Proposed LA FOIP/FOIP Amendments

June 2024

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Summary of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) Proposed Amendments	
Citizens	
Object or purpose clause	It is proposed that that an object or purpose clause be added to both FOIP and LA FOIP that is similar in wording to what is used in Alberta's *Freedom of Information and Protection of Privacy Act*.
New Section – public interest	It is proposed that a new section be added that expands the ability of a local authority to consider release of documents in the public interest.
New Section 32.1 – Privacy Impact Assessments	It is proposed that provisions be added for when a Privacy Impact Assessment should occur to ensure privacy protection practices are embedded in program design at the outset.
Section 53.1 – proactive disclosure	It is proposed that section 53.1 be amended to be more expansive and to help clarify what type of government records should be proactively released outside of the formal application process. An alternative is to establish an open data directive, similar to what is found in Ontario, that outlines requirements for public bodies on how to manage its data inventories.
Section 5 Regulations - fees	It is proposed that section 5 of the LA FOIP Regulations be amended to recognize that no fees should be charged when the fees will be less than $200.
Subsection 8(1)(b) of the LA FOIP Regulations – fee waivers	It is proposed that the requirement for determining if a fee waiver should be granted not be based on an applicant demonstrating both a financial hardship and that release be in the public interest; these conditions should be exclusive of each other.
Government	
New subsection 2(1)(f)(xviii) – new local authority	It is proposed that regional park authorities be added as a local authority at new subsection 2(1)(f)(xviii).
New subsection 2(1)(f)(xix) – new local authority	It is proposed that planning and development boards that are approved pursuant to *The Planning and Development Act* be added as a local authority at new subsection 2(1)(f)(xix).

Subsection 2(1)(f)(viii) – new local authority	It is proposed that subsection 2(1)(f)(viii) be amended to include in the definition "independent schools" within the meaning of *The Independent Schools Regulations*.
Subsection 2(1)(f)(xvii)(A) – new local authorities	It is proposed that subsection 2(1)(f)(xvii)(A) be amended by replacing 50% with 25% so that LA FOIP captures more organizations that receive government funding, such as non-profit organizations and charities.
Subsection 2(1)(f) – new definition	It is proposed that the definition of "dataset" be adopted into LA FOIP, and then the definition of "dataset" be added to the definition of "record", similar to what is found in Newfoundland and Labrador's legislation.
Repeal - subsections 21(b) and (c)	It is proposed that these subsections be repealed. Case law on the application of subsection 21(a) is solid in recognizing the seeking or giving of legal advice within the solicitor-client relationship and how it is different from counsel that is not privileged.
Repeal - subsection 23.2(1)(c)	It is proposed that this subsection be repealed because Information Management Service Providers who enter contracts with local authorities to manage personal information should not have the ability to take possession or control of personal information.
New section 29.01 – recovery of personal information	It is proposed that new provisions dealing with the recovery of personal information be added to LA FOIP and that it be an offence to not comply.
Commissioner	
Repeal - subsection 22(3)	It is proposed that this subsection be repealed. LA FOIP has many exemptions built into it, as well as many years of solid case law on how to interpret LA FOIP. Consequently, subsection 12 of the LA FOIP Regulations would also need to be repealed.
Section 28.1 – notify Commissioner	It is proposed that this section be amended to include the requirement that when a public body notifies an individual that a privacy breach poses a real risk of significant harm that it also notifies the Commissioner.

New section 32.2 – management programs and audits	It is proposed that new section 32.2 be added to require a local authority to develop privacy management programs and access management programs that are in accordance with directions from the Minister responsible for the Act. The Commissioner should be able to conduct audits.
Sections 38 to 43, 35 and 57 – consistent language	It is proposed these sections be amended to clean up the language in this part and add "investigations" in addition to reviews where appropriate.
Section 43 – clarifying powers	It is proposed that the Commissioner's powers be changed to include language that aligns more with powers of the Ombudsman and the Advocate for Children and Youth.
Section 45 – compliance with recommendations	It is proposed that section 45 be repealed and replaced with language enabling the Commissioner to seek compliance with a recommendation by adopting legislation similar to sections 49 and 51 of Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*.
Other	
New section 57.1 - Statutory Review Period	It is proposed that a mandatory review period of once every five years be added.
LA FOIP Regulations - Review Form A (Access to Information Request Form) Regulations	It is proposed that Form A in the Regulations include a date field in the "Information About You" section to capture the date an applicant makes an application for access to information (housekeeping)
LA FOIP Regulations - Form B (Request for Review Form) Regulations	There is inconsistency between the FOIP and LA FOIP regarding Form B - review forms (housekeeping)

Summary of *The Freedom of Information and Protection of Privacy Act* (FOIP) Proposed Amendments	
Citizens	
Object or purpose clause	It is proposed that that an object or purpose clause be added to FOIP that is similar in wording to what is used in Alberta's *Freedom of Information and Protection of Privacy Act*.
New Section – public interest	It is proposed that a new section be added to FOIP that expands on when a government institution may consider releasing records in the public interest.
New Section 33.1 – Privacy Impact Assessments	It is proposed that provisions be added for when a Privacy Impact Assessment should occur to ensure privacy protection practices are embedded in program design at the outset.
Section 65.1 – proactive disclosure	It is proposed that section 65.1 be amended to be more expansive and to help clarify what type of government records should be proactively released outside of the formal application process. An alternative is to establish an open data directive, similar to what is found in Ontario, that outlines requirements for public bodies on how to manage its data inventories.
Section 6 of FOIP Regulations - fees	It is proposed that section 6 of the FOIP Regulations be amended to recognize that no fees should be charged when the fees will be less than $200.
Subsection 9(1)(a) of FOIP Regulations – fee waivers	It is proposed that the requirement for determining if a fee waiver should be granted not be based on an applicant demonstrating both a financial hardship and that release be in the public interest; these conditions should be exclusive of each other.
Government	
2(1) – new definitions	It is proposed that the definition of "dataset" be adopted into FOIP, and then the definition of "dataset" be added to the definition of "record," similar to what is found in Newfoundland and Labrador's legislation.
Repeal subsections 22(b) and (c)	It is proposed that these subsections be repealed. Case law on the application of subsection 22(a) is solid in recognizing the seeking or giving of legal advice within the solicitor-client relationship and how it is different from other services that counsel may provide that is not privileged.

Repeal subsection 24.2(1)(c)	It is proposed that this subsection be repealed because Information Management Service Providers who enter contracts with government institutions to manage personal information should not have the ability to take possession or control of personal information.
New section 28.01 – recovery of personal information	It is proposed that provisions dealing with the recovery of personal information be added to FOIP and that it be an offence to not comply.
Commissioner	
Repeal - subsection 23(3) of FOIP	It is proposed that this subsection be repealed. FOIP has many exemptions built into it, as well as many years of solid case law on how to interpret FOIP. Consequently, subsection 8.1 of the FOIP Regulations would also need to be repealed.
Section 29.1 – notify Commissioner	It is proposed that this section be amended to include the requirement that when a public body notifies an individual that a privacy breach poses a real risk of significant harm that it also notifies the Commissioner.
Sections 43 to 47 – extending to contractors	It is proposed that these sections be amended to include provisions recognizing contractors or individuals the Commissioner enters into contracts or agreements with to provide services.
New section 43.5 – ability to delegate	It is proposed that a new section 43.5 be added to enable the Commissioner to delegate functions to staff.
Subsection 45(2)(a) and New Section 32.2 – management programs and audits	It is proposed that provisions be added requiring government institutions to develop privacy management program and access management programs that are in accordance with directions of the Minister responsible for the Act. It should also be clear that the Commissioner may conduct audits.
Sections 49 to 54, 56 and 69 – consistent language	It is proposed these sections be amended to clean up the language in this part and add "investigations" in addition to reviews where appropriate.

Section 54 – clarifying powers	It is proposed that the Commissioner's powers be changed to include language that aligns more with powers of the Ombudsman and the Advocate for Children and Youth.
Section 56 – compliance with recommendations	It is proposed that section 69 be repealed and replaced with language enabling the Commissioner to seek compliance with a recommendation by adopting legislation similar to certain sections of Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*.
Other	
New section 69.1 - Statutory Review Period	It is proposed that a mandatory review period of once every five years be added.
Coverage for Private and Non-profit Sector Employees	It is proposed that Saskatchewan amend *The Saskatchewan Employment Act* to include sections pertaining to employee personal information. This includes adding a definition of "employee personal information," clarifying the addition of the new Part, introducing the duty to protect and setting rules for the collection, use, disclosure, access to and correction of employee information. See letter-and-submission-to-sask-employment-labour-standards-act.pdf (oipc.sk.ca).
Use of generative Artificial Intelligence (AI)	It is proposed that the government adopt a framework for the use of generative AI that is similar to Ontario's *Trustworthy Artificial Intelligence (AI) Framework*.
FOIP Regulations - Form A (Access to Information Request Form)	It is proposed that Form A in the Regulations include a date field in the "Information About You" section to capture the date an applicant makes an application for access to information (housekeeping).

This document provides details of the proposals to amend *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) and *The Freedom of Information and Protection of Privacy Act* (FOIP). It provides some reasons for the proposed amendments based on legislation in other provinces or territories of Canada.

I - Amendments for Citizens

1. Object or Purpose Clause

A purpose clause at the beginning of an Act sets out the purposes taken into account when applying the Act. Quasi-constitutional legislation should have a clear statement of purpose for heads, the Commissioners and the Courts to refer to.

The purposes in Alberta's (AB) *Freedom of Information and Protection of Privacy Act* (FOIP) are set out as follows:

> **Purposes of this Act**
> **2** The purposes of this Act are
>
> (a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,
>
> (b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information,
>
> (c) to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body,
>
> (d) to allow individuals a right to request corrections to personal information about themselves that is held by a public body, and
>
> (e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.

British Columbia's (BC) *Freedom of Information and Protection of Privacy Act* (FIPPA) sets out its purposes as follows:

> **Purposes of this Act**
> **2**(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,

(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,

(c) specifying limited exceptions to the rights of access,

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act.

The federal *Access to Information Act* (ATIA) sets out its purpose as follows:

Purpose

2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Provincially, *The Health Information Protection Act* (HIPA) has the following preamble:

WHEREAS the Legislative Assembly recognizes the following principles with respect to personal health information:

THAT personal health information is private and shall be dealt with in a manner that respects the continuing interests of the individuals to whom it relates;

THAT individuals provide personal health information with the expectation of confidentiality and personal privacy;

THAT trustees of personal health information shall protect the confidentiality of the information and the privacy of the individuals to whom it relates;

THAT the primary purpose of the collection, use and disclosure of personal health information is to benefit the individuals to whom it relates;

THAT, wherever possible, the collection, use and disclosure of personal health information shall occur with the consent of the individuals to whom it relates;

THAT personal health information is essential to the provision of health services;

THAT, wherever possible, personal health information shall be collected directly from the individual to whom it relates;

THAT personal health information shall be collected on a need-to-know basis;

THAT individuals shall be able to obtain access to records of their personal health information;

THAT the security, accuracy and integrity of personal health information shall be protected;

THAT trustees shall be accountable to individuals with respect to the collection, use, disclosure and exercise of custody and control of personal health information;

THAT trustees shall be open about policies and practices with respect to the collection, use and disclosure of personal health information;

Proposal

It is proposed that FOIP and LA FOIP be amended to introduce a clause prior to section 1 of each Act similar to that used in Alberta with wording such as the following:

The purposes of this Act are:

(a) to allow any person a right of access to the records in the possession or under the control of a government institution (local authority) subject to limited and specific exemptions as set out in this Act;

(b) to control the manner in which a government institution (local authority) may collect personal information from individuals, to control the use that a government institution (local authority) may make of that information and to control the disclosure by a government institution (local authority) of that information;

(c) to allow individuals, subject to limited and specific exemptions as set out in this Act, a right of access to personal information about themselves that is in the possession or under the control of a government institution (local authority);

(d) to allow individuals a right to request corrections to personal information about themselves that is in the possession or under the control of a government institution (local authority); and

(e) to provide for independent reviews of decisions made by government institutions (local authorities) under this Act and the resolution of complaints under this Act.

2. New section - Public Interest

Neither LA FOIP nor FOIP have a general or overarching public interest override that requires information to be disclosed in all cases if the general interest in disclosure outweighs the

specific interest that is intended to be protected by the exempting provision. Rather, LA FOIP, for example, addresses the public interest in disclosure on a case-by-case basis only in certain situations as noted in subsections 18(3) and 28(2)(n) only. These subsections provide as follows:

> **18**(3) Subject to Part V, a head may give access to a record that contains information described in clauses 1(b) to (d) if:
>
> (a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and
>
> (b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:
>
> (i) financial loss or gain to;
>
> (ii) prejudice to the competitive position of; or
>
> (iii) interference with contractual or other negotiations of;
>
> a third party.
>
> …
>
> **28**(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:
>
> …
>
> (n) for any purpose where, in the opinion of the head:
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or

The equivalent provisions in FOIP are subsections 19(3) and 29(2)(o).

Newfoundland and Labrador's (NL) *Access to Information and Protection of Privacy Act, 2015* (ATIPPA) is more expansive in recognizing that the overarching principle of its act is to facilitate democracy by ensuring citizens have the information they require in order to facilitate democracy. ATIPPA then favours disclosure of information by public bodies by allowing public bodies to decide based on all relevant factors if information should be released in the public interest even though an exception could apply. This enhanced discretion is provided through the following in ATIPPA:

> **9.**(1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

(2) Subsection (1) applies to the following sections:

(a) section 28 (local public body confidences);

(b) section 29 (policy advice or recommendations);

(c) subsection 30(1) (legal advice);

(d) section 32 (confidential evaluations);

(e) section 34 (disclosure harmful to intergovernmental relations or negotiations);

(f) section 35 (disclosure harmful to the financial or economic interests of a public body);

(g) section 36 (disclosure harmful to conservation); and

(h) section 38 (disclosure harmful to labour relations interests of public body as employer).

(3) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

BC's FIPPA has the following, making public interest paramount:

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

(3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify

(a) any third party to whom the information relates, and

(b) the commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form

(a) to the last known address of the third party, and

(b) to the commissioner.

Proposal

It is proposed that Saskatchewan keep its existing provisions (subsections 18(3) and 28(2)(n) of LA FOIP and subsections 19(3) and 29(2)(o) of FOIP) regarding the public interest and expand the ability in a new section to require a consideration of the public interest when discretionary exemptions are applied.

3. New Section 32.1 LA FOIP/33.1 FOIP - Privacy Impact Assessments

Government institutions and local authorities deal with a lot of personal information. They introduce new programs and develop new computer systems. When these major changes occur, it is only reasonable that they step back and do a privacy impact assessment (PIA). This fits with the concept that entities should manage risks. Inappropriate release of personal information is a risk. Doing an assessment at the beginning reduces the risk of breaches.

A PIA is a diagnostic tool designed to help organizations assess their compliance with the privacy requirements of Saskatchewan legislation. No legal obligation exists presently for public bodies in Saskatchewan to complete these, nor is there a requirement for providing those to the Commissioner for comment. In order to ensure that privacy protective practices are embedded in program design at the beginning, PIAs should be mandatory in some cases. It is always more difficult, time consuming and costly to try to make changes after the fact if missed in the design and implementation phases.

New Brunswick's (NB) *Personal Health Information Privacy and Access Act* (PHIPAA) includes the following provision on requiring PIAs:

> **56**(1) A custodian that is a public body or any other custodian prescribed by regulation shall conduct a privacy impact assessment in the following situations:
>
> (a) for the new collection, use or disclosure of personal health information or any change to the collection, use or disclosure of personal health information;
>
> (a.1) for the creation of an integrated service, program or activity or a modification to an integrated service, program or activity;
>
> (b) for the creation of a personal health information system or personal health information communication technology or a modification to a personal health information system or personal health information communication technology;

(c) subject to section 57, if a custodian performs data matching with personal health information or with any personal health information held by another custodian or another person.

56(1.1) Paragraph (1)(a) does not apply to the collection, use or disclosure of personal health information if the collection, use or disclosure is necessary for the delivery of an existing integrated service, program or activity.

56(2) A privacy impact assessment shall describe, in the form and manner as may be prescribed by regulation, how the proposed administrative practices and information systems relating to the collection, use and disclosure of individually identifying health information may affect the privacy of the individual to whom the information relates.

Alberta's (AB) *Health Information Act* (HIA) includes the following provision on PIAs:

Duty to prepare privacy impact assessment
64(1) Each government institution (local authority) must prepare a privacy impact assessment that describes how proposed administrative practices and information systems relating to the collection, use and disclosure of individually identifying personal information may affect the privacy of the individual who is the subject of the information.

(2) The custodian must submit the privacy impact assessment to the Commissioner for review and comment before implementing any proposed new practice or system described in subsection (1) or any proposed change to existing practices and systems described in subsection (1).

On May 13, 2024, Ontario tabled Bill 194, which introduced the *Enhancing Digital Security and Trust Act, 2024* (EDST Act). The EDST Act introduces a requirement for public institutions to conduct a PIA before collecting personal information unless regulations provide otherwise. Bill 194 requires public institutions to keep PIAs current and to implement additional steps if they make significant changes to the purposes for collecting personal information. Connected to this is the ability of the Ontario's commissioner to conduct complaint-based and proactive reviews of an institution's information practices.

Proposal

It is proposed wording similar to Alberta's be included in LA FOIP and FOIP which might provide as follows:

32.1/33.1(1) A government institution (local authority) must prepare a privacy impact assessment that describes how proposed administrative practices and information systems relating to the collection, use and disclosure of personal information may affect the privacy of the individual who is the subject of the information.

(2) The government institution (local authority) must submit the privacy impact assessment to the Commissioner for review and comment before implementing any proposed new practice or system described in subsection (1) or any proposed change to existing practices and systems described in subsection (1).

4. Section 53.1 LA FOIP/section 65.1 FOIP - Increased Accessibility to Certain Types of Records

The Government of Canada is a member of the Open Government Partnership (OGP). The OGP works to promote the concept of open government, which is a guiding principle that maintains citizens have the right to access government data in a way that is transparent and invites participation. Open government also creates greater efficiency and response times.

Open government embraces the concept of "open government data", or the notion that citizens should be able to freely access government/public body records or data without restriction from mechanisms of control such as copyright. Governments typically achieve this by granting online, searchable access to data. Records containing data are open by default, access is timely and comprehensive as well as accessible and useable, and inclusive. Personal information in the possession or control of government/public bodies, for the most part, remains protected.

British Columbia has its Open Government Portal, which provides access to datasets, information and tools for public use. Datasets relate to health, education, transportation and more. Ministries are mandated to release categories of government information. The portal links to this information, which includes records such as contracts awarded to vendors, estimates, summaries of ministerial briefing notes, minister transition binders, purchase card expenditures, minister and deputy minister calendars, minister travel receipts, etc. The portal also contains access to information already disclosed through an access to information request.

Ontario has its *Open Data Directive*, issued in 2019 under the *Management Board of Cabinet Act*. The directive outlines requirements for ministries, provincial agencies on listing all data inventories, publishing open data and preparing information systems to support open data requirements. For the purpose of its directive, Ontario defines data to include facts, figures and statistics. The directive instructs ministries and provincial agencies to release government data they create, collect or manage as open data, subject to exemptions set out in legislation. There

is a Chief Digital and Data Officer who establishes, coordinates and maintains an inventory of government-wide data. Each ministry and provincial agency is required to create an inventory of datasets within its custody and control, and must provide the Chief Digital and Data Officer a listing of all datasets or data categories. Principles of open data publication according to Ontario's *Open Data Directive* include:

1. All ministry open data must be made available in the Ontario Data Catalogue, which is a central platform for all open data published by ministries and is administered by the Chief Digital and Data Officer. See Appendix B for information on approval authority in ministries for publishing datasets on the Ontario Data Catalogue, including any possible delegations of authority.
2. Provincial agencies must publish all open data following open data requirements. See Appendix B for information on approval authority in provincial agencies for publishing datasets, including any possible delegations of authority.
3. Ministries and provincial agencies must follow the Open Data Guidebook to ensure government data being released as open data meets required criteria.
4. Ministries and provincial agencies should prioritize the publication of datasets frequently requested by the public, collected in support of government priorities or mandated by legislation.
5. All open data must be released in an open format.
6. Open data must be released at no charge to the user and under the Open Government Licence – Ontario (See Appendix A) and/or a similar open licence where appropriate.
7. Ministries and provincial agencies must review and update datasets released as open data periodically to ensure accuracy and timeliness.
8. No datasets released as open data are to be deleted or removed from public access except where a dataset was published in error:
    1. In situations where active maintenance and update of a dataset is discontinued, or where any published dataset has to be replaced with a newer or modified version, the dataset description must be updated in the catalogue to reflect the "inactive" status, without restricting public access to the dataset.
    2. Where custody and control for a dataset is transferred from one program area to another program area, the new program area must update the dataset description in the Ontario Data Catalogue to reflect this.
9. When legislation mandates the release of data but does not specifically prescribe the format, ministries and provincial agencies should make best efforts to apply open data

principles (i.e., listed in Ontario Data Catalogue, in an open format under the Open Government Licence – Ontario and/or a similar open licence where appropriate).

10. In cases where ministries and provincial agencies apply fees to process a request for data, they must review the current practice to assess if releasing it as open data would be a more effective and efficient way of providing the data. This does not apply to freedom of information requests made under the *Freedom of Information and Protection of Privacy Act* application and processing fees or other fees authorized by or under statute.
11. Open data is to be published in the Ontario Data Catalogue in the language it was collected. The dataset title, description, and all accompanying information must be available simultaneously in both English and French.

Proposal

It is proposed that sections 53.1 of LA FOIP and 65.1 of FOIP be amended to be more expansive and to help clarify what types of records should be proactively released outside the formal access to information application process.

5. Section 5 LA FOIP Regulations/Section 6 FOIP Regulations - Fees

Regarding access to one's own personal information, AB's FOIP provides as follows:

> **Fees**
> **93**(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.
>
> (2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy.

AB's FOIP Regulations then provide as follows regarding access to personal information:

> **Fees for personal information**
> **12**(1) This section applies to a request for access to a record that is a record of the personal information of the applicant.
>
> (2) Only fees for producing a copy of a record in accordance with items 3 to 6 of Schedule 2 may be charged if the amount of the fees as estimated by the public body to which the request has been made exceeds $10.
>
> (3) Where the amount estimated exceeds $10, the total amount is to be charged.

Pursuant to subsection 12(2) of AB's FOIP Regulations, items 3 to 6 of Schedule 2 include: actual costs to produce a record from an electronic record up to $20 per 15 minutes ($80 per hour); cost for reproducing the record including photocopying (e.g., $0.25 per page, actual cost for reproducing blueprints); up to the actual cost for providing information electronically or on tape; prescribed costs for printing a photograph (e.g., $3.00 for a 4" x 6" print); and actual costs for producing a record by any other process or any other medium not listed (e.g., operator costs).

British Columbia does not permit public bodies to charge a fee when providing access to an individual's own personal information. BC's FIPPA provides as follows:

> **Fees**
> **75**(1) The head of a public body may require an applicant who makes a request under section 5 to pay to the public body the following:
>
> (a) a prescribed application fee;
>
> (b) prescribed fees for the following services:
>
> (i) locating and retrieving the record;
>
> (ii) producing the record;
>
> (iii) preparing the record for disclosure, except for time spent severing information from the record;
>
> (iv) shipping and handling the record;
>
> (v) providing a copy of the record.
>
> ...
> (3) Subsection (1) does not apply to a request for the applicant's own personal information.

Costs should not be a barrier to accessing information. At the same time, public bodies should be able to recover some of the costs associated with providing access to information.

Proposal

It is proposed that the FOIP and LA FOIP Regulations be updated as follows to recognize that a fee should not be charged if the fee will be less than $200.

LA FOIP Regulation - *new subsection 5(5), amend subsection 6(1) and repeal subsection 8(1)(c) as follows:*

> **5(5) Notwithstanding subsections (1) to (4), a local authority shall not charge a fee if the total will be less than $200.**
>
> ...
> **6**(1) For the purposes of subsection 9(2) of the Act, the amount of fees beyond which an estimate must be given by the head is ~~$100~~ **$200** in excess of the fee set out in subsection 5(1).
>
> ...
> **8**(1) For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:
>
> ~~(c) if the prescribed fee or actual cost for the services is $100 or less.~~

FOIP Regulation - *new subsection 6(4), amend subsection 7(1) and repeal subsection 9(1)(c) as follows:*

> **6(4) Notwithstanding subsections (1) to (3), a government institution shall not charge a fee if the total fee will be less than $200.**
>
> ...
> **7**(1) For the purposes of subsection 9(2) of the Act, ~~$100~~ **$200** is prescribed as the amount of fees beyond which an estimate must be given by the head.
>
> ...
> **9**(1) For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:
>
> ~~(c) if the prescribed fee or actual cost for the services is $100 or less.~~

6. Subsection 8(1)(b) of LA FOIP Regulations/subsection 9(1)(a) of FOIP Regulations - Fee Waivers

These subsections require that applicants, who request a fee waiver, must demonstrate substantial financial hardship and that release of a record is in the public interest. In other words, an applicant must demonstrate that both these conditions apply for a public body to consider waiving a fee. These conditions, however, should be exclusive of each other and made separate provisions.

Also, for the sake of clarity, there should be an "or" listed after subsection 8(1)(b) of the LA FOIP Regulations, and after subsection 9(1)(b) of the FOIP Regulations.

Proposal

LA FOIP Regulations

It is proposed that subsection 8(1)(b) of the LA FOIP Regulations be amended as per the underlined:

> **Waiver of fees**
> **8**(1) For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:
>
> …
>
> (b) with respect to the fees set out in subsections 5(2) to 5(4), if payment of the prescribed fees will:
>
> (i) cause a substantial financial hardship for the applicant or,
>
> (ii) in the opinion of the head, giving access to the record is in the public interest;

FOIP Regulations

It is proposed that subsection 9(1)(a) of the FOIP Regulations be amended as per the underlined:

> **Waiver of fees**
> **9**(1) For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:
>
> (a) if payment of the prescribed fees will:
>
> (i) cause a substantial financial hardship for the applicant, or
>
> (ii) in the opinion of the head, giving access to the record is in the public interest;

II - Amendments for Government/Local Authorities

1. New Subsection 2(1)(f)(xiii) LA FOIP - Definition of Regional Park Authorities

The Municipalities Act (MA) defines a municipality to mean a town, village, resort village, rural municipality, municipal district or restructured municipality. The MA further defines municipal district, resort village and rural municipality, but none of these appear to include regional park authorities. Regional park authorities, however, typically function, by order of the minister, as being comprised of municipalities. A municipal council resolution is required if changes are made to the park authority composition. Governing bodies of regional park authorities include members of a municipal council. Through *The Regional Parks Act, 2013*, regional park authorities derive some of their funding through agreements made between the minister and the authority and through provincial grants.

Proposal

It is proposed that new subsection 2(1)(f)(xviii) be added as follows:

2(1) In this Act:

…

(f) "local authority" means:

…

(xviii) regional park authorities;

2. New Subsection 2(1)(f)(xix) LA FOIP - Definition of Planning and Development Boards

LA FOIP provides that boards, commissions or other bodies appointed pursuant to *The Cities Act*, MA or *The Northern Municipalities Act, 2010*, are local authorities. Planning and development boards, however, are appointed pursuant to *The Planning and Development Act*, thereby excluding them as local authorities.

The Legislative Assembly clearly intended LA FOIP to cover all cities, towns and municipalities, or bodies that are part of the municipal structure and appointed or established by cities, towns and villages. Both regional park authorities and planning and development boards are part of the

municipal structure and established by cities, towns and villages. As such, they should be prescribed as local authorities under the LA FOIP Regulations. This is supported by provinces such as Ontario, for example, which expressly includes "planning boards" within its definition for institutions in Ontario's *Municipal Freedom of Information and Protection of Privacy Act*, which is similar to LA FOIP.

Proposal

It is proposed that new subsection 2(1)(f)(xix) be added as follows:

2(1) In this Act:

…

(f) "local authority" means:

…

(xix) planning and development boards appointed pursuant to *The Planning and Development Act*;

3. Subsection 2(1)(f)(viii) LA FOIP - Include Registered Independent Schools in Definition

Subsection 2(1)(d) of *The Education Act, 1995*, defines a "registered independent school" as one that is registered pursuant to the Act and regulations. It also includes an associate school (one that has an agreement with a board of education or the conseil scolaire) and an associate school or historical high school that holds a certificate of registration. Under the Act, the minister has the power to register an independent school, inspect it, and to appoint one or more persons to inquire into and report on any matter related to the condition and development of education in these schools. The minister may also approve an independent school as an online learning provider. *The Independent School Regulations* provide for a board, and also provide the minister with considerable oversight regarding all aspects of the operations of independent schools. *The Education Funding Regulations* allow the minister to provide operating grants per pupil who is not sponsored by a board of education. It is reasonable, then, that the board of an independents school be considered similar a board to of education or a conseil scolaire.

The Office of the Privacy Commissioner of Canada (PIPEDA Case Summary #345) has previously found that private schools that are not engaged in commercial, for-profit activities are not subject to the *Personal Information Protection and Electronic Documents Act* (PIPEDA). By default, such institutions would be subject to whichever provincial or territorial public or private sector

legislation exists. For example, in Alberta, private schools are covered by subsection 56(1) of its *Personal Information Protection Act* (PIPA). In Newfoundland and Labrador, private schools are covered within the *Schools Act, 1997*, and then its ATIPPA includes an "educational body" to mean a school board or district established under the *Schools Act, 1997*.

Proposal

It is proposed that subsection 2(1)(f)(viii) of LA FOIP be amended by adding the underlined as follows:

> **2**(1)(f)(viii) any board of education or conseil scolaire within the meaning of *The Education Act* **or the board of a registered independent school within the meaning of *The Registered Independent Schools Regulations***;

4. Subsection 2(1)(f)(xvii)(A) LA FOIP - Amend Definition to Recognize Charities/Non-profit Organizations

Subsection 2(1)(f)(xvii)(A) defines a local authority as any board, commission or other body that receives more than 50% of its annual budget from the Government of Saskatchewan or a government institution. There are many non-profit organizations or charities in Saskatchewan that receive less than 50% of their funding from the province and so are not captured by LA FOIP. This subsection provides as follows:

> **2**(1) In this Act:
>
> …
> (f) "local authority" means:
>
> …
> (xvii) any board, commission or other body that:
>
> (A) receives more than 50% of its annual budget from the Government of Saskatchewan or a government institution;

If these organizations are not commercial in nature, they are not likely to be captured by PIPEDA, thus reducing the public's ability to access records through such organizations. Reducing the amount of funding received to 25% would bring more of these organizations within LA FOIP.

Proposal

It is proposed that subsection 2(1)(f)(xvii)(A) of LA FOIP be amended by replacing 50% with 25%.

5. Section 2(1)(f) - Add Definition of a "Dataset" and Amend Definition of "Record" in FOIP and LA FOIP

Public bodies store large amounts of data in databases. Such data, or datasets, involve the collection and storage of information related to a public body's programs and activities. This information, in its raw form, should be accessible to the public subject to any exemptions that may apply.

NL's ATIPPA defines "dataset" and then includes datasets in its definition of "record" as follows:

> **2** In this Act
>
> …
>
> (g) "dataset" means information comprising a collection of information held in electronic form where all or most of the information in the collection
>
> (i) has been obtained or recorded for the purpose of providing a public body with information in connection with the provision of a service by the public body or the carrying out of another function of the public body,
>
> (ii) is factual information
>
> (A) which is not the product of analysis or interpretation other than calculation, and
>
> (B) to which section 13 of the *Statistics Agency Act* does not apply, and
>
> (iii) remains presented in a way that, except for the purpose of forming part of the collection, has not been organized, adapted or otherwise materially altered since it was obtained or recorded;
>
> …
>
> (y) "record" means a record of information in any form, and includes a dataset, information that is machine readable, written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;

The Saskatchewan Secondary Suite Incentive Regulations define "record" as follows:

> **"record"** includes any document or information that is recorded or stored in any medium or by means of any device, including a computer and its hard drive or any electronic media;

Proposal

It is proposed that LA FOIP and FOIP adopt a definition of "dataset" that is similar to what is found in Newfoundland, and then include "dataset" in the definition of "record" as follows:

> **2(1)**(b.01) **"dataset"** means information comprising a collection of information held in electronic form where all or most of the information in the collection:
>
> (i) has been obtained or recorded for the purpose of providing a government/local authority with information in connection with the provision of a service by the trustee or the carrying out of another function of the government/local authority;
>
> (ii) is factual information which is not the product of analysis or interpretation other than calculation; and
>
> (iii) remains presented in a way that, except for the purpose of forming part of the collection, has not been organized, adapted or otherwise materially altered since it was obtained or recorded;
>
> (j)/(i) **"record"** means a record of information in any form and includes information that is written, photographed, recorded, digitized or stored in any medium or manner, **including a dataset**, but does not include computer programs or other mechanisms that produce records;

6. Subsections 21(b)(c) LA FOIP/22(b)(c) FOIP - Legal Advice or Services

Section 21 LA FOIP/22 FOIP provide as follows:

> **22** A head may refuse to give access to a record that:
>
> (a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;
>
> (b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution/local authority in relation to a matter involving the provision of advice or other services by the agent or legal counsel; or

(c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution/local authority and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.

These provisions are intended to protect records that contain:

- Subclause (a) - information subject to any privilege available at law including solicitor-client privilege;
- Subclause (b) - information relating to the provision of legal advice or services prepared for specified individuals; and
- Subclause (c) - information relating to the provision of legal advice or services contained within correspondence between specified individuals.

Subsection 21(a)/22(a) deals specifically with solicitor-client privilege. Case law on the application of this subclause is solid. It has made a distinction between the seeking or giving of legal advice that is contained within the solicitor-client relationship, and the type of in-house counsel that is not privileged. The latter may include the purely business in-house advice provided by a solicitor who is, for example, a member of the public service.

Most cases can be dealt with by subsection 21(a)/22(a). General advice by lawyers may be captured under other provisions, such as subsection 16(1)(a) LA FOIP/subsection 17(1)(a) FOIP.

Proposal

It is proposed that subsections 21(b)(c)/22(b)(c) be repealed.

7. Subsections 23.2(1)(c) LA FOIP/24.2(1)(c) FOIP - Information Management Service Providers

Subsections 23.2(1)(c) of LA FOIP and 24.2(1)(c) of FOIP both read as follows:

> … A government institution/local authority may provide personal information to an information management service provider for the purpose of:
>
> …
> (c) having the information management service provider take possession or control of the personal information.

Information Management Service Providers (IMSPs) who enter into contracts with government institutions or local authorities should not have the ability to take possession or control of personal information.

Proposal

Repeal subsection 23.2(1)(c) of LA FOIP and subsection 24.2(1)(c) of FOIP.

8. New Section 29.01 LA FOIP/28.01 FOIP - Recovery of Personal Information & Non-compliance

In the event of a privacy breach where personal information has fallen into the wrong hands, public bodies often do not know what to do when it is necessary to retrieve or ensure the return or destruction of personal information.

In BC's FIPPA, it is provided:

> **Recovery of personal information**
> **73.1**(1) If the head of a public body has reasonable grounds to believe that personal information in the custody or under the control of the public body is in the possession of a person or an entity not authorized by law to possess the information, the head of the public body may issue a written notice demanding that person or entity to do either of the following within 20 calendar days of receiving the notice:
>
> (a) return the information to the public body or, in the case of electronic records, securely destroy the information and confirm in writing the date and the means by which the information was securely destroyed;
>
> (b) respond in writing and declare why the person or entity considers that
>
> (i) the information was not in the custody or under the control of the public body when the person or entity acquired possession of the information, or
>
> (ii) the person or entity is authorized by law to possess the information.
>
> (2) The written notice referred to in subsection (1) must
>
> (a) identify, with reasonable specificity, the personal information claimed to be in the custody or under the control of the public body and in the possession of the person or entity not authorized by law to possess the information, and

(b) state that the public body may undertake legal action to recover the personal information if the person or entity fails to respond in writing within the required time or does not adequately demonstrate that

(i) the information was not in the custody or under the control of the public body when the person or entity acquired possession of the information, or

(ii) the person or entity is authorized by law to possess the information.

Proposal

It is proposed that FOIP and LA FOIP have sections similar to British Columbia's section dealing with recovery of personal information and that it be made an offense not to return that personal information. The section might provide as follows:

29.01/28.01(1) If the head of a government institution (local authority) has reasonable grounds to believe that personal information in the possession or under the control of the government institution (local authority) was provided to a person or an entity not authorized by law to possess the information, the head of the government institution (local authority) may issue a written notice demanding that person or entity to do either of the following within 20 days of receiving the notice:

(a) as soon as reasonably practical, return the information to the government institution (local authority) or, in the case of electronic records, securely destroy the information and confirm in writing the date and the means by which the information was securely destroyed;

(b) respond in writing and declare why the person or entity considers that

(i) the information was not in the possession or under the control of the government institution (local authority) when the person or entity acquired the information, or

(ii) the person or entity is authorized by law to possess the information.

(2) The written notice referred to in subsection (1) must:

(a) identify, with reasonable specificity, the personal information claimed to be in the possession or under the control of the government institution (local authority) and received by the person or entity not authorized by law to possess the information, and

(b) state that the government institution (local authority) may undertake legal action to recover the personal information if the person or entity fails to respond in writing within the required time or does not adequately demonstrate that

(i) the information was not in the possession or under the control of the government institution (local authority) when the person or entity acquired the information, or

(ii) the person or entity is authorized by law to possess the information.

III - Amendments to Assist the Commissioner

1. Subsections 22(3) LA FOIP/23(3) FOIP - Confidentiality Provisions in Other Enactments

Primacy clauses in statutes define how a statute is interpreted if its provisions are inconsistent with another statute in the same jurisdiction. Primacy means the state or position of being first in order, importance or authority.

When engaging subsections 22(3) of LA FOIP and 23(3) of FOIP, public bodies need to demonstrate that the record or information falls within the statutory provision that is not subject to LA FOIP or FOIP. Sections 22 of LA FOIP and 23 of FOIP only apply to portions of Parts II and III of each respective Act, which refer to access to records. All other parts of LA FOIP and FOIP fully apply, including the protection of privacy provisions found in Part IV (FOIP and LA FOIP) and the review and appeal provisions found in Part VI of LA FOIP and Part VII of FOIP.

From a historical perspective, legislators took an approach to FOIP (1992) and LA FOIP (1993) that was cautious about the scope of each Act. Thus, they built in exceptions that exempted certain Acts from portions of LA FOIP and FOIP, or that recognized that other Acts had their own privacy schemes.

Section 22 of LA FOIP provides as follows:

> **Confidentiality provisions in other enactments**
> **22**(1) Where a provision of:
>
> (a) any other Act; or
>
> (b) a regulation made pursuant to any other Act; or
>
> (c) a resolution or bylaw;
>
> that restricts or prohibits access by any person to a record or information in the possession or under the control of a local authority conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.
>
> (2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.
>
> (3) Subsection (1) does not apply to:
>
> (a) *The Health Information Protection Act*;

(a.01) Part VIII of *The Vital Statistics Act, 2009*;

(a.1) any prescribed Act or prescribed provisions of an Act; or

(b) any prescribed regulation or prescribed provisions of a regulation;

and the provisions mentioned in clauses (a), (a.01), (a.1) and (b) shall prevail.

Section 23 of FOIP provides as follows:

Confidentiality provisions in other enactments
23(1) Where a provision of:

(a) any other Act; or

(b) a regulation made pursuant to any other Act;

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.

(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.

(3) Subsection (1) does not apply to the following provisions, and those provisions prevail:

(a) *The Adoption Act, 1998*;

(b) section 31 of *The Archives and Public Records Management Act*;

(c) section 74 of *The Child and Family Services Act*;

(d) section 14 of *The Enforcement of Maintenance Orders Act, 1997*;

(e) *The Health Information Protection Act*;

(f) section 91.1 of *The Police Act, 1990*;

(g) section 11 of *The Proceedings Against the Crown Act, 2019*;

(h) section 15 of *The Securities Act, 1988*;

(i) sections 40.1, 97 and 283 of *The Traffic Safety Act*;

(j) section 61 of *The Trust and Loan Corporations Act, 1997*;

(k) Part VIII of *The Vital Statistics Act, 2009*;

(l) Repealed. 2019, c28, s.12.

(m) any prescribed Act or prescribed provisions of an Act; or

(n) any prescribed regulation or prescribed provisions of a regulation.

FOIP itself has many exemptions, including for personal information, as well as solid case law on how they are to be interpreted. We no longer have a need for the overrides found in subsection 23(3) of FOIP.

Public bodies sometimes rely on subsection 22(3) of LA FOIP and subsection 23(3) of FOIP when they do not need to. Often, existing provisions within LA FOIP, FOIP or HIPA can apply to the information that the public body is withholding. For example, in Review Report 070-2023, it was found that the public body did not need to rely on subsections 23(3)(m) and (n) of FOIP to withhold what amounted to be personal health information when it should have instead relied on HIPA. Similarly, section 23 of FOIP may be invoked to withhold information such as information from an individual's tax return as per *The Revenue and Financial Service Act*, when that information could likely be properly withheld as personal information pursuant to subsection 29(1) of FOIP (Review Report 232-2020). Having two schemes such as this is often confusing and unnecessary.

Proposal

It is proposed that subsection 22(3) of LA FOIP and subsection 23(3) of FOIP be repealed. Consequently, subsection 8.1 of the LA FOIP Regulations and section 12 of the FOIP Regulations would also need to be repealed.

2. Section 28.1 LA FOIP/Section 29.1 FOIP - Notifying Commissioner of Real Risk of Significant Harm

Breaches of personal information have been occurring more frequently. North America is moving to ensure that individuals are notified when a breach occurs. There are two considerations with mandatory breach notification: (1) when to notify affected individuals; and (2) when to notify the Commissioner.

Currently, sections 28.1 of LA FOIP and 29.1 of FOIP require that the head take reasonable steps to notify an individual if they are subject to a privacy breach that poses a real risk of significant harm. There is no requirement to notify the commissioner when such notification occurs.

Federally, PIPEDA was amended to include the following breach security provisions:

> **Report to Commissioner**
> **10.1(1)** An organization shall report to the Commissioner any breach of security safeguards involving personal information under its control if it is reasonable in the circumstances to believe that the breach creates a real risk of significant harm to an individual.
>
> **Report requirements**
> **(2)** The report shall contain the prescribed information and shall be made in the prescribed form and manner as soon as feasible after the organization determines that the breach has occurred.

PIPEDA recognizes the impact of a "real risk of significant harm" and that a report shall be made to the federal privacy commissioner in those circumstances.

BC's FIPPA also has within its privacy breach notification provisions the following regarding notifying its commissioner:

> **Privacy breach notifications**
> **36.3**(1) In this section, **"privacy breach"** means the theft or loss, or the collection, use or disclosure that is not authorized by this Part, of personal information in the custody or under the control of a public body.
>
> (2) Subject to subsection (5), if a privacy breach involving personal information in the custody or under the control of a public body occurs, the head of the public body must, without unreasonable delay,
>
> (a) notify an affected individual if the privacy breach could reasonably be expected to result in significant harm to the individual, including identity theft or significant
>
> (i) bodily harm,
>
> (ii) humiliation,
>
> (iii) damage to reputation or relationships,

(iv) loss of employment, business or professional opportunities,

(v) financial loss,

(vi) negative impact on a credit record, or

(vii) damage to, or loss of, property, and

(b) notify the commissioner if the privacy breach could reasonably be expected to result in significant harm referred to in paragraph (a).

Similarly, AB's PIPA requires notice to the Alberta commissioner as follows:

Notification of loss or unauthorized access or disclosure
34.1(1) An organization having personal information under its control must, without unreasonable delay, provide notice to the Commissioner of any incident involving the loss of or unauthorized access to or disclosure of the personal information where a reasonable person would consider that there exists a real risk of significant harm to an individual as a result of the loss or unauthorized access or disclosure.

(2) A notice to the Commissioner under subsection (1) must include the information prescribed by the regulations.

Proposal

It is proposed to amend section 28.1 of LA FOIP and section 29.1 of FOIP as follows:

28.1(1)/29.1(1) A government institution shall take all reasonable steps to notify an individual of an unauthorized use or disclosure of that individual's personal information by the government institution if it is reasonable in the circumstances to believe that the incident creates a real risk of significant harm to the individual.

2) When a head provides notice under subsection (1), the head shall without unreasonable delay provide notice to the commissioner of the incident.

3. Sections 43-47 FOIP - Contractors

The Office of the Information and Privacy Commissioner has a core staff but occasionally needs to consult with outside experts. For example, the Commissioner may engage the services of

legal counsel in relation to a matter involving an access request. Presently, FOIP only explicitly lists the Commissioner or the staff of the Commissioner.

Manitoba's *The Freedom of Information and Protection of Privacy Act* (MB FOIP) has broader language that includes "anyone acting for or under the direction of the Ombudsman" (who also provides oversight for access and privacy in Manitoba). This provision and others of relevance are as follows:

> **General powers and duties**
> **49** In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may
>
> (i) consult with any person with experience or expertise in any matter related to the purposes of this Act

> **Ombudsman restricted as to disclosure of information**
> **55**(1) The Ombudsman, and anyone acting for or under the direction of the Ombudsman, shall not disclose information obtained in performing duties or exercising powers under this Act, except as provided in subsections (2) to (5).
>
> **When disclosure permitted**
> **55**(2) The Ombudsman may disclose, or may authorize anyone acting for or under the direction of the Ombudsman to disclose, information that is necessary to
>
> (a) perform a duty or exercise a power of the Ombudsman under this Act; or
>
> (b) establish the grounds for findings and recommendations contained in a report under this Act.

Section 102 of NL's ATIPPA contains similar language, as does the federal *Privacy Act,* which states as follows:

> **58**(1) Such officers and employees as are necessary to enable the Privacy Commissioner to perform the duties and functions of the Commissioner under this Act or any other Act of Parliament shall be appointed in accordance with the Public Service Employment Act.
>
> (2) The Privacy Commissioner may engage on a temporary basis the services of persons having technical or specialized knowledge of any matter relating to the work of the Commissioner to advise and assist the Commissioner in the performance of the duties and functions of the Commissioner under this Act or any other Act of Parliament and, with the approval of the Treasury Board, may fix and pay the remuneration and expenses of such persons.

Proposal

It is proposed that sections 43 to 47 of FOIP be amended to include contractors that the Commissioner appoints to exercise the powers and perform the duties of the Commissioner.

4. New Section 43.5 FOIP - Commissioner's Ability to Delegate Functions to Staff

Currently, FOIP does not allow the Commissioner to delegate any of his duties to staff. Saskatchewan's Ombudsman has the ability to delegate, pursuant to section 13 of *The Ombudsman Act, 2012*, certain functions or duties to her staff. This includes provisions that allow for a delegation to continue when the Ombudsman ceases to hold office. This section provides as follows:

> **13**(1) The Ombudsman may, in writing, delegate to any member of the staff of the Ombudsman or any person any of the Ombudsman's powers other than:
>
> (a) the power of delegation pursuant to this section; and
>
> (b) the power or duty to make a report pursuant to this Act.
>
> (2) A delegation pursuant to this section may:
>
> (a) be made to:
>
> (i) a specified member of the Ombudsman's staff; or
>
> (ii) the holder for the time being of a specified office or the holders of offices of a specified class of the staff; and
>
> (b) be made either generally or in relation to a particular case or class of cases.
>
> (3) The Ombudsman may revoke a delegation at any time.
>
> (4) No delegation prevents the exercise of any power by the Ombudsman.
>
> (5) The Ombudsman may impose any restrictions or conditions that the Ombudsman considers appropriate on a delegation.
>
> (6) A delegation continues in effect until it is revoked.
>
> (7) If the Ombudsman who made a delegation ceases to hold office, the delegation continues in effect as if it were made by that Ombudsman's successor.
>
> (8) If the Ombudsman has delegated a power pursuant to this section, the person to whom the power is delegated shall produce evidence of that person's authority to exercise the power when required to do so.

Section 49 of BC's FIPPA provides delegation powers as follows:

Delegation by commissioner

49(1) Subject to this section, the commissioner may delegate to any person any duty, power or function of the commissioner under this Act, other than the power to delegate under this section.

(1.1) The commissioner may not delegate the power to examine information referred to in section 15 if the head of a police force or the Attorney General

(a) has refused to disclose that information under section 15, and

(b) has requested the commissioner not to delegate the power to examine that information.

(1.2) Despite section 66, the head of a police force may not delegate the power to make a request under subsection (1.1) (b).

(1.3) Despite section 66, the Attorney General may only delegate the power to make a request under subsection (1.1) (b) to the Assistant Deputy Attorney General, Criminal Justice Branch.

(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the commissioner considers appropriate.

The British Columbia Commissioner then publicly outlines what duties or authorities are granted to staff by their position. For example, the authority to grant time extensions to a public body (e.g., to provide materials to the commissioner) can be made by the Deputy Commissioner or a Director of Investigations. Or, the authorization to disregard requests is given to the Deputy Commissioner, legal counsel or Director of Adjudication.

Proposal

It is proposed that a section be added to FOIP that is similar to section 13 of *The Ombudsman Act, 2012*. The delegation should be broad enough to allow the delegation of certain duties or authorities, such as issuing a report, when the Commissioner has a conflict. Suggested wording is as follows:

43.5(1) The commissioner may, in writing, delegate to any member of the staff of the Commissioner any of the Commissioner's duties, functions or powers other than the power of delegation pursuant to this section.

(2) The commissioner may revoke a delegation at any time.

(3) No delegation prevents the exercise of any power by the commissioner.

(4) The commissioner may impose any restrictions or conditions that the commissioner considers appropriate on a delegation.

(5) A delegation continues in effect until it is revoked.

(6) If the commissioner who made a delegation ceases to hold office, the delegation continues in effect as if it were made by that commissioner's successor.

(7) If the commissioner has delegated a power pursuant to this section, the person to whom the power is delegated shall produce evidence of that person's authority to exercise the power when required to do so.

5. Subsection 45(2)(a) and New Section 32.2 FOIP/ New Section 33.2 LA FOIP - Privacy Management and Audits

Public bodies are required to manage personal information in accordance with FOIP and LA FOIP. To do so, public bodies should have a privacy management program that ensures privacy is considered in all initiatives, programs and services. Such programs should:

- Promote and demonstrate organizational commitment - executive commitment is important to ensure good practices are established and maintained, and to champion the development, implementation and monitoring of the program.
- Empower privacy officers in their roles - while the head is responsible for ensuring compliance with legislation, it is privacy officers who are responsible for day-to-day compliance with privacy and the legislation. The role and responsibilities of the privacy officer need to be supported throughout the organization and supported by senior management.
- Include provisions for reporting on compliance - a public body's privacy management program controls need to include reporting mechanisms, a key component of which is internal auditing. Such auditing needs to evaluate and report on compliance. Audits may be conducted internally or by an external third-party, such as when a public body has suffered a significant privacy breach. Reporting should also include security breaches or privacy complaints by citizens.

A privacy management program should clearly define when and how public bodies escalate their response to a privacy incident, and to whom. Staff should generate progress reports about the handling of a matter to the Privacy Officer or their delegate. This is necessary to ensure that the public body is following its documented process. It is useful to evaluate the robustness of

the escalation and reporting process by conducting a test run of privacy breach identification, escalation, and containment protocols.

Policies are integral to privacy management programs. Section 24.1 of FOIP requires information policies and procedures to be established and implemented and not ad hoc. Such policies help employees understand their roles and responsibilities. They also establish policies regarding the collection of information (and notification of the collection), access and correction of personal information, retention and destruction of personal information, administrative/technical/physical safeguards and the process for managing privacy complaints. Policies should also cover breach management response procedures or guidelines. This includes having regard for roles/responsibilities, containment and notification procedures, and investigating and implementing prevention measures.

Privacy management programs should also include provisions for conducting risk assessments. Such assessments should identify risks to personal information and how such risks can evolve over time due to changes in practices, services, programs, technology or administrative structures. A risk assessment should be conducted on all new projects, services or systems where personal information is involved.

Training staff is also crucial for a privacy management program to be successful and so that employees remain engaged in the protection of personal information. Effective training is mandatory, tailored to the individual's role, covers all the public body's policies and procedures, and is delivered based on organizational needs.

There should be mechanisms in place that require a public body to audit its privacy management program, or to participate in an audit by the Commissioner.

To support its provisions for privacy breach notifications, BC added the following to its FIPPA regarding privacy management programs:

> **Privacy management programs**
> **36.2** The head of a public body must develop a privacy management program for the public body and must do so in accordance with the directions of the minister responsible for this Act.

At the same time, the Commissioner should have the ability to undertake audits.

Proposal

It is proposed that subsection 45(2)(a) of FOIP be amended, and that new sections be added, to specify the Commissioner's role in an audit as follows:

45(2) The commissioner may:

(a) engage in or commission research **or conduct an audit** into matters affecting the carrying out of the purposes of this Act;

Privacy management programs
33.2/32.2(1) The head of a government institution (local authority) must develop a privacy management program and an access management program that are in accordance with the directions of the minister responsible for this Act.

33.2/32.2(2) Pursuant to subsection (1), the head of a government institution (local authority) shall conduct audits of its privacy management program and its access management program that are in a form that is acceptable to the minister responsible for this Act.

6. Sections 38 to 43, 35 & 57 LA FOIP/49 to 54, 56 & 69 FOIP - Consistent Language

Section 40 of LA FOIP and section 51 of FOIP recognize the ability of the Commissioner to conduct a review (procedural or exemptions) and to conduct investigations into privacy breaches. Section 44 of LA FOIP and section 55 of FOIP recognize the ability of the Commissioner to issue a report upon the completion of a review or investigation.

There is, however, inconsistent language throughout Part VI of LA FOIP and Part VII of FOIP where "review" is referenced but "investigation" is not. The language should be made consistent throughout both Acts.

Proposal

It is proposed that where there is a "review" referenced in FOIP and LA FOIP, that "investigation" be included in the following sections:

- FOIP - sections 49 to 54, 56, 69(q)
- LA FOIP - sections 38 to 43, 45, 57(k)

7. Section 43 LA FOIP/54 FOIP - Powers of the Commissioner Changed

Section 26 of *The Advocate for Children and Youth Act* (ACY) and section 25 of *The Ombudsman Act, 2012* respectively lay out the powers of the Child and Youth Advocate (Advocate) and the Ombudsman. Wording in these sections is more expansive than what is found in sections 43 of LA FOIP and 54 of FOIP regarding the powers of the Commissioner. There is an argument that the powers of the Advocate, the Ombudsman and the Commissioner should reasonably be the same or substantially similar. Each office conducts reviews and investigations and needs to obtain information from public officials and others. Sections 43 of LA FOIP and 54 of FOIP should be amended to adopt wording similar to what is found in these two Acts for the sake of clarity and consistency, and to address such instances as recognizing the Commissioner's powers when asking a question.

Section 26 of ACY reads as follows:

> **26**(1) Subject to section 27, the Advocate may require any person who in the Advocate's opinion is able to give any information relating to any matter being investigated pursuant to this Act:
>
> (a) to furnish information to him or her; and
>
> (b) to produce any document, paper or thing that, in the Advocate's opinion:
>
> (i) relates to the matter being investigated; and
>
> (ii) may be in the possession or under the control of that person.
>
> (2) The Advocate may exercise the powers mentioned in subsection (1) whether or not:
>
> (a) the person mentioned in that subsection is an officer or employee of a ministry, agency of the government or publicly-funded health entity or a board member; and
>
> (b) the document, paper or thing is in the custody or under the control of a ministry, agency of the government or publicly-funded health entity.
>
> (3) The Advocate may take possession of any document, paper or thing mentioned in subsection (1) to make copies for the purposes of the investigation.
>
> (4) The Advocate may summon and examine under oath or on affirmation:
>
> (a) any person who is an officer, employee or member of any ministry, agency of the government or publicly-funded health entity or a board member and who in the opinion of the Advocate may be able to give any information relating to any matter being investigated pursuant to this Act;
>
> (b) any person who refers a matter; and

(c) any other person who in the opinion of the Advocate is able to give any information relating to any matter being investigated pursuant to this Act.

(5) For the purposes of subsection (4), the Advocate may administer an oath or take an affirmation.

(6) Every examination by the Advocate pursuant to subsection (4) is deemed a judicial proceeding for the purposes of section 136 of the *Criminal Code*.

Section 25 of *The Ombudsman Act*, *2012* reads as follows:

25(1) Subject to section 26, the Ombudsman may require any person who in the Ombudsman's opinion is able to give any information relating to any matter being investigated pursuant to this Act:

(a) to furnish information to him or her; and

(b) to produce any document, paper or thing that, in the Ombudsman's opinion:

(i) relates to the matter being investigated; and

(ii) may be in the possession or under the control of that person.

(2) The Ombudsman may exercise the powers mentioned in subsection (1) whether or not:

(a) the person mentioned in that subsection is an officer or employee of a ministry, agency of the government, publicly-funded health entity or municipal entity or a council member or a board member; and

(b) the document, paper or thing is in the custody or under the control of a ministry, agency of the government, publicly-funded health entity or municipal entity.

(3) The Ombudsman may take possession of any document, paper or thing mentioned in subsection (1) to make copies for the purposes of the investigation.

(4) The Ombudsman may summon and examine under oath or on affirmation:

(a) any person who:

(i) is an officer, employee or member of any ministry, agency of the government, publicly-funded health entity or municipal entity or a council member or a board member; and

(ii) in the opinion of the Ombudsman, may be able to give any information relating to any matter being investigated pursuant to this Act;

(b) any complainant; and

(c) any other person who in the opinion of the Ombudsman is able to give any information relating to any matter being investigated pursuant to this Act.

(5) For the purposes of subsection (4), the Ombudsman may administer an oath or take an affirmation.

(6) Every examination by the Ombudsman pursuant to subsection (4) is deemed a judicial proceeding for the purposes of section 136 of the *Criminal Code*.

(7) Subject to section 26:

(a) a rule of law that authorizes or requires the withholding of any document, paper or thing or the refusal to answer any question on the ground that the disclosure or answer would be injurious to the public interest does not apply with respect to any investigation by or proceedings before the Ombudsman;

(b) a provision of an Act requiring a person to maintain secrecy in relation to, or not to disclose information relating to, any matter shall not apply with respect to an investigation by the Ombudsman;

(c) no person who is required by the Ombudsman to furnish any information or to produce any document, paper or thing or who is summoned by the Ombudsman to give evidence shall refuse to furnish the information, produce the document, paper or thing or to answer questions on the ground of a provision of an Act mentioned in clause (b); and

(d) nothing in subsection (4) permits the Ombudsman to require questions to be answered, or to require the production of any information, report, statement, recommendation, memorandum, data or record that would be the subject of a privilege pursuant to section 10 of *The Evidence Act* or section 58 of *The Regional Health Services Act* or section 8-2 of *The Provincial Health Authority Act*.

(8) Except on the trial of a person respecting an offence against this Act:

(a) no statement made by the person or any other person in the course of an investigation by, or any proceedings before, the Ombudsman is admissible in evidence against any person in any court, at any inquiry or in any other proceedings; and

(b) no evidence with respect to proceedings before the Ombudsman is admissible against any person.

(9) No person is liable to prosecution for an offence against any Act by reason of the person's compliance with any requirement of the Ombudsman pursuant to this section.

In addition, essential to the Commissioner's duties is the need to obtain documents. This includes the need to obtain documents when public bodies claim an exemption due to solicitor-client privilege. In order to do an appropriate review, the Commissioner needs to physically review the documents over which privilege is claimed to determine that the privilege is justified. The Commissioner does not release documents over which privilege is claimed and can only go as far as saying the claiming of the privilege was not justified and recommend the document be

released. Thus, for clarity, it is necessary that FOIP and LA FOIP be clear that the Commissioner can require, and the public body will produce, documents over which they claim solicitor-client privilege. This aligns with powers of the Federal Information Commissioner has under ATIA as follows:

> **Access to records**
>
> **(2)** Despite any other Act of Parliament, any privilege under the law of evidence, solicitor-client privilege or the professional secrecy of advocates and notaries and litigation privilege, and subject to subsection (2.1), the Information Commissioner may, during the investigation of any complaint under this Part, examine any record to which this Part applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.
>
> **Protected information — solicitors, advocates and notaries**
> **(2.1)** The Information Commissioner may examine a record that contains information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege only if the head of a government institution refuses to disclose the record under section 23.
>
> **For greater certainty**
> **(2.2)** For greater certainty, the disclosure by the head of a government institution to the Information Commissioner of a record that contains information that is subject to solicitor-client privilege or the professional secrecy of advocates and notaries or to litigation privilege does not constitute a waiver of those privileges or that professional secrecy.

To support this, subsection 43(1) of LA FOIP and subsection 54(1) of FOIP should also include the phrase, "including solicitor-client privilege" to recognize this privilege, and a new subsection should be added to indicate that providing the Commissioner with a document where solicitor-client privilege is claimed is not a waiver of that privilege, similar to what is found in subsection 74(6) of *The Child and Family Services Act* as follows:

> **74**(6) Any disclosure of information pursuant to this section does not constitute a waiver of Crown privilege, solicitor-client privilege or any other privilege recognized in law.

These sections should also include that the head of a local authority or government institution shall produce requested documentation within 30 days of a request by the Commissioner.

Proposal

It is proposed that the Commissioner's powers be amended to adopt similar language found in the Acts respecting the Advocate and Ombudsman by amending sections 43 of LA FOIP and 54 of FOIP as follows:

Powers of Commissioner

54(1) Notwithstanding any other Act, **including a provision of an Act requiring a person to maintain secrecy in relation to a matter related to a review or investigation** or any privilege that is available at law, **including solicitor-client privilege**, the commissioner may, in a review **or investigation**:

(a) require to be produced and examine any record, **document or thing** that is in the possession or under the control of a government institution **within 30 days of being requested**; and

(b) enter and inspect any premises occupied by a government institution.

(2) For the purposes of conducting a review **or investigation**, the commissioner may summon and enforce the appearance of **any** person, **who in the opinion of the commissioner is able to give any information relating to any matter being reviewed or investigated** pursuant to this Act, before the commissioner and compel them:

(a) to give oral or written evidence on oath or affirmation; and

(b) to produce any documents, things, or **copies of**;

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

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

(4) Every examination by the commissioner pursuant to this section is deemed a judicial proceeding for the purposes of section 136 of the *Criminal Code of Canada*.

(5) Any disclosure of information, document or provision of a record pursuant to this section does not constitute a waiver of Crown privilege, solicitor-client privilege or any other privilege recognized in law.

8. Section 45 LA FOIP/56 FOIP - Compliance with Recommendations

Freedom of information laws promote transparency by allowing citizens to access records in the possession or control of a public body. FOIP and LA FOIP require public bodies to disclose records, subject to applicable exemptions.

Saskatchewan is one of six jurisdictions in Canada without order making power. Saskatchewan's Commissioner has only the power to make recommendations to release records, which a public body can choose to ignore. If a public body chooses to ignore the Commissioner's recommendations, then an applicant's only recourse is to appeal the public body's decision in the Court of King's Bench. The overwhelming majority of applicants do not appeal, likely because of associated costs.

British Columbia, Alberta, Ontario, Quebec, Prince Edward Island, the Northwest Territories and the federal government all have order making powers, or the power to make a public body disclose records.

Newfoundland and Labrador has unique provisions making its commissioner's recommendations convertible to an order. In Newfoundland and Labrador, a public body has 10 days to respond to the commissioner's recommendations. If a public body does not respond within 10 days, then they are said to comply with the recommendation. If a public body responds within 10 days that they do not agree with the commissioner, then the applicant has a right to appeal, or the commissioner has the right to file an order in one. The provisions are set out in sections 48-51 of ATIPPA, as follows:

> **48.**(1) On completing an investigation, the commissioner shall
>
> (a) prepare a report containing the commissioner's findings and, where appropriate, his or her recommendations and the reasons for those recommendations; and
>
> (b) send a copy of the report to the person who filed the complaint, the head of the public body concerned and a third party who was notified under section 44 .
>
> (2) The report shall include information respecting the obligation of the head of the public body to notify the parties of the head's response to the recommendation of the commissioner within 10 business days of receipt of the recommendation.
>
> **Response of public body**
> **49.**(1) The head of a public body shall, not later than 10 business days after receiving a recommendation of the commissioner,
>
> (a) decide whether or not to comply with the recommendation in whole or in part; and

(b) give written notice of his or her decision to the commissioner and a person who was sent a copy of the report.

(2) Where the head of the public body does not give written notice within the time required by subsection (1), the head of the public body is considered to have agreed to comply with the recommendation of the commissioner.

(3) The written notice shall include notice of the right

(a) of an applicant or third party to appeal under section 54 to the Trial Division and of the time limit for an appeal; or

(b) of the commissioner to file an order with the Trial Division in one of the circumstances referred to in subsection 51 (1).

Head of public body seeks declaration in court
50.(1) This section applies to a recommendation of the commissioner under section 47 that the head of the public body

(a) grant the applicant access to the record or part of the record; or

(b) make the requested correction to personal information.

(2) Where the head of the public body decides not to comply with a recommendation of the commissioner referred to in subsection (1) in whole or in part, the head shall, not later than 10 business days after receipt of that recommendation, apply to the Trial Division for a declaration that the public body is not required to comply with that recommendation because

(a) the head of the public body is authorized under this Part to refuse access to the record or part of the record, and, where applicable, it has not been clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception;

(b) the head of the public body is required under this Part to refuse access to the record or part of the record; or

(c) the decision of the head of the public body not to make the requested correction to personal information is in accordance with this Act or the regulations.

(3) The head shall, within the time frame referred to in subsection (2), serve a copy of the application for a declaration on the commissioner, the minister responsible for the administration of this Act, and a person who was sent a copy of the commissioner's report.

(4) The commissioner, the minister responsible for this Act, or a person who was sent a copy of the commissioner's report may intervene in an application for a declaration by filing a notice to that effect with the Trial Division.

(5) Sections 57 to 60 apply, with the necessary modifications, to an application by the head of a public body to the Trial Division for a declaration.

Filing an order with the Court
51.(1) The commissioner may prepare and file an order with the Trial Division where

(a) the head of the public body agrees or is considered to have agreed under section 49 to comply with a recommendation of the commissioner referred to in subsection 50 (1) in whole or in part but fails to do so within 15 business days after receipt of the commissioner's recommendation; or

(b) the head of the public body fails to apply under section 50 to the Trial Division for a declaration.

(2) The order shall be limited to a direction to the head of the public body either

(a) to grant the applicant access to the record or part of the record; or

(b) to make the requested correction to personal information.

(3) An order shall not be filed with the Trial Division until the later of the time periods referred to in paragraph (1)(a) and section 54 has passed.

(4) An order shall not be filed with the Trial Division under this section if the applicant or third party has commenced an appeal in the Trial Division under section 54 .

(5) Where an order is filed with the Trial Division, it is enforceable against the public body as if it were a judgment or order made by the court.

Newfoundland and Labrador's legislation also includes separate provisions for the response by a public body when there is a privacy complaint at sections 77 to 80 of ATIPPA.

Proposal

It is proposed to adopt a model similar to Newfoundland and Labrador's provisions. More particularly that section 45 of LA FOIP and 56 of FOIP be replaced with the following sections:

Response of local authority/government institution

45/56(1) The head of a local authority/government institution shall, not later than 30 business days after receiving a recommendation of the commissioner,

(a) decide whether or not to comply with the recommendation in whole or in part; and

(b) give written notice of his or her decision to the commissioner, the applicant or individual and any third party who was a party to the review or investigation.

(2) Where the head of the local authority/government institution does not give written notice within the time required by subsection (1), the head of the local authority/government institution is considered to have agreed to comply with the recommendations of the commissioner.

(3) The written notice shall include notice of the right:

(a) of an applicant or third party to appeal under section 46/57 to the Court of King's Bench and of the time limit for an appeal; or

(b) of the commissioner to file an order with the Court of King's Bench in one of the circumstances referred to in subsection 45.2/56.2.

Head of government institution/local authority seeks order in court

45.1/56.1(1) This section applies to a recommendation of the commissioner in a report where the commissioner conducted a review or investigation, and made recommendations, on any matter set out in section 32 or 38 of LA FOIP/33 or 49 of FOIP.

(2) Where the head of the local authority/government institution decides not to comply with a recommendation of the commissioner referred to in subsection (1) in whole or in part, the head shall, no later than 30 days after receipt of that recommendation, apply to the Court for an order that the public body is not required to comply with that recommendation.

(3) The head shall, within the time frame referred to in subsection (2), serve a copy of the application for an order on the commissioner, the applicant, and a third party who was sent a copy of the commissioner's report.

(4) The commissioner, the applicant, or a third party who was sent a copy of the commissioner's report may intervene in an application for an order by filing a notice to that effect with the Court of King's Bench.

Filing an order with the Court of King's Bench

45.2/56.2(1) The commissioner may prepare and file an order with the Court of King's Bench where:

(a) the head of the government institution/local authority agrees or is considered to have agreed under section 45/56 to comply with a recommendation of the commissioner in whole or in part but fails to do so within 30 days after receipt of the commissioner's recommendation; or

(b) the head of the government institution/local authority fails to apply under section 45.1/56.1 to the Court of King's Bench for an order.

(2) The order shall be limited to a direction to the head of the government institution/local authority on matters set out in sections 32 or 38/33 or 49.

(3) An order shall not be filed with the Court of King's Bench until the later of the time periods in subsection (1).

(4) An order shall not be filed with the Court of King's Bench under this section if the applicant or third party has commenced an appeal in the Court of King's Bench under section 46/57.

(5) Where an order is filed with the Court of King's Bench, it is enforceable against the government institution/local authority as if it were a judgment or order made by the Court of King's Bench.

IV - Other Items

1. New Section 57.1 LA FOIP/69.1 FOIP - Statutory Review Period

Saskatchewan has not undertaken a public review of FOIP or LA FOIP since the laws were introduced in 1992 and 1993 respectively. Public reviews should be conducted once every five years to ensure legislation remains relevant and responsive to the needs of public bodies and citizens, and so that it recognizes changes in technology.

BC's FIPPA has the following provision for a fixed six-year review period:

> **Review of Act**
> **80**(1) At least once every 6 years, a special committee of the Legislative Assembly must begin a comprehensive review of this Act and must submit a report respecting this Act to the Legislative Assembly within one year after the date of the appointment of the special committee.
>
> (2) A report submitted under subsection (1) may include any recommended amendments to this Act or any other Act.
>
> (3) For the purposes of subsection (1), the first 6 year period begins on October 4, 1997.

Newfoundland and Labrador has the following provision for a fixed five-year period:

> **Review**
> **117.**(1) After the expiration of not more than 5 years after the coming into force of this Act or part of it and every 5 years thereafter, the minister responsible for this Act shall refer it to a committee for the purpose of undertaking a comprehensive review of the provisions and operation of this Act or part of it.
>
> (2) The committee shall review the list of provisions in Schedule A to determine the necessity for their continued inclusion in Schedule A.

Proposal

It is proposed to introduce a new section 57.1 in LA FOIP and section 69.1 in FOIP that would provide for a periodic review of both statutes. The wording might be as follows:

57.1/69.1 After five years and every five years thereafter, the minister responsible for this Act shall refer it to a committee for the purpose of undertaking a comprehensive review of the provisions and operations of this Act.

2. Private and Non-profit Sector Employees (FOIP)

FOIP, passed in 1992, deals with government institutions, including Crown corporations, agencies and other prescribed organizations. LA FOIP, passed in 1993, applies to local authorities, including cities, towns, municipalities, universities and school boards. Each Act has provisions that deal with the collection, use, disclosure and protection of personal information practices including that of their respective employees.

Neither FOIP nor LA FOIP apply to most businesses in the province nor to non-profit organizations (non-profits). PIPEDA currently applies to federally regulated organizations such as banks, railways and airlines. Employees of these organizations are protected under PIPEDA. There are businesses and non-profits engaged in commercial activities in Saskatchewan where PIPEDA may apply and protect customer information, but not employee personal information. This means that employees of these organizations do not have any protection when it comes to their personal information or personal health information held by their employer.

HIPA, passed in 2003, applies to trustees as defined in the Act and regulations. It generally covers all health sector organizations and applies to the personal health information held by trustees. If an employee's personal health information is held by a trustee (who is also their employer), then the employee has protection of their personal health information, but no protection of other personal information held by that trustee unless they are also a government institution or a local authority.

Because of the above, the personal information and personal health information of employees in a segment of these organizations is not protected under any privacy law.

The Non-profit Corporations Act, 2022, sets out the rules for incorporating and registering a non-profit organization in Saskatchewan. Examples of non-profits include service groups, activity or sports clubs and dance groups. Non-profits are subject to all laws including contract and employment laws/standards, and are funded either through memberships (e.g., through fees, donations and loans) or through charitable means (e.g., government grants or donations). Charitable non-profits include those that receive in excess of 10% of its yearly funding from

government grants. Charitable non-profits are required by law to prepare a financial statement each fiscal year and are subject to reviews or audits.

Non-profits can collect a considerable amount of personal information about their employees. Currently, employees do not have any privacy protections for any personal information they provide to a non-profit.

The Saskatchewan Employment Act has exceptions where it deals with the collection of personal information. For example, subsection 2-56.1(7) allows an employer to require an employee to provide written evidence by persons identified in subsection 12.4(4) of *The Victims of Interpersonal Violence Act* to verify the circumstances of a leave. Other sections allow employers to ask for medical certificates or evidence, or when dealing with maternity leave, can allow an employer to ask for bona fide medical reasons for ceasing work immediately. This is all highly sensitive information about an employee or their family that is being collected and used.

Proposal

It is proposed that sections pertaining to employee personal information be inserted by creating a new Part in *The Saskatchewan Employment Act*. This would include adding a definition of "employee personal information", clarifying the application of this new Part (i.e., this Part does not apply to employees of government institutions or local authorities), introducing a duty to protect and setting the rules for collection, use, disclosure, access and correction of employee personal information.

See the Commissioner's submission on this proposal here - letter-and-submission-to-sask-employment-labour-standards-act.pdf (oipc.sk.ca).

3. Generative Artificial Intelligence (AI)

Artificial Intelligence (AI) can be defined as information technology that uses automation to perform tasks, such as learning behaviours or solving problems. AI produces content such as text, audio, video and images. Content is generated when the user enters prompts or instructional text.

Issues can arise when using generative AI. For example, inaccurate content can be produced, and privacy laws can be compromised, particularly when using personal data or information, which results in new personal information.

As public bodies may move towards the use of AI to perform tasks such as writing or editing documents and providing client support, it is important that privacy laws address the implications.

Using automated processes that use and create personal information will need to be managed according to the rules set out in FOIP and LA FOIP. For example, if an automated tool is used to assess level of risk or eligibility for a program or service, the output is considered personal information.

The federal government has developed guidelines for the use of AI. Some best practices include:

- Clearly identify the use of AI to generate content.
- Don't consider information generated through AI to be authoritative.
- Verify personal information to make sure it is accurate and up to date.
- Assess the output of inaccurate inputs.
- Test performance across a variety of uses.
- Assess training data.
- Notify users they are interacting with AI.
- Consider if you need to use generative AI to meet organizational needs.
- Use generative AI as an aid, not as substitutes.
- Consider the limits of AI.

In June 2022, the Government of Canada tabled the *Artificial Intelligence and Data Act* (AIDA), part of Bill C-27 (*the Digital Charter Implementation Act, 2022*). AIDA supports the responsible use of digital technologies that Canadians use every day, and calls for the safe design, development and use of AI systems. AIDA recognizes that AI systems being developed and used in Canada can benefit Canadians in many ways, such as by advancing healthcare initiatives, personalizing services and making language processing technologies better. AIDA takes a risk-based approach to ensuring the development of responsible AI. To this end, AIDA builds on existing Canadian consumer protection and human rights laws, ensures that policy and enforcement keep pace with evolving technologies, and prohibits the reckless use of AI.

The Quebec Government introduced Law 25 (from Bill C-64) which sets out new rules for protecting privacy of Quebec residents. The law does not speak specifically to the use of AI, but introduces reform that:

- Provides new rights for people whose personal information is processed by automated decision-making systems.
- Imposes new measure to ensure better protection of privacy, including the requirement that people be notified if their personal information is being processed automatically. Individuals, at their request, must be informed of what personal information was used to make the decision, and their right to have the personal information used to make the decision corrected.
- Includes provisions intended to protect individuals from being identified, located or profiled. Profiling is broadly described as "the collection and use of personal information to assess certain characteristics of a natural person, in particular for the purpose of analyzing that person's work performance, economic situation, health, personal preferences, interests or behaviours". As of September 2023, any functions that allow the identification, location or profiling of individuals must be disabled by default.

The province of Ontario introduced the *Trustworthy Artificial Intelligence (AI) Framework*. Ontario outlines the following six principles that apply to data enhanced technologies and AI in its government process, programs and services as follows:

- Transparent and explainable - use of data enhanced technologies like AI must be transparent, and an explanation of its use must be made available.
- Good and fair - data enhanced technologies should be designed and used in a way that respects laws, human rights, civil liberties and democracy.
- Safe - data enhanced technologies must have appropriate safeguards built in to ensure they work as intended.
- Accountable and responsible - organizations and individuals who develop, deploy or operate data enhanced technologies need to be accountable to the proper functioning of such systems. Human accountability and decision making over such systems need to be clearly identified within the organization.
- Human centric - systems should be designed with public benefit that considers who interacts with the systems and who benefits from them.
- Sensible and appropriate - data enhanced technologies can impact subsets of society within a broader context, and so consideration must be given to the impacts on these subsets.

Ontario's guiding principles are: 1) no AI in secret; 2) the people of Ontario must be able to trust the use of AI; and 3) AI must serve all people of Ontario and allow decisions to be challenged.

Ontario also tabled Bill 194 on May 13, 2024, which introduced the *Enhancing Digital Security and Trust Act, 2024* (EDST Act). The EDST Act will support the creation of regulations regarding AI, which will prescribe obligations on the use of AI in the public sector. Public sector institutions will be required to publish information about the use of AI, to develop and implement an accountability framework, and to manage risks associated with the use of AI. Obligations will be detailed in regulations.

The Alberta government is developing regulations for the use of AI, that may be ready as early as Fall 2024. The regulations would regulate the use of AI in Alberta.

Proposal

To support that information about an individual that is generated through automated means, it is proposed that the government, as a first step, adopt a framework similar to Ontario's *Trustworthy AI Framework*.

4. FOIP/LA FOIP Access to Information Request Form (Form A) Review

Form A, *Access to Information Request Form*, in the FOIP and LA FOIP Regulations does not contain a date field for the applicant to complete when making an application for access to information. While it is usually clear when a public body receives an access to information request, it is not always clear when an applicant made the request.

Proposal

It is proposed that the Form A in the FOIP and LA FOIP Regulations be amended to include a date field in the "Information About You" section.

5. LA FOIP Review Form B

There is an inconsistency between Form B, *Request for Review Form*, in the LA FOIP and FOIP Regulations.

Form B in the FOIP Regulations references section 20 of the FOIP Regulations, while Form B in the LA FOIP Regulations references subsections 38(1) and (3) of LA FOIP. It should instead reference section 12 of the LA FOIP Regulations.

Proposal

It is proposed that the Form B in the LA FOIP Regulations be amended to reference section 12 of the LA FOIP Regulations.