SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT LA-2009–002 / H-2009-001

Regina Qu'Appelle Regional Health Authority

Summary: The Applicant applied simultaneously under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) for access to the personal information of his deceased mother (the deceased) and general information related to her care in the possession or control of the Regina Qu'Appelle Health Region (RQHR or Region), and for access to the personal health information of the deceased under *The Health Information Protection Act* (HIPA). The Region refused access to records responsive to the request based on its contention that the Applicant's request was not related to the administration of an estate in accordance with section 56 of HIPA or section 49 of LA FOIP. Access was also denied based on section 38 of HIPA and sections 16 and 21 of LA FOIP. The Commissioner found that the Applicant was acting as a personal representative and that the access request did relate to the administration of the deceased's estate in accordance with both LA FOIP and HIPA. The Commissioner found that exemptions claimed under section 38 of HIPA did not apply to the withheld information. The Commissioner found that section 16 exemptions applied to some information, but recommended the release of other records. The Commissioner found that section 21 of LA FOIP did not apply to records in Package A and that RQHR failed to meet the burden of proof in claiming this exemption in respect to Package B. The Commissioner found that some of the information in the responsive record was personal information of identifiable individuals and recommended it be withheld in accordance with section 28(1) of LA FOIP. In failing to respond openly, accurately and completely to the Applicant's request, the Commissioner found that the Region failed to meet the duty to assist.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act*, (S.S. 1990-91, c. F-22.01) s. 17(1)(b); *The Health Information Protection Act*, (S.S. 1999, c. H-0.021) ss. 2(m), 2(m)(iv), 2(t)(ii), 27(4)(e), 35, 38(1)(d)(iii), 38(1)(e), 46(1), 56, 56(a); *The Local Authority Freedom of Information and Protection of Privacy Act*, (S.S. 1990-91, c. L-27.1) ss. 2(f), 2(f)(xiii), 8, 16(1), 16(1)(a), 16(1)(b), 21, 23, 23(1), 23(1)(b), 23(1)(c), 23(2), 23(3), 27(4)(e)(i), 28(1), 28(2), 43, 49, 49(a), 49(1); *The Local Authority Freedom of Information and Protection of Privacy Act Regulations*, (S.S 1993, c. L-27.1 Reg 1) s. 5; *The Hospital Standards Act*, (S.S. 1978, c. H-10); *The Hospital Standards Regulations, 1980*, (S.R. 331/79) ss. 16(1), 16(2), 16(2)(d); *The Fatal Accidents Act*, (S.S. 1978, c. F-11) ss. 4(1), 12(1); *The Survival of Actions Act*, (S.S. 1990-1991, c. S-66.1) ss. 2, 3, 4, 5, 6, 7, 8; *Personal Information Protection and Electronic Documents Act*, (S.C. 2000, c.5); *Freedom of Information and Protection of Privacy Act*, (R.S.A. 2000, c. F-25); *Health Information Act*, (R.S.A. 2000, c. H-5) ss. 35(1), 35(1)(d.1), 104(1)(d); *Personal Health Information Act*, (C.C.S.M. 2005, c. P33.5) s. 60(f); *Municipal Freedom of Information and Protection of Privacy Act*, (R.S.O. 1990, c. M.56) s. 54(a); *Personal Health Information Protection Act*, (R.S.O. 2004, c.3, Schedule A); *Trustee Act*, (R.S.O. 1990, c. T.23).

Authorities Cited: Saskatchewan Information and Privacy Commissioner Reports F-2004-003, F-2004-005, F-2004-007, F-2005-002, F-2005-005, F-2006-001, F-2006-002, F-2008-001, F-2008-002, LA-2004-001, LA-2007-001, H-2006-001, H-2007-001, H-2008-001; Alberta Information and Privacy Commission Order H2002-004; British Columbia Information and Privacy Commission Order 01-15; Newfoundland and Labrador Information and Privacy Commission Reports A-2005-007, A-2009-009; Ontario Information and Privacy Commission Orders MO-1075, MO-1256, PO-1772, PO-2215, Reconsideration Order R-980015; *Stevens v. Canada (Prime Minister)*, [1997] 2 F.C. 759.

Other Sources Cited:

Saskatchewan Information and Privacy Commissioner, *Saskatchewan FOIP FOLIO Newsletters* (January 2004 and April 2008); Saskatchewan Registered Nurses Association, *Competence Assurance Process* (available online at http://www.srna.org/competence_assurance/complaints_handling.pdf); Saskatchewan Association of Licensed Practical Nurses, *Investigation/Discipline Process* (available at http://www.salpn.com/public-protectioncomplaints/investigationdiscipline-process); *Black's Law Dictionary*, 8th ed. (USA: Thomson West, 2004); MacKenzie, J., ed., *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis Canada Inc., 2000); McNairn and Woodbury, *Government Information: Access and Privacy* (2005, Thomson Carswell, Toronto).

I BACKGROUND

[1] The Applicant is the son of the deceased, a woman who died in a hospital operated by the Regina Qu'Appelle Health Region (RQHR or Region).

[2] Within two weeks of the deceased's passing in November of 2003, the Applicant lodged formal written complaints with the Region, and with two professional nursing associations regarding concerns with respect to nursing care provided by certain Region staff members.

[3] By April 15, 2004, the Applicant had received a response to his complaint from the Region. The Applicant was dissatisfied with this response.

[4] On April 30, 2004, the Applicant submitted a written access request to the Region as follows:

> In accordance with the provincial *Saskatchewan Health Information Act* [sic] and the federal *Personal Information Protection and Electronic Documents Act* [sic] I am requesting a copy of all personal information concerning [the deceased] held by the Regina General Hospital, Regina Qu'Appelle, Health Region. This formal access request under these two Acts are to include all records that pertain to the care, treatment and investigation of care provided to [the deceased]. I also wish to receive a copy of all written communications and emails concerning [the deceased] and our complaint regarding her care. These records may include, but are not restricted to, communications that have occurred between Human Resources, the Office of the President and Chief Executive Officer, [name of President], nursing staff, unit minutes and staff notes, external reports concerning the care and treatment of [the deceased] and any internal investigation report or review that may contain information about this matter. In short I seek all records defined under the above Acts that involve any information or exchange of information pertaining to [the deceased]. I also seek a copy of any and all records containing the names of all Regina General Hospital staff members who provided care for [the deceased].

[5] On May 27, 2004, the solicitor for RQHR wrote the Applicant and suggested that he should apply under *The Hospital Standards Act*[1] for access to the deceased's chart records. He further advised that access to the internal investigation records was denied as the records did not contain the personal health information of the deceased and that the

[1] *The Hospital Standards Act*, S.S. 1978, c. H-10.

Applicant had no right to the information under *The Health Information Protection Act* (HIPA)[2].

[6] On July 13, 2004, RQHR requested proof that the Applicant was authorized to act on behalf of the deceased's Executor. On September 13, 2004, the Applicant provided a consent signed by the Executor of the deceased's estate.

[7] On September 28, 2004, the solicitor for RQHR provided a fee estimate of $650 - $700 for a copy of the deceased's chart. He further advised the Applicant that there was only one letter with regard to the performance complaint and that that letter had already been provided to the Applicant with the consent of the employee. He advised the Applicant that the records related to the employees were not personal health information of the deceased and therefore, not available under HIPA. He further stated the Region's position that the *Personal Information Protection and Electronic Documents Act* (PIPEDA)[3] did not apply to the Region's records.

[8] On October 3, 2004, the Applicant narrowed his request and requested a fee estimate as follows:

> I wish to narrow my access request to records that contain personal information about my mother, [the deceased]. In accordance with Saskatchewan's access and privacy legislation I am requesting that you provide me with a fee estimate and copy of the following records:
>
> - Copy of all charting completed by [employee #1], LPN pertaining to the care that she provided to my mother
> - Copy of all charting completed by [employee #2], RN pertaining to the care that she provided to my mother
> - Copy of all investigation information or interview information containing reference to [the deceased], comments regarding the nursing care my mother received from either of the two above identified nurses, assessments/evaluations or findings determined by RQHR related to the nursing care of [the deceased], emails or internal communications regarding this matter between, [name of Manager], Nursing Manager, [name of VP], VP Patient Care, [name of representative], Client Representative and [name of President], President and CEO.

[2] *The Health Information Protection Act*, S.S. 1999, c. H-0.021. (hereinafter HIPA)
[3] *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5. (hereinafter PIPEDA)

> Based on this narrowed request, please provide me with a detailed accounting of the fee quote.

[9] It appears that there was no response by RQHR to the October 3, 2004 letter from the Applicant.

[10] On December 3, 2004, the Applicant submitted a Request for Review to this office.

[11] On January 4, 2005 notice was provided to RQHR that this office was undertaking a Review of the matter.

[12] On June 30, 2005, the solicitor for RQHR advised this office that the access request for the charting and the assessments and evaluations of the nursing care provided to the deceased had been fulfilled and that no investigative interview records existed that reference the deceased. He further advised that access to the remainder of the access request was denied citing section 46(1) of HIPA and section 43(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP)[4]; sections 27(4)(e)(i) and section 56(a) of HIPA and section 49(1) of LA FOIP[5]; section 23(1)(c), 21 and 16(1)(b) of LA FOIP. In response to my request, the solicitor for RQHR also submitted an Affidavit of the Executive Director attesting to the search efforts made by the Region to identify records responsive to the access request.

[13] On October 5, 2005, the solicitor for RQHR submitted further arguments. He categorized the records responsive to the access request and submitted arguments with regard to each category. The records categorized as "Solicitor-Client Documents in the Possession of RQHR" were withheld on the basis of section 21 of LA FOIP and section 38(1)(d)(iii) and 38(1)(e) of HIPA. The records categorized as "RQHR Internal Communications Respecting the [Applicant's] Access Request" were denied on the basis of section 16(1)(a) and (b) of LA FOIP. The records categorized as "RQHR Internal Communications Respecting Complaint Against Nurses" were denied based on sections

[4] *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1. (hereinafter LA FOIP)
[5] Section 49(1) of LA FOIP as cited by the solicitor for the Regina Qu'Appelle Health Region (hereinafter RQHR) in his letter dated June 30, 2005 to this office does not exist. This is addressed at [76].

16(1)(a) and (b) of LA FOIP and sections 38(1)(d)(iii) and 38(1)(e) of HIPA. The solicitor argued that the Applicant does not have standing under section 56 of HIPA and section 49 of LA FOIP as applied to all the denied responsive records.

II RECORDS AT ISSUE

[14] RQHR provided to our office copies of records responsive to the request in two separate packages. The first was provided as an attachment to an RQHR submission dated June 30, 2005, hereinafter referred to as Package A. The second package of records was supplied as an attachment to an RQHR submission dated October 5, 2005, hereinafter referred to as Package B.

[15] Certain documents were created subsequent to April 30, 2004, the date of the written request for access from the Applicant.

[16] My approach is to consider that a request for access to personal information or personal health information is defined or 'crystallized' on the date it is received by the local authority or trustee.

[17] Normally that approach would lead me to conclude that the April 30, 2004 request from the Applicant would only capture personal information and personal health information that existed as of that date.

[18] In this case however in his correspondence dated June 30, 2005 and October 5, 2005, the Region's solicitor treated the access request as one that crystallized not on April 30, 2004 but rather October 4, 2004. In his correspondence to this office the Region's solicitor discussed the subject review in relation to the: "[Applicant's] original request of October 4, 2004." I note as well that neither of the two written submissions from the Region's solicitor makes any reference to the original request of April 30, 2004.

[19] Parenthetically I note that unlike Alberta's *Freedom of Information and Protection of Privacy Act*,[6] LA FOIP makes no provision for an ongoing or continuing request for access.

[20] Further to the above observation, I will consider the contents of both Packages A and B to be responsive to the Applicant's request.

[21] The contents of Package A are as follows:

Package A

Page (s)	Description
1-4	Copy of all charting completed by RQHR employee [Employee #1] pertaining to deceased.
5-25	Copy of all charting completed by RQHR employee [Employee #2] pertaining to deceased.
26	Letter to [Employee #1] from RQHR re: expectations
27-49	Various correspondence between Applicant and RQHR

[22] The contents of the records in Package B are as follows:

Package B

Page (s)	Description
50-54	Emails among RQHR management & solicitor
55-56	Letter from RQHR solicitor to Applicant
57	Email among RQHR management
58-59	Letter to RQHR from Applicant
60-62	Emails among RQHR management
63-68	RQHR Management handwritten notes
69-71	Emails among RQHR management & solicitor
72-73	RQHR Management handwritten notes
74-82	Emails among RQHR management & solicitor
83-86	Correspondence between Applicant and RQHR
87	Emails among RQHR management
88-89	RQHR Management handwritten notes
90	Email from RQHR to Applicant

[6] *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.

Page (s)	Description
91-92	Correspondence between Applicant and RQHR
93-96	Emails among RQHR management
97-101	Correspondence between Applicant and RQHR
102-103	Emails among RQHR management
104-106	Fax from RQHR management to Labour Relations Consultant
107	Email among RQHR management
108	Email from Labour Relations Consultant to RQHR
109	Correspondence between Applicant and RQHR
110-113	Email among RQHR management
114-115	Training Course Materials
116-117	Email among RQHR management
118-122	Executive Director's Summary of steps taken
123-124	Email among RQHR management; does contain a restatement of a legal opinion from solicitor
125	Email among RQHR management

III ISSUES

1. **Which legislation applies to the access request?**
2. **Has RQHR met the duty to assist?**
3. **Is the Applicant entitled to the requested records under section 56 of HIPA or section 49 of LA FOIP?**
    a) **Is the Applicant acting as a personal representative?**
    b) **Does the request for access relate to the administration of the deceased's estate?**
4. **Is the Applicant entitled to the requested records under section 27(4)(e) of HIPA?**
5. **Does the section 38 exemption in HIPA apply to the records?**
6. **Does the section 16 exemption in LA FOIP apply to the records?**
7. **Does the section 21 exemption in LA FOIP attach to the requested records?**
8. **Does information related to employment history of a third party qualify as personal information under section 23 for the purposes of section 28(1) of LA FOIP?**

IV DISCUSSION OF THE ISSUES

1. Which legislation applies to the access request?

[23] HIPA came into force September 1, 2003, and applies to personal health information in the custody or control of Saskatchewan trustees as defined by section 2(t)(ii) of HIPA. Personal health information is defined in section 2(m) of HIPA as follows:

> **2** In this Act:
>
> (m) "personal health information" means, with respect to an individual, whether living or deceased:
>
> (i) information with respect to the physical or mental health of the individual;
>
> (ii) information with respect to any health service provided to the individual;
>
> (iii) information with respect to the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;
>
> (iv) information that is collected:
>
> (A) in the course of providing health services to the individual; or
>
> (B) incidentally to the provision of health services to the individual; or
>
> (v) registration information

[24] As I have stated, for HIPA to apply, three elements must be present:

> (1) The organization must be a "trustee" as defined in section 2(t);
>
> (2) There must be personal health information as defined in section 2(m); and
>
> (3) The personal health information must be in either the custody or the control of a trustee.[7]

[7] Saskatchewan Information and Privacy Commissioner (hereinafter OIPC), Report H-2006-001 available online at http://www.oipc.sk.ca/Reports/H-2006-001.pdf at [13].

[25] By virtue of section 2(t)(ii) of HIPA, RQHR qualifies as a trustee. This section reads as follows:

> **2** In this Act:
>
> …
>
> (t) "trustee" means any of the following that have custody or control of personal health information:
>
> …
>
> (ii) a regional health authority or a health care organization;

[26] LA FOIP came into force in 1993 and applies to general and personal information in the possession or control of Saskatchewan local authorities.

[27] As a regional health authority (RHA), RQHR is defined as a local authority by virtue of section 2(f)(xiii) of LA FOIP.[8]

[28] Much of the information contained in the record is personal health information of the deceased; as such it will be considered under HIPA. Other information in the record is either the personal information of the deceased or RQHR employees, or general information in the possession or control of RQHR. This information will be considered under LA FOIP.

[29] Although referenced by the Applicant in his initial request to RQHR, PIPEDA would not apply to the records at issue. Pursuant to section 4, PIPEDA applies to commercial activities. PIPEDA also applies to employee information collected, used or disclosed in connection with the operation of a "federal work, undertaking or business". Neither of the above noted circumstances applies to RQHR and the matter under review.

[8] LA FOIP, section 2(f): "'local authority' means:… (xiii) a regional health authority…as defined in *The Regional Health Services Act*".

[30] In his October 5, 2005 letter, the solicitor for RQHR submitted the following:

> With respect to all of the documents provided, we also note that [the applicant] does not have standing under HIPA or [LA FOIP] unless his access request relates to the administration of [the deceased's] estate (HIPA, s. 56; [LA FOIP], s. 49).

[31] It is clear from RQHR's response above that it considered the Applicant's request simultaneously under both LA FOIP and HIPA.

[32] I note that even though the Applicant did not use the designated form with regards to the portion of the access request for personal information regulated by LA FOIP, RQHR appropriately proceeded on the basis that the request was properly before them. I will consider the access request in conjunction with the requirements of both HIPA and LA FOIP.

[33] I have previously stated that RHAs are placed in a curious position when they receive a request for access to information due to the fact that they are simultaneously local authorities for the purposes of LA FOIP and trustees for the purposes of HIPA.[9]

[34] This dynamic appears to have impacted the current situation in which access was requested for both records relating to personal health information and general records related to the care of the deceased which could contain personal information both of the deceased and of third parties. While this dynamic may have complicated matters for RQHR at the time, it is certainly not an unmanageable situation.

[35] When confronted with situations such as the matter under consideration here, RHA's must take as a starting point the intention underlying statutes such as LA FOIP and HIPA. To the extent that these statutes permit access to information, they are intended to be read broadly, and any exceptions construed narrowly.

[9] Saskatchewan OIPC, *Saskatchewan FOIP FOLIO* (April 2008) available online at http://www.oipc.sk.ca/newsletters.htm, p. 5.

[36] My interpretation of access rights afforded Saskatchewan citizens under LA FOIP has been discussed in my Report LA-2004-001 in which I stated:

> [41] The object of *The Freedom of Information and Protection of Privacy Act* was considered by this office in Report 2004-003 [8] to [11]. We apply the same object to *The Local Authority Freedom of Information and Protection of Privacy Act* with necessary changes to substitute local authority for government institution. We take the object of the Act to be to make local authorities more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records
>
> (b) giving individuals a right of access to, and a right of request corrections of, personal information about themselves
>
> (c) specifying limited exceptions to the rights of access
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (e) providing for an independent review of decisions made under this Act
>
> [42] To achieve that object, it is important to ensure that the general rule is disclosure unless it is clear that a mandatory or discretionary exemption applies.[10]

[37] Similarly, I have commented on the rights of access to personal health information afforded under HIPA. In my Report H-2007-001, I stated:

> [17] The right of a patient or client to access his/her own personal health information is fundamental to HIPA. Sections 12 and 32 state as follows:
>
> **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.
>
> …
>
> **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.
>
> [18] Although there is no purpose or object clause in HIPA, I note that the preamble includes the principle: "That individuals shall be able to obtain access to records of their personal health information".

[10] Saskatchewan OIPC, Report LA-2004-001 available online at http://www.oipc.sk.ca/Reports/LA-2004-001.pdf.

> [19] As I noted in my Investigation Report H-2005-002, in introducing Bill 29 at First Reading, which later became HIPA, the government minister advised the Legislative Assembly as follows:
>
> > Mr. Speaker, The Health Information Protection Act is about the rights of individuals to protect their personal health information. The Act enshrines in legislation certain rights that every person in this province has in regard to their personal health information.
> >
> > The Act then sets out the duties and responsibilities of government and the health system to ensure that those rights are respected. Mr. Speaker, *The Health Information Protection Act* will ensure that people's privacy rights are protected.
> > …
> >
> > Since 1995, the Department of Health has worked to develop a comprehensive framework of health information management principles and broad policies within the public sector. These principles, Mr. Speaker, are consistent with the best national and international information management principles in the world today.
> >
> > These principles include: accountability to the individual; collection, use and disclosure of personal health information only for legitimate health purposes; the right of individuals to access their own information; and that health professionals hold personal health information in trust for individuals, and manage it accordingly. [11]

[38] When responding to access to information requests it is clear that providing access to information is the default position from which I expect FOIP/HIPA Coordinators to undertake their endeavours. Further, it is my expectation that the clearly established duty of trustees to take reasonable steps to ensure that they respond openly, accurately and completely to applicants under HIPA applies implicitly to LA FOIP.[12]

2. Has RQHR met the duty to assist?

[39] HIPA contains an explicit duty to assist. Section 35 reads:

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

[11] Saskatchewan OIPC, Report H-2007-001 available online at http://www.oipc.sk.ca/Reports/H-2007-001.pdf.
[12] Saskatchewan OIPC, *FOIP FOLIO* (January 2004) available online at http://www.oipc.sk.ca/newsletters.htm, p. 5.

> (2) On the request of an Applicant, a trustee shall:
>
> (a) provide an explanation of any term, code or abbreviation used in the personal health information; or
>
> (b) if the trustee is unable to provide an explanation in accordance with clause (a), refer the Applicant to a trustee that is able to provide an explanation.

[40] In my Report F-2004-003, I concluded that under FOIP there is an implicit duty on the part of a government institution to make every reasonable effort to assist an applicant and to respond without delay to each applicant openly, accurately and completely. This also means that the government institution must undertake an adequate search for all records responsive to the access request.

[41] This position was confirmed in my Reports F-2006-001; F-2006-002; F-2005-005, F-2004-007 and F-2004-005.[13]

[42] The duty to assist applies in similar fashion to local authorities. As I stated in my Report H-2008-001:

> 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, when HIPA applies, the duty to assist is explicit.[14]

[43] It is important to note that LA FOIP is clear that access rights relate to "records that are in the possession or under the control" of a local authority. In HIPA, the test is whether the records are "in the custody or under the control" of a trustee. These rights of access apply regardless of whether those records are on or off site.

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[13] Saskatchewan OIPC, Report F-2006-001 available online at http://www.oipc.sk.ca/Reports/F-2006-001.pdf; Report F-2006-002 available online at http://www.oipc.sk.ca/Reports/F-2006-002.pdf; Report F- 2005-005 available online at http://www.oipc.sk.ca/Reports/F-2005-005.pdf; Report F-2004-007 available online at http://www.oipc.sk.ca/Reports/2004-007.pdf and Report F-2004-005 available online at http://www.oipc.sk.ca/Reports/2004-005.pdf.

[14] Saskatchewan OIPC, Report H-2007-001 available online at http://www.oipc.sk.ca/Reports/H-2008-001.pdf at [17].

[44] When a request for access to information is received, the public body has a duty to search for, identify and consider all responsive records in its possession/custody or control regardless of location. If the records do not exist or are not within its possession or control, the requested records cannot be provided.

[45] Most applicants will have limited, if any, knowledge of how a RHA manages and stores its records. That lack of knowledge cannot be allowed to become a way for trustees to avoid their statutory obligation to respond openly, accurately and completely to an access request. Unless the applicant indicates otherwise, the access request should not be 'read down' to relate only to records of the particular hospital or institution that receives the access request.

[46] In our experience, it is common practice for patient information within a RHA to be kept in a number of different locations. It is also common that the written access requests under HIPA may not be submitted to the Privacy Officer/HIPA Coordinator but to someone at their local hospital or some other facility operated by the RHA, although that is not the case in this instance.

[47] The solicitor for RQHR advised in his September 28, 2004 letter:

> I have caused a search of the **relevant personnel files** to be undertaken and there is only one letter on the file that is relevant to your complaint. A letter was forwarded to [employee #1] by [the Unit Manager] on December 18, 2003. [Employee #1] has consented to provide you with a copy of the letter she received. A copy of the letter is enclosed. There is no additional information **in the personnel files** for either employee in respect of your late mother. You should also be aware that there are no previous reported performance complaints in respect of either employee. The action taken by the Regina Qu'Appelle Health Region ("RQHR") in this instance is consistent with action taken by RQHR in similar instances. RQHR strives to constantly improve the delivery and quality of care that its patients receive.
>
> (emphasis added)

[48] It seems that the solicitor for RQHR had not considered records stored at RQHR that reside outside the Human Resources department and the personnel files of the nurse employees. The Executive Director provided an Affidavit that attested to the following:

> 3. A diligent search was made of all records pertaining to [the deceased's] admission to the General Hospital on October 9, 2003 and the accompanying complaint against two nursing staff, namely [Employee #1] and [Employee #2].
>
> 4. The search referred to in paragraph 3 included personnel files and [the deceased's] medical chart.
>
> 5. The search referred to in paragraph 3 included records stored at the Regina General Hospital and records stored at the Wascana Rehabilitation Centre.

[49] No wider search was apparently undertaken. For example, the labour relations consultant's records of the investigation interviews were never identified or provided. As the investigation was one of the primary areas of the request, it seems reasonable that these records would be canvassed. It also seems reasonable that the manager may keep her own records which appear to not have been considered.

[50] I am not convinced that responsive records may not exist elsewhere within other locations of RQHR; as such I am not convinced an adequate search for responsive records was undertaken.

[51] In my Report F-2008-001, I set out what criteria should be used in establishing the adequacy of a search for records. In that Report, I stated:

> [64] In terms of what constitutes an adequate search, I considered a helpful resource on conducting and documenting searches for responsive records from British Columbia's Information and Privacy Commissioner's Office, *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.* Step 3 of the document is titled, *Determining the Adequacy of the Search*. It offers the following guidance:
>
> *Ask yourself or staff:*
> - *Who conducted the search?*
> - *Which files or departments were searched?*
> - *Which ones weren't searched and why not?*
> - *How much time was spent searching for records?*
> - *Based on the applicant's concerns, are there any additional program areas that should be searched in order to ensure that every reasonable effort was made?*

> [65] In Order 01-47, the Information and Privacy Commissioner for British Columbia at [32] described the standard it imposes when considering a public body's search efforts as follows:
>
> > *ICBC argues that it "acted fairly" in attempting to search for the records. Of course, the test here is not whether ICBC acted "fairly" in searching for records. As I said at p. 5 of Order 00-32, [2000] B.C.I.P.D. No. 35:*
> >
> > > *Given my findings in this case, it is worth repeating what I have said before – for example, in Order 00-15, Order 00-26 and Order 00-30 - about the standards imposed by s. 6(1) on a public body's search for records.* ***Although the Act does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. In any inquiry such as this, the public body's evidence should candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also include how the searches were done and how much time its staff spent searching for the records.*** [Emphasis added]
>
> [66] I adopt these considerations in assessing the adequacy of a search in Saskatchewan.[15]

[52] I find that an adequate search for responsive records within RQHR's possession/custody or control has not been undertaken, and recommend that a further and more comprehensive search be undertaken by RQHR.

[53] As I have already noted, the duty to assist includes an obligation to respond to an applicant openly, accurately and completely. The fact that RQHR is withholding records which are to or from the Applicant violates that duty to assist.

[54] Instead of processing the Applicant's request pursuant to HIPA and LA FOIP, on May 27, 2004, the solicitor for RQHR advised the Applicant that in order to obtain the deceased's charting the Applicant should apply through *The Hospital Standards Regulations, 1980* (HSA Regulations) [16] as follows:

[15] Saskatchewan OIPC, Report F-2008-001 available online at: http://www.oipc.sk.ca/Reports/F-2008-001.pdf.
[16] *The Hospital Standards Regulations, 1980*, S.R. 331/79.

> As you may not be aware, under section 16 (2) of *The Hospital Standards Act Regulations*[sic], the next of kin of a deceased person can request production of a deceased's chart. If you wish to secure a copy of the chart, please write to Health Information Management Services at the Regina General Hospital, 1440 – 14th Avenue, S4P 0W5 or call 1-306-766-4332. There is a cost associated with obtaining a health record.

[55] Sections 16(1) and 16(2)(d) of the HSA Regulations would be most applicable to our current circumstance. These sections state:

> 16(1) Subject to subsection (2), the health record shall be the property of the hospital and shall remain confidential except that it shall be disclosed under the following circumstances:
>
> (a) upon the direction of the minister;
>
> (b) upon the order of a court of competent jurisdiction;
>
> (c) upon the request of a coroner enquiring into the death of a person who prior to death was a patient of the hospital;
>
> (d) in accordance with any other legal requirement.
>
> (2) The health record **may** be disclosed under the following circumstances:
>
> …
>
> (d) in the event of death or incapacity of the patient, upon a written request signed by the next of kin[17]
>
> (emphasis added)

[56] The above sections assign ownership of the health record and, in certain circumstances, the discretion to disclose the patient records to hospital management. If management decides not to exercise its discretion and disclose records under this section there is no apparent recourse available under the HSA Regulations other than a court application.

[17] Sections 16(1) and 16(2)(d) of *The Hospital Standards Regulations, 1980* were repealed in September 2007.

[57] Directing the Applicant to the HSA Regulations as the appropriate vehicle for accessing patient records demonstrates misunderstanding of the access provisions of HIPA. Directing the Applicant to a different procedure without the enforcement, sanctions, and oversight provisions of HIPA was inappropriate and fails to meet the duty to assist.

[58] The narrow interpretation of the access request, especially in light of the continued and detailed correspondence with the Applicant, may indicate an apparent misinterpretation of the legislation which ultimately frustrated legitimate access rights.[18] The solicitor for RQHR advised:

> These documents relate to [the Applicant's] access request and do not, in the opinion of RQHR, contain the personal health information of [the deceased]. As such, RQHR believes that these documents are not within the scope of [the Applicant's] original access request of October 4, 2004.

[59] Limiting the interpretation of the request to only those records which contain personal health information is unduly restrictive and fails to adequately address the Applicant's request.[19] Narrowly interpreting the access request in this manner fails to meet the duty to assist.

[60] In RQHR solicitor's September 28, 2004 letter to the Applicant, he provided a fee estimate of $650 – 700 as follows:

> The estimated cost of duplicating it is $650 - $700. Please confirm that the Estate wishes to have the entire chart copied.

[61] HIPA provides that a "reasonable fee" may be charged in order to cover the costs to trustees of providing access to information.[20]

[18] Although HIPA was not proclaimed until September 1, 2003, the bill had been passed by the Assembly in 1998 and Saskatchewan Department of Health had provided training to trustees in advance of its proclamation. Both the proclamation of HIPA and the advanced training would have occurred eight months in advance of the Applicant's access request.
[19] See Applicant's original request at [4].
[20] HIPA, section 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."

[62] The fees that can be charged by local authorities under LA FOIP are prescribed in its Regulations.[21]

[63] I have considered the issue of fees and fee estimates extensively in my Report F-2005-005 in which I state:

> [24] Given the purposes I have previously ascribed to the Act, I view the Act as an instrument to foster openness, transparency and accountability in government institutions. I want to ensure that fees do not present an unreasonable barrier to access to information in Saskatchewan. Consequently, this office will expect that fees should be reasonable, fair and at a level that does not discourage any resident from exercising their access rights. At the same time, the fee regime should promote and encourage applicants to be reasonable and to cooperate with government institutions in defining and clarifying their access requests.[22]

[64] In my Report H-2006-001, I provided the following suggestions for fees applied under HIPA. I stated:

> [50] Given the jurisdiction of this office to provide advice and commentary to trustees, I offer the following observations:
>
> - The photocopy charge of $0.50 seems to be excessive. This is double the charge for photocopying permitted under *The Freedom of Information and Protection of Privacy Act* (FOIP) or *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). It is also double the proposed photocopy charge in the relevant Draft Regulation.
>
> - The $50 fee to 'open the file' is problematic since it is not in any way related to the work required by a trustee to search for and obtain the record. It constitutes an "application fee". I note that there is no application fee under the FOIP Act but that there is a $20 application fee under the LA FOIP Act. In other words, a regional health authority when responding to an access request under LA FOIP is limited to the $20 application fee plus additional search and preparation fee when appropriate. In the result, the $50 fee to 'open the file' seems excessive.
>
> - I would encourage the Region to review its fees and charges to ensure that they are in line with charges permitted under the FOIP and LA FOIP Act.[23]

[21] *The Local Authority Freedom of Information and Protection of Privacy Regulations*, S.S 1993, c. L-27.1 Reg 1, section 5.
[22] *Supra* note 13, Report F-2005-005.
[23] *Ibid.*, Report F-2006-001.

[65] Further in my Report H-2008-001, I provided the following suggestions pertaining to the calculation of fees for trustee organizations which are simultaneously local authorities under LA FOIP. In that Report I stated:

> [49] As explained earlier, three parts of HIPA 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. I also considered fees in my Report H-2006-001 [47] to [50].
>
> [52] Fees under HIPA are for copies of records. 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.
>
> [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.[25]

[66] Aside from the cost of duplication, there is no breakdown of how the fees were calculated. No guidance is provided to assist the Applicant in determining whether to narrow the request, how to narrow the request and identifying what records would be considered as within the original request. This fails to meet the duty to assist the Applicant.

[24] Saskatchewan OIPC, Report H-2008-001 available online at http://www.oipc.sk.ca/Reports/H-2008-001.pdf.
[25] Saskatchewan OIPC, Report H-2008-001 available online at http://www.oipc.sk.ca/Reports/H-2008-001.pdf.

[67] Nevertheless, in an October 3, 2004 email, the Applicant narrowed his request as follows:

> I wish to narrow my access request to records that contain personal information about my mother, [the deceased]. In accordance with Saskatchewan's access and privacy legislation I am requesting that you provide me with a fee estimate and copy of the following records:
>
> - Copy of all charting completed by [employee #1], LPN pertaining to the care that she provided to my mother
> - Copy of all charting completed by [employee #2], RN pertaining to the care that she provided to my mother
> - Copy of all investigation information or interview information containing reference to [the deceased], comments regarding the nursing care my mother received from either of the two above identified nurses, assessments/evaluations or findings determined by RQHR related to the nursing care of [the deceased], emails or internal communications regarding this matter between, [name of Manager], Nursing Manager, [name of VP], VP Patient Care, [name of representative], Client Representative and [name of President], President and CEO.
>
> Based on this narrowed request, please provide me with a detailed accounting of the fee quote.

[68] No fee estimate for the narrowed request was ever provided but should have been. The solicitor for RQHR responded that all requested documents were denied and claimed exemptions as applying globally to all the records contained in Packages A and B. This response failed to meet the duty to assist the Applicant.

[69] The Applicant first requested access to information April 30, 2004. On July 13, 2004, the solicitor for RQHR first requested that the Applicant provide proof that he was acting on behalf of the deceased's Executor. Later on September 13, 2004, the Applicant provided the authorization from the Executor.

[70] It would not be uncommon for a public body to request that an Applicant provide proof of their status when acting on behalf of another party. This is a preliminary matter that should be addressed early on in the process of responding to an access request. Requesting such evidence almost two and one half months after receipt of the request is clearly not consistent with the positive duty to assist.

[71] It appears that no consideration was given as to which records should be released nor was there any apparent attempt to consider severing under section 8 of LA FOIP and section 38(2) of HIPA. I have previously identified the requirements for severing, including the requirement to claim all the exemptions in the initial response.[26] In this instance, it was months before the request was denied and exemptions were identified over time as more records were produced. This fails to meet the duty to respond openly, accurately and completely in a timely manner.

[72] On December 3, 2004, the Applicant requested that this office review his access request. Following a series of letters, emails and meetings, the solicitor for RQHR provided part of the Record on June 30, 2005 and part on October 5, 2005. He claimed exemptions which applied to generally described documents or batches of documents in the Record.

[73] From the correspondence between the Applicant and RQHR, it was apparent there was a good deal of confusion both over which legislation applied, as well as how it applied to the record. RQHR must be taken to be familiar with the legislation by which it is bound.

[74] The duty to assist requires that RQHR be able to demonstrate that the Applicant was provided with clear, helpful information as to the applicable process to access the desired records and, if not legally authorized to access those records, that the reasons for denial of the records were clearly communicated to the Applicant. RQHR's responses appear to have compounded the confusion. The right of access is a serious matter and deserves an appropriate, clear and well-founded response from the public body. I find that RQHR failed its duty to assist in both not communicating clearly with the Applicant and in not conveying the appropriate information to the Applicant.

[75] In light of the foregoing, I conclude that RQHR failed to meet the duty to assist under HIPA and LA FOIP.

[26] Saskatchewan OIPC, Report F-2006-003 available online at: http://www.oipc.sk.ca/Reports/F-2006-003.pdf at [19] to [29].

3. Is the Applicant entitled to the requested records under section 56 of HIPA or section 49 of LA FOIP?

a) Is the Applicant acting as a personal representative?

b) Does the request for access relate to the administration of the deceased's estate?

a) Is the Applicant acting as a personal representative?

[76] RQHR's solicitor cited section 49(1) of LA FOIP as an exemption in his letter dated June 30, 2005. I note that section 49(1) does not exist. Section 49 of LA FOIP reads as follows:

> **49** Any right or power conferred on an individual by this Act may be exercised:
>
> (a) where the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate;
>
> (b) where a personal guardian or property guardian has been appointed for the individual, by the guardian if the exercise of the right or power relates to the powers and duties of the guardian;
>
> (c) where a power of attorney has been granted, by the attorney if the exercise of the right or power relates to the powers and duties of the attorney conferred by the power of attorney;
>
> (d) where the individual is less than 18 years of age, by the individual's legal custodian in situations where, in the opinion of the head, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual; or
>
> (e) by any person with written authorization from the individual to act on the individual's behalf.

[77] The first requirement to be met is that the third party acting for the deceased must be the deceased's *personal representative*.

[78] The right and powers of personal representatives under HIPA are considered at section 56(a) which states:

> **56** Any right or power conferred on an individual by this Act may be exercised:
>
> (a) where the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate

[79] These rights and powers are considered in similar fashion in LA FOIP at section 49(a).

[80] Personal representative is not defined in the legislation.

[81] In my Report H-2006-001, I define personal representative as follows:

> [12] …A personal representative would be someone appointed by the court as Executor or Executrix or Administrator of an estate.[27]

[82] On July 13, 2004, RQHR requested proof that the Applicant was authorized to act on behalf of the deceased's Executor. The deceased's husband is the Executor of her estate. Accordingly, her husband, as Executor, would be her personal representative. On September 13, 2004, the Applicant supplied the Executor's written consent for the Applicant to represent him with regard to the access request to RQHR.

[83] Accordingly, I find that the Applicant is acting on behalf of the personal representative with the same rights and limitations as the personal representative in accordance with sections 56(a) of HIPA and 49(a) of LA FOIP.

b) Does the request for access relate to the administration of the deceased's estate?

[84] The second requirement to be met to qualify under the surrogacy provisions of LA FOIP and HIPA is that the personal representative's actions must relate *to the administration of the individual's estate*.

[27] *Supra* note 7.

[85] In his June 30, 2005 letter, the solicitor for RQHR submitted:

> … it is our understanding that the authority for [the Applicant's] entitlement to the personal health information and personal information of [the deceased] is found in subclause 27(4)(e)(i) and/or subsection 56(a) of HIPA and subsection 49(1) of [LA FOIP], respectively. Pursuant to these provisions, [the Applicant's] entitlement to the personal health information and personal information of [the deceased] flows from his capacity as the agent of the personal representative. Additionally, pursuant to these provisions, a personal representative may exercise their right to the said information only if the exercise of the right or power relates to the administration of the deceased's estate.
>
> We acknowledge that [the Applicant] eventually provided an authorization signed by his father, the deceased's executor, to pursue these matters on his behalf. However, we have no indication as to how [the Applicant's] request relates to the administration of the deceased's estate. Since our client's concern is to release personal health information and personal information only within the parameters of the legislation, we believe the information requested should not be released without establishing that the deceased's estate remains unsettled and exactly how [the Applicant's] request relates to the administration of the deceased's estate. There is no action commenced by the Estate pursuant to the provisions of *The Fatal Accidents Act* that we know of.

[86] The Applicant advised that he required the records to assess whether the Estate has a cause of action arising from the circumstances surrounding his late mother's death.

[87] The argument of RQHR's solicitor would suggest a narrow interpretation of the phrase "administration of estate". In order to determine if RQHR has appropriately withheld records, I must determine whether the surrogacy provision should be interpreted broadly or narrowly.

[88] "Administration of estate" is not defined in the legislation.

[89] *Black's Law Dictionary* (Black's) defines "administration" in relation to estates as:

> The management and settlement of the estate of an intestate decedent, or of a testator who has no executor, by a person legally appointed and supervised by the court. Administration of an estate involves realizing the moveable assets and paying out of them any debts and other claims against the estate. It also involves the division and distribution of what remains.[28]

[28] *Black's Law Dictionary, 8th Ed*. (USA: Thompson West, 2004) p. 46.

[90] As I have already stated in this Report, rights of access to information under LA FOIP and HIPA are to be interpreted broadly and the exemptions to access interpreted narrowly.

[91] That said, the right of the Applicant, acting as a personal representative, to access to such information can only be pursuant to the provisions of LA FOIP and HIPA, each of which impose the limitation of "that relates to the administration of the individual's estate" in respect of such access. That restriction must have some meaning. In addition, when one looks at the other parts of section 49 of LA FOIP and section 56 of HIPA which permit the exercise of rights by other persons, they appear to be broader. For example, a power of attorney may exercise any rights or powers if they relate to the powers and duties of the attorney conferred by the power of attorney. For a personal guardian, there is the same, broad permission. In contrast, this surrogacy provision does not permit an executor to access information for all purposes, but only those relating to the administration of the estate.

[92] A determination of whether the surrogacy provisions in LA FOIP and HIPA should be interpreted broadly or narrowly is assisted by the following inquiries:

i) How has the surrogacy provision been interpreted in other jurisdictions?

ii) Which Saskatchewan statutes inform the interpretation?

i) How has the surrogacy provision been interpreted in other jurisdictions?

[93] The Office of the Ontario Information and Privacy Commissioner has extensively interpreted the surrogacy provisions of that province's *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA).[29] Assistant Commissioner Tom Mitchison stated that the two requirements of the surrogacy provision[30] are that a person who is requesting information be able to demonstrate that:

[29] *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M.56. (hereinafter MFIPPA)
[30] Section 54(a) of MFIPPA is almost identical to section 49(a) of LAFOIP and section 56(a) of HIPA. It states: "Any right or power conferred on an individual by the Act may be exercised, if the individual is deceased, by the

- He or she is the personal representative of the deceased; and
- His or her request for access relates to the administration of the deceased's estate. [31]

[94] The Assistant Commissioner went on to state:

> The rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned…**I believe that the phrase "relates to the administration of the individual's estate" in section 54(a) should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate**.[32]
>
> (emphasis added)

[95] The Ontario Information and Privacy Commissioner has chosen to interpret the surrogacy provision of that province's legislation narrowly, as including only records relating to financial matters to which the personal representative requires access in order to wind up the estate. Ontario, therefore, appears to have taken the position that "administration of the estate" is limited to the "financial wind up" of the estate.[33]

[96] One of the reasons for this narrow interpretation is found at section 38(1) of the Ontario *Trustee Act*, which states:

> 38. (1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but, if death results from such injuries, no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the Family Law Act. [34]
> (emphasis added)

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individual's personal representative if exercise of the right or power relates to the administration of the individual's estate".

[31] Ontario Information and Privacy Commissioner, Order MO-1256 available online at http://www.ipc.on.ca/images/Findings/Attached_PDF/MO-1256.pdf and Order PO-2215 available online at http://www.ipc.on.ca/images/Findings/Attached_PDF/PO-2215.pdf.

[32] Ontario Information and Privacy Commissioner, Order M-1075 available online at http://www.ipc.on.ca/images/Findings/Attached_PDF/M-1075.pdf, p. 3 to 4.

[33] It is interesting to note that Ontario's *Personal Health Information Protection Act* does not use the term "personal representative", however, it does at section 23(1)(4) refer to the estate's trustee or person who has assumed responsibility for the administration of the estate for matters concerning the disclosure of the individuals personal health information.

[34] *Trustee Act*, R.S.O. 1990, c. T.23.

[97] This provision makes it clear that, in Ontario, damages for wrongful death do not form part of the estate of the deceased, but go, instead, to individual family member plaintiffs. As such, derivative actions for wrongful death are removed from the ambit of "the administration of the estate".[35]

[98] The surrogacy provision in Alberta's *Health Information Act* (HIA) allows personal representatives to exercise the rights of deceased individuals for the purpose of administering the individual's estate.

[99] The surrogacy provision states:

> 104(1) Any right or power conferred on an individual by this Act may be exercised …
>
> (d) if the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate[36]

[100] HIA also provides for disclosure in certain circumstances. As section 35(1)(d.1) states:

> 35(1) A custodian may disclose individually identifying diagnostic, treatment and care information without the consent of the individual who is the subject of the information …
>
> (d.1) where an individual is deceased, to family members of the individual or to another person with whom the individual is believed to have had a close personal relationship, if the information relates to circumstances surrounding the death of the individual or to health services recently received by the individual and the disclosure is not contrary to the express request of the individual[37]

[101] Alberta appears to be taking a broad view of the surrogacy provisions. The addition of section 35(1)(d.1) provides at the discretion of the custodian, an ability to effectively bypass the "administration of the estate" exception found therein, and allows family members access to a deceased's information in circumstances similar to those under consideration.

[35] *The Trustee Act* of Saskatchewan does not appear to contain an equivalent to subsection 38(1) of the Ontario Act.
[36] *Health Information Act*, R.S.A. 2000, c. H-5, section 104(1).
[37] *Ibid*., section 35(1)(d.1)

[102] Section 35(1)(d.1) of HIA is somewhat parallel to the disclosure provisions of HIPA at section 27(4)(e):

> (4) A trustee may disclose personal health information in the custody or control of the trustee without the consent of the subject individual in the following cases:
>
> …
>
> (e) if the subject individual is deceased:
>
> (i) where the disclosure is being made to the personal representative of the subject individual for a purpose related to the administration of the subject individual's estate; or
>
> (ii) where the information relates to circumstances surrounding the death of the subject individual or services recently received by the subject individual, and the disclosure:
>
> (A) is made to a member of the subject individual's immediate family or to anyone else with whom the subject individual had a close personal relationship; and
>
> (B) is made in accordance with established policies and procedures of the trustee, or where the trustee is a health professional, made in accordance with the ethical practices of that profession.

[103] The Manitoba Ombudsman, who is responsible for administering information access and privacy protection legislation in the province, has yet to interpret its surrogacy provision. However, the Manitoba Legislature itself appears to have given personal representatives broad access to information by not limiting the surrogacy provision to information "relating to the administration of the estate". The surrogacy provision in Manitoba's *Personal Health Information Act* states that "[t]he rights of an individual under this Act may be exercised… if the individual is deceased, by his or her personal representative".[38]

[104] Like Alberta, Manitoba appears to be taking a broad view of the surrogacy provision.

[38] *Personal Health Information Act*, C.C.S.M. 2005, c. P33.5, section 60(f).

[105] In Saskatchewan under HIPA, the right of a deceased individual's executor to obtain access to personal health information in respect of the deceased is limited to subsection 56(a), which requires that the information "relates to the administration of the individual's estate".

[106] As will be discussed below, the duties of an executor in administering an estate in Saskatchewan are not always limited to winding up the estate. There is a function of administration that includes the management of the estate and considerations of what assets may exist or may come into existence (such as when an estate sues for damages resulting from a wrongful death) and form part of the estate to be administered.

[107] I have previously mentioned the definition of "administration of estates" contained in Black's. Black's also defines "general administration" as:

> An administration with authority to deal with an **entire** estate.[39]
> (emphasis added)

[108] Therefore, as a general comment, I believe there is room for a more liberal interpretation of what may constitute the administration of an estate, which would, in appropriate circumstances, permit the disclosure of personal information and or personal health information relating to the death of an individual to their executor.

ii) Which Saskatchewan statutes inform the interpretation?

[109] As the Applicant advised that he required the record to assess whether the Estate has a cause of action arising from the circumstances surrounding his late mother's death, I must consider what Saskatchewan statutes inform my interpretation of the phrase "administration of estate".

[39] *Supra* note 27, p. 47.

[110] *The Trustee Act* does not have an equivalent to section 38(1) of the Ontario Act. As such, *The Trustee Act* does not prevent an executor acting on behalf of an estate from bringing a wrongful death claim.

[111] The duties owed by an estate trustee include pursuing damages by or against the estate. In *Feeney's Canadian Law of Wills*, James MacKenzie lists "Claim for Damages" as one of the particular duties owed by an estate trustee. At 8.48 he wrote:

> If there is a claim for liquidated damages by or against the estate at common law, or, where applicable provincial legislation, an action for tort may be brought by or against the estate, it is the duty of the personal representative to prosecute or defend the action, as the case may be.[40]

[112] *The Fatal Accidents Act* provides that any action for wrongful death will be for the benefit of the spouse, parent and child of the person whose death was so caused. This Act also states that an action for wrongful death must be brought by and in the name of the executor or administrator of the deceased. Section 4(1) states:

> 4(1) **Every action shall be for the benefit of the spouse, parent and child of the person whose death was so caused, and** except as provided by section 8 **shall be brought by and in the name of the executor or administrator of the deceased**, and in every action such damages may be awarded as are proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before mentioned persons in such shares as may be determined at the trial. [41]
>
> (emphasis added)

[113] Therefore, section 4(1) of *The Fatal Accidents Act* may support an argument that an executor is responsible for commencing a wrongful death claim, where applicable, as part of the "administration of the estate".

[114] *The Fatal Accidents Act* also provides that:

> 12(1) Where a person dies who would have been liable to an action for damages under this Act had he continued to live, then, whether he died before or after or at the same time as the person whose death was caused by wrongful act, neglect or default,

[40] James MacKenzie, ed., *Feeney's Canadian Law of Wills*, 4th ed. (Toronto: LexisNexis Canada Inc., 2000), at [8.48].
[41] *The Fatal Accidents Act*, S.S. 1978, c. F-11.

> **an action may be brought and maintained, or, if pending, may be continued, against the executor or administrator of the deceased person, and the damages and costs recovered in the action shall be payable out of the estate** of such deceased in like order of administration as the simple contract debts of the deceased.
>
> (emphasis added)

[115] Since an action may be brought against the executor or administrator of the deceased person, the process of defending such a claim also likely falls within the ambit of "administration of the estate".

[116] The following sections of *The Survival of Actions Act* are relevant to an interpretation of the surrogacy provision:

> 2 In this Act, "cause of action" means:
>
> (a) the right to bring a civil proceeding; or
>
> (b) a civil proceeding commenced before death;
> but does not include a prosecution for the contravention of an Act, regulation or bylaw.
>
> 3 A cause of action vested in a person who dies after the coming into force of this Act survives **for the benefit of that person's estate**.
>
> 4 A cause of action existing against a person who dies after the coming into force of this Act survives against that person's estate.
>
> 5 If a cause of action for damages suffered by reason of an act or omission would have existed against a person had that person not died at or before the time the damage was suffered, the cause of action is deemed to have existed against the person before that person's death.
>
> 6(1) Subject to subsection (3), if a cause of action survives pursuant to section 3, **only those damages that resulted in actual pecuniary loss to the deceased or the deceased's estate are recoverable**.
> …
>
> (3) If a cause of action survives pursuant to this Act, punitive or exemplary damages are only recoverable from:
> …
>
> (b) in the case of a cause of action that survives pursuant to section 4, the estate of the deceased person against whom the cause of action survives, but only if the award of damages is with respect to a gain by the deceased as a result of the deceased's wrongful conduct.

> 7(1) **If the death of a person was caused by an act or omission that gave rise to a cause of action, the damages shall be calculated without reference to a loss or gain to the person's estate as a result of the death.**
>
> (2) Notwithstanding subsection (1), **reasonable expenses of the funeral and disposal of the body of the deceased may be included in the damages awarded** if the expenses were, or liability for them was, incurred by the estate.
>
> 8 A cause of action that survives pursuant to this Act and a judgment or order on it or relating to the costs of it **is an asset or liability, as the case may be, of the estate** to which the cause of action relates.[42]
>
> (emphasis added)

[117] On October 3, 2004, the Applicant requested, inter alia:

> Copy of all charting completed by [employee #1], LPN pertaining to the care that she provided to my mother
>
> Copy of all charting completed by [employee #2], RN pertaining to the care that she provided to my mother

[118] In his June 30, 2005 letter, the solicitor for RQHR identified these records as:

> Copy of all charting completed by [employee #1], LPN pertaining to the care provided to [the deceased];
>
> copy of all charting completed by [employee #2], RN pertaining to the care provided to [the deceased];
>
> copy of assessments/evaluations or findings determined by RQHR related to the nursing care of [the deceased];
>
> We believe that parts 1 [charting by employee #1], 2 [charting by employee #2] and 6 [assessments/evaluations or findings determined by RQHR] of [the Applicant's] request have been fulfilled.

[119] Some of the records identified by the solicitor for RQHR may not in fact solely contain the personal health information of the deceased, but may also contain personal information of RQHR employees and may be subject to exemptions considered later in this Report. At any rate, the Applicant states that he has not received these documents. It

[42] *The Survival of Actions Act*, S.S. 1990-1991, c. S-66.1.

appears that the solicitor for RQHR is relying on his earlier notification to the Applicant of the charting access provisions under *The Hospital Standards Act*. As previously discussed, referral to the access procedure under *The Hospital Standards Act* is an insufficient response to this part of the access request.

[120] In this case I am satisfied that these records contain both the personal health information of the deceased subject to HIPA with respect to the physical or mental health of, and health services provided to the deceased. I am also satisfied that these records contain both general information and personal information of the deceased subject to LA FOIP.

[121] In the current instance, the Applicant, acting as personal representative of the Executor, believes that the deceased may have suffered mistreatment while under the care of RQHR or its employees, which would constitute a cause of action that the deceased would have had at the time of her death. Pursuant to section 3 of *The Survival of Actions Act*, that cause of action survives for the benefit of that person's estate. Therefore, seeking disclosure of information relating to such cause of action would appear to fall within the realm of the administration of the estate.

[122] Based upon the materials before me, I find that the appellant's request for access to these records *relates to the administration* of the deceased's estate within the meaning of sections 49 of LA FOIP and 56 of HIPA.

4. Is the Applicant entitled to the requested records under section 27(4)(e) of HIPA?

[123] In a June 30, 2005 letter, the solicitor for RQHR stated:

> [I]t is our understanding that the authority for [the Applicant's] entitlement to the personal health information and personal information of [the deceased] is found in subclause 27(4)(e)(i) and/or subsection 56(a) of HIPA and subsection 49(1) of [LA FOIP] respectively.

[124] I must note that "disclosure" is an entirely different exercise than "access" and the two must not be conflated as RQHR has done here.

[125] As I have found that the request meets the requirement of relating to the administration of the deceased's estate for the purposes of section 56(a) of HIPA, it is not necessary to consider discretionary disclosure of the record under this section.

5. Does the section 38 exemption in HIPA apply to the records?

[126] The solicitor for RQHR broadly claimed exemption for the entire contents of Package B under sections 38(1)(d)(iii) and (e) of HIPA.

[127] The relevant portion of section 38 of HIPA reads:

> **Refusing access**
>
> **38**(1) Subject to subsection (2), a trustee may refuse to grant an Applicant access to his or her personal health information if:
>
> …
>
> (d) subject to subsection (3), the information was collected and is used solely:
>
> …
>
> (iii) for the purposes of a body with statutory responsibility for the discipline of health professionals or for the quality or standards of professional services provided by health professionals;
>
> (e) the information was collected principally in anticipation of, or for use in, a civil, criminal or quasi-judicial proceeding

[128] The solicitor for RQHR argued:

> To the extent your office takes the position that these documents actually do contain personal health information, RQHR provides these documents to you to assist with your review subject to a refusal to give access to [the Applicant] based on subclause 38(1)(d)(iii) and 38(1)(e) of HIPA.
>
> …
>
> To the extent that these documents contain deliberations about the process to be followed in addressing a complaint, RQHR believes these documents do not constitute personal health information and therefore fall outside the scope of HIPA. RQHR discloses these documents to your office to assist you with your review, however pursuant to [LA FOIP] these documents remain subject to a refusal by RQHR to give access to [the Applicant] based on clauses 16(1)(a) and (b) of that Act.

> However, to the extent your office takes the position that deliberations about the process to be followed by a local authority in addressing a complaint are personal health information, we provide such documents to assist with your review, however these documents remain subject to a refusal by RQHR to give access to [the Applicant] based on subclause 38(1)(d)(iii) and 38(1)(e) of HIPA.
>
> To the extent that your office takes the position that these documents contain other personal health information of [the deceased], RQHR discloses these documents to your office to assist with your review, however these documents remain subject to a refusal by RQHR to give access to [the Applicant] based on subclause 38(1)(d)(iii) and 38(1)(e) of HIPA.

[129] While the solicitor for RQHR raised the above sections, he did not provide representations as to how the withheld information meets the criteria established within these clauses, nor did he specifically enumerate what portions of the record he was claiming these exemptions for.

[130] Most of the emails and letters in the record contain information that is not related to the actual discipline process per se or are addressed to the Applicant himself.

[131] With respect to section 38(1)(d)(iii), it appears that it is the professional regulatory bodies, not RQHR, that are charged with the mandate of ensuring that their members maintain professional competencies and are further charged with the task of discipline and investigation into professional misconduct or incompetence.[43]

[132] There appear to be no records that would qualify for exemption under section 38(1)(d)(iii), therefore this section does not apply.

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[43] Saskatchewan Registered Nurses Association, *Competence Assurance Process* available online at http://www.srna.org/competence_assurance/complaints_handling.pdf, page 1: "The Saskatchewan Registered Nurses' Association (SRNA) mandate is to ensure competent, caring, knowledge based nursing for the people of Saskatchewan. The requirement for investigation of written reports regarding the practice of graduate nurses (GNs), registered nurses (RNs), and registered nurse (nurse practitioners) RN (NPs) is provided for in Section 28(1) of *The Registered Nurses Act, 1988, Bylaws IX;* Section 3, and the *Code of Ethics*. *The Registered Nurses Act, 1988* provides direction for the process of investigation and requires SRNA Council to establish two committees – the investigation committee and the discipline committee – to deal with allegations of professional incompetence and/or professional misconduct concerning the nursing practice of any of its members."
Saskatchewan Association of Licensed Practical Nurses, *Investigation/Discipline Process* available at http://www.salpn.com/public-protectioncomplaints/investigationdiscipline-process, "The Saskatchewan Association of Licensed Practical Nurses (SALPN) is the registering, counselling and disciplining body for Licensed Practical Nurses in our province. The investigation and discipline processes, as outlined in *The Licensed Practical Nurses Act 2000* (the Act was revised on November 24, 2000 and amended in 2002) are very extensive."

[133] With respect to section 38(1)(e), RQHR provided no evidence that either civil or criminal proceedings were being undertaken at the time the access request was submitted.

[134] While the Applicant has advised that one of the reasons he required access to the records was to determine if the Estate had a cause of action arising from the circumstances surrounding his late mother's death, it cannot be argued after the fact that the information sought by the Applicant was "principally collected for use in a civil or criminal proceeding".

[135] There is some evidence (page 26, 95) that RQHR conducted an internal investigation into the conduct of nursing staff related to a complaint laid by the Applicant on November 16, 2003 (see page 83) that the care provided to his mother was not adequate. In order for section 38(1)(e) to apply, that investigation would have to qualify as a civil, criminal or quasi-judicial proceeding.

[136] Black's defines "proceeding" as follows:

> The regular and orderly progression of a lawsuit including all acts and events between the time of commencement and the entry of judgment. Any procedural means for seeking redress from a tribunal or agency. An act or step that is part of a larger action. The business conducted by a court or other official body; a hearing. [44]

[137] I adopt this definition for the purposes of section 38 of HIPA.

[138] I have found the analysis of the Newfoundland and Labrador Information and Privacy Commissioner to be of assistance in determining what qualifies as "quasi-judicial". In Report A-2005-007, the Commissioner states:

> [21] It is also useful to refer to *Administrative Law, A Treatise* (2nd ed., Volume 1, Carswell: Toronto, 1985). At pages 73 to 78 authors René Dussault and Louis Borgeat describe consultative committees and commissions of inquiry:
>
> > *As their name indicates, these committees and commissions have the responsibility of providing government with recommendations that it may need to direct its policies and which it is unable to draw upon from within its own ranks. Although, strictly speaking, they are not administrative agencies, since they have no decision-making power, the indispensable role which they play alongside the*

[44] *Supra* note 27, p. 1241.

> *Cabinet, both as privileged sources of information and advice, justifies them being considered in a general study of administrative structures….*
> *Established by commission under the Great Seal, by virtue of a general or special Act, [commissions of inquiry] have functions which may vary according to the subject matter of the inquiry. There are two major categories of commissions of inquiry which are recognized.* ***On the one hand, there are those of a generally quasi-judicial character which are responsible for examining the conduct of public officer or of a given sector of the central or decentralized administration; they are usually established following a particular event or a set of circumstances. On the other hand, there are also those which allow the government to obtain the views of the population and of interested groups on a question of administrative, economic or social policy or in a comprehensive field of the State's activities****. The official role of these commissions is to research and to formulate a global policy for an entire sector of activities; but they are also used simply to prepare the way for a policy which has been determined in advance, or to resolve a political or social controversy, to forestall eventual popular pressure or even to delay the Cabinet's analysis of a problem of relative urgency….* (emphasis added)
>
> …

[23] More recently, David Jones, Q.C. and Anne de Villars, Q.C., in *Principles of Administrative Law* (4th ed., Thomson Carswell: Scarborough, 2004), state that the recent development of "duty to be fair" has significantly narrowed the gap between quasi-judicial powers and powers that are merely administrative in nature. However, they still maintain an important distinction between a decision-making and non-decision making function. At pages 90 and 91 the authors state:

> *…Although it was previously thought that no procedural safeguards were required for the exercise of merely administrative powers, administrative law has now developed the "duty to be fair" in the method used to exercise even a merely administrative power. Accordingly, the distinction between quasi-judicial and merely administrative powers has become much less important.* ***Nevertheless, it is probably accurate to state that the further one moves from the judicial model of decision-making, the less are the procedural requirements involved in adopting a "fair" procedure for the exercise of a statutory power delegated to someone who is not a judge****.* (emphasis added)

[24] I also looked to a number of definitions of "judicial or quasi-judicial capacity." Although I am not bound by it, I found that the most useful definition, and the one that most accurately reflects the above-noted references, was provided by the Government of British Columbia in its Freedom of Information and Protection of Privacy Policy and Procedures Manual, Volume 1, available at http://www.mser.gov.bc.ca/privacyaccess/manual/toc.htm. In Part 1, Section 3 of this Manual "judicial or quasi-judicial capacity" is described as follows:

> *Generally, quasi-judicial boards and tribunals are under a duty to act in accordance with the rules of natural justice (Dictionary of Canadian Law). A person is acting in "**judicial or quasi**-judicial capacity" if he or she is required to:*
>
> - *investigate facts, hear all parties to the matters at issue, weigh evidence or draw conclusions as a basis for their action;*
> - *exercise discretion of a judicial nature; and*
> - *render a decision following the consideration of the issues rather than simply making a recommendation.* (Emphasis in original)
>
> I should note that sections 3(1)(a) and (b) of the British Columbia *Freedom of Information and Protection of Privacy Act* are, in all material respects, the same as sections 5(1)(a) and (b) of the *ATIPPA*, respectively.
>
> [25] I believe it to be clear from the Supreme Court of Canada and the textual descriptions that a judicial or quasi-judicial proceeding involves significant judicial power, including the power to make a finding of guilt or innocence, to impose sanctions or to award remedies. Key to this process is the ability to render a decision or an order. Such a process is to be distinguished from a proceeding with a mandate to investigate or to inquire into a matter and to issue recommendations in response to this investigation or inquiry. This latter process is more administrative in nature as opposed to judicial.[45]

[139] Based on the above I am disinclined to describe an internal RQHR investigation, which appears to be related to the management of personnel, as a quasi-judicial proceeding.

[140] Further, many of the records in question, or large portions of them, deal with who will respond to the Applicant, summarize conversations, or are to or from the Applicant. These records do not appear to contain information that is *collected principally in anticipation of, or for use in, a civil, criminal or quasi-judicial proceeding* or at least, RQHR has not identified which records contain such information, how the section would apply to those records or what proceeding would qualify under the section.

[141] While it appears that an internal investigation related to the Applicant's complaint was undertaken, I find that it is not a quasi-judicial proceeding. Therefore, I find that section 38(1)(e) of HIPA does not apply.

[45] Newfoundland and Labrador Information and Privacy Commissioner, Report A-2005-007 available online at http://www.oipc.nl.ca/pdf/Report2005007.pdf.

6. Does the section 16 exemption in LA FOIP apply to the records?

[142] The solicitor for RQHR argued that sections 16(1)(a) and 16(1)(b) applied to the records. In the current circumstance, those portions of the record containing personal health information as defined in HIPA are not under consideration here.

[143] Further, given section 2(m)(iv) of HIPA it is unclear how RQHR can draw a distinction between what constitutes personal health information, what constitutes personal information and what constitutes general records to which sections 16(1)(a) and (b) might apply.

[144] Irrespective of my comments above, RQHR did raise the exemptions at 16(1)(a) and (b) of LA FOIP, and as such I will consider their application to the current circumstances.

[145] Section 16(1) of LA FOIP reads, in part:

> **Advice from officials**
> **16**(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:
> (a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;
> (b) consultations or deliberations involving officers or employees of the local authority;

[146] In my Report LA-2007-001, I considered the application of section 16(1) as follows:

> [89] The analysis of section 17 of FOIP by *Geatros J. in Weidlich* and his description of "*advice*" as "*primarily the expression of counsel or opinion, favourable or unfavourable, as to action…*" is perfectly consistent with the ascribed purpose of FOIP and the Act, and with the decisions of the Ontario Court of Appeal noted earlier. With all due respect, I find that the quote he used from a 1950 Supreme Court of Canada decision and the phrase, "*…but it may, chiefly in commercial usage, signify information or intelligence*" did not form an essential element of his decision.
> [90] In addition, I rely on major developments since Weidlich that have refined the interpretation of "advice" in the context of a freedom of information and protection of privacy statute. This includes the April 3, 2006 decision of the Supreme Court of Canada to refuse leave to appeal from the Ontario Court of Appeal decision in *Ministry of Transportation v. Cropley.* I further find that, at this time, to best achieve the objectives of the Act and to ensure that the right of access is not unduly diminished by assigning an extremely broad meaning to the word "advice", I should construe "advice" in a way that is consistent with the Ontario Court of Appeal

> decisions noted above. I am further guided by a body of Supreme Court of Canada and Federal Court of Appeal decisions that highlight the limited and specific nature of exemptions generally. To interpret section 16 of the Act to allow non-disclosure by a local authority of records that contain "information or intelligence" would cast such a large blanket of secrecy over all kinds of information that public bodies routinely collect that it would seriously compromise transparency to the people of Saskatchewan.
>
> [91] In this Report I have not addressed in any significant way the words "*…proposals, recommendations, analyses or policy options*" in section 16(1)(a) of the Act. I take the view that each of these words also require more than mere information. To qualify for purposes of section 16(1)(a), the information in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Furthermore, information that would permit the drawing of accurate inferences as to the nature of the actual proposals, recommendations, analyses or policy options would also qualify for the exemption in section 16(1)(a) of the Act. [46]

[147] Utilizing the above analysis in the present circumstances, I find that the withheld information does not fit criteria enumerated at section 16(1)(a) and (b).

[148] Much of the record consists of internal communications which are simply summaries of the situation or requests as to who will be responding. The communications are logistical as opposed to substantive in nature. I see no reason to withhold those records.

[149] Portions of the withheld record consist of letters or emails that are to or from the Applicant.

[150] The Information and Privacy Commissioner for Newfoundland and Labrador has provided commentary on the subject of providing access to information originally provided by an applicant. His comments are very useful for our considerations, the Commissioner stated:

> [33] In my Report A-2009-009, while I agreed with Memorial's general statement that "other information, from which one can infer the identity of a referenced individual, must be redacted or the protection of personal information provisions would be meaningless," I disagreed with this statement where the applicant is the source of the information. Given the meaning of the word disclose as set out in *Black's Law Dictionary* and the *Concise Oxford English Dictionary*, I concluded that **providing personal information to an applicant, where there is clear and**

[46] Saskatchewan OIPC, Report LA - 2007-001 available online at: http://www.oipc.sk.ca/Reports/LA-2007-001.pdf.

> **objective evidence (for example, because the information was originally provided by the applicant) that the information and the person to whom it pertains is already known to the applicant, is not a "disclosure" within the meaning of the ATIPPA.** Therefore, there is no violation of section 30(1) in cases such as these. This is also in keeping with comments made by my predecessor in Report 2007-003.
>
> [34] Further, after review and consideration of Sullivan and Driedger on the Construction of Statutes and decisions from the British Columbia, Ontario, and Nova Scotia Information and Privacy Commissioner's offices, **I concluded that failing to provide to an applicant (as part of an access to information request) information which he or she originally provided to the public body would result in an absurdity, and legislation should be interpreted to avoid absurd results. Therefore, the meaning of "disclose" in section 30 of the ATIPPA should be interpreted to avoid the absurdity that would result should an applicant be denied access to information of which he or she was the original source.**[47]
>
> (emphasis added)

[151] I find there is no reason to withhold those portions of the record that are letters to or from the Applicant.

[152] Based on the above, I find that the section 16 exemption does not apply to any of the records in Package A. With regards to the records in Package B, I find pages 57-59, 62, 74, 75, 78-87, 89-93, 97-101, 105, 106, 108-111, 114, 115, 117 and 124 fail to meet the tests for exemption under section 16(1)(a) or section 16(1)(b).

[153] I find that pages 94, 103, 104,112, 113, 114, 120 and 123 fail to meet the tests for exemption under section 16(1)(a) or section 16(1)(b), however these pages contain personal information of third parties and must be withheld, or appropriately severed in accordance with section 28(1) which will be discussed later in this Report.

[154] I find that section 16(1)(a) applies to portions of pages 61 and 119 and may be provided to the Applicant with those portions of the record severed.

[47] Newfoundland and Labrador Information and Privacy Commissioner, Report A-2009-009 available online at http://www.oipc.nl.ca/pdf/ReportA-2009-009_MUN.pdf.

[155] I find that section 16(1)(b) applies to the entirety of pages 60, 69-71, 88, 96, 102, 107, 108 and 125, and to portions of pages 76, 77, 116, 118 and 119 and may be provided to the Applicant with those portions of the record severed.

7. Does the section 21 exemption in LA FOIP attach to the requested records?

[156] In his June 30, 2005, submission the solicitor for RQHR submitted that RQHR was exercising its discretion to deny access to records in package A based on section 21 of LA FOIP. An appendix itemizing those records being withheld under section 21 was provided along with the submission. The solicitor for RQHR submitted that section 21 applies to information characterized as:

> 1. solicitor/client correspondence and documents created by and in the possession of [the solicitor's law firm];
> 2. solicitor/client correspondence and documents in the possession of the Health Authority

[157] In his October 5, 2005 submission the solicitor for RQHR claimed that section 21 applied to the entire contents of Package B and that the record would be withheld on that basis.

[158] Section 21 of LA FOIP reads:

> **Solicitor-client privilege**
> **21** A head may refuse to give access to a record that:
> (a) contains information that is subject to solicitor-client privilege;
> (b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel; or
> (c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.

[159] Solicitor-Client Privilege was previously analyzed in my Report F-2005-002 as follows:

> [27] In the same text appears the following statement:
> *When a solicitor-client communication is once privileged, it is always privileged.*

Report 2003/004

…

[29] Mr. Rendek's discussion of section 22 in that Report is as follows:

> *The Federal Court of Appeal followed Canadian Jewish Congress v. Canada, [1996] 1 F.C. 268 (T.D.), in finding that since there was no definition of "solicitor-client privilege" in the Act, the common law definition should be followed. The Court adopted the definition of solicitor-client privilege formulated by the Exchequer Court in Susan Hosiery Ltd. v. Minister of National Revenue [1969] 2 Ex. C.R. 27, as follows:*
>
> > *(a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; and*
> >
> > *(b) all papers and materials created or obtained specifically for the lawyer's "brief" for litigation, whether existing or contemplated are privileged.*
>
> *The Court also adopted the rationale for solicitor-client privilege as enunciated by Mr. Justice Lamer (as he then was) in Descoteaux v. Mierzwinski, [1982] 1 S.C.R. 860, as follows:*
>
> > 1. *The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.*
> >
> > 2. *Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.*
> >
> > 3. *When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.*
> >
> > 4. *Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.*

The Court found that Mr. Justice Lamer advocated a very liberal approach to the scope of the privilege by extending it to include all communications made "within the framework of the solicitor-client relationship."

The Court held that whether the client is an individual, a corporation or a government body, there should be no distinction in the degree of protection offered by the rule. A government is not granted any less protection by law of solicitor-client privilege than any other client. But because it is a public body, it may have a greater incentive to waive the privilege.

…

Report 94/005

…

[34] I have also found useful the discussion of solicitor-client privilege in an adjudication order under the Alberta Freedom of Information and Protection of Privacy Act. In that order, Mr. Justice McMahon stated as follows:

The Supreme Court of Canada has recently described solicitor-client privilege as "a principle of fundamental justice and civil right of supreme importance in Canadian law": Lavallee, Rackel & Heintz v. Canada (Attorney General), 2002 SCC 61. The scope of legal privilege was examined in Stevens v. Canada, [1998] 4 F.C. 89 (C.A.). At para. 11 the Federal Court of Appeal cited Wigmore:

Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

The Court acknowledged the tension that exists when the doctrine of privilege is used to obstruct the truth finding process. Nevertheless, the need to protect the solicitor-client relationship takes priority. At para. 30, Linden J.A. properly observed:

It is essential to keep in mind that what the privilege protects is the integrity of the solicitor-client relationship. From a tactical point of view, in the context of litigation, clients should be free from the possibility that communications to their lawyers in "seeking, formulating or giving of legal advice" might be used against them. From a psychological point of view, in creating an atmosphere in which a client can be forthright and at ease, the privilege protects the relationship from the prying eyes of the state or other parties. …

…

In Legal Services Society v. British Columbia (Information and Privacy Commissioner) (1996), 140 D.L.R. (4th) 372 (B.C.S.C.), a request was made for

> *the amounts paid to a lawyer by the Legal Services Society. The Court framed the issue this way, at para. 12:*
>
> > *The question to be asked must be whether granting access to a record requested will disclose any information, directly or indirectly, that is the subject of solicitor-client privilege." [Emphasis in the original]*

[160] It is also important to recognize that due to the broad language incorporated by the Legislature in clauses (b) and (c) of section 21 that solicitor-client privilege has a broad application in this province. In that regard, I draw attention to the following from *Government Information: Access and Privacy* by McNairn and Woodbury (McNairn):

> The expanded exemption in the Saskatchewan Act covers information prepared by or for an agent of the Attorney General or legal counsel for an institution in relation to any matter involving the provision of advice or services – not necessarily of a legal nature – by the agent or counsel. This information includes correspondence between any such agent or counsel and a third party.[48]

[161] While McNairn clearly contemplates *The Freedom of Information and Protection of Privacy Act*, the analysis is entirely applicable to section 21 of LA FOIP.[49]

[162] As the withheld record contains correspondence and communications with the Applicant, I must also consider the following advice from *Stevens v. Canada (Prime Minister)* regarding what does and does not constitute a waiver of privilege:

> In essence, where the client authorizes the solicitor to reveal a solicitor-client communication, either it was never made with the intention of confidentiality or the client has waived the right to confidentiality. In either case, there is no intention of confidentiality and no privilege attaches. **For example, it has been held that documents prepared with the intention that they would be communicated to a third party, or where on their face they are addressed to a third party, are not privileged.** [50]
>
> (emphasis added)

[48] McNairn and Woodbury, *Government Information: Access and Privacy*, (Toronto: Thomson Carswell, 2005) at 3-47.
[49] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01.
[50] *Stevens v. Canada (Prime Minister)*, [1997] 2 F.C. 759

[163] RQHR's solicitor claimed section 21 to withhold pages 50-56 of Package B. In forwarding these claims the solicitor submitted:

> These documents relate to [the Applicant's] access request and do not, in the opinion of RQHR, contain the personal health information of [the deceased]. As such, RQHR believes that these documents are not within the scope of [the Applicant's] original access request of October 4, 2004. These documents are disclosed to your office to assist you with your review, however pursuant to section 21 of [LA FOIP] these documents remain subject to a refusal by RQHR to give access to [the Applicant].

[164] I find pages 50-56 fail to meet the requirements for exemption under section 21, furthermore in providing no further representations than the above as to the application of this section the solicitor has failed to meet the burden of proof.

[165] I also find that the section 21 exemption does not apply to any of the records in Package A.

8. Does information related to employment history of a third party qualify as personal information under section 23 for the purposes of section 28(1) of LA FOIP?

[166] Although not argued by RQHR, section 28(1) of LA FOIP is a mandatory exemption and must be considered by this office.

[167] Section 28(1) of LA FOIP provides:

> 28(1) No local authority shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 29.

[168] To determine whether section 28(1) applies, we must determine whether the records would be considered "personal information" as defined in LA FOIP.

[169] What is and what is not considered personal information for the purposes of LA FOIP is enumerated at sections 23(1), (2) and (3) as follows:

> **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:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) information that relates to health care that has been received by the individual or to the health history of the individual;

(d) any identifying number, symbol or other particular assigned to the individual;

(e) the home or business address, home or business telephone number, fingerprints or blood type of the individual;

(f) the personal opinions or views of the individual except where they are about another individual;

(g) correspondence sent to a local authority by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;

(h) the views or opinions of another individual with respect to the individual;

(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;

(j) information that describes an individual's finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.

…

(2) **"Personal information"** does not include information that discloses:

(a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a local authority;

(b) the personal opinions or views of an individual employed by a local authority given in the course of employment, other than personal opinions or views with respect to another individual;

(c) financial or other details of a contract for personal services;

(d) details of a licence, permit or other similar discretionary benefit granted to an individual by a local authority;

(e) details of a discretionary benefit of a financial nature granted to an individual by a local authority;

(f) expenses incurred by an individual travelling at the expense of a local authority;

(g) the academic ranks or departmental designations of members of the faculties of the University of Saskatchewan or the University of Regina; or

(h) the degrees, certificates or diplomas received by individuals from the Saskatchewan Institute of Applied Science and Technology, the University of Saskatchewan or the University of Regina.

(3) Notwithstanding clauses (2)(d) and (e), **"personal information"** includes information that:

(a) is supplied by an individual to support an application for a discretionary benefit; and

(b) is personal information within the meaning of subsection (1).

[170] I must next determine if records related to performance investigations constitute employment history for purposes of 23(1)(b) of LA FOIP.

[171] Ontario Reconsideration Order R-980015 addresses what does and does not constitute an employee's personal information as follows:

> A wide range of employment or work-related information is captured by the definition of personal information, including records relating to such things as job competitions (Orders 11, 20, 43, 97, 99, 159, 170, P-222, P-230, P-282, M-7, M-99 and M-135), **information generated in the course of investigations of improper conduct or disciplinary proceedings** (Orders 165, 170, P-256, P-326, P-447, P-448, M-120, M-121 and M-122), and specific details of individual employment arrangements with an institution (Orders 61, 170, 183,P-244, P-380, P-432, M-18, M-23, M-26, M-35, M-102, M-129 and M-141).
> …
> It is apparent from various provisions of the Act that certain employment and other work-related information is indeed, intended to fall with the scope of personal information definition. **For example, paragraph (b) of the definition in section 2(1) specifically provides that an individual's employment and education history is considered to be personal information.** This is also reflected in the presumption against disclosure of such information set out at section 21(3)(d). **Similarly, certain evaluative information in a personnel context is considered to be the personal information of the individual to whom it relates and is protected from disclosure** by the presumption at section 21(3) of the Act.
>
> …
>
> The statutory notion of **employment history** appears to relate to what might be referred to as "**personnel matters**" and should not, in my view, be construed to include every action of an individual employee which might cumulatively be said to constitute that employee's "history".[51]
>
> (emphasis added)

[172] I also considered British Columbia's Commissioner in Order 01-15 in which employment history is described as follows:

> [41] Section 22(3)(d), in relevant part, protects information related to the "employment history" of a third party. **In my view, someone's "employment history" includes information about her or his work record and reasons for leaving a job** (see, for example, Order 00-53). **It also includes information about disciplinary action taken against an employee** (see, for example, Order No. 62-1995, [1995] B.C.I.P.C.D. No. 35; and Order 00-13, [2000] B.C.I.P.C.D. No. 16). I see nothing in the withheld portions of records 5 and 7 that could even remotely be construed as information "that relates to employment ... history" of any third party.
> [42] The only withheld item in record 5 which is connected to anyone's employment in any way is the first severed line, a comment on a Ministry **employee's efforts in dealing with the applicant. It does not relate to the employee's work history**. **It**

[51] Ontario Information and Privacy Commissioner, Reconsideration Order R-980015 available online at: http://www.accessandprivacy.gov.on.ca/english/order/recon/R-980015.htm.

> **merely records action taken by that employee - information as to what was done and by whom**. Section 22(3)(d) does not apply to it. The withheld information in the middle of record 7 describes a Ministry employee's telephone call with the applicant and another employee's comment on a work-related decision by the first employee. This information does not relate to a third party's employment history. I find that it also does not fall under s. 22(3)(d).[52]
>
> (emphasis added)

[173] The Assistant Commissioner's comments in Ontario Order PO-1772 are also helpful as follows:

> The Ministry and the appellant both submit that the records contain the appellants personal information. I concur.
>
> …
>
> In support of its position, the Ministry relies on the findings of former Assistant Commissioner Irwin Glasberg in Order P-721, where he found that:
>
> > Previous orders have held that **information about an employee does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an evaluation of the employee's performance or an investigation of his or her conduct, these references are considered to be the individual's personal information**.
> >
> > **All of the records that remain at issue in this appeal were prepared by Correctional Officers during the course of discharging their professional responsibilities as employees of the Ministry. Previous orders have determined that references to a government employee contained in records created in the normal course of discharging employment responsibilities is not about the individual employee, and does not qualify as the employee's personal information** under section 2(1) of the Act (see Orders 139, 194, P-157, P-257, P-326, P-377, P-477, P-470, P-1538 and M-82 and Reconsideration Order R-980015). However, as the **Ministry points out in its representations, where the information is associated with the employee's performance or conduct, other orders have determined that this information is about the individual employee, and qualifies as the employee's personal information** (see Orders 165, 170, P-256, P-326, P-447, P-448, M-120, M-121 and M-122).[53]
> > (emphasis added)

[52] British Columbia Information and Privacy Commissioner, Order 01-15 available online at: http://www.oipc.bc.ca/orders/2001/Order01-15.html

[53] Ontario Information and Privacy Commissioner, Order PO-1772 available online at: http://www.accessandprivacy.gov.on.ca/english/order/prov/po-1772.html

[174] I adopt the considerations above in assessing if records related to performance investigations constitute employment history for purposes of 23(1)(b) of LA FOIP.

[175] Investigations into potential employee misconduct and the records created during those hearings or investigations would be considered information relating to the employment history of an identifiable individual and would thus be considered personal information under section 23(1)(b).

[176] In our current situation it appears that one employee agreed to share a copy of the letter from the regulatory body with both the employer and the applicant. While this may be the case, it would not alter the duty of the local authority to protect the personal information it holds. While an individual may choose to share personal information, the local authority must protect the personal information it holds except for those specific circumstances enumerated at section 28(2).

[177] Accordingly, I find that pages 94, 95, 103, and 104 contain personal information of third parties and must be withheld in their entirety. I find that portions of pages 112, 113, 116, 120 and 123 contain personal information of third parties and must be severed in accordance with section 28(1) of LA FOIP.

V FINDINGS

[178] I find that the Applicant is acting as the personal representative of the Executor with the same rights and limitations as the Executor in accordance with sections 56(a) of HIPA and 49(a) of LA FOIP.

[179] I find the rights accorded a personal representative are restricted by what may constitute the administration of an estate, which would, in appropriate circumstances, permit the disclosure of personal information / personal health information relating to the death of an individual to their executor.

[180] I find that the Applicant's request for access to records *relates to the administration* of the deceased's estate within the meaning of sections 49(a) of LA FOIP and 56(a) of HIPA.

[181] As I find that the request meets the requirement of relating to the administration of the deceased's estate for the purposes of section 56(a) of HIPA, it is not necessary to consider discretionary disclosure of the record under section 27(4)(e)(ii) of HIPA.

[182] I find that an adequate search for the responsive records within RQHR's possession/custody or control has not been undertaken.

[183] I find that the records regarding performance investigations of RQHR employees are the personal information of those RQHR employees in accordance with section 23 of LA FOIP.

[184] I find that RQHR failed its duty to assist in both not communicating clearly with the Applicant and in not conveying the appropriate information to the Applicant.

[185] In light of the foregoing, I conclude that RQHR failed to meet the duty to assist under HIPA and LA FOIP.

[186] While it appears that a performance investigation or hearing was held, I find that it is not a quasi-judicial proceeding. Therefore, I find that section 38(1)(e) of HIPA does not apply.

[187] I find there is no reason to withhold those portions of the record that are letters to or from the Applicant.

[188] Based on the above, I find that the section 16 exemption does not apply to any of the records in Package A. With regards to the records in Package B, I find pages 57-59, 62, 74, 75, 78-87, 89-93, 97-101, 105, 106, 108-111, 114, 115, 117 and 124 fail to meet the tests for exemption under section 16(1)(a) or section 16(1)(b).

[189] I find that pages 94, 103, 104, 112, 113, 114, 120 and 123 fail to meet the tests for exemption under section 16(1)(a) or section 16(1)(b), however these pages contain personal information of third parties and must be withheld, or appropriately severed in accordance with section 28(1).

[190] I find that section 16(1)(a) of LA FOIP applies to portions of pages 61 and 119 and may be provided to the Applicant with those portions of the record severed.

[191] I find that section 16(1)(b) of LA FOIP applies to the entirety of pages 60, 69-71, 88, 96, 102, 107, 108 and 125, and to portions of pages 76, 77, 116, 118 and119 and may be provided to the Applicant with those portions of the record severed.

[192] I find pages 50-56 fail to meet the requirements for exemption under section 21 of LA FOIP. Furthermore, in providing no further representations than the above as to the application of this section, RQHR has failed to meet the burden of proof.

[193] I also find that the section 21 of LA FOIP exemption does not apply to any of the records in Package A.

[194] Accordingly, I find that pages 94, 95, 103, and 104 contain personal information of third parties and must be withheld in their entirety. I find that portions of pages 112, 113, 116, 120 and 123 contain personal information of identifiable individuals and must be severed in accordance with section 28(1) of LA FOIP.

VI RECOMMENDATIONS

[195] I recommend that RQHR reassess the fashion in which it addresses requests for access to information under HIPA and LA FOIP as well as the manner in which it communicates with Applicants.

[196] I recommend that a further and more comprehensive search for responsive records be undertaken by RQHR.

[197] I recommend that RQHR release Package A to the Applicant.

[198] As section 16(1)(a) of LA FOIP applies to portions of pages 61 and 119 I recommend they be provided to the Applicant with those portions of the record severed.

[199] As section 16(1)(b) of LA FOIP applies to the entirety of pages 60, 69-71, 88, 96, 102, 107, 108 and 125 I recommend those pages be withheld by RQHR.

[200] As section 16(1)(b) of LA FOIP applies to portions of pages 76, 77, 116, 118 and119 I recommend they may be provided to the Applicant with those portions of the record severed.

[201] As pages 50-56 fail to meet the requirements for exemption under section 21 of LA FOIP, I recommend they be released to the Applicant.

[202] As pages 94, 95, 103, and 104 contain personal information of third parties, I recommend that they be withheld in their entirety.

[203] As portions of pages 112, 113, 114, 116, 120 and 123 contain personal information of third parties, I recommend they be severed in accordance with section 28(1) of LA FOIP and be provided to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 17th day of December, 2009.

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