

# Freedom of Information Transparency Strategies



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# Role of IPC



- ∞ Commissioner, Ronald J. Kruzeniski, Q.C.
- ∞ Oversees compliance with FOIP, LA FOIP and HIPA
- ∞ Referee
- ∞ Reviews, investigations, presentations, advice

# Why transparency?



∞ 1993 - In General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance (Sask. C.A) 1993, the Saskatchewan Court of Appeal describes FOIP's purpose as reflecting "a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language."



# Initiatives & Trends



## œ Open data/open government

œ BC example: access to information requests 72 hours after release to the applicant:

<http://www.openinfo.gov.bc.ca/>

œ “Welcome to B.C.'s catalogue of public information. Here is a summary of information requested and processed during the past 30 days.”

œ “Select the title of any record to view the details. Then, use the links attached to records for downloading information for use later on.”

# Initiatives & Trends (2)



œ Open by Default – A new way forward for Ontario

(<https://www.ontario.ca/page/open-default-new-way-forward-ontario>)

œ Engagement team provides recommendations on how to advance Open Government in Ontario

- œ Open dialogue
- œ Open information
- œ Open data

# Compliance considerations



## ∞ Laws that require disclosure

∞ i.e. *The Cities Act*

∞ 91(1) Any person is entitled at any time during regular business hours to inspect and obtain copies of:

∞ (a) any contract approved by the council, any bylaw or resolution and any account paid by the council relating to the city;

## ∞ Language in contracts or agreements

## ∞ Policy decision to release if in the public interest

# Common practices & concerns

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∞ What challenges do you face?



# Third party considerations

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- ∞ Define third party
- ∞ What's in a name – is it confidential?
- ∞ Information versus records
- ∞ Supplied versus mutually generated, negotiated
  - ∞ Two exceptions: immutable or accurate inferences



# Possession or control



- ∞ Nature of the relationship
- ∞ Difference between possession or control
- ∞ Obligations if an access request is received

# Exemptions



## ∞ Mandatory and discretionary

### ∞ Third party personal information

- ∞ About an identifiable individual of a personal nature

- ∞ Not business card info or work product

### ∞ Third party business information

- ∞ Class and injury based

# Guide to Exemptions



⌘ <http://www.oipc.sk.ca/Resources/2015-2016/IPC%20Guide%20to%20Exemptions.pdf>

⌘ Third party information (section 19 of FOIP; section 18 of LA FOIP)

⌘ To protect the business interests of third parties

⌘ Trade secrets (p. 12)

⌘ Financial, commercial, scientific, technical or labour relations information (pp. 12 & 13)



# Guide (2)



- ∞ In confidence, implicitly or explicitly (pp. 14 & 15)
  - ∞ Confidentiality stamps/clauses
- ∞ Could reasonably be expected to result in loss or gain, prejudice or interfere with contractual or other negotiations of a third party (pp. 15 & 16)

# Guide (3)



- ∞ Release with consent of the third party
- ∞ Public interest override

# Notifying third parties



- ∞ If an access request is received involving third party information, the public body should notify you and provide details as to what information is being sought
- ∞ You do not get to know the name of the applicant
- ∞ May waive notice provisions



# Notify (2)



- ∞ Notice includes statement and description of record
- ∞ Consent to release or object
- ∞ Provide representation

# Review process



- ∞ Public body should notify you that request for review is received but we will request contact info to inform you also
- ∞ Right to make representation
- ∞ Do you object to release?
- ∞ Get a copy of the final report
- ∞ Right to appeal to the Court of Queen's Bench
- ∞ Watch the clock

# IPC Reports Dealing with Third Party Contracts



Report Name / Statute	Date Issued	Type of Contract Information	Exemptions Applied	IPC Findings
<a href="#">195-2015 &amp; 196-2015 – Central Services</a>	2016-01-28	<ul style="list-style-type: none"> <li>All current active information technology service contracts, including attachments between the Ministry of Central Services and Paradigm Consulting Group, with a maximum value of over \$1 million.</li> <li>Same as above except “Solvera” over Paradigm</li> </ul>	19(1)(b) and (c) of FOIP	These exemptions were applied to the hourly rates of the contractors in the contracts. The IPC found these exemptions did not apply to the hourly rates.
<a href="#">109-2015 – City of Moose Jaw</a>	2015-09-04	Documentation related to the City of Moose Jaw ‘Request for Proposal’ 2015 Curbside Recycling Collection and the Processing Service including written criteria to determine successful proposal, the scoring results on the evaluation criteria for submissions by Emterra Group and Loraas Disposal, and the information the City used to deny Emterra Group’s proposal and accepted Loraas Disposal’s proposal.	18(1)(b) of LA FOIP	The IPC found the City appropriately applied 18(1)(b) of LA FOIP.
<a href="#">031-2015 – SGI</a>	2015-09-01	All records related to an RFP including evaluations of proposals and the debrief session	19(1)(b), 19(1)(c)(i), (ii) of FOIP	The IPC found the exemptions applied to the records.
<a href="#">054-2015 &amp; 055-2015 – City of Regina</a>	2015-08-19	Two <i>Form of Tender</i> documents (applicant was only interested in the unit prices and total prices): <ul style="list-style-type: none"> <li>COR2341 Street Infrastructure Renewal Package No. 14B, Tender Number 14B</li> <li>COR2074 – Contract #5400-157-300 Street Infrastructure Renewal</li> </ul>	18(1)(b) and (c) of LA FOIP	The IPC found these exemptions applied to the records.



# IPC Case Studies (1)



- ❧ Review Report 082-2015 (Sunrise Regional Health Authority) – access request for MSA between two third parties (3sHealth & K-Bro Linen Systems)
  - ❧ Issues pertaining to possession or control
    - ❧ “In other words, when contracting on a fee for service basis with some other organization, Sunrise should carefully consider how access to information and privacy should be addressed.”
    - ❧ “The current agreement between 3sHealth and Sunrise does not sufficiently recognize Sunrise’s obligations under LA FOIP and that it has the right to require unredacted copies of records pertaining to it in the possession of 3sHealth. With the partnership review described by 3sHealth in mind, I will recommend that the agreement between 3sHealth and Sunrise be revised.”
  - ❧ Recommendation was that Sunrise provide a copy of the MSA to the Applicant.

# IPC Case Study (2)



- ❧ Review Report 084-2015 (City of Lloydminster) – request for tender documents, bid evaluation reports and the contract with the third party
  - ❧ Records did not exist and applied ss. 18(1)(a), (b), (c)(i), (ii) and (iii) of LA FOIP
    - ❧ Did contain financial and commercial information
    - ❧ Could not conclude that information was supplied by third party
    - ❧ Insufficient information provided to demonstrate release would result in harm that is genuine and conceivable
    - ❧ Further consideration was the application of *The Cities Act*
    - ❧ Found tender documents and bid evaluation forms did not exist
  - ❧ Recommendation was to release the contract

# IPC Case Study (3)



- Review Report 054/2015 & 055/2015 (City of Regina) – unit prices and total prices severed from Form of Tender documents but released total tender prices
  - Section 18(1)(b) of LA FOIP applied
  - Found to be commercial and financial information supplied by third parties provided explicitly in confidence so the City should continue to withhold



# Tips & Tricks



- œ Mark or identify any proprietary information delivered to government
- œ Provide specific proprietary information in confidence in an appendix so easily severable
- œ Review standard contractual language
- œ Consider what is already in the public domain

# Resources



Available on [www.oipc.sk.ca](http://www.oipc.sk.ca)

- Guide to Exemptions

- Annotated Section Index

- Review Reports

- A Contractor's Guide to Access & Privacy in SK

- Blog – Contracting with Governments

Other sources

- Information Commissioner of Canada

- Investigators Guide to Interpreting the ATIA (section on confidential third party information)



# Resources (2)



## ∞ ON IPC

- ∞ Open Contracting: Proactive Disclosure of Procurement Records

## ∞ Government of BC

- ∞ Release of Information &/or Documents Related to Competitive Procurement Opportunities

## ∞ Government of Alberta

- ∞ FOIP Guidelines and Practices
- ∞ Managing Contracts under the FOIP Act
  - ∞ Table 2 – Disclosure of Contracting Information