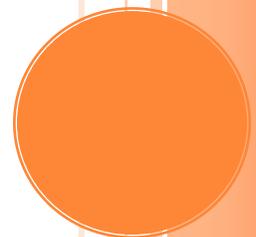


# IPC GUIDE TO EXEMPTIONS

*For FOIP and LA FOIP*

The following is a tool that provides guidance on the application of access related provisions, including exemptions, found in The Freedom of Information and Protection of Privacy Act (FOIP) and The Local Authority Freedom of Information and Protection of Privacy Act (LA FOIP). The guidance provided is non-binding and every matter should be considered on a case-by-case basis. In some instances, public bodies may wish to seek legal advice.



# IPC Guide to Exemptions

*For FOIP and LA FOIP*

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## Acknowledgments

We wish to thank the Ministry of Justice for their time and expertise in the development of this document.

This document could not have been created without the many resources published by other Information and Privacy Commissioners Office's across the country and other government publications to which we extend our gratitude.

## About the Guide

The tests, criteria and interpretations established in this guide reflect the precedence set by the current and/or former Information and Privacy Commissioners in Saskatchewan through the issuing of Review Reports. Where this office has not previously considered a section of FOIP or LA FOIP, we look to other jurisdictions. This includes consideration of other IPC Orders, Reports and/or other relevant resources. In addition, court decisions from across the country are relied upon. This guide will be updated regularly to reflect any changes in precedence.

When using this guide, ensure you are always working with the most current version. We will update the footer to reflect the last update. Using the electronic version directly from our website will ensure you are always using the most current version.

## MANDATORY EXEMPTIONS

Exemptions under FOIP and LA FOIP can be **mandatory** or **discretionary** depending on the wording of the provision. Mandatory exemptions are introduced with the wording “A head shall refuse...” This indicates that there is no option but to refuse access to the information. There are some “shall” provisions, however, which contain certain conditions under which the public body can still release the information. For example, subsection 13(1) provides that the public body “shall refuse to give access” unless the government or institution from which the information was obtained gives consent or makes the information public.

### 1. Records from other governments (s. 13 of FOIP/s. 13 of LA FOIP)

FOIP	LA FOIP
<p><b>13(1)</b> A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:</p> <ul style="list-style-type: none"> <li>(a) the Government of Canada or its agencies, Crown corporations or other institutions;</li> <li>(b) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;</li> <li>(c) the government of a foreign jurisdiction or its institutions; or</li> <li>(d) an international organization of states or its institutions;</li> </ul> <p>unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.</p> <p>(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from a local authority as defined in the regulations.</p>	<p><b>13(1)</b> A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:</p> <ul style="list-style-type: none"> <li>(a) the Government of Canada or its agencies, Crown corporations or other institutions;</li> <li>(b) the Government of Saskatchewan or a government institution;</li> <li>(c) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;</li> <li>(d) the government of a foreign jurisdiction or its institutions; or</li> <li>(e) an international organization of states or its institutions;</li> </ul> <p>unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.</p> <p>(2) A head may refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from another local authority or a similar body in another province or territory of Canada.</p>

Subsection 13(1) is a mandatory class-based exemption (see [Class-based versus Harm-based Exemptions](#)). The provision is meant to protect information received in confidence both formally and informally from other governments or organizations unless those governments or organizations consented to release of the information or made it public.

Public bodies should determine whether there is consent to release the information or if the information has been made public by the organization to which the information was obtained.

Subsection 13(2) is a discretionary class-based exemption and does not contemplate consent or information being made public.

### **13(1)(a)/13(1)(a)**

This exemption covers information obtained in confidence, implicitly or explicitly from the Government of Canada. It includes its agencies, Crown corporations or other institutions.

Both parts of the following test must be met:

1. Was the information obtained from the Government of Canada or its agencies, Crown corporations or other institutions?

For some assistance, Schedule 1 (Section 3) of the federal [Access to Information Act](#) (ATIA) provides a list of federal government institutions.

Section 13 uses the term “information contained in a record” rather than “a record” like other exemptions. Therefore, the exemption can apply to information contained within a record that was authored by the public body provided the information at issue was obtained from the Government of Canada.

**Obtained** means to acquire in any way; to get possession of; to procure or to get a hold of by effort.

A public body could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the Government of Canada. However, to obtain information suggests that the public body did not create it.

2. Was the information obtained **implicitly or explicitly in confidence**?

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

The expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. ([Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland, Gary Kachanoski, 2014 CanLII 55800 \(NL SCTD\)](#))

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

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the public body or the party that provided the information?
- Was the information treated consistently in a manner that indicated a concern for its protection by the public body and the party that provided the information from the point it was obtained until the present time?
- Is the information available from sources to which the public has access?
- Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? **Mutual understanding** means that the public body and the party that provided the information both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.

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

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

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the public body and the party that provided the information;
- The fact that the public body requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.

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

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

### **LA FOIP 13(1)(b)**

This exemption covers information obtained by a local authority in confidence, implicitly or explicitly from the government of Saskatchewan or a government institution.

Both parts of the following test must be met:

1. Was the information obtained from the government of Saskatchewan or a government institution?

For some assistance, Appendix Part 1 of the [FOIP Regulations](#) provides a list of bodies that qualify as government institutions.

Section 13 uses the term “information contained in a record” rather than “a record” like other exemptions. Therefore, the exemption can apply to information within a record that was authored by the local authority provided the information at issue was obtained from the Government of Saskatchewan or a Saskatchewan government institution.

**Obtained** means to acquire in any way; to get possession of; to procure or to get a hold of by effort.

A local authority could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the Government of Saskatchewan. However, to obtain information suggests that the local authority did not create it.

2. Was the information obtained ***implicitly or explicitly in confidence***?

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

The expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. ([Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland, Gary Kachanoski, 2014 CanLII 55800 \(NL SCTD\)](#))

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

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the provincial government or the local authority?
- Was the information treated consistently in a manner that indicated a concern for its protection by the provincial government and the local authority from the point it was obtained until the present time?
- Is the information available from sources to which the public has access?
- Does the local authority have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? ***Mutual understanding***, in this context, means that the local authority and the provincial government both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have

been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.

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

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

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the local authority and the provincial government;
- The fact that the local authority requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.

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

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

### **13(1)(b)/13(1)(c)**

This exemption covers information obtained in confidence, implicitly or explicitly from another provincial or territorial government in Canada. It includes its agencies, Crown corporations or other institutions.

Both parts of the following test must be met:

1. Was the information obtained from the government of another province or territory of Canada?

Section 13 uses the term “information contained in a record” rather than “a record” like other exemptions. Therefore, the exemption can include information within a record that was authored by the public body provided the information at issue was obtained from the government of another province or territory of Canada.

**Obtained** means to acquire in any way; to get possession of; to procure or to get a hold of by effort.

A public body could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the government of another province or territory of Canada. However, to obtain information suggests that the public body did not create it.

2. Was the information obtained ***implicitly or explicitly in confidence?***

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

The expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. ([\*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland, Gary Kachanoski\*, 2014 CanLII 55800 \(NL SCTD\)](#))

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

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the public body or the party that provided the information?
- Was the information treated consistently in a manner that indicated a concern for its protection by the public body and the party that provided the information from the point it was obtained until the present time?
- Is the information available from sources to which the public has access?
- Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? ***Mutual understanding***, in this context, means that the public body and the party that provided the information both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.

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

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

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the public body and the party that provided the information;

- The fact that the public body requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.

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

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

### **13(1)(c)/13(1)(d)**

This exemption covers information obtained in confidence, implicitly or explicitly from the government of a foreign jurisdiction.

Both parts of the following test must be met:

1. Was the information obtained from the government of a foreign jurisdiction?

A **foreign jurisdiction** refers to a government or its institutions of any foreign nation or state outside of Canada.

Section 13 uses the term “information contained in a record” rather than “a record” like other exemptions. Therefore, the exemption can include information within a record that was authored by the public body provided the information at issue was obtained from the government of a foreign jurisdiction.

**Obtained** means to acquire in any way; to get possession of; to procure or to get a hold of by effort.

A public body could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the government of a foreign jurisdiction. However, to obtain information suggests that the public body did not create it.

2. Was the information obtained **implicitly or explicitly in confidence**?

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

The expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. ([\*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland, Gary Kachanoski\*, 2014 CanLII 55800 \(NL SCTD\)](#))

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

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the public body or the party that provided the information?
- Was the information treated consistently in a manner that indicated a concern for its protection by the public body and the party that provided the information from the point it was obtained until the present time?
- Is the information available from sources to which the public has access?
- Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? ***Mutual understanding***, in this context, means that the public body and the party that provided the information both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist in addition.

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

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

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the public body and the party that provided the information;
- The fact that the public body requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.

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

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

### **13(1)(d)/13(1)(e)**

This exemption covers information obtained in confidence, implicitly or explicitly from international organizations of states or its institutions.

Both parts of the following test must be met:

1. Was the information obtained from an international organization of states or its institutions?

An **international organization of states** refers to any organization with members representing and acting under the authority of the governments of two or more states. Examples include the United Nations and the International Monetary Fund. (Service Alberta, *FOIP Guidelines and Practices*, 2009 at p. 162)

Section 13 uses the term “information contained in a record” rather than “a record” like other exemptions. Therefore, the exemption can include information within a record that was authored by the public body provided the information at issue was obtained from the international organization of states.

**Obtained** means to acquire in any way; to get possession of; to procure or to get a hold of by effort.

A public body could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the international organization of states. However, to obtain information suggests that the public body did not create it.

2. Was the information obtained **implicitly or explicitly in confidence**?

**In confidence** usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained *in confidence* means that the provider of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the public body and the party providing the information. The expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. ([\*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland, Gary Kachanoski\*, 2014 CanLII 55800 \(NL SCTD\)](#))

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

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the public body or the party that provided the information?
- Was the information treated consistently in a manner that indicated a concern for its protection by the public body and the party that provided the information from the point it was obtained until the present time?
- Is the information available from sources to which the public has access?
- Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? **Mutual understanding**, in this context, means that the public body and the party that provided the information both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the

information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.

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

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

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the public body and the party that provided the information;
- The fact that the public body requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.

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

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

## FOIP 13(2)

Subsection 13(2) of FOIP is a discretionary class-based exemption (see [Class-based versus Harm-based Exemptions](#)). The provision is meant to protect information obtained by a government institution in confidence, implicitly or explicitly from a local authority.

Both parts of the following test must be met:

1. Was the information obtained from a local authority?

For some assistance, the FOIP Regulations subsection 2(2) points to the definition of a “local authority” found in subsection 2(f) of LA FOIP.

Section 13 uses the term “information contained in a record” rather than “a record” like other exemptions. Therefore, the exemption can include information within a record that was authored by the public body provided the information at issue was obtained from a local authority.

**Obtained** means to acquire in any way; to get possession of; to procure or to get a hold of by effort.

A public body could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the local authority. However, to obtain information suggests that the public body did not create it.

2. Was the information obtained implicitly or explicitly in confidence?

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

The expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. ([\*Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland, Gary Kachanoski\*, 2014 CanLII 55800 \(NL SCTD\)](#))

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

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the public body or the local authority?
- Was the information treated consistently in a manner that indicated a concern for its protection by the public body and the local authority from the point it was obtained until the present time?
- Is the information available from sources to which the public has access?
- Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? ***Mutual understanding***, in this context, means that the public body and the local authority both had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.

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

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

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between the public body and the local authority;

- The fact that the public body requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.

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

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

## LA FOIP 13(2)

Subsection 13(2) of LA FOIP is a discretionary class-based exemption (see [Class-based versus Harm-based Exemptions](#)). The provision is meant to protect information obtained by a local authority in confidence, implicitly or explicitly from another local authority in Saskatchewan or a similar body in another province or territory in Canada.

Both parts of the following test must be met:

1. Was the information obtained from another local authority or a similar body in another province or territory of Canada?

For some assistance, the definition of a Saskatchewan “local authority” can be found at subsection 2(f) of LA FOIP.

Section 13 uses the term “information contained in a record” rather than “a record” like other exemptions. Therefore, the exemption can include information within a record that was authored by the public body provided the information at issue was obtained from a Saskatchewan local authority or a similar body in another province or territory of Canada.

**Obtained** means to acquire in any way; to get possession of; to procure or to get a hold of by effort.

A public body could obtain information either intentionally or unintentionally. It can also include information that was received indirectly provided its original source was the other local authority. However, to obtain information suggests that the public body did not create it.

2. Was the information obtained implicitly or explicitly in confidence?

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

The expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. ([Corporate Express Canada, Inc. v. The President and Vice Chancellor of Memorial University of Newfoundland, Gary Kachanoski, 2014 CanLII 55800 \(NL SCTD\)](#))

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

Factors to consider when determining whether information was obtained in confidence *implicitly* include (not exhaustive):

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by both parties?
- Was the information treated consistently in a manner that indicated a concern for its protection by both parties from the point it was obtained until the present time?
- Is the information available from sources to which the public has access?
- Do either of the local authorities have any internal policies or procedures that speak to how records, such as the one in question, are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? **Mutual understanding**, in this context, means that both parties had the same understanding regarding the confidentiality of the information at the time it was provided. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been obtained in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist.

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

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

Factors to consider when determining if information was obtained in confidence *explicitly* include (not exhaustive):

- The existence of an express condition of confidentiality between both parties;
- The fact that the local authority requested the information be provided in a sealed envelope and/or outlined its confidentiality intentions prior to the information being provided.

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

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

## 2. Cabinet documents (s. 16 of FOIP)

### FOIP

**16(1)** A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

- (a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;
- (b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees;
- (c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;
- (d) records that contain briefings to members of the Executive Council in relation to matters that:
  - (i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or
  - (ii) are the subject of consultations described in clause (c).

(2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:

- (a) the record has been in existence for more than 25 years; or
- (b) consent to access is given by:
  - (i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or
  - (ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

Subsection 16(1) is a mandatory class-based exemption (see [Class-based versus Harm-based Exemptions](#)). Subsections 16(1)(a) through (d) are not an exhaustive list. Therefore, even if none of the subsections are found to apply, the introductory wording of 16(1) must still be considered. In other words, is the information a confidence of Executive Council?

**Executive Council** consists of the Premier and Cabinet Ministers. Executive Council is also referred to as “Cabinet” (Government of Saskatchewan, Cabinet Secretariat, Executive Council, *Executive Government Processes and Procedures in Saskatchewan: A Procedures Manual*, 2007, at p. 16). Treasury Board is a committee of the Executive Council and is therefore also captured by the exemption. (Review Report 041-2015 at [8])

**Cabinet confidences** can generally be defined as:

...in the broadest sense, the political secrets of Ministers individually and collectively, the disclosure of which would make it very difficult for the government to speak in unison before Parliament and the public.

(*Federal Access to Information and Privacy Legislation Annotated 2015* (Canada: Thomas Reuters Canada Limited, 2014) at page 1-644.4.)

In Review Report 016-2015, the Commissioner found that information in Transition Briefing Binders that was already publicly available did not qualify for the exemption.

### 16(1)(a)

Records that contain advice, proposals, recommendations, analyses or policy options developed from sources outside of the Executive Council for presentation to the Executive Council is intended to be covered by the provision.

**Advice** includes the analysis of a situation or issue that may require action and the presentation of options for future action.

**Recommendations** relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.

**Proposals and analyses or policy options** are closely related to advice and recommendations and refer to the concise setting out of the advantages or disadvantages of particular courses of action.

Some examples include:

- an agenda, minute or other record that documents matters addressed by Cabinet (e.g. a list of issues tabled at Cabinet that reflects the priorities of Cabinet);
- a letter from Cabinet or a Cabinet committee that relates to the discussion or consideration of an issue or problem, or that reflects a decision made but not made public (e.g. a letter from Treasury Board to a ministry executive stating a decision that affects the ministry's budget but which has not been announced);
- a briefing note placed before Cabinet or one of its committees;
- a memo from a deputy minister to an assistant deputy minister in a ministry that informs them when Cabinet will consider an issue;
- a briefing note from a deputy minister to a minister concerning a matter that is or will be considered by Cabinet;
- a draft or final Cabinet submission; and
- draft legislation or regulations.

A draft memorandum that was created for the purpose of presenting proposals and recommendations to Cabinet but that was never actually presented to Cabinet remains a confidence. Equally, a memorandum in final form is a confidence even if it has not been presented to Cabinet.

### 16(1)(b)

Agendas, minutes of agenda meetings or the deliberations or decisions of Cabinet and/or its committees are covered by this provision. This includes drafts of these documents and any notes which officials may make during the meetings.

**Deliberation** means the act of weighing and examining the reasons for and against a contemplated act or course of conduct. It also includes an examination of choices of direction or means to accomplish an objective (Service Alberta, *FOIP Guidelines and Practices, 2009* at pages 173 to 175).

### 16(1)(c)

This provision protects records used for, or records that reflect, consultations amongst members of the Executive Council on matters relating to the making of government decisions or the formulation of government policy.

A **consultation** in this context occurs when one or more members of Executive Council discuss matters related to making government decisions or formulating government policy.

**16(1)(d)**

In order for this provision to apply, the records must contain briefings and be intended for Executive Council. In addition, subsections 16(1)(d)(i) or (ii) must apply. The purpose for which the record was prepared is key.

An important qualifier here is that the records must be for the purpose of briefing a minister in relation to matters before Cabinet or for use in a discussion with other ministers ([The Access to Information Act and Cabinet confidences: A Discussion of New Approaches](#), 1996, at p. 11).

In Review Report 016-2015, the Commissioner found that information in Transition Briefing Binders that was already publicly available did not qualify for the exemption.

See above for a definition of **Executive Council**.

**16(1)(d)(i)**

The record must be before or be proposed to be brought before the Executive Council or its committees.

**16(1)(d)(ii)**

The record must be the subject of consultations as described in subsection 16(1)(c) above.

A **consultation** in this context occurs when one or more members of Executive Council discuss matters related to making government decisions or formulating government policy.

**16(2)**

Subsection 16(2) of FOIP requires disclosure of cabinet documents where:

- the record has been in existence for more than 25 years; or
- consent to release is given by the President of the Executive Council or in absence of the President, the next senior member of Executive Council.

However, if the record contains personal information, the rules around disclosure under section 30 of FOIP still apply:

- personal information of a deceased individual shall not be disclosed until 25 years after the death of the individual.
- the head may disclose the personal information to the next of kin before 25 years if in the head’s opinion disclosure would not constitute an unreasonable invasion of privacy.

**3. Third party information (s. 19 of FOIP/s. 18 of LA FOIP)**

FOIP	LA FOIP
<p><b>19(1)</b> Subject to Part V and this section, a head shall refuse to give access to a record that contains:</p> <p>(a) trade secrets of a third party;</p> <p>(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a</p>	<p><b>18(1)</b> Subject to Part V and this section, a head shall refuse to give access to a record that contains:</p> <p>(a) trade secrets of a third party;</p> <p>(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to the local</p>

<p>government institution by a third party;</p> <p>(c) information, the disclosure of which could reasonably be expected to:</p> <ul style="list-style-type: none"> <li>(i) result in financial loss or gain to;</li> <li>(ii) prejudice the competitive position of; or</li> <li>(iii) interfere with the contractual or other negotiations of;</li> </ul> <p>a third party;</p> <p>(d) a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution;</p> <p>(e) a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution; or</p> <p>(f) information supplied by a third party to support an application for financial assistance mentioned in clause (e).</p> <p>(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.</p> <p>(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:</p> <ul style="list-style-type: none"> <li>(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and</li> <li>(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any: <ul style="list-style-type: none"> <li>(i) financial loss or gain to;</li> <li>(ii) prejudice to the competitive position of; or</li> <li>(iii) interference with contractual or other negotiations of;</li> </ul> </li> </ul> <p>a third party.</p>	<p>authority by a third party;</p> <p>(c) information, the disclosure of which could reasonably be expected to:</p> <ul style="list-style-type: none"> <li>(i) result in financial loss or gain to;</li> <li>(ii) prejudice the competitive position of; or</li> <li>(iii) interfere with the contractual or other negotiations of;</li> </ul> <p>a third party; or</p> <p>(d) a statement of a financial account relating to a third party with respect to the provision of routine services from a local authority.</p> <p>(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.</p> <p>(3) Subject to Part V, a head may give access to a record that contains information described in clauses (1)(b) to (d) if:</p> <ul style="list-style-type: none"> <li>(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and</li> <li>(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any: <ul style="list-style-type: none"> <li>(i) financial loss or gain to;</li> <li>(ii) prejudice to the competitive position of; or</li> <li>(iii) interference with contractual or other negotiations of;</li> </ul> </li> </ul> <p>a third party.</p>
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FOIP defines a **third party** as a person, including an unincorporated entity, other than an applicant or a government institution.

LA FOIP defines a **third party** as a person, including an unincorporated entity, other than an applicant or a local authority.

Section 19/18 is intended to protect the business interests of third parties and to ensure that public bodies are able to maintain the confidentiality necessary to effectively carry on business with the private sector. Although public bodies need to be open and accountable, they also need to conduct business and enter into business relationships and in doing so they must be able to assure their private sector partners that their trade secrets and commercial and financial secrets

will not be readily disclosed to competitors and the general public (NT IPC Review Report 04-043). However, this is balanced against the need for public accountability in the expenditure of public funds. Third parties must understand that certain information regarding how the public body meets its financial obligations will be made public.

If the public body determines that the information qualifies as third party information and it intends to withhold it, it should ask the third party if it consents to the release of the information pursuant to subsection 19(2)/18(2). Consent should be in writing.

### **19(1)(a)/18(1)(a)**

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

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

[\(Merck Frosst Canada Ltd. v. Canada \(Health\) \(2012\)\)](#)

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

If the public body determines that the information qualifies as a trade secret and it intends to withhold it, it should ask the third party if it consents to the release of the information pursuant to subsection 19(2)/18(2). Consent should be in writing.

In [Canadian Bank Note Limited v. Saskatchewan Government Insurance, \(2016\)](#), Justice Zarzeczny found that unit prices in a contract between the public body and a third party did not qualify as a trade secret.

### **19(1)(b)/18(1)(b)**

All three parts of the following test must be met:

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

**Financial information** is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investments strategies, budgets, and profit and loss statements. The financial information must be specific to a particular party that must demonstrate a proprietary interest or right of use of the financial information.

**Commercial information** is information relating to the buying, selling or exchange of merchandise or services.

Types of information included in the definition of commercial information:

- offers of products and services a third-party business proposes to supply or perform;

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

In Review Report 031-2015, the Commissioner found that a third party's entire proposal package in response to a public body's Request for Proposal (RFP) constituted commercial information.

In Review Report 229-2015, the Commissioner found that unit prices in a contract between SGI and a third party qualified as commercial information of the third party. This was later upheld by Justice Zarzeczny in [\*Canadian Bank Note Limited v. Saskatchewan Government Insurance\*, \(2016\)](#).

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

**Technical information** is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics...it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information ([\*Consumers' Co-Operative Refineries Limited v. Regina \(City\)\*, \(2016\)](#)).

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

2. Was the information supplied by the third party to a public body?

The requirement that it be shown that the information was supplied to the public body reflects the purpose of section 19(1)/18(1) of protecting the informational assets of third parties.

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

Records can still be “supplied” even when they originate with the public body (i.e. the records still may contain or repeat information extracted from documents supplied by the third party). For FOIP, information can be “supplied” as long as the third party provided the information to “a” government institution. However, LA FOIP requires that the information be “supplied” to “the” local authority.

The content, rather than the form of the information, is the important factor.

The contents of a contract involving the public body and a third party will not normally qualify as having been supplied by a third party. The provisions of a contract, in general, have been treated as *mutually generated*, rather than supplied by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. There are two exceptions to this general rule:

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

In Review Report 054-2015 and 055-2015, the Commissioner found that unit pricing in a Form of Tender as part of a Request for Proposal (RFP) process was supplied by the third parties involved.

In Review Report 229-2015, the Commissioner found that unit pricing in a contract between the public body and a third party was not supplied by the third party but was part of the negotiated terms of the contract (mutually generated). Justice Zarzeczny, considering the facts and circumstances in the de novo appeal, however, determined that it was supplied [\*Canadian Bank Note Limited v. Saskatchewan Government Insurance, \(2016\)\*](#). The Commissioner continues to consider unit prices on a case by case basis.

In Review Reports 007-2015, 195-2015 and 196-2015, the Commissioner found that the estimated hours, hourly rates and estimated cost per consultant were not supplied by the third parties but were negotiated terms of contracts (mutually generated).

Where the public body collects information by their own observation, as in the case of an inspection, the information they obtain in that way will not be considered as having been supplied by the third party.

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

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

Also, in order for subsection 19(1)(b) of FOIP to apply, a public body must show that both parties intended the information be held in confidence at the time the information was supplied (Review Reports 158-2016 and 203-2016).

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

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

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

- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the third party or public body?
- Was the information treated consistently in a manner that indicated a concern for its protection by the third party and the public body from the point at which it was supplied until the present time?
- Is the information available from sources to which the public has access?
- Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentially?
- Was there a mutual understanding that the information would be held in confidence? **Mutual understanding** means that the public body and the third party both had the same understanding regarding the confidentiality of the information at the time it was supplied. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been supplied in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist in addition.

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

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

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

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

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

Simply labelling documents as “confidential” does not, on its own, make the documents confidential (i.e. confidentiality stamps or standard automatic confidentiality statements at

the end of emails). It is just one factor that we consider when determining whether the information was explicitly supplied in confidence.

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

Again, there must be a reasonable and objective basis for the confidentiality.

### **19(1)(c)/18(1)(c)**

For this provision to apply there must be objective grounds for believing that disclosing the information would result in the harm alleged. The parties do not have to prove that a harm is probable, but need to show that there is a “reasonable expectation of harm” if any of the information were to be released.

For all of the subsections of this provision, all three parts of the following test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the harm which is alleged?
2. Is the harm caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of the harm genuine and conceivable?

Public bodies and third parties should not assume that the harms are self-evident. Particularity in describing the harm is needed to support the application of the provision.

In Review Reports 007-2015, 195-2015 and 196-2015, the Commissioner found that the risk of being underbid by competitors for future contracts did not meet the threshold for this provision. Releasing costs will increase the chances that the public body will obtain fair bids and a competitive bidding process.

### **19(1)(c)(i)/18(1)(c)(i)**

For this provision to apply there must be objective grounds for believing that disclosing the information would result in an undue loss or gain measured in monetary or monetary-equivalent terms (e.g. loss of revenue, loss of corporate reputation or loss of good will).

### **19(1)(c)(ii)/18(1)(c)(ii)**

For this provision to apply there must be objective grounds for believing that disclosing the information would prejudice or cause detriment to the competitive position of a third party.

### **19(1)(c)(iii)/18(1)(c)(iii)**

To interfere with contractual or other negotiations means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving a third party.

The exemption could apply to ongoing or future negotiations. Completed negotiations are not normally subject to the exemption unless there is a good probability that the particular strategies will be used in the future and the disclosure of the information relating to the completed negotiations would reveal these strategies (Service Alberta, *FOIP Guidelines and Practices*, 2009 at p. 107).

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

### **19(1)(d)/18(1)(d)**

This exemption has not been considered yet by the OIPC. Once considered, the guide will be updated accordingly.

### **19(1)(e)**

Both parts of the following test must be met:

1. Is the record a statement of financial assistance related to the third party?

A *statement of financial assistance* means a document showing credits and debits. The exemption does not include records that merely list a company as having received a loan. It must include other details such as credits and debits in order to meet the definition of a statement of financial assistance.

2. Was the statement provided to the third party by a prescribed Crown corporation?

See the Appendix, Part I of the [FOIP Regulations](#) for prescribed Crown corporations.

### **19(1)(f)**

A test for this provision has not yet been established by the OIPC. Once established, the guide will be updated accordingly.

### **19(2)/18(2)**

If the public body determines that the information qualifies as third party information and it intends to withhold it, it should ask the third party if it consents to the release of the information pursuant to subsection 19(2)/18(2). Consent should be in writing.

### **19(3)/18(3)**

A public body should consider subsection 19(3) when dealing with third party information. A public body should first determine that the information is indeed third party information pursuant to one of the subsections outlined at 19(1)/18(1).

Both parts of the following test must be met:

1. Is disclosure in the public interest as it relates to public health, public safety or protection of the environment?

For determining whether disclosure is in the *public interest*, the following factors can be considered:

- Will records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:
  - Have others besides the Applicant sought or expressed an interest in the records? Are there other indicators that the public has or would have an interest in the records?

- Is the Applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:
    - Do the records relate to a personal conflict between the Applicant and the public body? What is the likelihood the Applicant will disseminate the contents of the records in a manner that will benefit the public?
  - If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government? The following may be relevant:
    - Do the records contain information that will show how the public body reached or will reach a decision? Are the records desirable for the purpose of subjecting the activities of the public body to scrutiny? Will the records shed light on an activity of the public body that have been called into question?
2. Would public interest outweigh in importance any financial loss or gain to or prejudice the competitive position of the third party?

In Review Report 043-2015, the Commissioner found that subsection 19(3) of FOIP applied to certain information supplied by the third party that was contained in an environmental report. In this finding, the Commissioner took into consideration that legislation existed that required the third party to supply the information to the public body.

## DISCRETIONARY EXEMPTIONS

Discretionary exemptions are introduced with the wording “A head may refuse...” This indicates that the public body has the option to withhold or release the information. The head should exercise his/her discretion when deciding whether to apply the exemption.

### 1. Information injurious to intergovernmental relations or national defence (s.14 of FOIP)

#### FOIP

14 A head may refuse to give access to a record, the release of which could reasonably be expected to prejudice, interfere with or adversely affect:

- (a) relations between the Government of Saskatchewan and another government; or
- (b) the defence or security of Canada or of any foreign state allied or associated with Canada.

*Prejudice* in this context refers to detriment to intergovernmental relations or national defence.

To *interfere* with means to obstruct or make much more difficult.

To *adversely affect* is to have unfavorable or negative impacts or to impair in some way.

For this provision to apply there must be objective grounds for believing that disclosing the information would result in the harm alleged. The public body does not have to prove that the harm is probable, but needs to show that there is a “reasonable expectation of harm” if any of the information or records were to be released.

For both subsections of this provision, all three parts of the following test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the harm which is alleged?
2. Is the harm caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of the harm genuine and conceivable?

Public bodies should not assume that the harms are self-evident. Particularity in describing the harm is needed to support the application of the provision.

#### 14(a)

The term *relations* in this context are intended to cover both formal negotiations and more general exchanges and associations between the Government of Saskatchewan and other governments.

#### 14(b)

*Defence of Canada* means any activity or plan relating to the defence of Canada, including improvements in the nation’s ability to resist attack.

A **foreign state** refers to the government of any foreign nation or state, including the component state governments of federated states.

An **allied state** is one with which Canada has concluded formal alliances or treaties.

An **associated state** is one with which Canada may be linked for trade or other purposes outside the scope of a formal alliance.

## 2. Law enforcement and investigations (s. 15 of FOIP/s. 14 of LA FOIP)

FOIP	LA FOIP
<p><b>15(1)</b> A head may refuse to give access to a record, the release of which could:</p> <ul style="list-style-type: none"> <li>(a) prejudice, interfere with or adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;</li> <li>(a.1) prejudice, interfere with or adversely affect the detection, investigation or prevention of an act or omission that might constitute a terrorist activity as defined in the <i>Criminal Code</i>;</li> <li>(b) be injurious to the enforcement of:               <ul style="list-style-type: none"> <li>(i) an Act or a regulation; or</li> <li>(ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada;</li> </ul> </li> <li>(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;</li> <li>(d) be injurious to the Government of Saskatchewan or a government institution in the conduct of existing or anticipated legal proceedings;</li> <li>(e) reveal investigative techniques or procedures currently in use or likely to be used;</li> <li>(f) disclose the identity of a confidential source of information or disclose information furnished by that source with respect to a lawful investigation or a law enforcement matter;</li> <li>(g) deprive a person of a fair trial or impartial adjudication;</li> <li>(h) facilitate the escape from custody of an individual who is under lawful detention;</li> <li>(i) reveal law enforcement intelligence information;</li> <li>(j) facilitate the commission of an offence or tend to</li> </ul>	<p><b>14(1)</b> A head may refuse to give access to a record, the release of which could:</p> <ul style="list-style-type: none"> <li>(a) prejudice, interfere with or adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;</li> <li>(a.1) prejudice, interfere with or adversely affect the detection, investigation or prevention of an act or omission that might constitute a terrorist activity as defined in the <i>Criminal Code</i>;</li> <li>(b) be injurious to the enforcement of:               <ul style="list-style-type: none"> <li>(i) an Act or a regulation;</li> <li>(ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; or</li> <li>(iii) a resolution or bylaw;</li> </ul> </li> <li>(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;</li> <li>(d) be injurious to the local authority in the conduct of existing or anticipated legal proceedings;</li> <li>(e) reveal investigative techniques or procedures currently in use or likely to be used;</li> <li>(f) disclose the identity of a confidential source of information or disclose information furnished by that source with respect to a lawful investigation or a law enforcement matter;</li> <li>(g) deprive a person of a fair trial or impartial adjudication;</li> <li>(h) facilitate the escape from custody of an individual who is under lawful detention;</li> <li>(i) reveal law enforcement intelligence</li> </ul>

<p>impede the detection of an offence;</p> <p>(k) interfere with a law enforcement matter or disclose information respecting a law enforcement matter;</p> <p>(l) reveal technical information relating to weapons or potential weapons; or</p> <p>(m) reveal the security arrangements of particular vehicles, buildings or other structures or systems, including computer or communication systems, or methods employed to protect those vehicles, buildings, structures or systems.</p> <p>(2) Subsection (1) does not apply to a record that:</p> <p>(a) provides a general outline of the structure or programs of a law enforcement agency; or</p> <p>(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.</p>	<p>information;</p> <p>(j) facilitate the commission of an offence or tend to impede the detection of an offence;</p> <p>(k) interfere with a law enforcement matter or disclose information respecting a law enforcement matter;</p> <p>(l) reveal technical information relating to weapons or potential weapons; or</p> <p>(m) reveal the security arrangements of particular vehicles, buildings or other structures or systems, including computer or communication systems, or methods employed to protect those vehicles, buildings, structures or systems.</p> <p>(2) Subsection (1) does not apply to a record that:</p> <p>(a) provides a general outline of the structure or programs of a law enforcement agency; or</p> <p>(b) reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.</p>
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**Investigation** has been defined, in general, as a systematic process of examination, inquiry and observation. For purposes of this exemption, investigations may be police, security or administrative investigations. Further, the public body must have authority to conduct the investigation and the investigation must lead or could lead to penalties or sanctions (i.e. fines, imprisonment, revocation of a license, an order to cease activities) (Service Alberta, *FOIP Guidelines and Practices*, 2009, at p. 145). The penalties or sanctions do not have to be imposed by the investigating body to qualify, but can be referred to another body to impose the penalty or sanction.

**Law enforcement and investigations** can include a police, security or administrative investigation or a combination of these.

**Security investigations** would not include investigations conducted in accordance with a public body’s policies. In order to qualify, the investigation must lead or could lead to a penalty or sanction imposed under a statute, regulation, bylaw or resolution.

An **administrative investigation** refers to activities undertaken to enforce compliance or to remedy non-compliance with standards, duties and responsibilities imposed by statute or regulation. For example, investigations under [The Securities Act, 1988](#) as the Act provides for such investigative powers. A **regulation** is understood to mean a regulation as defined by section 2 of [The Interpretation Act, 1995](#)

Subsection 15(1)/14(1) contains both class-based and harms-based exemptions. For the harms-based exemptions, subsection 15(1) uses “could” rather than “could reasonably be expected to” as seen in other harms-based exemptions in FOIP/LA FOIP.

**Could** versus **could reasonably be expected** to have different requirements. The requirement for *could* is simply that the release of information *could* have the specified result. The threshold test for a *reasonable expectation* is somewhat higher.

For all subsections of this provision that contemplate a particular harm, all three parts of the following test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the harm which is alleged?
2. Is the harm caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of the harm genuine and conceivable?

Public bodies should not assume that the harms are self-evident. Particularity in describing the harm is needed to support the application of the provision.

### **15(1)(a)/14(1)(a)**

For this provision to apply there must be objective grounds for believing that disclosing the information could result in the harm alleged. See the three part test above for assessing the harm alleged.

*Prejudice* in this context refers to detriment to the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention.

*Interfere with* includes hindering or hampering an ongoing investigation and anything that would detract from an investigator's ability to pursue the investigation.

*Adversely affect* in this context refers to hurt, injury or impairment to the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention.

A *prosecution* in this context refers to proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Saskatchewan or Canada and may include regulatory offences that carry true penal consequences such as imprisonment or a significant fine (ON Order PO-3424-I at [27]).

*Security* generally means a state of safety or physical integrity (Ibid p. 155).

*Centre of lawful detention* is a centre where persons are detained when suspected of a crime, awaiting trial or sentencing, found to be an illegal immigrant or youthful offender, or for political reasons. It can also include a centre where persons are in custody under federal or provincial statute.

### **15(1)(a.1)/14(1)(a.1)**

For this provision to apply there must be objective grounds for believing that disclosing the information could result in the harm alleged. See the three part test above for assessing the harm alleged.

See the definitions for *prejudice*, *interfere with* or *adversely affect* in subsection 15(1)(a) above.

*Terrorist activity* is defined at section 83.01 of the [Criminal Code](#) of Canada.

### **15(1)(b)/14(1)(b)**

All three parts of the following test must be met:

1. Which Act or regulation is the public body identifying as being engaged?

The main question is: “*under which investigative power was this investigation conducted?*” If the public body can't advance any Acts or Regulations in force in any part of Canada under which the investigation was conducted, the exemption cannot be claimed.

For subsection 15(1)(b)(ii)/14(1)(b)(ii) a '*law of Canada*' encompasses all Acts enacted by the Parliament of Canada together with any regulations issued thereunder.

2. Is this an enforcement matter specific to an Act?

**Enforcement** is the act or process of compelling compliance with a law, mandate, command, decree, or agreement.

3. Could release of the record injure enforcement of the Act or regulation?

**Injury** implies damage or detriment. The harm threshold is designed to protect law enforcement while preserving the public's right of access to some types of law enforcement information.

There must be objective grounds for believing that disclosing the information could result in injury. See the three part test above for assessing the harm alleged.

### 15(1)(c)/14(1)(c)

Both parts of the following test must be met:

1. Does the public body's activity qualify as a “lawful investigation”?

A **lawful investigation** is an investigation that is authorized or required and permitted by law.

The public body should identify the legislation under which the investigation is occurring.

2. Does one of the following exist?

- a. The release of information would interfere with a lawful investigation, **or**

**Interfere with** includes hindering or hampering an ongoing investigation and anything that would detract from an investigator's ability to pursue the investigation (Service Alberta, *FOIP Guidelines and Practices*, 2009 at p. 152).

There must be objective grounds for believing that disclosing the information could result in interference. See the three part test above for assessing the harm alleged.

- b. The release of information would disclose information with respect to a lawful investigation.

It is only necessary for the public body to demonstrate that the information in the record is information with respect to a lawful investigation to meet this part of the test.

In Review Report 223-2016, the Commissioner found that subsection 15(1)(c) of FOIP did not apply to pipeline audit forms created two years prior to the commencement of the investigation.

Records caught by this exemption should relate to the process of the investigation itself. Records that existed before the investigation commenced, such as regular reporting information, would not qualify. Public bodies should consider the unique circumstances in each case. There may be circumstances where the exemption would apply to such records.

### **15(1)(d)/14(1)(d)**

Both parts of the following test must be met:

1. Do the proceedings qualify as existing or anticipated legal proceedings?

**Legal proceedings** are proceedings governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment of a court or a ruling by a tribunal. Legal proceedings include all proceedings authorized or sanctioned by law, and brought or instituted in a court or legal tribunal, for the acquiring of a right or the enforcement of a remedy. To qualify for this exemption, the legal proceedings must be “existing or anticipated”.

2. Could disclosure of the records be injurious to the public body in the conduct of the legal proceedings?

**Injury** implies damage or detriment. The exemption is designed to protect the public body from harm in its existing or anticipated legal proceedings.

There must be objective grounds for believing that disclosing the information could result in injury. See the three part test above for assessing the harm alleged.

Discovery and disclosure provisions of [\*The Queen’s Bench Rules\*](#) of Saskatchewan operate independent of any process under FOIP or LA FOIP. Subsection 4(c) of FOIP and LA FOIP establishes that the Act(s) do not limit access to information otherwise available by law to parties to litigation. Section 4 also establishes that the Act(s) complement and do not replace existing procedures for access to records. Therefore, the injury should be above and beyond any prejudice that relates to the production of a relevant, non-privileged document in the usual course of a lawsuit.

The Commissioner considered this subsection in Review Report 223-2015 and 224-2015. In that case, the Commissioner found the exemption applied. The applicant was not a party to the litigation.

### **15(1)(e)/14(1)(e)**

Both parts of the following test must be met:

1. Does the information in question constitute “investigative techniques” or “procedures”?

**Investigative techniques and procedures** means techniques and procedures used to conduct an investigation or inquiry for the purpose of law enforcement.

- The techniques or procedures must include specific steps. General information (such as forms and standard policies that do not include specific investigative steps and procedures) would not qualify;
- Routine, common or customary investigative techniques and procedures would not qualify; and

- Generally known investigative techniques and procedures which the public is already aware of would not qualify.

It does not include well-known investigative techniques, such as wire-tapping, fingerprinting and standard sources of information about individuals' addresses, personal liabilities, real property, etc.

If a technique or procedure is generally known to the public, disclosure would not normally compromise its effectiveness.

2. Are the investigative techniques and/or procedures currently in use or likely to be used?

The exemption is more likely to apply to new technologies in electronic monitoring or surveillance equipment used for a law enforcement purpose. The exemption extends to techniques and procedures that are likely to be used, in order to protect techniques and technology under development and new equipment or procedures that have not yet been used.

### 15(1)(f)/14(1)(f)

One of the following parts of the test must be met:

1. Does the information disclose the identity of a confidential source? **or**

A **confidential source** is someone who has provided information with the assurance that his or her identity will remain secret. There must be evidence of the circumstances in which the information was provided to establish whether the source is confidential.

2. Would disclosure reveal information that was provided by the confidential source with respect to a lawful investigation or law enforcement matter?

- Must establish the source of the information qualifies as a confidential source; and
- The information must relate to a lawful investigation and/or law enforcement matter [see definitions for **lawful investigation** and **law enforcement matter** at subsections 15(1)(c),(b) and (k)].

### 15(1)(g)/14(1)(g)

**Person** includes an individual, a corporation, a partnership and the legal representatives of a person.

**Fair trial** refers to a hearing by an impartial and disinterested tribunal that renders judgment only after consideration of the evidence, the facts, the applicable law and arguments from the parties.

**Impartial adjudication** means a proceeding in which the parties' legal rights are safeguarded and respected.

This exemption applies not only to civil and criminal court actions but also to proceedings before tribunals established to adjudicate individual and collective rights. Examples of proceedings before tribunals include hearings before the Labour Relations Board, and hearings of human rights panels.

In applying the exemption, the public body must present specific arguments about how and why disclosure of the information in question could deprive a person of the right to a fair trial or

hearing. Commencement of a legal action is not by itself enough to support the application of this exemption (Service Alberta, *FOIP Guidelines and Practices*, 2009 at p. 153).

### **15(1)(h)/14(1)(h)**

**Lawfully detained** means being held in custody pursuant to a valid warrant or other authorized order. Persons lawfully detained would include:

- persons in custody under federal or provincial statute;
- young persons in open or secure custody or pre-trial detention under the [Youth Criminal Justice Act](#) (YCJA);
- persons involuntarily committed to psychiatric institutions;
- individuals remanded in custody (charged but not yet tried or convicted); and
- parole violators held under a warrant.

In order to apply this exemption, the public body must establish that disclosure of the information could facilitate an escape from custody (Service Alberta, *FOIP Guidelines and Practices*, 2009 at p. 154). An example of information protected by this exemption is the building plans for a correctional facility.

### **15(1)(i)/14(1)(i)**

The information must qualify as law enforcement intelligence information.

See section 15(1)(k) for the definition of **law enforcement**.

**Intelligence information** is information that has been secretly or covertly gathered in furtherance of police or other penal investigations and/or prosecutions.

It is distinct from compiled information that is identifiable and part of the investigation of a specific occurrence, such as information collected as part of a regular investigation, such information would not qualify as intelligence information.

### **15(1)(j)/14(1)(j)**

This provision permits a public body to refuse to disclose information that would be of use in committing a crime or impede the detection of a crime. Examples include information about techniques, tools and instruments used for criminal acts, names of individuals with permits for guns, the location of police officers, and the location of valuable assets belonging to a public body (Service Alberta, *FOIP Guidelines and Practices*, 2009 at p. 154).

### **15(1)(k)/14(1)(k)**

Both parts of the following test must be met:

1. Does the public body's activity qualify as a "law enforcement matter"?

**Law enforcement** includes:

- i) policing, including criminal intelligence operations, or
- ii) investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which lead to or could lead to a penalty or sanction being imposed under the enactment.

2. Does one of the following exist?

- a. The release of information would interfere with a lawful investigation, **or**

*Interfere with* includes hindering or hampering an ongoing investigation and anything that would detract from an investigator's ability to pursue the investigation.

There must be objective grounds for believing that disclosing the information could result in interference. See the three part test above for assessing the harm alleged.

- b. The release of information would disclose information with respect to a law enforcement matter.

It is necessary for the public body to demonstrate that the information in the record is information with respect to a law enforcement matter to meet this part of the test.

### 15(1)(l)/14(1)(l)

This provision enables a public body to refuse to disclose information that could be expected to make the applicant or others aware of technical information relating to weapons or to materials that have the potential to become weapons. For example, this exemption would cover information on how to make a bomb.

### 15(1)(m)/14(1)(m)

One of the following parts of the test must be met:

1. Does the information reveal security arrangements (of particular vehicles, buildings, other structures or systems)? **or**

*Security* generally means a state of safety or physical integrity. The security of a building includes the safety of its inhabitants or occupants when they are present in it. Examples of information relating to security include methods of transporting or collecting cash in a transit system, plans for security systems in a building, patrol timetables or patterns for security personnel, and the access control mechanisms and configuration of a computer system (Service Alberta, *FOIP Guidelines and Practices*, 2009 at p. 155).

2. Does the information reveal security methods employed to protect the particular vehicles, buildings, other structures or systems?

The public body must demonstrate that the information in the record is information that would reveal security methods employed to protect particular vehicles, buildings, other structures or systems to meet this part of the test.

### 15(2)/14(2)

A public body cannot rely on subsection 15(1)/14(1) for a record that:

- Provides a general outline of the structure or program of a law enforcement agency; or
- Reports, by means of statistical analysis or otherwise, on the degree of success achieved in a law enforcement program.

### 3. Documents of a local authority (s. 15 of LA FOIP)

#### LA FOIP

**15(1)** A head may refuse to give access to a record that:

- (a) contains a draft of a resolution or bylaw; or
- (b) discloses agendas or the substance of deliberations of meetings of a local authority if:
  - (i) an Act authorizes holding the meetings in the absence of the public; or
  - (ii) the matters discussed at the meetings are of such a nature that access to the records could be refused pursuant to this Part or Part IV.

(2) Subject to section 29, a head shall not refuse to give access pursuant to subsection (1) to a record where the record has been in existence for more than 25 years.

#### 15(1)(a)

**Draft** means a version of the resolution, bylaw that has not been finalized for consideration in public by the local authority.

A **resolution** means a formal expression of opinion or will of an official body or public assembly, adopted by a vote of those present. The term is usually employed to denote the adoption of a motion such as an expression of opinion, a change to rules or a vote of support or censure.

A **bylaw** means a rule adopted by a local public body with bylaw-making powers, such as a municipal council.

#### 15(1)(b)

This provision is intended to enable the local authority to freely and privately debate contentious issues. The provision protects the agendas or the substance of the deliberations of the meetings.

#### 15(1)(b)(i)

All three parts of the following test must be met:

1. Has a meeting of a council, board, commission or other body or a committee of one of them taken place?
2. Does a statute authorize the holding of the meeting in the absence of the public?

The question to ask is whether the purpose of the meeting was to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.

3. Would disclosure of the record reveal the agenda or substance of the deliberations of the meeting?

A **deliberation** is a discussion or consideration of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

**Substance** generally means more than just the subject or basis of the meeting. Rather, it is the essential or material part of the deliberations themselves.

Records that would permit the drawing of accurate inferences with respect to the substance of the deliberations of the meeting could also qualify.

A local authority seeking to rely on this exemption must establish that the local authority's meeting in question was a properly constituted *in camera* meeting. Further, provide information concerning when the *in camera* meeting was held and details of the subject matter or substance of the deliberations of the meeting.

The content of *in camera* minutes (i.e. what matters were discussed), views council members expressed about those matters and how they voted would generally be caught by the exemption.

The names of attendees, the dates and times of the meeting, the date the minutes were adopted and signed and who certified the minutes as correct would generally not reveal the substance of deliberations.

The Commissioner considered this subsection in Review Report 128-2015 and found that subsection 120(2)(b) of *The Municipalities Act* provided Council with the ability to hold a closed meeting in that case. However, it did not provide adequate information to meet the third part of the test. The Commissioner found that subsection 15(1)(b)(i) of LA FOIP did not apply to the record.

### **15(1)(b)(ii)**

This provision is meant to protect the agendas and/or the substance of deliberations of meetings of a local authority where the nature of the information discussed is subject to another exemption under Part III of LA FOIP or is personal information subject to privacy protections under Part IV. In other words, the provision is meant to protect the fact that the local authority even deliberated about the matters or had the matters on its agenda for discussion.

For example, a local enforcement issue arising from a complaint from the community could contain the personal information of the individual subject to the enforcement. The fact that the enforcement issue involving the individual was even discussed at a Village meeting or that it was on the agenda could be captured by this provision. In addition, the outcome of the deliberations could be considered part of the substance of the deliberations and therefore could also be captured by the exemption.

In order to qualify, the local authority must demonstrate that the agenda and/or substance of the deliberations would qualify for one or more of the exemptions under Part III or that the information could be refused pursuant to Part IV (protection of privacy).

### **15(2)**

Subsection 15(1) does not apply a record that has been in existence for more than 25 years.

However, for records containing personal information of a deceased individual, the local authority must follow section 29 of LA FOIP (Personal information of deceased individual) when making a determination on release.

#### 4. Advice from officials (s. 17 of FOIP/s. 16 of LA FOIP)

FOIP	LA FOIP
<p><b>17(1)</b> Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:</p> <ul style="list-style-type: none"> <li>(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;</li> <li>(b) consultations or deliberations involving:                             <ul style="list-style-type: none"> <li>(i) officers or employees of a government institution;</li> <li>(ii) a member of the Executive Council; or</li> <li>(iii) the staff of a member of the Executive Council;</li> </ul> </li> <li>(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;</li> <li>(d) plans that relate to the management of personnel or the administration of a government institution and that have not yet been implemented;</li> <li>(e) contents of draft legislation or subordinate legislation;</li> <li>(f) agendas or minutes of:                             <ul style="list-style-type: none"> <li>(i) a board, commission, Crown corporation or other body that is a government institution; or</li> <li>(ii) a prescribed committee of a government institution mentioned in subclause (i); or</li> </ul> </li> <li>(g) information, including the proposed plans, policies or projects of a government institution, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.</li> </ul> <p>(2) This section does not apply to a record that:</p> <ul style="list-style-type: none"> <li>(a) has been in existence for more than 25 years;</li> <li>(b) is an official record that contains a</li> </ul>	<p><b>16(1)</b> Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:</p> <ul style="list-style-type: none"> <li>(a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;</li> <li>(b) consultations or deliberations involving officers or employees of the local authority;</li> <li>(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the local authority, or considerations that relate to those negotiations;</li> <li>(d) plans that relate to the management of personnel or the administration of the local authority and that have not yet been implemented; or</li> <li>(e) information, including the proposed plans, policies or projects of the local authority, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.</li> </ul> <p>(2) This section does not apply to a record that:</p> <ul style="list-style-type: none"> <li>(a) has been in existence for more than 25 years;</li> <li>(b) is an official record that contains a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;</li> <li>(c) is the result of product or environmental testing carried out by or for a local authority, unless the testing was conducted:                             <ul style="list-style-type: none"> <li>(i) as a service to a person, a group of persons or an organization other than the local authority, and for a fee; or</li> <li>(ii) as preliminary or experimental tests for the purpose of:                                     <ul style="list-style-type: none"> <li>(A) developing methods of testing; or</li> <li>(B) testing products for possible</li> </ul> </li> </ul> </li> </ul>

<p>statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;</p> <p>(c) is the result of product or environmental testing carried out by or for a government institution, unless the testing was conducted:</p> <p>(i) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or</p> <p>(ii) as preliminary or experimental tests for the purpose of:</p> <p>(A) developing methods of testing; or</p> <p>(B) testing products for possible purchase;</p> <p>(d) is a statistical survey;</p> <p>(e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal; or</p> <p>(f) is:</p> <p>(i) an instruction or guide-line issued to the officers or employees of a government institution; or</p> <p>(ii) a substantive rule or statement of policy that has been adopted by a government institution for the purpose of interpreting an Act or regulation or administering a program or activity of a government institution.</p> <p>(3) A head may refuse to give access to any report, statement, memorandum, recommendation, document, information, data or record, within the meaning of section 10 of <i>The Evidence Act</i>, that, pursuant to that section, is not admissible as evidence in any legal proceeding.</p>	<p>purchase;</p> <p>(d) is a statistical survey;</p> <p>(e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal; or</p> <p>(f) is:</p> <p>(i) an instruction or guide-line issued to the officers or employees of a local authority; or</p> <p>(ii) a substantive rule or statement of policy that has been adopted by a local authority for the purpose of interpreting an Act, regulation, resolution or bylaw or administering a program or activity of the local authority.</p> <p>(3) A head may refuse to give access to any report, statement, memorandum, recommendation, document, information, data or record, within the meaning of section 10 of <i>The Evidence Act</i>, that, pursuant to that section, is not admissible as evidence in any legal proceeding.</p>
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**17(1)(a)/16(1)(a)**

The exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice.

All three parts of the following test must be met:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

**Advice** includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice has a broader meaning than recommendations.

**Recommendations** relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.

**Proposals, analyses and policy options** are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.

Therefore, advice is the course of action put forward, while analyses refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.

2. The advice, recommendations, proposals, analyses and/or policy options must:
  - i) be either sought, expected, or be part of the responsibility of the person who prepared the record; and
  - ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and
  - iii) involve or be intended for someone who can take or implement the action.

The information does not have to have arrived at the person who can take or implement the action in order to qualify as advice, recommendations, proposals, analyses and/or policy options.

Drafts and redrafts of advice, recommendations, proposals, analyses and/or policy options would also be protected by the exemption.

3. Was the advice, recommendations, analyses and/or policy options developed by or for the public body?

For information to be developed by or for a public body, the person developing the information should be an official, officer or employee of the public body, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the public body. The role of the individuals involved should be explained by the public body.

For FOIP, the information must have been developed by or for a government institution or a member of Executive Council.

For LA FOIP, the information must have been developed by or for **the** local authority.

The provision is not meant to protect the bare recitation of facts, without anything further.

The exemption does not generally apply to records or parts of records that in themselves reveal only the following:

- that advice was sought or given;

- that particular persons were involved in the seeking or giving of advice; or
- that advice was sought or given on a particular topic or at a particular time.

In cases where this is an exception, the public body must demonstrate why.

In Review Report 042-2015, the Commissioner found that Excel Workbooks that contained only raw numerical data did not qualify as advice because there was no written context setting out the advantages or disadvantages or references to any particular courses of action. The Commissioner found that this provision is meant to protect actual advice, not the information that is used to formulate the advice.

### **17(1)(b)/16(1)(b)**

The provision is meant to permit public bodies to consider options and act without constant public scrutiny.

A *consultation* occurs when the views of one or more officers or employees of the public body are sought as to the appropriateness of a particular proposal or suggested action.

A *deliberation* is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

In order to qualify, the opinions solicited during a consultation or deliberation must:

- i) be either sought, expected, or be part of the responsibility of the person who prepared the record; and
- ii) be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

Public bodies should identify those individuals involved in the consultations or deliberations, include the job title of each, list organization affiliation and clarification as to each individuals role in the decision making process. For FOIP, the consultations and/or deliberations must involve:

- officers or employees of a government institution;
- a member of Executive Council (see definition at section 16 above); or
- the staff of a member of the Executive Council.

For LA FOIP, the consultations and/or deliberations must involve individuals that are officers or employees of the local authority.

The provision is not meant to protect the bare recitation of facts, without anything further.

The exemption does not generally apply to records or parts of records that in themselves reveal only the following:

- that a consultation or deliberation took place at a particular time;
- that particular persons were involved; or
- that a particular topic was involved.

In cases where this is an exception, the public body must demonstrate why.

In Review Report 042-2015, the Commissioner found that Excel Workbooks that contained only raw numerical data did not fit the definition of a consultation or deliberation.

### **17(1)(c)/16(1)(c)**

The provision covers positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the public body. It also covers considerations related to the negotiations. Examples of the type of information that could be covered by this exemption are the various positions developed by public body negotiators in relation to labour, financial and commercial contracts.

All three parts of the following test must be met:

1. Does the record contain positions, plans, procedures, criteria, instructions **or** considerations that relate to the contractual or other negotiations?

A **plan** is a formulated and especially detailed method by which a thing is to be done; a design or scheme.

**Positions and plans** refer to information that may be used in the course of negotiations.

**Procedures, criteria, instructions and considerations** are much broader in scope, covering information relating to the factors involved in developing a particular negotiating position or plan.

2. Were they developed for the purpose of contractual or other negotiations?

The contractual or other negotiations can be concluded, ongoing or future negotiations.

3. Were the contractual or other negotiations being conducted by or on behalf of a public body?

For FOIP, this can include an individual government institution or the Government of Saskatchewan as a whole and an outside party.

For LA FOIP, this can include the local authority applying the exemption and an outside party.

In Review Report 258-2016, the Commissioner found that subsection 16(1)(c) of LA FOIP was intended to capture negotiations involving a local authority and an outside party. It did not include internal negotiations with employees.

### **17(1)(d)/16(1)(d)**

This provision covers plans relating to the internal management of public bodies, including information about the relocation or reorganization of government departments and agencies, as well as reorganization of local authorities.

All three parts of the following test must be met:

1. Does the record contain a plan(s)?

A **plan** is a formulated and especially detailed method by which a thing is to be done; a design or scheme.

2. Does the plan(s) relate to:

i) The management of personnel? **or**

**Management of personnel** refers to all aspects of the management of human resources of a public body that relate to the duties and responsibilities of employees. This includes staffing requirements, job classification, recruitment and selection, employee salary and benefits, hours and conditions of work, leave management, performance review, training, separation and layoff. It also includes the management of personal service contracts (i.e. contracts of service) but not the management of consultant, professional or other independent contractor contracts (i.e. contracts for service).

ii) The administration of the public body?

**Administration of a public body** comprises all aspects of a public body's internal management, other than personnel management, that are necessary to support the delivery of programs and services. Administration includes business planning, financial operations, and contract, property, information, and risk management.

3. Has the plan(s) been implemented by the public body?

**Implementation** means the point when the implementation of a decision begins. For example, if a public body decides to go forward with an internal budget cut or restructuring of departments, implementation commences when this plan of action is communicated to its organizational units.

In order for the third part of the test to be met, the plan(s) cannot yet have been implemented.

For FOIP, the plans can relate to a government institution and not just the one relying on the exemption.

For LA FOIP, the plans can relate only to the local authority relying on the exemption.

### **17(1)(e)**

This provision is only available under FOIP and protects the contents of draft legislation or regulations. No similar exemption exists in LA FOIP.

**Draft legislation or subordinate legislation** refers to preliminary versions of legislative instruments, such as draft Acts or regulations. A regulation is often referred to as subordinate legislation.

### **17(1)(f)**

The provision is intended to protect agendas and/or meeting minutes as they relate to decision-making within the bodies listed. The government institution must demonstrate that the agenda or minutes are those of one of the bodies noted in the provision and it can only be applied to the records of that body.

Both parts of the following test must be met:

1. Is the record an agenda of a meeting or minutes of a meeting?

2. Was it a meeting of a:

i. a board, commission, Crown corporation or other body that is a government institution? **or**

(see the *Appendix* at Part I of the [FOIP Regulations](#) for bodies that qualify)

- ii. a committee of a board, commission, Crown corporation or other body that is a government institution as prescribed in the [FOIP Regulations](#)?

In Review Report 157-2016, the Commissioner found that subsection 17(1)(f)(ii) of FOIP requires that the committee be prescribed in the *FOIP Regulations*. However, there are no committees prescribed in the *Regulations*.

### 17(1)(g)/16(1)(e)

This provision allows public bodies to prevent premature disclosure of a policy or budgetary decision. Once a policy or budgetary decision has been taken and is being implemented, the information can no longer be withheld under this exemption. A decision has been implemented once those expected to carry out the activity have been authorized and instructed to do so.

Both parts of the following test must be met:

1. Is it information of a government institution (for LA FOIP – a local authority)?

The public body must demonstrate that the information is of a government institution (for LA FOIP – the local authority) in order for the exemption to apply.

The information does not have to be a plan, policy or project to qualify for the exemption. The information can include plans, policies or projects but also other types of information. The public body should describe what the information is.

**Plans** are a formulated and especially detailed method by which a thing is to be done; a design or scheme.

A **policy** is a course or principle of action adopted or proposed by an organization or individual.

A **project** is an enterprise carefully planned to achieve a particular aim.

2. Could disclosure reasonably be expected to result in disclosure of a pending policy or budgetary decision?

The public body must tie the information in the record to the pending policy or budgetary decision that could be disclosed.

In Review Report 042-2015, the Commissioner found that Excel Workbooks that contained only raw numerical data did not qualify for this exemption because the public body had indicated that it had not yet finalized a particular policy and was considering a range of potential actions.

### 17(2)/16(2)

Subsection 17(2)/16(2) provides some specific cases where the exemptions in 17(1)/16(1) do not apply. Subject to section 30 (personal information of deceased individuals), subsections 17(1)/16(1) do not apply to records:

- in existence for more than 25 years;
- records that are an official record containing a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;

This provision makes it clear that subsection 17(1)/16(1) cannot be used to withhold formal judgments, including reasons for reaching those judgments. The provision applies when the decision has already been made and is not merely contemplated.

**Reasons for decision** mean the motive, rationale, justification or facts leading to a decision.

**Exercise of discretionary power** refers to making a decision that cannot be determined to be right or wrong in an objective sense.

**Adjudicative function** means a function conferred upon an administrative tribunal, board or other non-judicial body or individual that has the power to hear and rule on issues involving the rights of people and organizations. Examples would be a school board hearing an appeal under Part V of [\*The Education Act, 1995\*](#), or a hearing by a review board.

Reasons for decisions of this type cannot be withheld under subsections 17(1)/16(1) despite the fact that the decisions may contain advice or recommendations prepared by or for a minister or a public body.

- is the result of product or environmental testing carried out by or for the public body, unless the testing was conducted:
  - as a service to a person, a group of persons or an organization other than a government institution or local authority, and for a fee; or
  - as preliminary or experimental tests for the purpose of:
    - developing methods of testing; or
    - testing products for possible purchase.

Examples include test results of commercial products and soil testing. Subsection 17(1)/16(1) may apply if the testing was done for the purpose of developing methods of testing, for example, the development of a new methodology for recycling tires. It also covers test results where testing was done by a public body in order to determine whether or not to purchase a product.

- is a statistical survey;

**Statistical surveys** are general views or considerations of subjects using numerical data.

Where a statistical survey appears with information that can be withheld under subsection 17(1)/16(1), the exempted information should be severed and the statistical survey released.

An example of a statistical survey would be a study of growth rates in various forested areas of northern Saskatchewan. Such a study could not be withheld under 17(1)/16(1) even though it may be part of a larger document dealing with reform of forestry law, regulation or policy.

- is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal; or

**Background research** encompasses a wide range of study, review and fieldwork aimed at analyzing and presenting an overview of issues.

Subsection 17(2)/16(2) applies to research that is scientific (conducted according to the principles of objective research) or technical (based on a particular technique or craft) and directed toward policy formulation. In order for information to be considered background research under this provision, it must be connected with the development of some specific policy. This would clearly be the case if, for example, a policy proposal referred directly to the research on which the proposal was based.

Normally the research methodology, data and analysis cannot be withheld under subsection 17(1)/16(1). However, advice and recommendations contained in the same record as the background research or prepared separately by or for a public body or a minister could be withheld.

- is:
  - an instruction or guide-line issued to the officers or employees of a public body;  
  
Information used by officials in interpreting legislation, regulations or policy cannot be withheld under subsection 17(1)/16(1). Generally, an official or employee in a position to provide interpretation or policy direction will have issued the instruction or guideline.
  - a substantive rule or statement of policy that has been adopted by a public body for the purpose of interpreting an Act, regulation, resolution or bylaw or administering a program or activity of the public body.

Basic interpretations of the law, regulations and policy under which a public body operates its programs and activities cannot be withheld under subsection 17(1)/16(1). The public should have access to any manual, handbook or other guideline used in the decision-making processes that affect the public.

### **17(3)/16(3)**

Subsection 17(3)/16(3) provides that the head may refuse to give access to any report, statement, memorandum, recommendation, document, information, data or record, within the meaning of section 10 of [The Evidence Act](#) that is not admissible as evidence in any legal proceeding.

Section 10 of [The Evidence Act](#) pertains to evidence given before quality improvement committees.

**Committee** means a committee designated as a quality improvement committee by a health services agency to carry out a quality improvement activity the purpose of which is to examine and evaluate the provision of health services.

**Legal proceeding** means any civil proceeding or inquiry in which evidence is or may be given, and includes a proceeding for the imposition of punishment by way of fine, penalty or imprisonment to enforce an Act or a regulation made pursuant to an Act.

Refer to section 10 of [The Evidence Act](#) for more guidance.

## 5. Economic and other interests (s. 18 of FOIP/s. 17 of LA FOIP)

FOIP	LA FOIP
<p><b>18(1)</b> A head may refuse to give access to a record that could reasonably be expected to disclose:</p> <ul style="list-style-type: none"> <li>(a) trade secrets;</li> <li>(b) financial, commercial, scientific, technical or other information: <ul style="list-style-type: none"> <li>(i) in which the Government of Saskatchewan or a government institution has a proprietary interest or a right of use; and</li> <li>(ii) that has monetary value or is reasonably likely to have monetary value;</li> </ul> </li> <li>(c) scientific or technical information obtained through research by an employee of a government institution, the disclosure of which could reasonably be expected to deprive the employee of priority of publication;</li> <li>(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the Government of Saskatchewan or a government institution;</li> <li>(e) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;</li> <li>(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;</li> <li>(g) information, the disclosure of which could reasonably be expected to be injurious to the ability of the Government of Saskatchewan to manage the economy of Saskatchewan; or</li> <li>(h) information, the disclosure of which could reasonably be expected to result in an undue benefit or loss to a person.</li> </ul> <p>(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:</p> <ul style="list-style-type: none"> <li>(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or</li> <li>(b) as preliminary or experimental tests for the</li> </ul>	<p><b>17(1)</b> Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:</p> <ul style="list-style-type: none"> <li>(a) trade secrets;</li> <li>(b) financial, commercial, scientific, technical or other information: <ul style="list-style-type: none"> <li>(i) in which the local authority has a proprietary interest or a right of use; and</li> <li>(ii) that has monetary value or is reasonably likely to have monetary value;</li> </ul> </li> <li>(c) scientific or technical information obtained through research by an employee of the local authority, the disclosure of which could reasonably be expected to deprive the employee of priority of publication;</li> <li>(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the local authority;</li> <li>(e) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the local authority, or considerations that relate to those negotiations;</li> <li>(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the local authority; or</li> <li>(g) information, the disclosure of which could reasonably be expected to result in an undue benefit or loss to a person.</li> </ul> <p>(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for the local authority, unless the testing was conducted:</p> <ul style="list-style-type: none"> <li>(a) as a service to a person, a group of persons or an organization other than the local authority, and for a fee; or</li> <li>(b) as preliminary or experimental tests for the purpose of: <ul style="list-style-type: none"> <li>(i) developing methods of testing; or</li> <li>(ii) testing products for possible purchase.</li> </ul> </li> </ul> <p>(3) The head of the University of Saskatchewan, the University of Regina or a facility designated as a hospital or a health centre pursuant to The Regional</p>

<p>purpose of:</p> <p>(i) developing methods of testing; or</p> <p>(ii) testing products for possible purchase.</p>	<p>Health Services Act may refuse to disclose details of the academic research being conducted by an employee of the university, hospital or health centre, as the case may be, in the course of the employee's employment.</p> <p>(4) Notwithstanding subsection (3), where possible, the head of the University of Saskatchewan, the University of Regina or a facility designated as a hospital or a health centre pursuant to The Regional Health Services Act shall disclose:</p> <p>(a) the title of; and</p> <p>(b) the amount of funding being received with respect to;</p> <p>the academic research mentioned in subsection (3).</p>
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**18(1)(a)/17(1)(a)**

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

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

[\(Merck Frosst Canada Ltd. v. Canada \(Health\) 2012 SCC 3, \[2012\] 1 S.C.R. 23\)](#)

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

For the fourth part of the test, the public body must own the trade secret or be able to prove a claim of legal right to the information (i.e. license agreement). Normally, this will mean that the trade-secret information has been created by employees of the public body as part of their jobs, or by a contractor as part of a contract with the public body (Service Alberta, *FOIP Guidelines and Practices*, 2009, p. 190).

**18(1)(b)/17(1)(b)**

All three parts of the following test must be met:

1. Does the information contain financial, commercial, scientific, technical or other information?

**Financial information** is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investments strategies, budgets, and profit and loss statements. The financial information must be specific to a particular party that must demonstrate a proprietary interest or right of use of the financial information.

**Commercial information** means information relating to the buying, selling or exchange of merchandise or services. This includes third party associations, past history, references and

insurance policies and pricing structures, market research, business plans, and customer records.

**Scientific information** is information exhibiting the principles or methods of science. The information could include designs for a product and testing procedures or methodologies.

**Technical information** is information relating to a particular subject, craft or technique. Examples are system design specifications and the plans for an engineering project. (Service Alberta, *FOIP Guidelines and Practices*, 2009 at p. 191)

2. Does the public body have a proprietary interest or a right to use it?

This means that the public body must be able to demonstrate rights to the information. For example, a municipality may have a proprietary interest in geographical information systems mapping data or statistical data.

**Proprietary interest** is the interest held by a property owner together with all appurtenant rights, such as a stockholder's right to vote the shares.

3. Does the information have monetary value for the public body or is it likely to?

**Monetary value** may be demonstrated by evidence of potential for financial return to the public body. An example of information that is reasonably likely to have monetary value might include a course developed by a teacher employed by a school board (Service Alberta, *FOIP Guidelines and Practices*, 2009 at p. 191).

The mere fact that the public body incurred a cost to create the record does not mean it has monetary value for the purposes of this section (ON IPC Order PO-3464-I).

In Review Report 185-2016, the Commissioner found that SaskPower had only demonstrated that other organizations, not SaskPower, would find monetary value in the contract at issue. As such, subsection 18(1)(b) of FOIP was found not to apply.

### **18(1)(c)/17(1)(c)**

Public bodies employ a wide range of researchers, including professional scientists, technicians and social scientists. Their reputations are often dependent on the research they publish. The fact that the employees have a professional reputation is of considerable value to public bodies that employ them. In addition, their research often has monetary and program value for the public bodies. For these reasons, the Act protects the priority of publication for all types of research.

All three parts of the following test must be met:

1. Does the information in question constitute scientific or technical information?

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

**Technical information** is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics...it will usually involve

information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.

2. Was the scientific or technical information obtained through research conducted by an employee of the public body?

**Research** is defined as a systematic investigation designed to develop or establish principles, facts or generalized knowledge, or any combination of them, and includes the development, testing and evaluation of research (ON IPC Order PO-3464-I).

Examples for this provision include scientific and technical research carried out at research institutes or universities; historical research connected with the designation or preservation of historical or archaeological resources; and epidemiological and other medical studies carried out in health care bodies. A public body would have to be able to provide some proof that publication is expected to result from the research or that similar research in the past has resulted in publication.

In order to apply this provision, the research must refer to specific, identifiable research projects conducted by a specific employee of the public body.

3. Could disclosure reasonably be expected to deprive the employee of priority publication?

For this provision to apply there must be objective grounds for believing that disclosing the information would result in depriving an employee of priority publication. The public body does not have to prove that the deprivation is probable, but needs to show that there is a “reasonable expectation” it will occur if any of the information or records are released. Both parts of the following test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the deprivation which is alleged?
2. Is the likelihood of the deprivation genuine and conceivable?

Public bodies should not assume that the deprivation with respect to priority publication is self-evident. Particularity in describing the circumstances is needed to support the application of the provision.

### **18(1)(d)/17(1)(d)**

Both parts of the following test must be met:

1. Are there contractual or other negotiations occurring?

Public bodies should detail what is occurring and what parties are involved.

2. Could release of the record reasonably be expected to interfere with the contractual or other negotiation(s)?

To **interfere with contractual or other negotiations** means to obstruct or make much more difficult the negotiation of a contract or other sort of agreement involving the public body.

The public body does not have to prove that interference is probable, but needs to show that there is a “reasonable expectation” of interference if any of the information or records were to be released. All three parts of the following test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the interference which is alleged?
2. Is the interference caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of the interference genuine and conceivable?

Public bodies should not assume that the interference is self-evident. Particularity in describing the interference is needed to support the application of the provision.

Prospective or future negotiations could be included within this exemption, as long as they are foreseeable.

Once a contract is executed, negotiation is concluded. The exemption would generally not apply.

### **18(1)(e)/17(1)(e)**

The provision is meant to protect positions, plans, procedures, criteria, instructions and/or considerations developed for contractual or other negotiations. Examples of the type of information that could be covered by this exemption are the various positions developed by public body negotiators in relation to labour, financial and commercial contracts.

All three parts of the following test must be met:

1. Does the record contain positions, plans, procedures, criteria, instructions or considerations?

*Positions and plans* refer to information that may be used in the course of negotiations.

*Procedures, criteria, instructions and considerations* are much broader in scope, covering information relating to the factors involved in developing a particular negotiating position or plan.

2. Were they developed for the purpose of contractual or other negotiations?
3. Were they developed by or on behalf of the public body?

For FOIP, this can include an individual government institution or the Government of Saskatchewan as a whole.

For LA FOIP, this can include the local authority applying the exemption.

### **18(1)(f)/17(1)(f)**

*Prejudice* in this context refers to detriment to economic interests.

*Economic interest* refers to both the broad interests of a public body and for the government as a whole, in managing the production, distribution and consumption of goods and services. The term also covers financial matters such as the management of assets and liabilities by a public body and the public body’s ability to protect its own or the government’s interests in financial transactions.

For this provision to apply there must be objective grounds for believing that disclosing the information would result in prejudice. The public body does not have to prove that prejudice is probable, but needs to show that there is a “reasonable expectation” of prejudice if any of the information were to be released. All three parts of the following test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the prejudice which is alleged?
2. Is the prejudice caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of prejudice genuine and conceivable?

Public bodies should not assume that the prejudice is self-evident. Particularity in describing the prejudice is needed to support the application of the provision.

### **18(1)(g)**

The provision is only available in FOIP. The provision is meant to protect the government’s ability to manage the economy of Saskatchewan.

**Injury** implies damage or detriment.

**Ability to manage the economy** refers to the responsibility of the Government of Saskatchewan to manage the province’s economic activities by ensuring that an appropriate economic infrastructure is in place, and by facilitating and regulating the activities of the marketplace. This depends on a range of activities, including fiscal and economic policies, taxation, and economic and business development initiatives.

For this provision to apply there must be objective grounds for believing that disclosing the information would result in the injury alleged. The public body does not have to prove that the injury is probable, but needs to show that there is a “reasonable expectation” the injury will occur if any of the information or records are released. All three parts of the following test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the injury which is alleged?
2. Is the injury caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of the injury genuine and conceivable?

Public bodies should not assume that the injury alleged is self-evident. Particularity in describing the injury is needed to support the application of the provision.

### **18(1)(h)/17(1)(g)**

This provision is meant to prevent undue benefit or loss to a person if particular records were disclosed.

**Person** includes an individual, a corporation, a partnership and the legal representatives of a person (Service Alberta, *FOIP Guidelines and Practices*, 2009 at p. 153).

For this provision to apply there must be objective grounds for believing that disclosing the information would result in the undue benefit or loss. The public body does not have to prove that the undue benefit or loss is probable, but needs to show that there is a “reasonable expectation” it

will occur if any of the information or records were released. All three parts of the following test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the undue benefit or loss which is alleged?
2. Is the undue benefit or loss caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of the undue benefit or loss genuine and conceivable?

The public body should be able to detail what the undue benefit or loss is and be able to tie the undue benefit or loss to the record in question. Public bodies should not assume the undue benefit or loss is self-evident. Particularity in describing it is needed to support the application of this provision.

### 18(2)/17(2)

The intent of this provision is to ensure that a public body does not withhold information resulting from product or environmental testing carried out either by the employees of a public body or on its behalf by another organization. Examples include information on products such as air filters, environmental test results on water quality or air quality and commercial product testing and soil testing.

Subsection 18(2)/17(2) provides that the exemptions in 18(1)/17(1) do not apply to a record containing the results of product or environmental testing carried out by or for the public body unless:

- the testing was done as a service to a person, a group of persons or an organization other than a government institution or local authority, and for a fee; or
- as preliminary or experimental tests for the purpose of:
  - developing methods of testing; or
  - testing products for possible purchase.

Examples include test results of commercial products and soil testing.

## 6. Testing procedures, tests and audits (s. 20 of FOIP/s. 19 of LA FOIP)

FOIP	LA FOIP
<p><b>20</b> A head may refuse to give access to a record that contains information relating to:</p> <p>(a) testing or auditing procedures or techniques; or</p> <p>(b) details of specific tests to be given or audits to be conducted;</p> <p>if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.</p>	<p><b>19</b> A head may refuse to give access to a record that contains information relating to:</p> <p>(a) testing or auditing procedures or techniques; or</p> <p>(b) details of specific tests to be given or audits to be conducted;</p> <p>if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.</p>

## 20(a)/19(a)

The provision provides protection for the procedures and techniques involved in testing and auditing. It is generally applied where disclosure of a specific test to be given or audit to be conducted, or one that is currently in process, would invalidate the results. This applies even if there is no intention to use the test or audit again in the future.

The provision may also apply where there is an intention to use the testing or auditing procedure in the future, and disclosure would result in unreliable results being obtained and the test or the audit having to be abandoned as a result. Test questions that are regularly used – for example, in making staffing decisions may qualify.

In Review Report 145-2015, the Commissioner found that the testing and/or auditing techniques or procedures must include specific steps. General information, such as forms and standard policies that do not include specific steps and procedures, would not qualify. Routine, common or customary auditing techniques and procedures would not qualify.

## 20(b)/19(b)

This provision protects details relating to specific tests to be given or audits to be conducted.

*Prejudice* in this context refers to detriment to the use or to the results of tests or audits.

An *audit* is a systematic identification, evaluation, and assessment of an organization's policies, procedures, acts, and practices against pre-defined standards (Review Report F-2010-001 at [97]).

The terms *test* and *audit* cover a wide range of activities. Examples include environmental testing, staffing examinations, personnel audits, financial audits, and program audits.

For this provision to apply there must be objective grounds for believing that disclosing the information would result in the prejudice alleged. The public body does not have to prove that the prejudice is probable, but needs to show that there is a “reasonable expectation” the prejudice will occur if any of the information or records were released. For both subsections of this provision, all three parts of the following test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the prejudice which is alleged?
2. Is the prejudice caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of the prejudice genuine and conceivable?

The public body should be able to detail the prejudice expected and be able to tie that prejudice to the release of the specific record in question. Public bodies should not assume that the prejudice is self-evident. Particularity in describing it is needed to support the application of the provision.

For subsection 20(a)/19(a), the provision primarily protects testing or auditing procedures and techniques: the testing/auditing mechanism, not the content.

In Review Report F-2010-001, the Commissioner found that a privacy impact assessment (PIA) qualified as an audit for purposes of subsection 20(a) of FOIP. However, the provision was found not to apply as a PIA is a fact finding exercise where the questions remain constant. It is the responses that change with the circumstances. The exemption is intended to primarily protect procedures and techniques: the testing mechanism, not the content.

## 7. Danger to health or safety (s. 21 of FOIP/s. 20 of LA FOIP)

FOIP	LA FOIP
<p><b>21</b> A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual.</p>	<p><b>20</b> A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual.</p>

This provision is meant to provide the ability to refuse access to information if its disclosure could threaten the safety, physical or mental health of an individual.

**Threaten** means to expose to risk or harm.

**Safety** implies relative freedom from danger or risks.

**Physical health** refers to the well-being of an individual’s physical body.

**Mental health** refers to the functioning of a person’s mind in a normal state.

In order to determine whether a threat to the safety, physical or mental health of any person exists, all three parts of the following test must be met:

1. Is there a reasonable expectation of probable harm?
2. Does the harm constitute damage or detriment and not mere inconvenience?
3. Is there a causal connection between disclosure and the anticipated harm?

(see Review Reports H-2007-001, F-2008-001 and LA-2012-002)

Generally, this means the public body must make an assessment of the risk and determine whether there are reasonable grounds for concluding there is a danger to the health or safety of any person. That assessment must be specific to the circumstances of the case under consideration. The inconvenience, upset or unpleasantness of dealing with difficult or unreasonable people is not sufficient to trigger this section (Review Report LA-2012-002 at [45]). The threshold cannot be achieved on the basis of unfounded, unsubstantiated allegations (*Ibid* at [102]).

The public body should be able to detail what the harm is and to whom the harm threatens if the information were released.

For example, the mental or physical health of a person would be threatened if information were disclosed to an applicant that would cause severe stress such as suicidal ideation or that could result in verbal or physical harassment or stalking. Individual safety could be threatened if information were released that allowed someone who had threatened to kill or injure the individual to locate him or her. Examples of individuals whose safety might be threatened would include an individual fleeing from a violent spouse, a victim of harassment or a witness to harassment, an employee who has been threatened.

In [\*Consumers’ Co-Operative Refineries Limited v. Regina \(City\), 2016 SKQB 335 \(CanLII\)\*](#), Justice Keene ruled that a Major Hazard Risk Assessment Report (MHRAR) qualified for section 20 of LA FOIP. In making this decision, Justice Keene considered that the MHRAR revealed specific

parts of a refinery where the worst possible accidents could occur. Over disclosure of information could be harmful to the public (i.e. nondisclosure of records can actually promote public safety in certain circumstances). Facilities such as nuclear power plants and refining complexes could be the target of attack which could pose a public safety risk. As such, the provision was found to apply in the greater sense of the protection of the public.

## 8. Solicitor-client privilege (s. 22 of FOIP/s. 21 of LA FOIP)

FOIP	LA FOIP
<p><b>22</b> A head may refuse to give access to a record that:</p> <p>(a) contains information that is subject to solicitor-client privilege;</p> <p>(b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel; or</p> <p>(c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.</p>	<p><b>21</b> A head may refuse to give access to a record that:</p> <p>(a) contains information that is subject to solicitor-client privilege;</p> <p>(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</p> <p>(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.</p>

This provision allows public bodies to withhold information that is subject to solicitor-client privilege or relates to the provision of legal services or advice.

### 22(a)/21(a)

This provision is meant to protect information that is subject to solicitor-client privilege. In [Solosky v. Canada](#), (1980), Justice Dickson regarded the rule of solicitor-client privilege as a “fundamental civil and legal right” that guaranteed clients a right to privacy in their communications with their lawyers. This provision ensures that a public body, as the client, has the same protection for its legal documents as persons in the private sector.

In [Descoteaux et al. v. Mierzwinski](#), (1982), Justice Lamer outlined 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 protection is very strong, as long as the person claiming the privilege is within the framework.

All three parts of the following test established in [Solosky v. Canada](#), (1980) must be met:

1. Is the record a communication between solicitor and client?
  - The public body should make it clear who the solicitor is and who the client is.
    - The client can be an individual, corporation or government body
    - The Ministry of Justice can act as legal advisors for all departments of government. However, the privilege does not attach to advice provided by someone who is not a lawyer; the advice must be sought from a professional legal advisor in his or capacity as such.

- The communications can be written or verbal.
2. Does the communication entail the seeking or giving of legal advice?
    - **Legal advice** means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.
    - The second part of the test is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications, and turns to their legal advisor to determine what those legal implications might be.
  3. Was the communication intended to be confidential?
    - In [\*Descoteaux et al. v. Mierzwinski\*](#), (1982), Justice Lamer set out a substantive rule of confidentiality:
      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 nature of the records themselves can imply confidentiality.
    - Express statements of an intention of confidentiality on records may qualify if they are specific to the communication (i.e. wording and content).

### **Examples**

Written communications between officials or employees of a public body, in which they quote or discuss the legal advice given by the public body's solicitor, could be captured by the privilege as it is part of the continuum of legal advice.

Communications discussing the application of legal advice given by a solicitor could qualify. An employee's notes regarding a solicitor's legal advice, and comments on that advice could qualify. This includes notes "to file" in which legal advice is quoted or discussed.

A lawyer's bill of accounts and itemized disbursements are protected including: the terms and amount of the retainer; the arrangements with respect to payment; the type of services rendered and their cost – all these matters are central to the solicitor-client relationship ([\*Stevens v. Canada \(Prime Minister\)\*](#), (1998), [\*Maranda v. Richer\*](#), (2003)). In Review Reports 052-2013, 280-2016 & 281-2016 and 003-2017, the Commissioner found that the presumption of privilege for lawyers' invoices can be rebutted. The test for whether it can be rebutted is as follows:

1. Is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? and
2. Could an assiduous inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications?

[\(School District No. 49 \(Central Coast\) v. British Columbia \(Information and Privacy Commissioner\), 2012 BCSC 427\)](#)

Attachments to communications between a solicitor and client could qualify when the attachments are part of the continuum of the legal advice. The attachment itself does not have to contain legal advice to fall within the privilege.

Where the communication itself, between client and solicitor, constitutes a criminal act, or counsels someone to commit a crime, the privilege will not apply ([Stevens v. Canada \(Prime Minister\), \(1998\)](#)).

It is not sufficient for a finding of solicitor-client privilege that a public body gave records to the public body's solicitor; not every record dropped off or otherwise given to a public body's solicitor has been given in confidence for the purpose of giving or seeking legal advice; just because a solicitor may have been involved is not enough to find that privilege applies to records (AB IPC Order 2000-019).

### ***Waiver of privilege***

Solicitor-client privilege belongs to the client and persists unless it is waived by the client. Waiver of privilege is established where it is shown that the client:

1. knows of the existence of the privilege; and
2. demonstrates a clear intention to forego the privilege.

Waiver of privilege can be express, inadvertent, by implication or where fairness requires. There must be an intention manifested from either the client's voluntary disclosure of confidential information or from objective consideration of the client's conduct (Review Report F-2005-002).

Disclosing that legal advice was received and relied on, or revealing the mere gist, summary or conclusion of that advice (i.e. public announcements) is not sufficient to imply a waiver over the whole of the privileged communications absent any unfairness. Further, this approach reflects the fundamental purposes of freedom of information legislation because it recognizes the need for accountability on the part of public bodies without impinging on their right to maintain confidentiality over privileged communications (BC IPC Order F15-09).

Communication of privileged information between ministries or departments is not a waiver ([Stevens v. Canada \(Prime Minister\), \(1997\)](#)).

### **22(b)/21(b)**

This provision is broader than subsection 22(a)/21(a) and is meant to capture records prepared by or for legal counsel (or an agent of the Attorney General) for a public body in relation to the provision of advice or services by legal counsel (or agent of the Attorney General).

Both parts of the following test must be met:

1. Were the records “prepared by or for” an agent or legal counsel for a public body?

The record must be “prepared”, as the term is understood, in relation to the advice or services or compiled or created for the purpose of providing the advice or services.

In order to qualify, the person preparing the record must be either the person providing the legal advice or legal service or a person who is preparing the record in question on behalf of, or, for the use of, the provider of legal advice or legal related services (Review Report LA-2014-003 at [17]).

An agent of the Attorney General for Saskatchewan can include public prosecutions at the Ministry of Justice (Review Report F-2012-006 at [111]).

For FOIP, a government institution can capture any government institution and not just the one applying the exemption (i.e. by the use of “a” government institution rather than “the”).

For LA FOIP, the local authority must be the local authority applying the exemption. In addition, LA FOIP does not include an agent of the Attorney General for Saskatchewan.

2. Were the records prepared in relation to a matter involving the provision of advice or other services by the agent or legal counsel?

**Legal advice** includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.

**Legal service** includes any law-related service performed by a person licensed to practice law.

The prepared record does not have to constitute legal advice or legal services to qualify for this part of the test. However, it must relate back to a matter that involves the provision of legal advice or services. The public body should explain how the record relates to a matter involving legal advice or legal services provided by its legal counsel.

### **22(c)/21(c)**

This provision is also broader than subsection 22(a)/21(a) and is meant to capture records that contain correspondence between the public body’s legal counsel (or an agent of the Attorney General) and any other person in relation to a matter that involves the provision of advice or services by legal counsel (or agent of the Attorney General).

Both parts of the following test must be met:

1. Is the record a correspondence between the public body’s legal counsel (or an agent of the Attorney General for Saskatchewan) and any other person?

**Correspondence**, in this context, is an interchange of written communications.

2. Does the correspondence relate to a matter that involves the provision of advice or other services by the agent or legal counsel?

**Legal advice** includes a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.

**Legal service** includes any law-related service performed by a person licensed to practice law.

The correspondence does not have to constitute legal advice or legal services to qualify for this part of the test. However, it must relate back to a matter that involves the provision of legal advice or services. The public body should explain how the correspondence relates to a matter involving legal advice or legal services provided by its legal counsel.

## 9. Disclosure of personal information (s. 29 of FOIP/s. 28 of LA FOIP)

FOIP	LA FOIP
<p><b>24(1)</b> Subject to subsections (1.1) and (2), “<b>personal information</b>” means personal information about an identifiable individual that is recorded in any form, and includes:</p> <p>(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;</p> <p>(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;</p> <p>(c) <b>Repealed.</b> 1999, c.H-0.021, s.66.</p> <p>(d) any identifying number, symbol or other particular assigned to the individual, other than the individual’s health services number as defined in <i>The Health Information Protection Act</i>;</p> <p>(e) the home or business address, home or business telephone number or fingerprints of the individual;</p> <p>(f) the personal opinions or views of the individual except where they are about another individual;</p> <p>(g) correspondence sent to a government institution 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;</p> <p>(h) the views or opinions of another individual with respect to the individual;</p> <p>(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;</p> <p>(j) information that describes an individual’s</p>	<p><b>23(1)</b> Subject to subsections (1.1) and (2), “<b>personal information</b>” means personal information about an identifiable individual that is recorded in any form, and includes:</p> <p>(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;</p> <p>(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;</p> <p>(c) information that relates to health care that has been received by the individual or to the health history of the individual;</p> <p>(d) any identifying number, symbol or other particular assigned to the individual;</p> <p>(e) the home or business address, home or business telephone number, fingerprints or blood type of the individual;</p> <p>(f) the personal opinions or views of the individual except where they are about another individual;</p> <p>(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;</p> <p>(h) the views or opinions of another individual with respect to the individual;</p> <p>(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;</p> <p>(j) information that describes an individual’s finances, assets, liabilities, net worth, bank balance, financial history or activities or credit</p>

<p>finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or</p> <p>(k) the name of the individual where:</p> <p>(i) it appears with other personal information that relates to the individual; or</p> <p>(ii) the disclosure of the name itself would reveal personal information about the individual.</p> <p>(1.1) “Personal information” does not include information that constitutes personal health information as defined in <i>The Health Information Protection Act</i>.</p> <p>(2) “<b>Personal information</b>” does not include information that discloses:</p> <p>(a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a government institution or a member of the staff of a member of the Executive Council;</p> <p>(b) the salary or benefits of a legislative secretary or a member of the Executive Council;</p> <p>(c) the personal opinions or views of an individual employed by a government institution given in the course of employment, other than personal opinions or views with respect to another individual;</p> <p>(d) financial or other details of a contract for personal services;</p> <p>(e) details of a licence, permit or other similar discretionary benefit granted to an individual by a government institution;</p> <p>(f) details of a discretionary benefit of a financial nature granted to an individual by a government institution;</p> <p>(g) expenses incurred by an individual travelling at the expense of a government institution.</p> <p>(3) Notwithstanding clauses (2)(e) and (f), “<b>personal information</b>” includes information that:</p> <p>(a) is supplied by an individual to support an application for a discretionary benefit; and</p> <p>(b) is personal information within the meaning of subsection (1).</p>	<p>worthiness; or</p> <p>(k) the name of the individual where:</p> <p>(i) it appears with other personal information that relates to the individual; or</p> <p>(ii) the disclosure of the name itself would reveal personal information about the individual.</p> <p>(1.1) On and after the coming into force of subsections 4(3) and (6) of <i>The Health Information Protection Act</i>, with respect to a local authority that is a trustee as defined in that Act, “<b>personal information</b>” does not include information that constitutes personal health information as defined in that Act.</p> <p>(2) “<b>Personal information</b>” does not include information that discloses:</p> <p>(a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a local authority;</p> <p>(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;</p> <p>(c) financial or other details of a contract for personal services;</p> <p>(d) details of a licence, permit or other similar discretionary benefit granted to an individual by a local authority;</p> <p>(e) details of a discretionary benefit of a financial nature granted to an individual by a local authority;</p> <p>(f) expenses incurred by an individual travelling at the expense of a local authority;</p> <p>(g) the academic ranks or departmental designations of members of the faculties of the University of Saskatchewan or the University of Regina; or</p> <p>(h) the degrees, certificates or diplomas received by individuals from the Saskatchewan Polytechnic, the University of Saskatchewan or the University of Regina.</p> <p>(3) Notwithstanding clauses (2)(d) and (e), “<b>personal information</b>” includes information that:</p> <p>(a) is supplied by an individual to support an application for a discretionary benefit; and</p> <p>(b) is personal information within the meaning of subsection (1).</p>
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When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to section 24/23. Once identified as personal information, a decision needs to be made as to whether to release it or not pursuant to section 29/28.

The list of examples provided for at subsection 24(1)/23(1) are not meant to be exhaustive. There can be other types of information that would qualify as personal information that are not listed. Part of that consideration involves assessing if the information has both of the following:

1. Is there an identifiable individual?

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

Use of the term “individual” in this provision makes it clear that the protection provided relates only to natural persons. Therefore, it does not include information about a sole proprietorship, partnership, unincorporated association or corporation.

2. Is the information personal in nature?

**Personal in nature** means that the information reveals something personal about the individual. Information that relates to an individual in a professional, official or business capacity could only qualify if the information revealed something personal about the individual for example, information that fits the definition of employment history.

Information previously found to not qualify as personal information includes:

**Work product** is information generated by or otherwise associated with an individual in the normal course of performing his or her professional or employment responsibilities, whether in a public or private setting. This is not considered personal information.

**Business card information** is the type of information found on a business card (name, job title, work address, work phone numbers and work email address). This type of information is generally not personal in nature and therefore would not be considered personal information.

In Review Report 277-2016, the Commissioner found that employer assigned cell phone numbers for government employees was considered business card information. The Commissioner also found that the same approach is taken to business cell phone number for non-government employees, professionals and corporate officers.

**Names of nurses and firefighters** found not to be personal information (see Review Reports LA-2012-002 and F-2006-001).

**Position, function, responsibilities or hours of work** pertain more to a job description of an individual than personal information (see Review Report LA-2012-002).

**Signatures** found not to be personal information when made in a work-related capacity. However, a signature may be personal in nature outside of a professional context (see Review Report 156-2015).

**24(1)(a)/23(1)(a)**

**Creed** refers to an individual’s basic beliefs of a religion or an idea or set of beliefs that guide the actions of a person.

**Family status** has been defined by [The Saskatchewan Human Rights Code](#) as the status of being in a parent and child relationship. Child is defined as a son, daughter, stepson, stepdaughter, adopted child and person to whom another person stands in place of a parent. Parent is defined as a father, mother, stepfather, stepmother, adoptive parent and person who stands in place of a parent to another person (see Review Report 109-2015).

**24(1)(b)/23(1)(b)**

**Employment history** is the type of information normally found in a personnel file such as performance reviews, evaluations, disciplinary actions taken, reasons for leaving a job or leave transactions. It does not include work product. Employment history is considered personal information (subsection 24(1)(b) of FOIP/subsection 23(1)(b) of LA FOIP).

**24(1)(d)/23(1)(d)**

**Employee number** when linked with a name found to be personal information (see Review Reports F-2005-001 and LA-2012-002).

**24(1)(f)/23(1)(f)**

**Signing a petition** found to be personal information because the individual is indicating that they agree with the petition by signing. This would constitute the opinions or views of the individual (see Review Report 156-2015).

**24(1)(k)/23(1)(k)**

A name by itself is not personal information unless release of the name alone reveals something of a personal nature about an individual (subsection 24(1)(k)(ii))

FOIP	LA FOIP
<p><b>29(1)</b> No government institution 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 30.</p> <p>(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:</p> <p>(a) for the purpose for which the information was obtained or compiled by the government institution or for a use that is consistent with that purpose;</p> <p>(b) for the purpose of complying with:</p> <p>(i) a subpoena or warrant issued or order made by a court, person or body that has the authority to compel the production of information; or</p> <p>(ii) rules of court that relate to the production of</p>	<p><b>28(1)</b> 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.</p> <p>(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:</p> <p>(a) for the purpose for which the information was obtained or compiled by the local authority or for a use that is consistent with that purpose;</p> <p>(b) for the purpose of complying with:</p> <p>(i) a subpoena or warrant issued or order made by a court, person or body that has the authority to compel the production of information; or</p> <p>(ii) rules of court that relate to the production of information;</p> <p>(c) to the Attorney General for Saskatchewan or to</p>

<p>information;</p> <p>(c) to the Attorney General for Saskatchewan or to his or her agent or legal counsel for use in providing legal services;</p> <p>(d) to legal counsel for a government institution for use in providing legal services to the government institution;</p> <p>(e) for the purpose of enforcing any legal right that the Government of Saskatchewan or a government institution has against any individual;</p> <p>(f) for the purpose of locating an individual in order to:</p> <p>(i) collect a debt owing to Her Majesty in right of Saskatchewan or to a government institution by that individual; or</p> <p>(ii) make a payment owing to that individual by Her Majesty in right of Saskatchewan or by a government institution;</p> <p>(g) to a prescribed law enforcement agency or a prescribed investigative body:</p> <p>(i) on the request of the law enforcement agency or investigative body;</p> <p>(ii) for the purpose of enforcing a law of Canada or a province or territory or carrying out a lawful investigation; and</p> <p>(iii) if any prescribed requirements are met;</p> <p>(h) pursuant to an agreement or arrangement between the Government of Saskatchewan or a government institution and:</p> <p>(i) the Government of Canada or its agencies, Crown corporations or other institutions;</p> <p>(ii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;</p> <p>(iii) the government of a foreign jurisdiction or its institutions;</p> <p>(iv) an international organization of states or its institutions; or</p> <p>(v) a local authority as defined in the regulations;</p> <p>for the purpose of administering or enforcing any law or carrying out a lawful investigation;</p> <p>(h.1) for any purpose related to the detection, investigation or prevention of an act or omission that might constitute a terrorist activity as defined in the <i>Criminal Code</i>, to:</p> <p>(i) the Government of Canada or its agencies,</p>	<p>his or her legal counsel for use in providing legal services to the Government of Saskatchewan or a government institution;</p> <p>(d) to legal counsel for a local authority for use in providing legal services to the local authority;</p> <p>(e) for the purpose of enforcing any legal right that the local authority has against any individual;</p> <p>(f) for the purpose of locating an individual in order to collect a debt owing to the local authority by that individual or make a payment owing to that individual by the local authority;</p> <p>(g) to a prescribed law enforcement agency or a prescribed investigative body:</p> <p>(i) on the request of the law enforcement agency or investigative body;</p> <p>(ii) for the purpose of enforcing a law of Canada or a province or territory or carrying out a lawful investigation; and</p> <p>(iii) if any prescribed requirements are met;</p> <p>(h) pursuant to an agreement or arrangement between the local authority and:</p> <p>(i) the Government of Canada or its agencies, Crown corporations or other institutions;</p> <p>(ii) the Government of Saskatchewan or a government institution;</p> <p>(iii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;</p> <p>(iv) the government of a foreign jurisdiction or its institutions;</p> <p>(v) an international organization of states or its institutions; or</p> <p>(vi) another local authority;</p> <p>for the purpose of administering or enforcing any law or carrying out a lawful investigation;</p> <p>(h.1) for any purpose related to the detection, investigation or prevention of an act or omission that might constitute a terrorist activity as defined in the <i>Criminal Code</i>, to:</p> <p>(i) a government institution;</p> <p>(ii) the Government of Canada or its agencies, Crown corporations or other institutions;</p> <p>(iii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;</p> <p>(iv) the government of a foreign jurisdiction or its institutions;</p> <p>(v) an international organization of states or its</p>
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<p>Crown corporations or other institutions;</p> <p>(ii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;</p> <p>(iii) the government of a foreign jurisdiction or its institutions;</p> <p>(iv) an international organization of states or its institutions; or</p> <p>(v) a local authority as defined in the regulations;</p> <p>(i) for the purpose of complying with:</p> <p>(i) an Act or a regulation;</p> <p>(ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; or</p> <p>(iii) a treaty, agreement or arrangement made pursuant to an Act or an Act of the Parliament of Canada;</p> <p>(j) where disclosure is by a law enforcement agency:</p> <p>(i) to a law enforcement agency in Canada; or</p> <p>(ii) to a law enforcement agency in a foreign country;</p> <p>pursuant to an arrangement, a written agreement or treaty or to legislative authority;</p> <p>(k) to any person or body for research or statistical purposes if the head:</p> <p>(i) is satisfied that the purpose for which the information is to be disclosed is not contrary to the public interest and cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates; and</p> <p>(ii) obtains from the person or body a written agreement not to make a subsequent disclosure of the information in a form that could reasonably be expected to identify the individual to whom it relates;</p> <p>(l) for the purpose of:</p> <p>(i) management;</p> <p>(ii) audit; or</p> <p>(iii) administration of personnel;</p> <p>of the Government of Saskatchewan or one or more government institutions;</p> <p>(m) where necessary to protect the mental or physical health or safety of any individual;</p> <p>(n) in compassionate circumstances, to facilitate</p>	<p>institutions; or</p> <p>(vi) another local authority;</p> <p>(i) for the purpose of complying with:</p> <p>(i) an Act or a regulation;</p> <p>(ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; or</p> <p>(iii) a treaty, agreement or arrangement made pursuant to an Act or an Act of the Parliament of Canada;</p> <p>(j) where disclosure is by a law enforcement agency:</p> <p>(i) to a law enforcement agency in Canada; or</p> <p>(ii) to a law enforcement agency in a foreign country;</p> <p>pursuant to an arrangement, a written agreement or treaty or to legislative authority;</p> <p>(k) to any person or body for research or statistical purposes if the head:</p> <p>(i) is satisfied that the purpose for which the information is to be disclosed is not contrary to the public interest and cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates; and</p> <p>(ii) obtains from the person or body a written agreement not to make a subsequent disclosure of the information in a form that could reasonably be expected to identify the individual to whom it relates;</p> <p>(l) where necessary to protect the mental or physical health or safety of any individual;</p> <p>(m) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;</p> <p>(n) for any purpose where, in the opinion of the head:</p> <p>(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or</p> <p>(ii) disclosure would clearly benefit the individual to whom the information relates;</p> <p>(o) to the Government of Canada or the Government of Saskatchewan to facilitate the auditing of shared cost programs;</p> <p>(p) where the information is publicly available;</p> <p>(q) to the commissioner;</p> <p>(r) for any purpose in accordance with any Act or</p>
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<p>contact with the next of kin or a friend of an individual who is injured, ill or deceased;</p> <p>(o) for any purpose where, in the opinion of the head:</p> <p>(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or</p> <p>(ii) disclosure would clearly benefit the individual to whom the information relates;</p> <p>(p) where the information is publicly available;</p> <p>(q) to the office of the Provincial Auditor, or to any other prescribed person or body, for audit purposes;</p> <p>(r) to the Ombudsman;</p> <p>(s) to the commissioner;</p> <p>(t) for any purpose in accordance with any Act or regulation that authorizes disclosure; or</p> <p>(u) as prescribed in the regulations.</p> <p>(3) A government institution that is a telephone utility may disclose names, addresses and telephone numbers in accordance with customary practices.</p> <p>(4) Subject to any other Act or regulation, the Provincial Archivist may release personal information that is in the possession or under the control of The Saskatchewan Archives Board where, in the opinion of the Provincial Archivist, the release would not constitute an unreasonable invasion of privacy.</p>	<p>regulation that authorizes disclosure; or</p> <p>(s) as prescribed in the regulations.</p>
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Once the information has been identified as personal information, there must be authority determined under FOIP/LA FOIP to release it. Releasing personal information with a lack of authority could constitute a privacy breach.

Subsection 29(1)/28(1) requires a public body to have consent of the individual prior to disclosing personal information. The consent must be in writing pursuant to section 18/11 of the FOIP/LA FOIP *Regulations*. There may be circumstances where getting consent is possible. However, in some circumstances it may not be reasonable to do so.

Subsection 29(2)/28(2) provides a number of circumstances where a public body can disclose personal information without consent. There are additional circumstances enumerated in the FOIP/LA FOIP *Regulations*.

**29(2)(o)(i)/28(2)(n)(i)**

This provision enables the public body to disclose personal information in a record without the consent of the individual to whom it relates when it is deemed to be in the public interest to do so, more specifically, where the public interest in releasing outweighs any invasion of privacy. All three parts of the following test must be met:

1. Is the information ‘*personal information*’?

- Is it personal information? and
- If so, to whom does it relate?

2. Is there a public interest in the information?

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

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

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

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

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

The public body must weigh the public interest against the personal privacy interests of the individuals whose personal information appears in the record.

Some further things to consider regarding public interest:

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

Some things to consider regarding any invasion of privacy:

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

Where the public body intends to rely on this provision to release personal information in response to an access to information request, notification is required to the individual(s) pursuant to the third party notification requirements outlined at subsection 34/33.

## 10. Individual’s access to personal information (s. 31 of FOIP/s. 30 of LA FOIP)

FOIP	LA FOIP
<p><b>31(1)</b> Subject to Part III and subsection (2), an individual whose personal information is contained in a record in the possession or under the control of a government institution has a right to, and:</p> <ul style="list-style-type: none"> <li>(a) on an application made in accordance with Part II; and</li> <li>(b) on giving sufficient proof of his or her identity;</li> </ul> <p>shall be given access to the record.</p> <p>(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual’s suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits, where the information is provided explicitly or implicitly in confidence.</p>	<p><b>30(1)</b> Subject to Part III and subsections (2) and (3), an individual whose personal information is contained in a record in the possession or under the control of a local authority has a right to, and:</p> <ul style="list-style-type: none"> <li>(a) on an application made in accordance with Part II; and</li> <li>(b) on giving sufficient proof of his or her identity;</li> </ul> <p>shall be given access to the record.</p> <p>(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual’s suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the local authority, where the information is provided explicitly or implicitly in confidence.</p> <p>(3) The head of the University of Saskatchewan or the University of Regina may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of:</p> <ul style="list-style-type: none"> <li>(a) determining the individual’s suitability for: <ul style="list-style-type: none"> <li>(i) appointment, promotion or tenure as a member of the faculty of the University of Saskatchewan or the University of Regina;</li> <li>(ii) admission to an academic program; or</li> <li>(iii) receipt of an honour or award; or</li> </ul> </li> <li>(b) evaluating the individual’s research projects or materials for publication;</li> </ul> <p>where the information is provided explicitly or implicitly in confidence.</p>

### 31(2)/30(2)

This provision enables the head to refuse to disclose to individuals information that is evaluative or opinion material compiled for the purpose of determining suitability, eligibility or qualifications for employment.

The provision attempts to address two competing interests: the right of an individual to have access to his or her personal information and the need to protect the flow of frank information to public bodies so that appropriate decisions can be made respecting the awarding of jobs, contracts and other benefits.

All three parts of the following test must be met:

1. Is the information personal information that is evaluative or opinion material?

In order to qualify as **personal information**, the information must be about an identifiable individual and must be personal in nature. Some examples are provided in subsection 24(1)/23(1) of FOIP/LA FOIP.

**Evaluative** means to have assessed, appraised, to have found or to have stated the number of.

**Opinion material** is a belief or assessment based on grounds short of proof; a view held as probable for example, a belief that a person would be a suitable employee, based on that person's employment history. An opinion is subjective in nature, and may or may not be based on facts (AB IPC Order 98-021).

2. Was the personal information compiled solely for one of the following purposes:

- for determining the individual's suitability, eligibility or qualifications for employment? or
- for the awarding of contracts with the public body? or
- for awarding other benefits?

**Employee** can include a person who performs a service for the public body as an appointee, officer, volunteer or student under a contract or agency relationship with the public body.

An example would be an employment reference as defined in subsection 2(1)(b) of the [FOIP Regulations](#).

3. Was the personal information provided explicitly or implicitly in confidence?

See the criteria for **explicitly or implicitly in confidence** under section 19(1)(b)/18(1)(b).

In Review Report 258-2016, the Commissioner found that the name of the individual giving the opinion was also captured by the provision. The purpose and intent of the provision is to allow individuals to provide frank feedback where there is an evaluation process occurring. In addition, evaluating suitability for employment can take place not only during the hiring process but also during an employee's tenure. Further, the provision can include unsolicited records such as letters of concern or complaint (see: [Fogal v. Regina School Division No. 4 \(2002\)](#)).

### **LA FOIP 30(3)(a)**

This provision is only meant for the University of Saskatchewan or the University of Regina. The purpose and intent of this subsection is to allow individuals to provide frank feedback when there is an evaluative process occurring.

All three parts of the following test must be met:

1. Is the information personal information that is evaluative or opinion material?

In order to qualify as **personal information**, the information must be about an identifiable individual and must be personal in nature. Some examples are provided in subsection 23(1) of LA FOIP.

**Evaluative** means to have assessed, appraised, to have found or to have stated the number of.

**Opinion material** is a belief or assessment based on grounds short of proof; a view held as probable for example, a belief that a person would be a suitable employee, based on that person's employment history. An opinion is subjective in nature, and may or may not be based on facts (AB IPC Order 98-021).

2. Was the personal information compiled solely for the purpose of determining the individual's suitability for:
  - appointment, promotion or tenure as a member of the faculty? or
  - admission to an academic program? or
  - receipt of an honour or award?

3. Was the personal information provided explicitly or implicitly in confidence?

See the criteria for **explicitly or implicitly in confidence** under section 19(1)(b)/18(1)(b).

In Review Report 164-2016, it was found that letters of reference related to an application to medical residency programs at the University of Saskatchewan included an explicit statement of confidentiality qualified for the exemption. Further, the Commissioner found that the scores and notes made by individuals reviewing the Applicant's applications for residency positions also qualified.

### **LA FOIP 30(3)(b)**

This provision is only meant for the University of Saskatchewan or the University of Regina. The purpose and intent of this subsection is to allow individuals to provide frank feedback when there is an evaluative process occurring.

All three parts of the following test must be met:

1. Is the information personal information that is evaluative or opinion material?

In order to qualify as **personal information**, the information must be about an identifiable individual and must be personal in nature. Some examples are provided in subsection 23(1) of LA FOIP.

**Evaluative** means to have assessed, appraised, to have found or to have stated the number of.

**Opinion material** is a belief or assessment based on grounds short of proof; a view held as probable for example, a belief that a person would be a suitable employee, based on that person's employment history. An opinion is subjective in nature, and may or may not be based on facts (AB IPC Order 98-021).

2. Was the personal information compiled solely for the purpose of evaluating the individual's research projects or materials for publication?
3. Was the personal information provided explicitly or implicitly in confidence?

See the criteria for *explicitly or implicitly in confidence* under section 19(1)(b)/18(1)(b).

## OTHER TESTS

### 1. Confidentiality provisions in other enactments (s. 23 of FOIP/s. 22 of LA FOIP)

FOIP	LA FOIP
<p><b>23(1)</b> Where a provision of:</p> <ul style="list-style-type: none"> <li>(a) any other Act; or</li> <li>(b) a regulation made pursuant to any other Act;</li> </ul> <p>that restricts or prohibits access by any person to a record or information in the possession or under the control of a government institution conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.</p> <p>(2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.</p> <p>(3) Subsection (1) does not apply to:</p> <ul style="list-style-type: none"> <li>(a) <i>The Adoption Act, 1998</i>;</li> <li>(b) section 27 of <i>The Archives Act, 2004</i> ;</li> <li>(c) section 74 of <i>The Child and Family Services Act</i>;</li> <li>(d) section 7 of <i>The Criminal Injuries Compensation Act</i>;</li> <li>(e) section 12 of <i>The Enforcement of Maintenance Orders Act</i>;</li> <li>(e.1) <i>The Health Information Protection Act</i>;</li> <li>(f) section 38 of <i>The Mental Health Services Act</i>;</li> <li>(f.1) section 91.1 of <i>The Police Act, 1990</i> ;</li> <li>(g) section 13 of <i>The Proceedings against the Crown Act</i>;</li> <li>(h) sections 15 and 84 of <i>The Securities Act, 1988</i>;</li> <li>(h.1) section 61 of <i>The Trust and Loan</i></li> </ul>	<p><b>22(1)</b> Where a provision of:</p> <ul style="list-style-type: none"> <li>(a) any other Act;</li> <li>(b) a regulation made pursuant to any other Act; or</li> <li>(c) a resolution or bylaw;</li> </ul> <p>that restricts or prohibits access by any person to a record or information in the possession or under the control of a local authority conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.</p> <p>(2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act, regulation, resolution or bylaw that states that the provision is to apply notwithstanding any other Act or law.</p> <p>(3) Subsection (1) does not apply to:</p> <ul style="list-style-type: none"> <li>(a) The Health Information Protection Act;</li> <li>(a.01) Part VIII of The Vital Statistics Act, 2009;</li> <li>(a.1) any prescribed Act or prescribed provisions of an Act; or</li> <li>(b) any prescribed regulation or prescribed provisions of a regulation;</li> </ul> <p>and the provisions mentioned in clauses (a), (a.01), (a.1) and (b) shall prevail.</p>

<p><i>Corporations Act, 1997;</i></p> <p>(i) section 283 of <i>The Traffic Safety Act;</i></p> <p>(i.1) subsection 97(4) of <i>The Traffic Safety Act;</i></p> <p>(j) Part VIII of <i>The Vital Statistics Act, 2009;</i></p> <p>(j.1) section 12 of <i>The Vital Statistics Administration Transfer Act;</i></p> <p>(k) sections 172 to 174 of <i>The Workers' Compensation Act, 2013;</i></p> <p>(l) any prescribed Act or prescribed provisions of an Act; or</p> <p>(m) any prescribed regulation or prescribed provisions of a regulation;</p> <p>and the provisions mentioned in clauses (a) to (m) shall prevail.</p>	
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The purpose of this provision is to ensure that FOIP/LA FOIP prevail over other statutory provisions unless the records or information fall within the enumerated list of exclusions in subsection 23(3)/22(3). The list of exclusions continues in the FOIP/LA FOIP *Regulations* at section 12/8.1.

The public body must demonstrate that the record or information in question falls within the statutory provision that is not subject to FOIP/LA FOIP.

## 2. Possession/Control (s. 5 of FOIP/s. 5 of LA FOIP)

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

**Possession** is physical possession plus a measure of control of the record (see Review Reports F-2014-007 and LA-2010-002).

**Control** connotes authority. A record is under the control of a public body when the public body has the authority to manage the record including restricting, regulating and administering its use, disclosure or disposition (see Review Report F-2008-002).

To determine whether a public body has a measure of control over a record(s), both parts of the following test must be met:

1. Do the contents of the document relate to a departmental matter? and
2. Can the public body reasonably expect to obtain a copy of the document upon request?

If both questions are answered in the affirmative, the document is under the control of the public body. In answering these questions, the following factors may be considered:

- The record was created by a staff member, an officer, or a member of the public body in the course of his or her duties performed for the public body;
- The record was created by an outside consultant for the public body;
- The public body possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory, statutory or employment requirement;
- An employee of the public body possesses the record for the purposes of his or her duties performed for the public body;
- The record is specified in a contract as being under the control of a public body and there is no understanding or agreement that the records are not to be disclosed;
- The content of the record relates to the public body's mandate and core, central or basic functions;
- The public body has a right of possession of the record;
- The public body has the authority to regulate the record's use and disposition;
- The public body paid for the creation of the records;
- The public body has relied upon the record to a substantial extent;
- The record is closely integrated with other records held by the public body;
- A contract permits the public body to inspect, review and/or possess copies of the records the contractor produced, received or acquired;
- The public body's customary practice in relation to possession or control of records of this nature in similar circumstances;
- The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances; and
- The owner of the records.

Possession and control are different things. It is conceivable that a public body might have possession but not control of a record or that it might have control but not possession (see Review Report F-2008-002).

### 3. Search

An IPC review involving search can occur in two situations:

- The public body issued a section 7 response indicating records do not exist; or
- The applicant believes there are more records than what was provided.

The focus of an IPC search review is whether or not the public body conducted a reasonable search.

A *reasonable search* is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request.

The threshold that must be met is one of “reasonableness”. In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable. FOIP and LA FOIP do not require the public body to prove with absolute certainty that records do not exist.

When a public body receives a notification letter from the IPC requesting details of its search efforts, the following can be included in the public body’s submission (non-exhaustive):

Outline the **search strategy** conducted:

- For personal information requests – explain how the individual is involved with the public body (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.
- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search:
  - Describe how records are classified within the records management system. For example, are the records classified by:
    - alphabet
    - year
    - function
    - subject

Consider providing a copy of your organizations record schedule and screen shots of the electronic directory (folders & subfolders).

If the record has been destroyed, provide copies of record schedules and/or destruction certificates.

- Explain how you have considered records stored off-site.
- Explain how records that may be in the possession of a third party but in the public body’s control have been searched such as a contractor or information service provider. For more on this, see the OIPC resource, *A Contractor’s Guide to Access and Privacy in Saskatchewan* available on our website.
- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
  - For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did the search take for each employee?

- What were the results of each employee’s search?
  - Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see the OIPC resource, *Using Affidavits in a Review with the IPC* available on our website.

The above list is meant to be a guide. Providing the above details is not a guarantee that the IPC will find the search conducted was reasonable. Each case will require different search strategies and details depending on the records requested.

## 4. Records not Responsive

When a public body receives an access to information request, it must determine what information is responsive to the access request.

**Responsive** means relevant. The term describes anything that is reasonably related to the request. It follows that any information or records that do not reasonably relate to an Applicant’s request will be considered “not-responsive”.

When determining what information is responsive, consider the following:

- The request itself sets out the boundaries of relevancy and circumscribes the records or information that will ultimately be identified as being responsive.
- A public body can remove information as not-responsive only if the applicant has requested specific information, such as his or her own personal information.
- The public body may treat portions of a record as not-responsive if they are clearly separate and distinct and entirely unrelated to the access request. However, use it sparingly and only where necessary.
- If it is just as easy to release the information as it is to claim “not responsive”, the information should be released (i.e. releasing the information will not involve time consuming consultations nor considerable time weighing discretionary exemptions).
- The purpose of FOIP/LA FOIP is best served when a public body adopts a liberal interpretation of a request. If it is unclear what the applicant wants, a public body should contact the applicant for clarification. Subsection 6(3) of FOIP and LA FOIP provide that the public body shall invite the applicant to supply additional details that might lead the identification of the record.
  - Applicants are responsible for providing sufficient information to enable an employee familiar with the subject matter to identify the record. Subsection 6(1)(b) of FOIP and LA FOIP provide that applicant must “specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject-matter to identify the record”.
    - In Ontario Order PO-3492, the Adjudicator at the Information and Privacy Commissioner of Ontario found that the Applicant was not clear in his original request. Even after clarifying his request with the Ministry,

the Adjudicator disagreed with the Applicant that the records he alleged to have been responsive to his request would be caught within the scope of his clarified request.

- So while public bodies must take on a liberal interpretation of access to information requests and invite applicants to provide additional details, applicants have the responsibility of providing sufficient information to the public body so it can identify the requested record and remain reasonable in their expectations of what the scope of the request would capture.
- Avoid breaking up the flow of information (i.e. if possible, do not claim “not responsive” within sentences or paragraphs).
- In the section 7 response to the applicant, the public body should explain what “not responsive” means and that some information has been redacted on this basis.

In Review Report 016/2014, the Commissioner found that the Ministry of Education appropriately withheld information as not-responsive because the applicant’s access to information request was very specific.

In Review Report 187-2015, the Commissioner found that the information deemed as not responsive by SGI, was indeed responsive.

## 5. Frivolous, Vexatious, Not in good faith (s. 50(2) of FOIP/s. 39(2) of LA FOIP)

FOIP	LA FOIP
<p><b>50(1)</b> Where the commissioner is satisfied that there are reasonable grounds to review any matter set out in an application pursuant to section 49, the commissioner shall review the matter.</p> <p>(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:</p> <ul style="list-style-type: none"> <li>(a) is frivolous or vexatious;</li> <li>(b) is not made in good faith; or</li> <li>(c) concerns a trivial matter.</li> </ul>	<p><b>39(1)</b> Where the commissioner is satisfied that there are reasonable grounds to review any matter set out in an application pursuant to section 38, the commissioner shall review the matter.</p> <p>(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:</p> <ul style="list-style-type: none"> <li>(a) is frivolous or vexatious;</li> <li>(b) is not made in good faith; or</li> <li>(c) concerns a trivial matter.</li> </ul>

Subsection 50(2)/39(2) of FOIP/LA FOIP permits the Commissioner to dismiss or discontinue a review where it appears the access provisions are not being utilized appropriately by an applicant.

However, generally, the actions of applicants are not under scrutiny in an access request; they have no duty to be accountable to the provincial government. The law is in place to allow for the scrutiny of those who govern, not the other way around. When making access requests, applicants who frequently use the Act are exercising a statutory right. While some requests can be

complicated and may even be intended as “fishing expeditions”, they are lawful and ought to be treated with respect (AB IPC Investigation Report F2017-IR-01).

A public body can request the Commissioner dismiss or discontinue a review based on subsection 50(2)/39(2). The public body should provide its arguments in support of its position to the OIPC.

**Frivolous** is typically associated with matters that are trivial or without merit, lacking a legal or factual basis or legal or factual merit; not serious; not reasonably purposeful; of little weight or importance.

**Vexatious** means without reasonable or probable cause or excuse. A request is *vexatious* when the primary purpose of the request is not to gain access to information but to continually or repeatedly harass a public body in order to obstruct or grind a public body to a standstill. It is usually taken to mean with intent to annoy, harass, embarrass, or cause discomfort.

**Not in good faith** means the opposite of “good faith”, generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or other contractual obligation, not prompted by an honest mistake as to one’s rights, but by some interested or sinister motive.

When an applicant refuses to cooperate with a public body in the process of accessing information or if a party misrepresents events to the OIPC, this could suggest the party is not acting in good faith. *Bad faith* is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

The intention to use information obtained from an access request in a manner that is disadvantageous to the public body does not qualify as bad faith. To the contrary, it is appropriate for requesters to seek information “to publicize what they consider to be inappropriate or problematic decisions or processes undertaken” by public bodies (ON IPC Order MO-1924).

A **trivial matter** is something insignificant, unimportant or without merit. It is similar to frivolous.

When considering whether a request for review was made on grounds that are frivolous, vexatious or not in good faith, the Commissioner is determining whether there is a pattern or type of conduct that amounts to an abuse of the right of access. The following factors are considered. Depending on the nature of the case, one factor alone or multiple factors in concert with each other can lead to a finding that a request is an abuse of the right of access:

- *Number of requests:* is the number excessive?

Where the volume of requests interferes with the operations of a public body it can be argued the requests are excessive. In order to interfere with operations, the volume of requests must obstruct or hinder the range of effectiveness of the public body’s activities.

- *Nature and scope of the requests:* are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?

- *Purpose of the requests:* are the requests intended to accomplish some objective other than to gain access? For example, are they made for “nuisance” value, or is the applicant’s aim to harass the public body or to break or burden the system?
- *Timing of the requests:* is the timing of the requests connected to the occurrence of some other related event, such as a court or tribunal proceeding?
- *Wording of the request:* are the requests or subsequent communications in their nature offensive, vulgar, derogatory or contain unfounded allegations?

Offensive or intimidating conduct or comments by applicants is unwarranted and harmful. They can also suggest that an applicant’s objectives are not legitimately about access to records. Requiring employees to be subjected to and to respond to offensive, intimidating, threatening, insulting conduct or comments can have a detrimental effect on well-being.

(see Review Reports 053-2015 and F-2010-002)

## 6. Class-based *versus* Harm-based Exemptions

Exemptions under FOIP/LA FOIP currently fall into two types:

**Class-based** exemptions apply where the information falls within the class of information described in the exemption and there is no reference to any consequence that might result from the release of the information. Class-based exemptions presuppose that the information is inherently sensitive and that an injury or prejudice would automatically flow from release. Examples include section 16 of FOIP which protects cabinet documents. For class-based exemptions, the public body must show that the information in question falls within the class of records described in the exemption.

**Harm-based** exemptions, on the other hand, are based on a determination by the head of the public body that it is reasonable to expect that some injury, harm or prejudice will occur if the information is released. Examples include subsection 19(1)(c)/18(1)(c) which contemplates three different types of harm to a third party – financial loss or gain, prejudice to competitive position or interference with contractual or other negotiations.

For harm-based exemptions to be found to apply there must be objective grounds for believing that disclosing the information would result in the harm alleged. The public body does not have to prove that the harm is probable, but needs to show that there is a likelihood the harm will occur if any of the information or records are released. All three parts of the following test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the harm which is alleged?
2. Is the harm caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of the harm genuine and conceivable?

## 7. Delegation (s. 60 of FOIP/s. 50 of LA FOIP)

FOIP	LA FOIP
<p><b>60(1)</b> A head may delegate to one or more officers of the government institution a power granted to the head or a duty vested in the head.</p> <p>(2) A delegation pursuant to subsection (1):</p> <p>(a) is to be in writing; and</p> <p>(b) may contain any limitations, restrictions, conditions or requirements that the head considers necessary.</p>	<p><b>50(1)</b> A head may delegate to one or more officers of the local authority a power granted to the head or a duty vested in the head.</p> <p>(2) A delegation pursuant to subsection (1):</p> <p>(a) is to be in writing; and</p> <p>(b) may contain any limitations, restrictions, conditions or requirements that the head considers necessary.</p>

The head of a public body may delegate some or all of his/her powers under FOIP/LA FOIP to one or more officers of the public body. The delegation should:

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

The **head** for purposes of FOIP includes the member of the Executive Council responsible for the administration of the agency (i.e. Minister, President/CEO).

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

Here are some important things regarding a delegation:

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

- In general, delegation should be considered for all provisions of FOIP/LA FOIP that state that the head may or must do something.

## 8. Severing (s. 8 of FOIP/s. 8 of LA FOIP)

FOIP	LA FOIP
8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused.	8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused.

**Severing** is the exercise by which portions of a document are blacked out before the document is provided to an applicant.

To be compliant with section 8, when processing records in response to an access request, public bodies should do a line-by-line review of each page and apply severing where appropriate. Each severed item should have a notation indicating which exemption(s) applies in each instance.

When providing the record to the OIPC for a review, the ideal format is with:

- a. the withheld information outlined or highlighted so it is still visible; and
- b. the applicable exemption(s) clearly indicated beside or near the withheld information.

However, any format will be accepted provided it is clear what is withheld and what exemptions are being relied upon for each item severed.

## 9. Fee Estimates (s. 9 of FOIP/s. 9 of LA FOIP)

FOIP	LA FOIP
<p><b>9(1)</b> An applicant who is given notice pursuant to clause 7(2)(a) is entitled to obtain access to the record on payment of the prescribed fee.</p> <p>(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.</p> <p>(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the</p>	<p><b>9(1)</b> An applicant who is given notice pursuant to clause 7(2)(a) is entitled to obtain access to the record on payment of the prescribed fee.</p> <p>(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.</p> <p>(3) Where an estimate is provided pursuant to subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the</p>

applicant notifies the head that the applicant wishes to proceed with the application.

(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.

(5) Where a prescribed circumstance exists, the head may waive payment of all or any part of the prescribed fee.

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(5) Where a prescribed circumstance exists, the head may waive payment of all or any part of the prescribed fee.

Section 9(2) of FOIP/LA FOIP requires a public body to provide a fee estimate where the cost for providing access exceeds \$50.

Fees encourage responsible use of the right of access by applicants. However, fees should not present an unreasonable barrier to access. Therefore, fees should be reasonable, fair and at a level that does not discourage any resident from exercising their access rights. As a best practice, where an estimate of costs is being issued by a public body, the public bodies' access and privacy office should take steps to contact the applicant in an attempt to narrow the scope of the requests to reduce work and costs (Review Reports 064-2016 to 076-2016 & 078-2016 to 091-2016).

FOIP/LA FOIP provide for reasonable cost recovery associated with providing individuals access to records. A *reasonable* fee estimate is one that is proportionate to the work required on the part of the public body to respond efficiently and effectively to an applicant's request. The public body should be able to detail how it arrived at its fee estimate amounts for each of the types of fees that can be charged.

Public bodies should ensure that in keeping with best practices it:

- Treats all applicants the same (fairness); and
- Calculates its fees the same (consistency).

This is best achieved through establishment of internal guidelines that set out when and how fees will be applied and/or waived.

The following are the steps that can be taken when charging fees:

1. Contact the applicant:
  - a. advise that fees will be necessary;
  - b. attempt to clarify or offer ways to narrow the request to reduce or eliminate fees;
  - c. follow up in writing with applicant when narrowing occurs;
2. Make a [search strategy](#);
3. Based on the search strategy, prepare a fee estimate (do not complete search);
4. Decide whether to charge a fee (refer to your public body's policy);
5. Send out fee estimate and suspend work;
6. If applicant initiates, clarify or narrow request with applicant;
7. When applicant pays 50% deposit; start search.

There are three kinds of fees that can be included in a fee estimate:

1. Fees for searching for a responsive record

The public body should develop a [search strategy](#) when preparing its fee estimate.

Search time consists of every half hour of manual search time required to locate and identify responsive records. For example:

- staff time involved with searching for records;
- examining file indices, file plans or listings of records either on paper or electronic;
- pulling paper files/specific paper records out of files; and
- reading through files to determine whether records are responsive.

Search time does not include:

- time spent to copy the records;
- time spent going from office to office or off-site storage to look for records; or
- having someone review the results of the search.

The tests related to a reasonable search are:

- Generally, it should take an experienced employee 1 minute to visually scan 12 pages of paper or electronic records to determine responsiveness;
- Generally, it should take an experienced employee 5 minutes to search 1 regular file drawer for responsive file folders.

In instances where the above tests do not accurately reflect the circumstances, the public body should design a search strategy and test a representative sample of records for time. The time can then be applied to the responsive records as a whole.

Where the search or preparation for responsive records exceeds 2 hours (FOIP) or 1 hour (LA FOIP), the public body can charge \$15.00 for every half hour after that for search or preparation.

In Review Report 064-2016 to 076-2016, the Commissioner noted that where a search of active email accounts of current employees is required, search time should be calculated using subsection 6(2) of the [FOIP Regulations](#) and not subsection 6(3) of the *Regulations* unless it is less expensive and the applicant is in agreement. Further, the Commissioner found that government institutions cannot charge for searches of archived email accounts pursuant to subsection 6(3) of the FOIP Regulations because [The Archives and Public Records Management Act](#) (APRM) requires records be useable and accessible.

However, local authorities are not subject to APRM, therefore, local authorities do not have the same legal requirement and may have different records management practices (see Review Reports 010-2017 to 014-2017).

## 2. Fees for preparing the record for disclosure

Preparation includes time spent preparing the record for disclosure including:

- time anticipated to be spent physically severing exempt information from records.

Preparation time does not include:

- Deciding whether or not to claim an exemption;

- Identifying records requiring severing;
- Identifying and preparing records requiring third party notice;
- Packaging records for shipment;
- Transporting records to the mailroom or arranging for courier service;
- Time spent by a computer compiling and printing information;
- Assembling information and proofing data;
- Photocopying; and
- Preparing an index of records.

The test related to reasonable time spent on preparation is:

- Generally, it should take an experienced employee 2 minutes per page to physically sever only.

In instances where the above test does not accurately reflect the circumstances (i.e. a complex record), the public body should test the time it takes to sever on a representative sample of records. The time can then be applied to the responsive records as a whole.

Where the search or preparation for responsive records exceeds 2 hours (FOIP) or 1 hour (LA FOIP), the public body can charge \$15.00 for every half hour after that for search or preparation.

### 3. Fees for the reproduction of records

FOIP and LA FOIP prescribe \$0.25 per page for photocopying

If a fee is going to be high, public bodies should contact applicants to see if the applicant is willing to clarify or narrow the scope of the request in order to reduce the fees. These efforts should be documented. If an applicant is unwilling to work constructively with the public body to narrow or clarify the scope of their request, or advance a compromise solution which would reduce cost, this could be taken into consideration in determining whether the fee is reasonable during a review by the OIPC.

For the public body, the 30 day period to respond to an access request is suspended once the fee estimate is sent and remains suspended until the applicant notifies the public body that the applicant wishes to proceed with the application. The public body can require the applicant to pay a 50% deposit on the fee estimate. Alternatively, the applicant could request a review of the fee estimate.

Applicants are not required to pay any fees beyond what was originally estimated by the public body. If the actual fee ends up being less, the public body should refund the applicant accordingly (see subsection 7(2)/6(2) of FOIP/LA FOIP *Regulations*).

Where a decision is made to withhold records, applicants do not pay a fee for records withheld. The public body should refund the applicant any deposit paid for these records (see subsections 8(1) & 8(2)/7(1) & 7(2) of FOIP/LA FOIP *Regulations*).

In November 2014, the OIPC posted a guest blog on its website from Sun Country Health Region titled, *Using an Index to Clarify an Access Request and Reduce the Cost*. The blog provides great advice on how to handle fees and provides an example of a template that can be used to break down a fee estimate.

## 10. Fee Waivers (s. 9 of FOIP Regulations/s. 8 of LA FOIP Regulations)

FOIP	LA FOIP
<p><b>9</b> For purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:</p> <p>(a) where the actual cost of responding to an application varies from the total of the prescribed fees that are applicable to the application;</p> <p>(b) where payment of the prescribed fees will cause a substantial financial hardship for the applicant and:</p> <p style="padding-left: 20px;">(i) in the opinion of the head, giving access to the record is in the public interest; or</p> <p style="padding-left: 20px;">(ii) the application involves the personal information of the applicant;</p> <p>(c) where the prescribed fee or actual cost for the service is \$10 or less.</p>	<p><b>8</b> For purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:</p> <p>(a) with respect to the fee set out in subsection 5(1), where the application involves the personal information of the applicant;</p> <p>(b) with respect to the fees set out in subsections 5(2) to 5(4):</p> <p style="padding-left: 20px;">(i) where the actual cost of responding to an application varies from the total of the prescribed fees that are applicable to the application;</p> <p style="padding-left: 20px;">(ii) where payment of the prescribed fees will cause a substantial financial hardship for the applicant and:</p> <p style="padding-left: 40px;">(A) in the opinion of the head, giving access to the record is in the public interest; or</p> <p style="padding-left: 40px;">(B) the application involves the personal information of the applicant.</p>

Subsection 9(5) of FOIP/LA FOIP provides that where a prescribed circumstance exists, the head can waive payment of all or any part of the fees.

For LA FOIP only, the \$20 application fee can be waived if the request is for the personal information of the applicant (subsection 8(a) – [LA FOIP Regulations](#)). There is no application fee provided for in FOIP.

For FOIP only, the head can waive the fees (prescribed or actual) if the cost is \$10 or less (subsection 9(c) [FOIP Regulations](#)).

### 9(a)/8(b)(i)

This provision provides that the head may waive the fee where the actual cost of responding varies from the total prescribed fees (section 6/5) that are applicable. In some instances, the prescribed fees may exceed the actual cost. The head can charge the actual fee and waive the difference.

### 9(b)/8(b)(ii)

For processing fees listed under section 6: FOIP/section 5: LA FOIP, the head can waive the fees if payment would cause substantial financial hardship for the applicant: and

- giving access is in the public interest; or
- the application involves the personal information of the applicant.

Applicants must establish that payment of the fee would cause substantial financial hardship which could include providing information about income, expenses, assets and liabilities. Public bodies should have established criteria to apply for determining when payment of fees may be waived (i.e. policy or form to be completed by applicants). Public bodies should only collect what is necessary and destroy it when no longer needed.

**Substantial financial hardship** is where any money spent outside of life sustaining requirements (food, water, clothing and shelter) is cause for financial difficulties (ON IPC Order PO-2464). For example, one can consider whether an applicant's expenses exceed their income and the value of their assets.

To determine if granting access to a record is in the **public interest**, the following factors may be considered:

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:
  - Have others besides the applicant sought or expressed an interest in the records?
  - Are there other indicators that the public has or would have an interest in the records?
2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:
  - Do the records relate to a personal conflict between the applicant and the public body?
  - What is the likelihood the applicant will disseminate the contents of the records in a manner that will benefit the public?
3. If the records are about the process or functioning of the public body, will they contribute to open, transparent and accountable government? The following may be relevant:
  - Do the records contain information that will show how the public body reached or will reach a decision?
  - Are the records desirable for the purpose of subjecting the activities of the public body to scrutiny?
  - Will the records shed light on an activity of the public body that have been called into question?

The factors above do not require that all questions be answered in the affirmative in order for the public body to find that access to the records is in the public interest. The public body should weigh the circumstances of each case in making its decision.

(see Review Report 145-2015)

A review of a fee waiver denied considers the criteria or process used by the public body to deny a fee waiver and whether it was consistent with FOIP/LA FOIP. Public bodies should have a policy or process for dealing with fee waivers and not make decisions arbitrarily. A public body should be able to explain in detail how it arrived at its decision to deny a fee waiver.

## 11. Right of Correction (s. 32 of FOIP/s. 31 of LA FOIP)

FOIP	LA FOIP
<p><b>32(1)</b> An individual who is given access to a record that contains personal information with respect to himself or herself is entitled:</p> <p>(a) to request correction of the personal information contained in the record if the person believes that there is an error or omission in it; or</p> <p>(b) to require that a notation be made that a correction was requested but not made.</p> <p>(2) Within 30 days after a request pursuant to clause (1)(a) is received, the head shall advise the individual in writing that:</p> <p>(a) the correction has been made; or</p> <p>(b) a notation pursuant to clause (1)(b) has been made.</p> <p>(3) Section 12 applies, with any necessary modification, to the extension of the period set out in subsection (2).</p>	<p><b>31(1)</b> An individual who is given access to a record that contains personal information with respect to himself or herself is entitled:</p> <p>(a) to request correction of the personal information contained in the record if the person believes that there is an error or omission in it; or</p> <p>(b) to require that a notation be made that a correction was requested but not made.</p> <p>(2) Within 30 days after a request pursuant to clause (1)(a) is received, the head shall advise the individual in writing that:</p> <p>(a) the correction has been made; or</p> <p>(b) a notation pursuant to clause (1)(b) has been made.</p> <p>(3) Section 12 applies, with any necessary modification, to the extension of the period set out in subsection (2).</p>

### 32(1)(a)/31(1)(a)

This provision provides an individual with the right to request a public body correct his/her personal information where the individual believes there has been an error or omission.

An **error** is a mistake or something wrong or incorrect.

An **omission** means that something is missing, left out or overlooked.

As it is applicants alleging errors, applicants must provide some argument to support the request for correction. A request for correction must, at a minimum:

- i) Identify the personal information the applicant believes is in error. That personal information must be the personal information of the applicant and not of a third party;
- ii) The alleged error must be a factual error or omission;
- iii) The request must include some evidence to support the allegation of error or omission. Mere assertions will not suffice; and
- iv) The proposed correction must be clearly stated and cannot be a substitution of opinion.

The provision is not intended to function as an avenue of appeal, or redress, for an individual who is disappointed by a decision or disagrees with it.

Records of an investigatory nature cannot be said to be “incorrect”, “in error”, “incomplete”, “inexact” or “ambiguous” if they simply reflect the views of the individuals whose impressions are being set out. In other words, it is not the truth of the recorded information that is determinative of whether a correction request should be granted, but rather whether what is recorded

accurately reflected the author’s observations, perception of events and impressions as they existed at the time the records were created.

The section does not require a public body to ‘correct’ opinions or any expressions of judgement based on facts and arrived at applying knowledge, skill and experience.

In each case, the appropriate method for correcting personal information should be determined by taking into account the nature of the record, the method indicated by the applicant, if any, and the most practical and reasonable method in the circumstances.

**32(1)(b)/31(1)(b)**

This provision requires a public body to make a notation on file where a correction was requested by an applicant but the decision was made not to correct the information.

Notations should be:

- Permanent and obvious; and
- Include:
  - Date;
  - Who requested the amendment;
  - What the requested amendment was;
  - A signature of the decision-maker; and
  - The reason why the notation instead of the amendment was made.

**12. Manner of Access (s. 10 of FOIP / s. 10 of LA FOIP)**

FOIP	LA FOIP
<p><b>10(1)</b> Where an applicant is entitled to access pursuant to subsection 9(1), the head shall provide the applicant with access to the record in accordance with this section.</p> <p>(2) A head may give access to a record:</p> <p style="padding-left: 40px;">(a) by providing the applicant with a copy of the record; or</p> <p style="padding-left: 40px;">(b) where it is not reasonable to reproduce the record, by giving the applicant an opportunity to examine the record.</p> <p>(3) A head may give access to a record that is a microfilm, film, sound recording, machine-readable record or other record of information stored by electronic means:</p> <p style="padding-left: 40px;">(a) by permitting the applicant to examine a transcript of the record;</p> <p style="padding-left: 40px;">(b) by providing the applicant with a copy of</p>	<p><b>10(1)</b> Where an applicant is entitled to access pursuant to subsection 9(1), the head shall provide the applicant with access to the record in accordance with this section.</p> <p>(2) A head may give access to a record:</p> <p style="padding-left: 40px;">(a) by providing the applicant with a copy of the record; or</p> <p style="padding-left: 40px;">(b) where it is not reasonable to reproduce the record, by giving the applicant an opportunity to examine the record.</p> <p>(3) A head may give access to a record that is a microfilm, film, sound recording, machine-readable record or other record of information stored by electronic means:</p> <p style="padding-left: 40px;">(a) by permitting the applicant to examine a transcript of the record;</p> <p style="padding-left: 40px;">(b) by providing the applicant with a</p>

<p>the transcript of the record; or</p> <p>(c) in the case of a record produced for visual or aural reception, by permitting the applicant to view or hear the record or by providing the applicant with a copy of it.</p>	<p>copy of the transcript of the record; or</p> <p>(c) in the case of a record produced for visual or aural reception, by permitting the applicant to view or hear the record or by providing the applicant with a copy of it.</p>
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Section 10 concerns how access to a record will be given. Public bodies can provide applicants with a copy of the record, or given the applicant an opportunity to examine the record.

If the record is microfilm, film, sound recording, machine-readable record, or other record of information stored by electronic means, the public body has the option to provide access by permitting the applicant to examine a transcript of the record, by providing the applicant with a copy of the transcript of the record, enable the applicant to view or hear the record (or providing the applicant a copy of the record) if the record is produced for visual or aural reception.

In Review Report 110-2015, the Commissioner found that subsection 10(3) of FOIP does not require a government institution to provide both audio and transcription copies of a record.

In Review Report 138-2015, the government institution stated it would provide access to the Applicant by enabling him to view the record. The Applicant wished for a copy of the record instead. The Commissioner found that the manner of access under subsection 10(3) is at the discretion of the public body.

### 13. Transfer of Access Requests (s. 11 of FOIP / s. 11 of LA FOIP)

<b>FOIP</b>	<b>LA FOIP</b>
<p><b>11(1)</b> Where the head of the government institution to which an application is made considers that another government institution has a greater interest in the record, the head:</p> <p>(a) may, within 15 days after the application is made, transfer the application and, if necessary, the record to the other government institution; and</p> <p>(b) if a record is transferred pursuant to clause (a), shall give written notice of the transfer and the date of the transfer to the applicant.</p> <p>(2) For the purposes of this section, a government institution has a greater interest in a record if:</p> <p>(a) the record was originally prepared in or for the government institution; or</p> <p>(b) the government institution was the first government institution to obtain the record or</p>	<p><b>11(1)</b> Where the head of the local authority to which an application is made considers that another local authority or a government institution has a greater interest in the record, the head:</p> <p>(a) may, within 15 days after the application is made, transfer the application and, if necessary, the record to the other local authority or government institution; and</p> <p>(b) if a record is transferred pursuant to clause (a), shall give written notice of the transfer and the date of the transfer to the applicant.</p> <p>(2) For the purposes of this section, another local authority or a government institution has a greater interest in a record if:</p> <p>(a) the record was originally prepared in or for the other local authority or the government institution; or</p>

<p>a copy of the record.</p> <p>(3) For the purposes of section 7, an application that is transferred pursuant to subsection (1) is deemed to have been made to the government institution on the day of the transfer.</p>	<p>(b) the other local authority or the government institution was the first to obtain the record or a copy of the record.</p> <p>(3) For the purposes of section 7 and section 7 of <i>The Freedom of Information and Protection of Privacy Act</i>, an application that is transferred pursuant to subsection (1) is deemed to have been made to the local authority or the government institution on the day of the transfer.</p> <p>(4) Where the application is transferred to a government institution, <i>The Freedom of Information and Protection of Privacy Act</i>, and not this Act, applies to the application.</p>
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This provision enables public bodies to transfer an access to information request if another public body has a greater interest in the record.

The transfer must take place within 15 days of the public body receiving the access to information request.

In Review Report 059-2015, the government institution did not transfer the access to information request until more than 15 months after receiving the request. The Commissioner found that the government institution did not comply with section 11 of FOIP.

#### 14. Extension of Time (s. 12 of FOIP/ s. 12 of LA FOIP)

FOIP	LA FOIP
<p><b>12(1)</b> The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:</p> <p>(a) where:</p> <ul style="list-style-type: none"> <li>(i) the application is for access to a large number of records or necessitates a search through a large number of records; or</li> <li>(ii) there is a large number of requests;</li> </ul> <p>and completing the work within the original period would unreasonably interfere with the operations of the government institution;</p> <p>(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or</p>	<p><b>12(1)</b> The head of a local authority may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:</p> <p>(a) where:</p> <ul style="list-style-type: none"> <li>(i) the application is for access to a large number of records or necessitates a search through a large number of records; or</li> <li>(ii) there is a large number of requests;</li> </ul> <p>and completing the work within the original period would unreasonably interfere with the operations of the local authority;</p> <p>(b) where consultations that are necessary to comply with the application cannot reasonably be completed within the original period; or</p>

<p>(c) where a third party notice is required to be given pursuant to subsection 34(1).</p> <p>(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.</p> <p>(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.</p>	<p>(c) where a third party notice is required to be given pursuant to subsection 33(1).</p> <p>(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within 30 days after the application is made.</p> <p>(3) Within the period of extension, the head shall give written notice to the applicant in accordance with section 7.</p>
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Section 12 of FOIP and LA FOIP provide that public bodies can extend the initial 30 day response time to a maximum of 30 more days. This means 60 days in total. However, this is only under limited circumstances which are outlined in the provision.

**12(1)(a)**

This provision allows for additional time where:

- the access to information request is for a large number of records; or
- a search through a large number of records is required; or
- a large number of access to information requests was received.

However, public bodies must demonstrate that even where one of the above circumstances exist, completing the work within the original 30 days would unreasonably interfere with the public body’s operations.

**12(1)(a)(i)**

An extension can be applied where there are a large number of records responsive to the request that require processing or where a search through a large number of records is required in order to respond to the request. In addition, completing this work within the original 30 days would unreasonably interfere with the operations of the public body.

Both parts of the following test must be met:

1. Are there a large number of records requested or needing to be searched?

*Volume considerations:*

- How many pages are involved?
- Do the records require special handling?
- Does the type of record require different methods of searching or handling?

2. Will meeting the original time limit unreasonably interfere with the operations of the public body?

**Interference**, in this context, means to obstruct or hinder the range of effectiveness of the public body’s activities.

Circumstances that may contribute to unreasonable interference:

- Significant increase in FOI requests (e.g. sharp rise over 1-4 months)

- Significant increase in FOI caseloads
- Computer systems or technical problems
- Unexpected FOI employee leaves
- Unusual number (high percentage ) of new FOI employees in training
- Cross government requests
- Program area discovers a significant amount of additional records
- Type of records (maps, etc.)
- Number of program areas searched
- Location of records

Circumstances that would not qualify:

- The public body has not allocated the FOI area sufficient resources
- Long term or systemic problems
- Vacations
- Office processes (e.g. sign-off)
- Personal commitments
- Pre-planned events (e.g. retirements)
- No work done during initial 30 days
- Type of applicant (media, political, etc.)

*(BC IPC, Time Extension Requests Guidelines for Public Bodies)*

In Review Report F-2014-003, the Commissioner found that the Ministry of Justice appropriately applied an extension for purposes of processing a large number of records. The Commissioner found that generally more than 500 records constitute a large number of records for purposes of subsection 12(1)(a)(i) of FOIP.

### **12(1)(a)(ii)**

An extension can be applied where the public body has received a large number of access to information requests and completing them within the original 30 days would unreasonably interfere with the operations of the public body.

Both parts of the following test must be met:

1. Were there a high number of requests at the time?

*Volume considerations:*

- How many requests are involved?
- How does volume compare with average request volume?

2. Will meeting the original time limit unreasonably interfere with the operations of the public body?

***Interference***, in this context, means to obstruct or hinder the range of effectiveness of the public body's activities.

Circumstances that may contribute to unreasonable interference:

- Significant increase in FOI requests (e.g. sharp rise over 1-4 months)
- Significant increase in FOI caseloads
- Computer systems or technical problems
- Unexpected FOI employee leaves
- Unusual number (high percentage ) of new FOI employees in training
- Cross government requests
- Program area discovers a significant amount of additional records
- Type of records (maps, etc.)
- Number of program areas searched
- Location of records

Circumstances that would not qualify:

- The public body has not allocated the FOI area sufficient resources
- Long term or systemic problems
- Vacations
- Office processes (e.g. sign-off)
- Personal commitments
- Pre-planned events (e.g. retirements)
- No work done during initial 30 days
- Type of applicant (media, political, etc.)

(BC IPC, *Time Extension Requests Guidelines for Public Bodies*)

In Review Report 123-2015, the Commissioner found that at least double the amount of requests normally opened within the Ministry of Justice qualified as a “large number” of requests. In addition, because the Ministry of Justice had seven vacancies in its Freedom of Information and Privacy Branch, it was reasonable to consider the interference with its operations if it were to try to complete them within the original 30 days. The Ministry of Justice normally had 25 to 50 access to information requests. However, it had over 100 at the time it extended the original time period of 30 days.

### **12(1)(b)**

An extension can be applied where the public body needs more time to consult in order to process the request.

Both parts of the following test must be met:

1. Was the public body consulting a third party or other public body?

The public body should be able to explain why it was necessary to consult with a third party or other public body in order to make a decision about access, including how the third party or other public body is expected to assist.

Some valid reasons for consulting:

- Third party or other public body has an interest in the records
- Records were created or controlled jointly

Consultations with staff, program areas or branches within the same public body do not qualify for this provision.

Consultations for a purpose other than deciding whether to give access do not qualify for this provision.

2. Was it not reasonable for the consultations to be completed within the first 30 days?

Considerations:

- When did the public body initiate consultations?
- Were a large number of consultations required?
- Availability of third party and public body contacts
- Did the public body set deadline expectations?
- Is time required for consultation reasonable?
- Did the public body follow up on consultation requests?
- Has the public body proceeded with a phased release?

(BC IPC, *Time Extension Requests Guidelines for Public Bodies*)

## 15. Representative Capacity (s. 59 of FOIP/ s. 49 of LA FOIP)

FOIP	LA FOIP
<p><b>59</b> Any right or power conferred on an individual by this Act may be exercised:</p> <p>(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;</p> <p>(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;</p> <p>(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;</p> <p>(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</p> <p>(e) by any person with written authorization from the individual to act on the individual's behalf.</p>	<p><b>49</b> Any right or power conferred on an individual by this Act may be exercised:</p> <p>(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;</p> <p>(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;</p> <p>(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;</p> <p>(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</p> <p>(e) by any person with written authorization from the individual to act on the individual's behalf.</p>

Section 59 of FOIP and section 49 of LA FOIP provides that another person, under specific circumstances, may exercise any right or power under FOIP or LA FOIP that is conferred on an individual.

### **59(a)/49(a)**

A **personal representative** would be someone appointed by the court as Executor or Executrix or Administrator of an estate.

**Administration of an estate** means the management and settlement of the estate of a deceased, including selling, collecting and liquidating assets, paying debts, and making claims for funds owing or exercising any right of a financial benefit of the deceased.

In Review Report 098-2015, the Commissioner found that the information requested by the Applicant relates to the administration of her son's estate because the information appears in records related to the adjudication of the claim and were considered in the decision-making process. To only provide portions to the Applicant now, would appear unfair.

### **59(d)/49(d)**

The legal custodian can sign on behalf of the child. Sections 3 and 4 of *The Children's Law Act* provide who would be a legal custodian:

- The parents of a child are joint legal custodians with equal rights unless changed in a court order or an agreement;
- Where parents have not lived together after the birth of a child, the parent with whom the child resides is the sole legal custodian;
- If a parent dies, the surviving parent is the legal custodian of that child unless changed by a court order or an agreement.

Both FOIP and LA FOIP provide that legal custodians can have child's information, unless in the opinion of the head, providing the information would be an unreasonable invasion of privacy of the individual.

Social workers, teachers and guidance counsellors can run into this problem. Parents may want all the information but that information could include information on pregnancy, drug addiction, sexually transmitted disease, contemplated suicide, contemplated leaving home or commission of a crime. In these instances, the professional involved, his or her supervisor, the head or the trustee must consider very carefully the words "unreasonable invasion of privacy".

If the child verbally or in writing tells the professional that the child has shared the information in confidence and does not want his or her parents to know, it is important that the professional takes that into consideration in determining whether there would be an "unreasonable invasion of privacy" when disclosing the information to a legal custodian.