

UNDERSTANDING THE DUTY TO ASSIST

A Guide for Public Bodies

This guide provides assistance to public bodies in understanding their duty to assist applicants which requires reasonable effort to not only identify and seek out records responsive to an applicant's access to information request, but to explain the steps in the process and seek any necessary clarification on the nature or scope of the request within legislative timeframes.

January 2018



Office of the
Saskatchewan Information
and Privacy Commissioner

Understanding the Duty to Assist

The duty to assist requires a public body to make every reasonable effort to not only identify and seek out records responsive to an applicant's access to information request, but to explain the steps in the process and seek any necessary clarification on the nature or scope of the request within legislative timeframes. If the access to information request received seems overly broad, it may be because the individual does not have a sophisticated understanding of the public body's mandate and record holdings. Communicating with the applicant at an early stage and throughout the process, will not only help to clarify the request, but also hopefully streamline the search and preparation of records for release. Most importantly, meeting the duty to assist may result in a more satisfactory experience for all involved and perhaps, result in fewer complaints to this office.

“The purpose of FOIP is best served when a government institution adopts a liberal interpretation of a request. If a government institution has any doubts about its interpretation, it has a duty to assist the Applicant by clarifying or reformulating it.”

Review Report 023-2017 & 078-2017

Whereas historically in Saskatchewan, the duty to assist was only explicit in *The Health Information Protection Act* (HIPA), with recent amendments to *The Freedom of Information and Protection of Privacy Act* (FOIP) and *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) it is now explicit in FOIP and LA FOIP. We have prepared this resource to help public bodies understand what the duty to assist may entail.

The new section regarding duty to assist in FOIP is as follows:

- 5.1(1) Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.
- (2) On the request of an applicant, the government institution shall:
- (a) provide an explanation of any term, code or abbreviation used in the information; or
 - (b) if the government institution is unable to provide an explanation in accordance with clause (a), endeavour to refer the applicant to a government institution that is able to provide an explanation”.

Subsection 5.1(2) is fairly straightforward, so it is not the focus of this guidance document. The language in LA FOIP is nearly identical so it is not reproduced here.

Though FOIP and LA FOIP require the public body to respond openly, accurately and completely, the duty also involves making every reasonable effort to assist without delay. This should occur pre and post receipt of any access to information request.



In order to know where to direct his or her request, contact information for each public body's FOIP Coordinator should be publicly available.

When an individual first contacts a public body, reasonable efforts to assist could include the following:

- Make sure the individual is redirected to the 'right person' (i.e. FOIP Coordinator);
- Discuss whether the request can be accommodated outside the formal process:
 - Can this information be routinely released?
 - Have the records sought been released previously through an earlier access to information request?
 - Does the applicant only want an answer to a question and not access to records?
 - Is there another Act or administrative process that provides a right of access?
 - Is the information being sought available publicly online or in a government publication? If it is, direct the applicant where to look.
- Would another public body be better able to assist the applicant? If so, the request may be transferred in certain cases.
- Provide information about records in the public body's possession or control.
- Provide copies of the prescribed form or accept written requests that contain all the necessary elements;
- Explain the access to information processes to the applicant including:
 - that the applicant's identity will only be shared on a need-to-know basis;
 - any pertinent timeframes;
 - what is required if identity needs to be authenticated;
 - what is required if a fee waiver is requested;
 - if and why consent is required in certain circumstances;
 - methods of access to records (i.e. view or receive a copy);
 - any fees estimated;
 - extensions; and
 - the right to request a review by the Commissioner's office if dissatisfied.

Reasonable efforts to assist an applicant, after a request is made but before a response is provided, would include determining if the request can be clarified without deterring the applicant, or causing the applicant to incur unnecessary costs or delays.

The reason why an applicant is seeking certain information is generally not relevant. However, if appropriate, asking may assist the FOIP Coordinator in focusing in on what is of most interest or importance to the applicant.



RESPOND OPENLY

Responding openly to an applicant requires a public body to be transparent by providing an explanation of the processes, actions and decisions taken to fulfill an access request, such as the following:

- the basis for an extension of the time limit for responding
- the basis for fees being charged in relation to an access request
- the reasons for a decision not to waive the fees
- how the records referred to in the response are responsive;
- the reasons why each record or portion is being withheld including the section(s) of FOIP or LA FOIP that are being relied on for withholding it; and
- any abbreviations or acronyms contained in a record. Handwriting may need to be transcribed if illegible.

The public body should try to avoid the use of any technical words or explanations wherever possible when corresponding with applicants.

RESPOND ACCURATELY

The duty to respond accurately requires the public body to ensure it has sufficient information upon which to base its access decision. This is achieved by doing the following:

- conduct an adequate search for responsive records:
 - develop a search strategy;
 - cease any destruction activity of potentially responsive records;
 - search all reasonably related record holdings in the public body’s possession or control (including off site locations and those held by agents, consultants or other contracted service providers)
- thoroughly review all records by:
 - ensuring all pages of a record and attachments to emails are included;
 - review each record line-by-line;
 - apply exemptions if appropriate;
 - decide whether or not to refuse a record where a discretionary exemption applies; and
 - seek consent to release records where appropriate;
- prepare an index of records; and
- provide the index of records and copies of records released in full or in part to the applicant.



RESPOND COMPLETELY

The response should fully answer the access request. If an access request has been clarified or the scope altered, this should be confirmed in writing to ensure no misunderstandings going forward.

In order to respond completely, a public body should provide a brief explanation as to how the records provided are records responsive to the access to information request. If there are no responsive records, reasons should be provided as to how this conclusion was reached. This could include a brief explanation as to how the search was conducted, why records would not have been created or how the record at issue was destroyed in keeping with the public body's record retention/disposition schedule. Also, if records have been deemed non-responsive, a brief justification as to how that conclusion was reached could be offered.

APPLICANT NOT COOPERATING

It is possible that after numerous attempts, the applicant chooses not to engage or cooperate with the public body in the process. In those cases, the result may still be a request for review, but the topic of duty to assist is less likely to be an issue in any report issued. FOIP and LA FOIP already included provisions to address lack of specificity in access requests in section 6 but the amendments also introduce a new section regarding when an access request may be considered abandoned. That new section in both FOIP and LA FOIP is 7.1.

COMPLAINTS REGARDING THE DUTY TO ASSIST

This office has commented in many review reports on whether or not the public body met the duty to assist in the circumstances. In many of those cases, a new search or providing a new section 7 response was recommended by the Commissioner. For more on the conclusions reached, check out the following Review Reports at www.oipc.sk.ca under the *Reports* tab:

- Review Report 2004-003 (Saskatchewan Government Insurance)
- Review Report 2004-007 (Saskatchewan Property Management Corporation)
- Review Report F-2013-004 (Ministry of Labour Relations and Workplace Safety)
- Review Report F-2013-001 (Saskatchewan Workers' Compensation Board)
- Review Report LA-2014-001 (Village of Killaly)
- Review Report 059-2014 (Ministry of Highways and Infrastructure)
- Review Report 023-2017 & 078-2017 (Saskatchewan Power Corporation)

In some jurisdictions part of the duty to assist is creating records which currently do not exist. There is no such obligation presently in Saskatchewan. However, if the applicant and public body agree on these terms in order to satisfy a request, this office most likely would not object.



It is best to verify in writing any agreement reached in the event there is a disagreement down the road.

In addition, public bodies should not attach conditions or ask the applicant to waive the right to sue, request a review or take other actions against the public body as a result of being provided copies of records pursuant to an access to information request.

DISREGARDING APPLICATIONS

Along with other new amendments, a public body will now have the ability to ask the Commissioner for approval to disregard an access to information request or request for correction within the 30 day window after receiving one or more such requests. The result would be that a public body would not have to reply to the applicant's access to information request, request for correction or a group of such requests. However, before making application to the Commissioner, it is important that the public body is able to demonstrate it has met its duty to assist obligations under FOIP or LA FOIP. For more information on this new application process, see [Application to Disregard an Access to Information Request or Request for Correction](#) on our website. Also, the [IPC Guide to Exemptions](#) now includes a section on the topic.

For more on the duty to assist in other jurisdictions, you may wish to check out [The Duty to Assist: A Comparative Study](#) (May 2008) prepared by the Office of the Information Commissioner of Canada. Also, our office would like to extend our thanks to both the Manitoba Ombudsman and the Yukon Information and Privacy Commissioner for allowing our office to adapt and adopt much from publications on the topic from their respective offices.

CONTACT INFORMATION

If you have any questions or concerns regarding the duty to assist, please contact the IPC at:

306-787-8350 | toll free 1-877-748-2298

503 – 1801 Hamilton Street | Regina SK S4X 4H7

webmaster@oipc.sk.ca | www.oipc.sk.ca | @SaskIPC

