



Sample Section 45 Decisions

For Local Authorities

Pursuant to section 45 of *The Local Authority Freedom of Information and Protection of Privacy Act*, the head of a local authority must decide if they will follow the Commissioner's recommendations as set out in the Commissioner's report.

DISCLAIMER

This document is not intended to provide legal advice and is provided for informational use only.

Introduction

When the Commissioner issues a review or investigation report (report) of his or her findings and recommendations pursuant to section 44 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), the head of the local authority must decide pursuant to section 45 of LA FOIP if they will or will not follow the Commissioner's recommendations. This written notice is referred to as the head's "section 45 decision," and the head is required to provide this notice to both the applicant or individual (complainant) and to the Commissioner (and third party if required). This resource will guide local authorities on how to prepare a written notice to an applicant or complainant pursuant to section 45 of LA FOIP.

Section 44 of LA FOIP

44(1) On completing a review or investigation, the commissioner may prepare a written report setting out the commissioner's recommendations with respect to the matter and the reasons for those recommendations.

(2) If a report is prepared pursuant to subsection (1), the commissioner shall forward a copy of the report to the head and, if the matter was referred to the commissioner by:

(a) an applicant or individual, to the applicant or individual and to any third party notified by the head pursuant to section 41; and

(b) a third party, to the third party and to the applicant.

(3) In the report mentioned in subsection (1), the commissioner may make any recommendations with respect to the matter under review or investigation that the commissioner considers appropriate.

Applicants can request that the Commissioner review a local authority's decision to deny access to a record, deny a correction request, or on a procedural issue such as a late response or a fee estimate. A complainant who was affected by a local authority's privacy breach can request that the Commissioner review or investigate the local authority's response to the breach.

After completing a review or an investigation, the Commissioner may issue a public report. The report will include the Commissioner's findings and recommendations. If the Commissioner completes a report, it is provided to each party to review or investigate prior to the report becoming publicly available via posting to the Commissioner's website, usually within 7 days.

Section 45 of LA FOIP

45 Within 30 days after receiving a report of the commissioner pursuant to subsection 44(1), a head shall:

- (a) make a decision to follow the recommendation of the commissioner or any other decision that the head considers appropriate; and
- (b) give written notice of the decision to the commissioner and the persons mentioned in subsection 44(2).

Within 30 days of the Commissioner issuing his or her report, the head of the local authority concerned has 30 calendar days to provide their written decision regarding any recommendations the Commissioner has made. The head is required to provide notice of their decision to any applicant, complainant or third party involved in the review. Calendar days are used (see section 2-28 of [The Legislation Act](#)). A decision can be provided by email or letter but needs to be in writing.

One administrative rule is that decision-makers are usually expected to give reasons for their decision. If the head decides to follow the Commissioner's recommendation, then there is no need to give reasons for complying with the recommendation. On the other hand, if the head decides to not comply with the recommendation, then the head in their decision should give reasons for not complying.

The head should also consider the exercise of discretion when releasing records and issuing a section 7 decision. The head should also consider the exercise of discretion when responding to the Commissioner's recommendations in a review. Some considerations include:

- The general purpose of LA FOIP; the principle that information should be made available to the public; the principle that individuals have a right of access to personal information about themselves.
- The wording of discretionary exemptions and the interest which the exemption attempts to protect or balance, including public safety.
- Whether the applicant's request can be satisfied by severing the record and providing as much information as possible.
- The local authority's historical practice of releasing similar types of information.
- The nature of the record and the extent to which it is sensitive to the local authority.
- Whether disclosure will increase public trust and confidence in the operation of the local authority.
- The age of the record.
- If there is a compelling need to release the information.
- If the Commissioner's recommendations have ruled that similar types of information should be released.

In an investigation, some considerations include:

- The nature of the privacy breach.

- The type of breach and the number of affected individuals.
- How affected individuals have been impacted and if the local authority has taken all the steps it could to protect their privacy.
- Has the local authority taken all the steps it could have taken to manage the breach in identifying the root cause and preventing future breaches.
- If taking additional steps would increase public trust and confidence.

In a section 45 decision the head should include the following:

- A statement that they are responding to the Commissioner's review or investigation report pursuant to section 45 of LA FOIP.
- A quote of each individual recommendation made by the Commissioner that the head is responding to.
- A response to each individual recommendation with a decision regarding whether they intend to follow it or not.
- The reasons as to why they have made each decision.
- If the head is releasing additional records to an applicant, identify those records.
- Identify any of the third party's information that the head intends to release or to continue to withhold.
- A statement that the applicant, individual or third party involved has a right to appeal a decision of the head to the Court of King's Bench pursuant to section 46 of LA FOIP.

Where no response is provided to a recommendation, the Commissioner will consider that no response has been made and will indicate so in the Annual Report.

Section 46 of LA FOIP

46(1) Within 30 days after receiving a decision of the head pursuant to section 45, an applicant or individual or a third party may appeal that decision to the court.

(2) A head who has refused an application for access to a record or part of a record shall, immediately on receipt of a notice of appeal by an applicant, give written notice of the appeal to any third party that the head:

(a) has notified pursuant to subsection 33(1); or

(b) would have notified pursuant to subsection 33(1) if the head had intended to give access to the record or part of the record.

(3) A head who has granted an application for access to a record or part of a record shall, immediately on receipt of a notice of appeal by a third party, give written notice of the appeal to the applicant.

(4) A third party who has been given notice of an appeal pursuant to subsection (2) or an applicant or individual who has been given notice of an appeal pursuant to subsection (3) may appear as a party to the appeal.

(5) The commissioner shall not be a party to an appeal.

Section 46 of LA FOIP provides that within 30 days of receiving the head's decision, an applicant/complainant or a third party can appeal the decision to the Court of King's Bench if they are not satisfied with the decision. A list of appeals that applicants or complainants have undertaken can be found on the IPC website here: [Court Cases](#).

An applicant/complainant or third party can launch an appeal of the head's decision by submitting an *Originating Application* to the Court of King's Bench. The applicant/complainant or third party that launches an appeal is responsible for serving the local authority with the Originating Application once it is filed with the Court. For more information, see [Guide to Appealing the Decision of a Head](#).

The Commissioner and his or her office is not party to an appeal.

Note on Third Parties in an Appeal

If the head refuses to grant access to a record or part of a record and receives a notice of appeal from an applicant, then the head is required to provide notice to any third party they notified pursuant to subsection 33(1) of LA FOIP (or would have notified had they intended to grant access).

If a head intends to grant access to a third party's information and the third party provides the head with a notice of appeal regarding that decision, the head is required to provide notice to the applicant of the third party's appeal.

SAMPLE LETTER – to an applicant (no third-party information)

[Date]

[Applicant's name and address]

Dear [Applicant's name]:

Re: Notice of decision regarding [Name of review report]

I am writing in response to the recommendations made by the Commissioner in [insert name of review report] which the Commissioner issued on [insert date].

This letter is written notice of the head of [name of local authority] decision pursuant to section 45 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The head has decided as follows:

- [Enter recommendation # and recommendation]

[Enter decision to follow or not follow. If the decision is to not follow, provide reasons. If the decision is to follow regarding release of additional records, provide a description of additional records being released and attach the records]

<Repeat for each recommendation made>

Pursuant to section 46 of LA FOIP, within 30 days of receiving this decision, you have a right to appeal this decision to the Court of King's Bench.

Sincerely,

[Name]

[Title]

SAMPLE LETTER – to a complainant

[Date]

[Complainant's name and address]

Dear [Complainant's name]:

Re: Notice of decision regarding [Name of investigation report]

I am writing in response to the recommendations made by the Commissioner in [insert name of investigation report] which the Commissioner issued on [insert date].

This letter is written notice of the head of [name of local authority] decision pursuant to section 45 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The head has decided as follows:

- [Enter recommendation # and recommendation]

[Enter decision to follow or not follow. If the decision is to not follow, provide reasons.]

<Repeat for each recommendation made>

Pursuant to section 46 of LA FOIP, within 30 days of receiving this decision, you have a right to appeal this decision to the Court of King's Bench.

Sincerely,

[Name]

[Title]

SAMPLE LETTER – to applicant (third party information involved)

[Date]

[Applicant's name and address]

Dear [Applicant's name]:

Re: Notice of decision regarding [Name of review or investigation report]

I am writing in response to the recommendations made by the Commissioner in [insert name of review or investigation report] which the Commissioner issued on [insert date].

This letter is written notice of the head of [name of local authority] decision pursuant to section 45 of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The head has decided as follows:

- [Enter recommendation # and recommendation]

[Enter decision to follow or not follow. If the decision is to not follow, provide reasons. If the decision is to follow regarding release of additional records, provide a description of additional records being released]

<Repeat for each recommendation made>

Pursuant to section 46 of LA FOIP, within 30 days of receiving this decision, you and the third party have a right to appeal this decision to the Court of King's Bench. If the third party appeals this decision, my office will notify you pursuant to section 46 of LA FOIP.

Sincerely,

[Name]

[Title]

SAMPLE LETTER – to third party

[Date]

[Third party's name and address]

Dear [Third party]:

Re: Notice of decision regarding [Name of review or investigation report]

I am writing further to our letter dated [insert date] wherein we advised that the [insert name of local authority] had received an access to information request pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) for records that concern your organization.

On [insert date] the Office of the Information and Privacy Commissioner (IPC) issued [insert name of review report], which made [insert number] recommendations that pertain to records that concern your organization.

As required by section 45 of LA FOIP, I am writing to notify you of our decision regarding these recommendations as follows:

- [Enter recommendation # and recommendation]

[If the decision is to continue to withhold, no reasons are required for the decision but provide reasons for not complying].

[If the decision is to release, provide reasons for this decision. Attach a copy of the responsive record and highlight the portion that the head intends to release].

<Repeat for each recommendation made>

Pursuant to subsection 46(1) of LA FOIP, the applicant and any third party may appeal the decision of the head of [insert name of local authority] to the Court of King's Bench. As a third party in this matter, you have 30 calendar days from the date of this letter to appeal to the Court of King's Bench. If the applicant (or another third party) appeals to the Court, my office will notify you pursuant to section 46 of LA FOIP.

[<if the decision is to release the record, include the following> The redacted record will be released to the applicant if the 30-day period to appeal expires, and you have not appealed to the Court of King's Bench. The 30-day appeal period expires on <insert date>, so please advise us on or before that date if you intend to appeal this decision. If we do not receive a response

from you, the head of <insert local authority> will release the record to the applicant the following day, or on <insert date>].

If you have any questions, please contact me prior to [insert date that the notice of appeal is due].

Sincerely,

[Name]

[Title]

cc Office of the Information and Privacy Commissioner

SAMPLE LETTER— to third party (notice not previously provided pursuant to subsection 33(1) of LA FOIP)

[Date]

[Third party's name and address]

Dear [Third party]:

Re: Notice of decision regarding [Name of review or investigation report]

I am writing to advise you that the Office of the Information and Privacy Commissioner (IPC) issued [insert name of review report] on [insert date report issued]. The review involved records regarding your organization and the IPC's recommendation regarding those records.

As required by section 45 of LA FOIP, I am writing to notify you of our decision regarding these recommendations as follows:

- [Enter recommendation # and recommendation]

[If the decision is to continue to withhold, no reasons are required for the decision].

[If the decision is to release, provide reasons for this decision. Attach a copy of the responsive record and highlight the portion that the head intends to release].

<Repeat for each recommendation made>

Pursuant to subsection 46(1) of LA FOIP, the applicant and any third party may appeal the decision of the head of [insert name of local authority] to the Court of King's Bench. As a third party in this matter, you have 30 calendar days from the date of this letter to appeal to the Court of King's Bench. If the applicant (or another third party) appeals to the Court, my office will notify you pursuant to section 46 of LA FOIP.

[<if the decision is to release the record, include the following> The redacted record will be released to the applicant if the 30-day period to appeal expires, and you have not appealed to the Court of King's Bench. The 30-day appeal period expires on <insert date>, so please advise us on or before that date if you intend to appeal this decision. If we do not receive a response from you, the head of <insert local authority> will release the record to the applicant the following day, or on <insert date>].

If you have any questions, please contact me prior to [insert date that the notice of appeal is due].

Sincerely,

[Name]

[Title]

cc Office of the Information and Privacy Commissioner