifics as to how the Region responded to the Applicant's various requests will be discussed later in this Report.

b) Discovery through litigation

[25] While the review was underway, the Region's Legal Department brought the following to our attention:

> *Further to your letter of May 27, 2005, we will take your comments under advisement. Meanwhile,* [the Applicant] *has commenced legal action in the nature of a claim for a civil assault. He is represented by* […]. *Obviously, in the course of that litigation, there will be certain disclosure requirements.*

[26] In my Report F-2006-002 [18], I observed that, "[t]*he review process under the Act is independent of any other proceedings that may provide access to documents."*[10]

[27] In response to the Legal Department's comments, we explained as follows:

> *We note your reference to an action that has apparently been commenced by or on behalf of the Applicant. The right of access provided by the Act however is independent of any rights to discovery that a litigant may have in an action before any Saskatchewan court. We refer you to Alberta IPC Orders 96-020 [62-64] and 97-009 [90-96] and [97-99]. Our approach is to view litigation as irrelevant to the issue before this office under the … in the current review process.*

[28] Our view is also consistent with that taken in *Canada Post Corp.* v. *Canada*.[11]

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[9] *Ibid*, available online: http://www.oipc.sk.ca/FOIPFOLIO/February2004.pdf.
[10] Available online: http://www.oipc.sk.ca/Reports/F-2006-002.pdf.
[11] *Canada Post Corp.* v. *Canada* (Minister of Public Works) (C.A.), [1995] 2 F.C. 110: "*This distinction may be relevant in the context of discovery of documents, but there is no analogy between discovery of documents in litigation and access to records under the Act* [*Access to Information Act* (R.S., 1985, c. A-1)]. *The discovery process is adversarial in nature and relevancy is the predominant test for disclosure. By contrast, access under the Act is based on the public interest in disclosure and not on the private interest of litigants. There are many exemptions justifying confidentiality under the Act that would not be available in the discovery process. The considerations for disclosure and confidentiality under the Act constitute a code in themselves which cannot properly be interpreted by reference to considerations in the discovery process."*

[29] Accordingly, I find that whether or not the Applicant has commenced or may commence legal action against the Region to be of no consequence to the obligations of a trustee under Part V of HIPA.

c) Records in the Region's possession/custody or control

[30] During the review, when he requested access to his personal health information, the Applicant asserted that the Region did not advise him that some of it was maintained elsewhere (with Clinical Health Psychology). He insisted that he inadvertently learned that the Region had this assessment only when he applied for disability benefits with the assistance of his family physician.

[31] When an applicant requests access to his/her patient file/chart, if the request is not more specific, the default should be to treat the individual's request as one for all of his/her personal health information in the region's custody/control regardless of where or how it is stored. I believe this is reasonable as most patients will not understand how a region manages its information holdings. As a routine part of the process, when the individual first submits an application for or expresses interest in viewing/accessing his/her file/chart/records, the region should discuss with the individual what is available, clarify exactly what records the individual is interested in and explore where those may be located.

[32] When we asked if there was any reason why the Region withheld this report (the assessment) from the Applicant, the response received was as follows:

> *This independent assessment would not be part of the health record nor would Saskatoon Health Region have access to the assessment unless access consent was provided by* [the Applicant] *or through the subpoena process. The request was specifically for a regional provider to do the assessment. I am not sure why* [the Applicant] *would not have access to this assessment, but I recommend* [the Applicant] *contact his lawyer for the assessment content.*

[33] I note parenthetically that the right of access in HIPA is not restricted to something that the region describes as "the health record." The definition in section 2(m) of HIPA is much broader.[12]

[34] For clarification purposes, we wrote the Region as follows:

> *After reading your October 5, 2005 response, I was unclear if the Applicant was* ***asking for a new assessment to be conducted or asking for a copy of an assessment already on file with the region, whether or not considered as part of the 'official patient file****'. My confusion was compounded after reading your August 30, 2005 letter to me stating: "Finally we would like the OIPC to be aware of a neuropsychological assessment completed earlier this year…"* ***By this statement it appears that the region had access to this assessment, thus it would in turn be in the region's custody or control and accessible if the Applicant made an access request for it.*** *Please clarify if this is the same assessment that the Applicant is seeking and whether or not the region, at any time, provided him or his lawyer with a copy. … We need to be clear on whether or not the region had a copy of this assessment in its* ***custody or control*** *when the Applicant requested a copy and if the region's response was in alignment with its obligations under PART V of HIPA.* ***If instead, the issue is whether or not the Applicant was required to pay for a test (the assessment), and what is NOT at issues*** [sic] ***is if the region is responding to an access to information request, then please clarify this for us.***
>
> [Emphasis added]

[35] In our February 2006 issue of the Saskatchewan FOIP FOLIO, I differentiated between the terms possession and control.[13] I further defined these terms in my Investigation Report H-2007-001 [29] to [31].[14]

[36] After exchanging further correspondence on this issue, the Region acknowledged that "*Saskatoon Health Region is in custody and control of neuropsychological assessments conducted within Clinical Health Psychology.*"

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[12] HIPA, supra, note 4, section 2(m).

[13] "*Our view is that the words "in the possession" mean in the physical custody of a public body. The words "under the control of" refer to a case where the records are not in the physical custody or possession of a public body. To be under the control of a public body, records might be those that typically would be removed by an employee from the public body's premises for some reason or records that a third party contractor has received or created at the direction of a public body.*" Available online: http://www.oipc.sk.ca/FOIPFOLIO/February2006.pdf.

[14] Available online: http://www.oipc.sk.ca/Reports/IR%20H-2007-001.pdf.

[37] The record in question is maintained by Clinical Health Psychology, but, in its representations to us, the Region made no mention of the applicability of *The Mental Health Services Act*[15] (MHSA) to that record. Nonetheless, I must consider what impact this has, if any, on the access to information process under LA FOIP or HIPA or both.

[38] The relevant section of HIPA is as follows:

> ***4****(1) Subject to subsections (3) to (6), where there is a conflict or inconsistency between this Act and any other Act or regulation with respect to personal health information, this Act prevails.*
>
> *(2) Subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.*
>
> *(3) Except where otherwise provided, The Freedom of Information and Protection of Privacy Act and The Local Authority Freedom of Information and Protection of Privacy Act do not apply to personal health information in the custody or control of a trustee.*
>
> *(4)* ***Subject to subsections (5) and (6), Parts II, IV and V of this Act do not apply to personal health information obtained for the purposes of:***
>
> …
>
> *(e)* ***The Mental Health Services Act***:
>
> …
>
> …
>
> *(6) The Freedom of Information and Protection of Privacy Act and* ***The Local Authority Freedom of Information and Protection of Privacy Act apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.***
>
> [Emphasis added]

[39] If section 4(4) of HIPA takes this record out from three Parts of HIPA[16], then the question I must answer is does LA FOIP apply instead.

[40] Section 22 of LA FOIP reads as follows:

> ***22****(1)* ***Where a provision of****:*

[15] *The Mental Health Services Act* [S.S. 1984-85-86 *c.* M-13.1 as amended]. [hereinafter "MHSA"].
[16] Part II (Rights of the Individual), Part IV (Limits on Collection, Use and Disclosure of Personal Health Information by Trustees), and Part V (Access of Individuals to Personal Health Information) of HIPA.

> ***(a) any other Act;***
>
> ***(b) a regulation made pursuant to any other Act****; or*
>
> *(c) a resolution or bylaw;*
>
> ***that restricts or prohibits access by any person to a record or information in the possession or under the control of a local authority conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail****.*
>
> *(2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act, regulation, resolution or bylaw that states that the provision is to apply notwithstanding any other Act or law.*
>
> *(3)* ***Subsection (1) does not apply to:***
>
> ***(a) The Health Information Protection Act;***
>
> ***(a.1) any prescribed Act or prescribed provisions of an Act;*** *or*
>
> *(b) any prescribed regulation or prescribed provisions of a regulation;*
>
> ***and the provisions mentioned in clauses (a), (a.1) and (b) shall prevail.***
>
> [Emphasis added]

[41] Section 8.1 of *The Local Authority Freedom of Information and Protection of Privacy Regulations*[17] (LA FOIP Regulations) provides as follows:

> ***8.1*** *For the purposes of clause 22(3)(a.1) of the Act, the following are prescribed as provisions to which subsection* ***22(1) of the Act does not apply****:*
>
> …
>
> *(b)* ***section 38 of The Mental Health Services Act****;*
>
> [Emphasis added]

[42] The relevant provisions from MHSA are as follows:

> ***2*** *In this Act:*
>
> …
>
> *(h) "****facility****" means:*
>
> *(i) a mental health centre;*
>
> *(ii) a psychiatric ward;*
>
> *(iii) a mental health clinic; or*
>
> *(iv) any other building or portion of a building for the care, treatment or training of persons with mental disorders that is designated as a facility;*

[17] *The Local Authority Freedom of Information and Protection of Privacy Regulations* [S.S. 1993 c. L-27 Reg.1 as amended]. [hereinafter "LA FOIP Regulations"]

> …
> *(m) "**mental disorder**" means a disorder of thought, perception, feelings or behaviour that seriously impairs a person's judgment, capacity to recognize reality, ability to associate with others or ability to meet the ordinary demands of life, in respect of which treatment is advisable;*
> …
> *(u) "**patient**" means a person receiving:*
>
> *(i) diagnostic services for the purpose of determining the existence or nature of; or*
>
> *(ii) care or treatment for;*
>
> *a mental disorder pursuant to this Act;*
>
> …
>
> ***38**(1) All records maintained by a facility are the property of the facility.*
>
> *(2) Subject to subsections (3) and (4) and to the regulations, no person shall disclose any information concerning a patient that comes to his knowledge in the course of performing his duties pursuant to this Act or the regulations.*
>
> *(3) A person shall disclose information described in subsection (2) where:*
>
> *(a) the disclosure is required by law; or*
>
> *(b) the minister orders that the information be disclosed.*
>
> *(4) A person may disclose information described in subsection (2) where:*
>
> *(a) the information is required to administer this Act or the regulations or to perform a duty or exercise a power imposed or conferred by this Act or the regulations;*
>
> *(a.1) the information is required to assist a person who is receiving services pursuant to this Act to receive other services which are necessary to maintain or restore the mental health of that person; or*
>
> *(b) the disclosure is requested or approved by the patient to whom the information relates.*

[43] In *The Mental Health Services Regulations*[18] (MHSR), the following is also applicable:

> ***15**(1) **In this section and sections 16, 17 and 18, "information concerning a patient" means information concerning a patient that comes to a person's knowledge in the course of performing his duties pursuant to the Act or these regulations**.*
>
> *(2) **A person shall disclose information concerning a patient**:*
>
> …
>
> *(b) Subject to subsection (3), **to the patient where the patient requests disclosure of such information to himself**.*[19]

[18] *The Mental Health Services Regulations* [S.S. 1986 c. M-13.1 Reg 1 as amended].

> *(3) Subject to section 16, where a person who holds information concerning a patient that is requested by the patient to be disclosed considers that the disclosure of such information is likely to be injurious to the patient or a third party and documents the reasons for this belief, he may withhold the information.*
>
> [Emphasis added]

[44] The department in question, Clinical Health Psychology, appears to constitute a facility pursuant to section 2(h) of MHSA. The services provided to the Applicant also appear to fall within MHSA. Accordingly, I find that MHSA applies to the assessment sought by the Applicant.

[45] There is authority to release information to the patient in section 38 of MHSA and sections 15-18 of its accompanying Regulations. Is there a conflict between the provisions of LA FOIP and MHSA? Or, does MHSA trump LA FOIP and apply solely instead? Section 38 of MHSA is not all that different from the provision in LA FOIP[20] as both allow the individual to request his/her personal information. I must determine what impact, if any, this has on the access to information process.

[46] This question, what is the specific application of LA FOIP to the records to which the MHSA applies, is similar to that considered in our submission to the Workers' Compensation Act Committee of Review on October 24, 2006 as follows:

> *We need to determine whether a "conflict" or an "inconsistency" exists between the provisions of the FOIP Act* [The Freedom of Information and Protection of Privacy Act] *and sections 171 to 171.2 of the WCA. In an analysis of the obligations under the WCA, there is no conflict or inconsistency with the requirements of the FOIP Act. Section 171 affirms the duty to not disclose personal information outside the need to know purview of managing the case file. This is further delineated in the appeal process identified in s. 171.1 and 171.2. In fact it seems apparent that the FOIP Act codifies the high standards of procedural fairness and natural justice as well as the common law fiduciary duties required of the WCB.*
>
> *The first step would require determination of who holds the records, in this instance WCB. The next test would be whether a conflict or inconsistency exists. This would entail a thorough examination of the relevant legislation to determine whether the records are subject to the access and privacy legislation or are*

[19] This reference to "disclosure" is different than the particular meaning ascribed to "disclosure" in modern privacy laws. Our office has adapted the following definition of disclosure: see [114]. What MHSR is dealing with is an exercise of an individual's right of access to his or her own personal health information.
[20] LA FOIP, supra note 5, section 30.

> *exempted by a primacy clause. If the record is excluded from access and privacy legislation, there is no jurisdiction to process the request or review the decision respecting access to the record. If the record is subject to access and privacy legislation, but exempted under a primacy clause, determine whether the access and privacy legislation and the other statutes that apply to the records have conflicting obligations.* ***If the statutes are complementary, they can coexist and the records would be subject to the highest standard. In fact, in Saskatchewan s. 4 of the FOIP Act expressly states that the FOIP Act "complements and does not replace existing procedures for access to government information or records" and "does not in any way limit access" to records that are normally available. The FOIP Act operates to ensure that access is provided where it did not previously****.*
>
> *Under the FOIP Act section 23, the FOIP Act prevails over another act that conflicts with the FOIP Act.* ***This paramountcy provision does not apply to s. 171 to 171.2 of the WCA. Section 23(3) is slightly different from other jurisdictions in that s. 23(1) "does not apply" to the acts listed. Those listed Acts are not included in the "in the event of a conflict or inconsistency" provision****. Alberta reads that the FOIP Act applies unless expressly provided that the other Act "prevails". WCB may argue that s. 23(3) is exclusionary; therefore, the FOIP Act does not apply prima facie to access during appeals or case management files generally.* ***However, s. 23(3) merely states that s. 23(1) does not apply to prevail in the event of a conflict****.*[21]
>
> [Emphasis added]

[47] I adopt the above analysis of paramountcy for purposes of this review. In the case above, the issue was whether *The Freedom of Information and Protection of Privacy Act*[22] (FOIP) could provide access where the right didn't exist previously. In the present case, the authority of LA FOIP is not at issue as MHSA provides access if "*the disclosure is requested or approved by the patient to whom the information relates."*

[48] I find that as there is no conflict between the provision of LA FOIP and MHSA, the access to information process prescribed in LA FOIP applies to records to which both Acts apply. Consequently, the most reasonable and least complicated method to address access requests to which MHSA applies is to treat such requests as any other request for access under LA FOIP.

[21] *Saskatchewan Information and Privacy Commissioner Submission to Workers' Compensation Board Review Committee* [Page 9], Available online: http://www.oipc.sk.ca/Reports/OIPCWCBReviewCommitteeReport.pdf.
[22] *The Freedom of Information and Protection of Privacy Act*, [S.S. 1990-91 c. F22.01 as amended].

[49] As explained earlier, three parts of HIPA[23] including section 39 pertaining to fees do not apply to records created pursuant to MHSA. Nonetheless, I feel it may be useful to provide some further guidance to Regions as to what fees would be reasonable in the circumstances.

[50] If HIPA were to apply, section 39 provides as follows:

> ***39*** *A trustee may charge a reasonable fee not exceeding the prescribed amount to recover costs incurred in providing access to a record containing personal health information.*

[51] Though the draft of *The Health Information Protection Regulations*[24] pertaining to fees have yet to be proclaimed, I previously provided my views on the appropriateness of fees in a report titled, *2004 Report on the Draft HIPA Regulations*[25]. I also considered fees in my Report H-2006-001 [47] to [50].[26]

[52] Fees under HIPA are for copies of records.[27] Nowhere in MHSA or its accompanying Regulations are fees mentioned. The fee schedule for costs associated with providing copies of records pursuant to LA FOIP is contained within its Regulations.[28]

[53] The above poses an additional challenge for a trustee organization that is also a local authority for purposes of LA FOIP. The challenge is for a region to keep its processes simple enough even in those circumstances when more than one Act applies to the records at issue. I am of the opinion that charging a fee using a different formula (application fee plus other costs including photocopying), depending on which of the multiple Acts may apply is unfair and confusing. The more straightforward and clear the process, the better. It is also confusing for staff and makes consistency more difficult to achieve.

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[23] Supra, note 16.
[24] *The Health Information Regulations: Draft for Consultation*. Sask. Health Policy and Planning Branch 2004, Available online: http://www.scf.sk.ca/Privacy/mc_hipa_reg_draftforconsultation.pdf.
[25] *2004 Report on the Draft HIPA Regulations*, Available online: http://www.oipc.sk.ca/Reports/TheHIPADraftRegulations.pdf.
[26] SK Report H-2006-001, supra, note 3.
[27] HIPA, supra, note 4, section 39: *"A trustee may charge a reasonable fee not exceeding the prescribed amount to recover costs incurred by providing* ***access to a record*** *containing personal health information."*
[28] LA FOIP, supra, note 17.

[54] Section 4 of HIPA is a particularly awkward and confusing provision. Our experience is that this causes trustees considerable difficulty in HIPA implementation. I encourage the Ministry of Health and the Legislative Assembly to integrate the 'privacy' portion of MHSA into HIPA to ensure the total package is more comprehensible to health care workers.

d) No obligation to create records

[55] On March 24, 2005, the Region's Legal Department observed,

> *What he* [the Applicant] *appears to want is an itemized list of employee's names that attended upon him and a security report.*
>
> *We do not believe that we are required to "create" a list of employees.*

[56] As stated in our May 2005 issue of the Saskatchewan FOIP FOLIO, "[t]*here is no responsibility under either Act* [FOIP or LA FOIP] *to create records that do not otherwise exist"*.[29]

[57] Even if it appeared that the Applicant's request was solely for information that would require the creation of a new record, in order to respond openly, accurately and completely, the Region should have contacted the Applicant to clarify the Applicant's request.[30] The Applicant in this case, however, did not request only the names of those involved in the incident in question, but by the wording of his request, also sought all information, notes and reports in regards to the incident. In this respect, I find that the Region did not meet the duty to assist.

[29] SK FOIP FOLIO, supra, note 8.

[30] *Ibid*: "*Regardless of the form (phone, letter, prescribed form) when the request for information is received by the public body, our office encourages both parties to discuss the substance of the request to see if what is being sought is what will be produced after a thorough search. Unnecessary delays and considerable costs are being incurred by government institutions due to a lack of timely communication between the applicant and the government institution. … The public body does not have a right to know why the Applicant is pursuing the records, but it is still helpful in the early stages for discussion to ensue between the two to ensure that the public body is interpreting the wording of the access request as intended".*

e) Searching for responsive records

[58] Twice the Applicant called into question the adequacy of the Region's search efforts with respect to his requests for: (a) records relating to the incident; and (b) a copy of the assessment from Clinical Health Psychology.

[59] With the Applicant's original written request, to assist in the Region's search for responsive records, the Applicant provided details of where he believed additional responsive records may be found (i.e. Social Worker's office).

[60] On January 12, 2005 and again on May 27, 2005, we advised the Region's Legal Department as follows:

> *During our January 12, 2005 telephone conversation, I expressed the need to interpret the request broadly and search numerous locations such as Occupational Health and Safety files for incident reports. Yet, your March 24, 2005 response narrows the Applicant's request to include only, "an itemized list of employee's names that attended upon him and a security report."*
>
> *We need to be satisfied that the region conducted an adequate search for responsive records. …*

[61] The Region's Legal Department responded to the above with the following:

> *With respect to the documents sought in your July 11, 2005 letter, the writer did cause a further search to be conducted. We enclose copies of documentation from Security personnel, as well as e-mails indicating that there were no separate incident reports or OH&S reports prepared. ECG lab and social work department records would be on the health record which has previously been disclosed.*

[62] During the fall of 2005, the Privacy and Access Office was created by the Region and thereafter all of our communication was with this office.

[63] With respect to the Applicant's second written request for a copy of the assessment, the Region explained that,

> [t]*he Client Representative Office did not know of the neuropsychological report until mentioned in the package sent by the Privacy Commissioner. As previously*

> *noted, the neuropsychological report in* [sic] *part of the Royal University Health Record.*

[64] Further on this point, the Region explained that,

> *Within Clinical Health Psychology, as with many other mental health departments, files (records) are maintained separately from the hospital charts. The Clinical Health Psychologists do this in order to protect and maintain client confidentiality. In general, it will not be apparent to someone reviewing a Health Region chart from a specific facility that a person has been seen at Clinical Health Psychology.*

[65] After reviewing the Index of Records of the Applicant's file with Clinical Health Psychology and the submission from the Region's Privacy and Access Office, I am now satisfied that the Region has conducted a reasonable search and properly accounted for the record (assessment). I find, however, the Region did not have an adequate mechanism in place to identify all responsive records within the deadlines imposed by LA FOIP and HIPA. The process utilized in this circumstance was in my view wholly inadequate. Too many people were involved, and too narrow a view was taken of what records may be responsive to the Applicant's request. Helpful resources on locating and retrieving records include the Alberta Government publication, *Health Information Act Guidelines and Practices,*[31] and as referenced in my Report F-2008-001[32] [64], British Columbia's Information and Privacy Commissioners, *Tips for DMIPS and Freedom of Information and Privacy Coordinators: Conducting An Adequate Search Investigation under the Freedom of Information and Protection of Privacy Act*.[33]

[66] I find that the Region did not meet the duty to assist the Applicant for all the reasons cited earlier. The Region, in the early stages of processing the request from the Applicant, made the process for the Applicant difficult and confusing. The trustee's procedure for requesting access was unclear and involved too many different employees of the Region without clearly defined roles. I note however, that since the creation of the Privacy and Access Office, the Region has gone to great lengths to improve its processes, practices,

[31] Pages 39 and 40, available online: http://www.health.gov.ab.ca/about/HIA_Guidelines-Practices-Manual.pdf.
[32] Available online: http://www.oipc.sk.ca/Reports/F-2008-001.pdf
[33] Available online: http://www.oipcbc.org/advice/Guidelines_for_Adequate_Search_Investigations.pdf.

and procedures to bring them into alignment with the requirements of LA FOIP and HIPA.

2. Did the Region meet its section 7 obligations under *The Local Authority Freedom of Information and Protection of Privacy Act* and section 36 obligations under *The Health Information Protection Act* when providing its responses to the Applicant with respect to each application?

a) What LA FOIP and HIPA require

[67] Because SHRA is both a local authority and a trustee, LA FOIP or HIPA or both may apply depending on what records are responsive to the request.

[68] An applicant's access rights under LA FOIP are for the following:

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

[69] The above includes access to personal information as defined by LA FOIP.

[70] The access to information application process varies somewhat depending on which law applies in the circumstances. Each law dictates what is entailed in its application process. In the case of LA FOIP, section 6 provides as follows:

> ***6****(1) An applicant shall:*
>
> *(a) make the application in the prescribed form to the local authority in which the record containing the information is kept; and*
>
> *(b) specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject matter to identify the record.*

[71] LA FOIP Regulations further provide the following:

> ***4*** *For the purposes of clause 6(1)(a) of the Act, Form A of Part III of the Appendix is the form prescribed for applications for access to records.*

[72] For HIPA to apply, as explained in Report H-2006-001, the following is required:

> *[13] For The Health Information Protection Act to apply, three elements must be present: (1) there must be personal health information as defined in section 2(m); (2) the personal health information must be in either the custody or the control of an organization; and (3) that organization must be a "trustee" as defined in section 2(t).*[34]

[73] Access for an applicant under HIPA is limited to his/her personal health information.[35] HIPA enables applicants to request access to his/her personal health information by simply asking to see it, as provided for by section 33 of HIPA as follows:

> ***33*** *Nothing in this Act precludes:*
>
> *(a) an individual from making an oral request for access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee; or*
>
> *(b) a trustee from responding to an oral request.*

[74] Once in receipt of a written application, the trustee must comply with the following HIPA provisions:

> ***31*** *In this Part:*
>
> *(a)* ***"applicant"*** *means an individual who makes a written request for access to personal health information about himself or herself;*
>
> *(b)* ***"written request for access"*** *means a request made pursuant to section 34.*
>
> ***32*** *Subject to this Part, on making a written request for access, an individual has the right to obtain access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.*
>
> …
>
> ***34****(1) An individual may, in accordance with the regulations, make a written request for access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee.*
>
> *(2) A written request for access must:*
>
> *(a) be made to the trustee that the applicant believes has custody or control of the record containing the personal health information; and*
>
> *(b) contain sufficient detail to enable the trustee to identify the personal health information requested.*

[34] SK Report H-2006-001, supra, note 3.

[35] HIPA, supra note 4, section 12: **"***In accordance with Part V, an individual has the right to request access to personal health information about himself or herself that is contained in a record in the custody or control of a trustee*."

> *(3) An applicant must prove his or her identity to the satisfaction of the trustee.*
>
> *(4) The right to make an application for review pursuant to section 42 applies only to written requests for access.*

[75] In order for our office to review a trustee's decision with respect to an access request, the Applicant must have first submitted a written application to the trustee. Rather than requiring the applicant to pursue the formal route in every instance, our view is that public bodies and trustees should be making an initial determination as to whether the information may be provided through less formal means.

[76] To ensure that a trustee provides an appropriate response once in receipt of a written request for access, HIPA requires the trustee to:

> ***35****(1) Subject to sections 36 to 38, a trustee shall respond to a written request for access openly, accurately and completely.*

[77] When in receipt of a written request for access under HIPA, the Region has 30 calendar days to respond, as required by section 36 as reproduced below:

> ***36****(1)* ***Within 30 days after receiving a written request for access****, a trustee must respond to the request in one of the following ways:*
>
> *(a) by making the personal health information available for examination and providing a copy, if requested, to the applicant;*
>
> *(b) by informing the applicant that the information does not exist or cannot be found;*
>
> *(c)* ***by refusing the written request for access, in whole or in part, and informing the applicant****:*
>
> *(i)* ***of the refusal and the reasons for the refusal; and***
>
> ***(ii) of the applicant's right to request a review of the refusal pursuant to Part VI;***
>
> …
>
> *(3) The failure of a trustee to respond to a written request for access within the period mentioned in subsection (1) or (2) is deemed to be a decision to refuse to provide access to the personal health information, unless the written request for access is transferred to another trustee pursuant to clause (1)(d).*
>
> [Emphasis added]

[78] If LA FOIP applies, the Region must instead abide by the following provisions in LA FOIP:

> ***7**(1) Where an application is made pursuant to this Act for access to a record, the head of the local authority to which the application is made shall:*
>
> > *(a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or*
> >
> > …
>
> *(2) The head shall give written notice to the applicant within 30 days after the application is made:*
>
> > *(a) **stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available**;*
> >
> > …
>
> *(3) A notice given pursuant to subsection (2) is to **state that the applicant may request a review by the commissioner** within one year after the notice is given.*
>
> …
>
> ***10**(1) Where an applicant is entitled to access pursuant to subsection 9(1), the head shall provide the applicant with access to the record in accordance with this section.*
>
> *(2) A head may give access to a record:*
>
> > *(a) by providing the applicant with a copy of the record; or*
> >
> > *(b) where it is not reasonable to reproduce the record, by giving the applicant an opportunity to examine the record.*
>
> [Emphasis added]

[79] To be compliant with section 7 of LA FOIP and section 36 of HIPA, when providing written notice to an Applicant, the local authority/trustee must, in writing: (a) state that access is refused to all or part of the record; (b) set out the reason for refusal; and (c) identify the specific provision of the applicable Act to which the refusal is based.[36]

b) The Region's response to the Applicant's applications

[80] Section 36 of HIPA, however, is not engaged with respect to this review, as both of the Applicant's written requests were for records to which LA FOIP, not HIPA applies.

[81] Prior to submitting his first written request, on October 26, 2004, the Applicant met with the Region's CSR. During this meeting, after having the Applicant sign a *Consent for Disclosure of Personal Health Information Form* (consent form), the CSR released

[36] SK OIPC Report F-2006-003 at [22], available online: http://www.oipc.sk.ca/Reports/F-2006-003.pdf.

copies of some documents to the Applicant. The CSR recorded what transpired at the meeting in the following email to another Region employee as follows:

> *I met with* [the Applicant] *on October 26, 2004 at 1100hrs…I went over his chart with him.* … [The Applicant] *signed a consent for release of information form and I provided him with copies of the nursing notes, SW* [Social Worker] *notes, Physician Orders and Progress Notes and Admission notes.*

[82] In the same email, the CSR further reported that,

- [The Applicant] ***asked about obtaining a copy of the security report. I stated that the security report is a confidential report for internal SHR purposes and therefore would not be released to him.***
- [The Applicant] ***has the following additional requests****:*

  …

- [The Applicant] *is wanting a copy of the job description and guidelines for security officers.*
- [The Applicant] *is wanting the names of the two security officers that attended him and the nurse …*
- [The Applicant] *also states that a Porter… and he is wanting the name of this person.*

I have agreed to meet with [the Applicant] *again on Friday, October 29, 2004 to go over the above requests.*

[Emphasis added]

[83] Though the Applicant submitted a written request prior to meeting again with the CSR, the CSR advised the Applicant on November 8, 2004 of the following:

> *I am writing to follow-up our meetings in my office on Friday, October 15, 2004 and on Tuesday October 26, 2004 and our telephone conversation on October 27, 2004. Thank you for bringing forward your concerns to my attention.*
>
> *During our meeting on October 26, 2004 we went over your past medical chart and the nurses notes that were written around the time of the incident involving the Royal University Hospital Security Officers. … As requested, I am attaching information from Security Services regarding their training and procedures*.

[84] The CSR provided the Applicant with some of the documents he requested, yet provided no explanation as to why others were not forthcoming.

[85] Though the Applicant was dealing with the Region's CSR directly, the Region's Legal Department communicated the following to the Applicant on November 9, 2004:

> *Your access to information request sent to the Minister of Health has been redirected to myself to respond on behalf of Saskatoon Regional Health Authority. You indicated that you wished documentation in respect to a possible restraint episode. It is my understanding that* […], *Client Representative, has gone over relevant portions of the chart with you and thus you have had "access" to the information requested.*

[86] At this point, no one had explained to the Applicant why the Region withheld the documentation of the incident from him. As well, in their correspondence with the Applicant, the Region's CSR and Legal Department did not reference the Applicant's rights under LA FOIP or HIPA including the Applicant's right to request a review of the Region's decision by our office.

[87] After meeting with the Region's CSR and before requesting that our office undertake a review, the Applicant raised the above noted concerns with the Region's CSR in a letter dated November 29, 2004 as follows:

> *I received a letter from* […] *MLA office dated Nov 24, 2004. The first paragraph read* [sic] "[The CSR] *called and left a message on my phone, he suggested that you put your complaint into a written letter and requested* [sic] *a response from the Health Board."*
>
> *There for* [sic] *once again I express my dissatisfaction to you now written* [sic].
>
> *My complaint is as follows that on October 12, 04 ….*
>
> [The CSR] ***since then I have requested all security information, reports, notes regarding there*** [sic] ***services and my self***, [sic] *and* ***names of all staff who was*** [sic] ***involved in my care. I was informed by you on Oct 26/04 this information was confidential***. ***I made a written request on*** [sic] ***access to information request form, for this information***.
>
> ***The requested information was not disclosed to my satisfaction or as the five (5) principles of the freedom of information of the freedom of information and protection of privacy act (FOIP) an*** [sic] ***local authority of freedom of information and protection of privacy act (LA FOIP) or Health Information Protection Act (HIPA).*** *So I will be forwarding my request for the above information to the Privacy Commissioner by Dec 6.*
>
> [Emphasis added]

[88] In response to the Applicant, the CSR provided the following:

> *I am writing to acknowledge that I have received your letter of concern dated* ***November 29, 2004****. In that letter you outline your concerns around the Security Officers' interactions with you on October 12, 2004. As I indicated to you in your* ***subsequent visit to my office on December 1, 2004,*** *your letter of concern was forwarded to the Director of Human Resources & Security Services.*
>
> ***Previously, Security Services for Saskatoon Health Region shared with you documentation that outlines the services they provide and the intervention techniques they use when asked to assist in resolving conflicts.*** *The Health Region has looked into your concerns and finds that the Security Officers in question ….*
>
> *Thank you for bringing your concerns forward as it allows us to look at the services we provide to all of our patients and their families.*
>
> [Emphasis added]

[89] In the above noted response, the CSR deals only with the Applicant's complaint regarding the incident.

[90] On May 27, 2005, we advised the Region that it had "*yet to cite any exemptions under The Health Information Protection Act or The Local Authority Freedom of Information and Protection of Privacy Act that would allow the region to withhold the records in question.*"

[91] On August 30, 2005, the Region finally advised us of the exemptions it applied to some of the information withheld from the Applicant as follows:

> *Regarding the request for exemption of the names of the security guards, we reference HIPA 38(1)a, LAFOIPPA (20) and The Occupational Health and Safety Act (3, 36).*

[92] Though eventually the Region did provide reasons for withholding some of the information sought, as indicated earlier in this Report, during mediation, the Region reconsidered and released those records responsive to the Applicant's first written request in full.

[93] During the review when the Applicant sought additional records from the Region, the CSR advised him as follows:

> *Dear* [the Applicant], *I am writing in follow-up to our discussions that you and I had in my office on June 30, 2005. At this time you are requesting further information from you* [sic] *health chart at Royal University Hospital. As you have a pending legal matter with Saskatoon Health Region, I would ask you to work through your legal counsel to obtain this information. Your legal counsel would then contact the Saskatoon Health Region's legal counsel, and arrangements would be made to get this information to you.*

[94] I have already determined the Applicant's involvement in litigation has no impact on this review. It also does not prohibit the Applicant from submitting future applications to the Region, nor does it require the Applicant to employ a lawyer to make access requests on his behalf.

[95] The Applicant's lawyer, though, did submit a written request for a copy of the assessment sought by the Applicant. When the information wasn't forthcoming, the Applicant again sought our assistance.

[96] As it appeared the Region was again not providing reasons for withholding a record from the Applicant, on September 7, 2005, we advised the Region as follows:

> *I talked to the complainant today. He will be faxing me a request, in writing, he submitted to the region for access to his personal health information. At the time, he claims that he was provided access to his medical file, but his psychiatric file was not mentioned, nor any legal reasons cited for withholding the records from him. If the region has not considered the information contained within the psychiatric file as part of this review, then please notify us of the fact ASAP.*

[97] The Applicant provided us with a copy of a letter he received from one of the Region's Registered Doctoral Psychologists dated August 18, 2005. The letter reads as follows:

> *We received your request for the Psychological Assessment Report pertaining to* [the Applicant]. ***It is our department's policy that any neuropsychological reports that are used for legal or insurance purposes are charged a fee of $500.00****. We inform patients of this prior to the appointment and in the information provided at time of the appointment …. If you still wish a copy of* [the Applicant's] *report, we would ask that you would issue us a cheque in the amount of $500.00.*
>
> [Emphasis added]

[98] After reviewing this letter, we contacted the Region to inquire again into why: (a) this record was not earlier identified as a possible responsive record; and (b) it would require the Applicant to pay $500.00 for a copy. The fee, however, was eventually waived by the Region and a copy of the record was provided to the Applicant.

[99] As indicated earlier at [63], the Region advised us that this record was not earlier identified as responsive since the CSR did not know of its existence when he met with the Applicant.

[100] The Region did not treat the Applicant's above request as a formal request for access pursuant to LA FOIP or HIPA. I find that the Region's responses to both of the Applicant's written requests to be insufficient as the Region did not offer in writing: (a) sufficient reason for the refusal; and (b) the specific exemption or reason for withholding responsive records in both cases. Though the Region did respond initially within the 30 day statutorily imposed deadline in response to the Applicant's first written application, I find that it was inadequate for the reasons cited above and also for its dismissive nature.[37] Consequently, I find that the Region did not meet the requirements of section 7 of LA FOIP in both cases.

[101] As for the Region's policy for providing copies of neuropsychological reports, in my view, any individual exercising a statutory right of access should not be affected by a policy that contemplates use or disclosure for unrelated purposes.

[102] When we asked the Region to provide us with its procedures for responding to and processing access to information applications pursuant to LA FOIP and HIPA, the Region offered the following:

> *Access by individuals to their health records follows a process managed by Health Records within each of the acute-based facilities within the Saskatoon Health Region. If for some reason, a patient / client / resident is upset with their care or treatment and feels the need for an advocate, they are directed to the Client Representative. From a privacy perspective, if a patient is not satisfied with the level of access to their personal health information, the front line staff will provide contact to our office.*

[37] See quoted text in letter from Region's Legal Department at [85].

[103] When the Applicant first sought access to records pertaining to the incident, the CSR played a central role in the process.

[104] We asked the Region to provide more information about the job responsibilities of the CSR. In response, the Region explained that:

> [The CSR's] *role is the Client Representative or Quality of Care Coordinator for Saskatoon Health Region. This role is described within the Regional Health Authority Act and is mandated by Saskatchewan Health - including performance indicator reporting quarterly and through the annual report process.* ***This role is often as a patient/client/resident advocate.***
>
> *The Client Representative position within Saskatoon Health Region supports the Saskatchewan District Quality of Care Coordinator initiative, as well as, the vision and mission of the Health Region.* ***The intent of the program is to create a more transparent, client-focused health care system. The Client Representative:***
>
> - *Assists individuals and families with questions and concerns about health services;*
> - ***Ensures individuals are informed about their rights and options****; and*
> - *Recommends changes and improvements to enhance the quality of health services.*
>
> *The Client Representative's primary responsibility is to assist clients/ patients and families to address concerns and issues encountered in dealing with the health care system. This happens through letters, phone calls, and face-to-face meetings.*
>
> *With respect to fulfilling access requests, the Client Representative assists the client/patient in accessing their health record. The Client Representative presents the consent forms and disclose* [sic] *the fees associated with their request for access to their health record. The Client Representative will go over the form with the client/patient. Further, if a client/patient expresses concerns related to the fees, the Client Representative will review their circumstances, and if appropriate waive the fees to ensure access.* ***The Client Representative will also review the health record and its content with the client / patient.*** *It should also be noted that the client / patient has the right to go directly to the Health Record's Department or service department to request access to their health records. In these circumstances the personnel will go over the consent form and fees. If concerns are raised through that process, the client / patient will be referred to the Client Representative.*
>
> [Emphasis added]

[105] Why have more than one individual designated with this responsibility? As HIPA has now been in force for four years, every region should have a clear, efficient process in place to respond to applicants' oral and written requests for access. The role of the CSR

may have been a recommendation in the Fyke Report[38] and may have been mandated by the Saskatchewan Government. It is secondary, however, to the statutory requirements of HIPA and the quasi-constitutional character of that law. We have urged all regions to ensure that the primacy of access rights under HIPA is reflected in their policies, procedures and practices. I think problems arose in this case as the region had too many players involved without clearly defining the role of each. Also, whatever process the region utilizes to respond to access requests, there must be a mechanism in place to ensure the Region's LA FOIP responsibilities are also met if engaged by the specific request at hand.

[106] The Region's policy, *Client Conflict Complaint Comment Management* states that,

> *all staff members, physicians and volunteers will attempt to resolve conflict between clients and health service workers at point of service. When a satisfactory resolution to a conflict is not achieved with the manager at the point of service, the Client Representative or a Social Worker will be asked to assist in the resolution process. When this approach does not achieve a satisfactory resolution then the General Manager and if applicable the Chief of Staff will be asked to assist in the resolution process.*[39]

[107] We know of no specialized training provided to a CSR with respect to providing a patient with access to his/her personal information or personal health information. The moment it becomes apparent to the CSR that the individual is raising a matter that engages HIPA or LA FOIP the matter should be immediately referred to the Privacy Officer or alternatively, at that point the CSR has to assume a very different role as a representative of the Privacy Officer.

[108] By immediately bringing the CSR into the process, the Region complicated what should be a fairly simple process; once the decision is made to deny access, there should be a straightforward appeal to the OIPC. Whomever an applicant makes a direct request to, if that representative of the Region is unable to provide access directly, he/she should know where to direct the applicant. In this case, though the Applicant first made his request to his physician, the Region's CSR took the lead. In most cases, the referral should instead

[38] Fyke, Kenneth J., *Caring for Medicare - Sustaining a Quality System – Saskatchewan Commission on Medicare.* [April 2001].
[39] 1.1 and 1.2 of the Policy referenced.

be made directly to the facility's records department or to the Region's Privacy and Access Office.

[109] In one of my past Annual Reports, I observed that,

> [i]*n many health regions, access to information under the LA FOIP Act is a responsibility assigned to one individual and compliance with HIPA is assigned to someone else in a different part of the organization. I recognize that given the historic relative inactivity under the LA FOIP Act, this divided responsibility was not identified as a problem. There has been however a marked increase in the utilization of these laws and we anticipate that this trend will continue for the foreseeable future. In our view, this increasing awareness of information rights will directly impact health regions and warrants a review of how the 'access and privacy' file is managed. The current divided responsibility is inefficient, cumbersome and ultimately contributes to an unacceptably low level of statutory compliance. It means that the obvious advantage of developing expertise and experience with access and privacy is impaired.*
>
> *We strongly recommend that regional health authorities and indeed, all trustee organizations that are also either government institutions or local authorities, task the same person with responsibility for both the LA FOIP Act, the FOIP Act, and HIPA compliance*.[40]

[110] It was inappropriate in my view for the Region to deal with the Applicant's request for access in the manner it did. It is unacceptable in Saskatchewan that where an individual wants access to his or her file, that applicant is first required to participate in protracted discussions with Regional staff about his/her motivation or attitudes towards the region.

[111] The Region further complicated the application process by introducing a consent form. Before providing copies of records sought by the Applicant, the Region required the Applicant to complete this form.

[112] On learning of the Region's reliance on this form, we advised the Region as follows:

> *The Applicant filled out the form twice requesting access to information on June 4, 2005 and December 1, 2004.* ***It appears that the region is utilizing one form for providing access and for facilitating disclosures****.*
>
> *In the PPCC* [Prevention Program for Cervical Cancer] *report on page 24, the Commissioner wrote, "(13) That the Agency revise its form for access to*

[40] Saskatchewan Office of the Information and Privacy Commissioner Annual Report 2004-2005; Available online: http://www.oipc.sk.ca/Reports/AnnualReport04-05.pdf [hereinafter "SK OIPC Annual Report 2004-2005"].

> *information by an individual woman to: reflect the clear difference between a right of access provided by section 32 of HIPA and the discretionary disclosure provided for by section 27; and reflect the provisions for a surrogate to make such an access request pursuant to section 56 of HIPA."* ***Has the region considered revising this form in light of the Commissioner's recommendation?***[41]
>
> [Emphasis added]

[113] The Region's response of October 5, 2005 is vague and noncommittal:

> *With respect to the OIPC recommendation to separate providing access and facilitating disclosures, we were privy to the PPCC and noted the recommendation, as well, we are aware of the work done by* […]. *As mentioned in our telephone discussion our clinical forms committee is currently reviewing many forms within the Health Region.*

[114] Use of this form creates problems as it does not distinguish between access and disclosure. I commented in one of my Annual Reports that we have encountered a number of trustees that "*were not treating a request from an individual to access their own personal health information any differently than a disclosure of that same information to some outside agency. In fact they are different activities. An access request is a matter of right while disclosure is discretionary.*[42] "Access" in privacy parlance has a specific meaning. It should be defined as the action by a data subject to see or obtain a copy of his/her personal health information. "Disclosure" means sharing personal health information outside of the organization.[43] The form even contains the word disclosure in its title. If the Region feels it is necessary to document every time it provides an applicant with copies of portions of his/her chart, a simple notation could be made instead on the file or in a log elsewhere. I find that the manner in which the form was used is inappropriate and misleading.

[115] I specifically acknowledge the thoroughness and professionalism exhibited by the members of the Privacy and Access Office. They responded promptly to our suggestions for process enhancements. They have been diligent in their internal investigation, integral to this review. The numerous problems catalogued in this Report appear to be

[41] SK OIPC Investigation Report H – 2005 – 002, available online: http://www.oipc.sk.ca/Reports/H-2005-002.pdf.
[42] SK OIPC Annual Report 2004-2005, available online: http://www.oipc.sk.ca/Reports/AnnualReport04-05.pdf.
[43] For more information on the different terms see page 5 of the SK FOIP FOLIO October 2006, available online: http://www.oipc.sk.ca/FOIPFOLIO/October2006.pdf.

attributable to other roles within the Region which operated more or less independently of the Privacy and Access Office. The history of the subject access request documented in this report should provide a compelling example of why centralized management of LA FOIP and HIPA responsibilities is so important. I commend the Region for publishing on its website detailed information on individuals' access rights and procedures for obtaining access.[44]

V. RECOMMENDATIONS

[116] I recommend that the Region cease to use the *Consent for Disclosure of Personal Health Information Form* in its access application process.

[117] I recommend that the Region's Privacy and Access Office be explicitly tasked to lead and coordinate all activities connected with patient access to personal health information and personal information.

[118] I recommend that the Region's CSRs immediately, upon determining that the individual they are dealing with has requested access to personal health information (HIPA) or personal information (LA FOIP), should notify and thereafter operate for purposes of that request under the direction of the Region's Privacy and Access Office.

Dated at Regina, in the Province of Saskatchewan, this 24th day of March, 2008.

R. GARY DICKSON, Q.C.
Saskatchewan Information and Privacy Commissioner

[44] Available online: http://www.saskatoonhealthregion.ca/about_us/privacy_access.htm.