

WHAT TO EXPECT DURING A REVIEW WITH THE IPC

A Guide for Public Bodies

This document has been prepared to outline best practices for public bodies/trustees in the event of a review by the office of the Information and Privacy Commissioner for Saskatchewan (IPC) under Part VII of The Freedom of Information and Protection of Privacy Act (FOIP), Part VI of The Local Authority Freedom of Information and Protection of Privacy Act (LA FOIP) or Part VI of The Health Information Protection Act (HIPA).

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Office of the
Saskatchewan Information
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What to Expect During a Review with the IPC

This document outlines our new process and provides information to public bodies/trustees on what is required to assist us in meeting our goals and the requirements of the legislation.

SUMMARY OF REVIEW PROCESS

1. A request for review is received at the office of the Information and Privacy Commissioner (IPC). It will be assigned to an Early Resolution Officer (ERO).
2. ERO will ensure all necessary information has been received from the applicant and will attempt informal resolution between the parties.
3. If early resolution is not possible, the ERO will send out a notification e-mail to all parties. It will request that all submissions and materials be provided within 14 calendar days. This includes the submission and, if necessary, the Index of Records and record File will be assigned to an Analyst.
4. Analyst will ensure materials arrive in 14 calendar days.
 - a. Analyst will share Index of Records with applicant and advise him/her of any new exemptions, although the expectation is that the public body will do so.
 - b. If there is permission to share submission – analyst will share. If there is nothing said about sharing, Analyst will make one phone call or send one email to public body/trustee to inquire. No response means not willing to share – carry on with next steps.
 - c. If materials are not received in 14 calendar days, or an agreed upon deadline, the escalation guidelines are as follows:
 - i. Analyst will follow up and attempt to receive materials;
 - ii. Analyst will escalate to Director of Compliance (DoC) – DoC will attempt to get materials within seven calendar days before moving it on;
 - iii. DOC will escalate to Commissioner – Commissioner will contact the ‘head’ if necessary.
5. Analyst will review materials received – do some initial analysis to determine direction of review.
6. Analyst will meet with Commissioner and DOC to discuss direction of review. Analyst will prepare the draft report.
7. Analyst will send a PDF copy of Draft Report to the FOIP Coordinator/Privacy Officer of the public body/trustee and request response within seven calendar days. The public



body/trustee will be asked if there are any factual errors in the draft report and to indicate if they plan to comply with any recommendations. This has the potential to change a finding or recommendation.

8. Analyst will put Report into final format and send to Commissioner for final approval.
9. Analyst will e-mail Final Report to applicant and public body/trustee.
 - a. One copy of Final Report will go to the applicant.
 - b. Another copy of the Final Report will be e-mails to the public body/trustee:
 - i. E-mail will be sent to the Head;
 - ii. E-mails will be copied to the FOIP Coordinator/Privacy Officer, the Deputy Minister of Justice and Executive Director of the Access and Privacy Branch;
 - iii. Final Report may also be shared with other Deputy Ministers.
 - c. Another copy of the Final Report will be sent to relevant third parties if applicable.
 - d. Report is now issued.
10. All reports will be posted to the website on the date designated by the Commissioner (3-5 days after report is issued). However, the Report may be posted on the date of issuance.
11. Public body/trustee must respond to the final report within 30 calendar days. A copy of the response should be sent to this office and the applicant.
12. If no response is received from the public body/trustee within 23 calendar days of issuing the final report, Analyst will provide the public body/trustee with one reminder of its duty to respond. Responses are tracked by this office.
13. The IPC will delete copies of “the record” in its possession six months after report is issue unless the public body/trustee’s decision is appealed.

PRELIMINARY OBJECTIONS

In the event that the public body/trustee has reason to believe that the Commissioner does not have jurisdiction to deal with a request for review, the public body should let the IPC know right away. Preferably, the public body/trustee should let the ERO know before notification is sent to the parties.

If the public body/trustee believes that or that the Commissioner should refuse to conduct a review or discontinue a review pursuant to section 50 of FOIP, 39 of LA FOIP, or 43 of HIPA, the public body/trustee should also let the IPC know as soon as possible.

If the public body/trustee believes this office does not have jurisdiction, it should provide the office with a letter saying so and giving reasons why, as soon as it has reached this opinion. Similarly if the public body/trustee should refuse a review or discontinue a review, it should advise by letter, with reasons, right away.



Note that preliminary objections to a review is different from an application to disregard an access request or request for a correction to personal information made pursuant to sections 45.1 of FOIP/ 43.1 of LA FOIP. If you are seeking information about the disregard process please see the IPC resource [Application to Disregard an Access to Information Request or a Request for Correction](#).

INFORMAL RESOLUTION

Where possible, the IPC will aim to achieve informal resolution for review files. Informal resolution is beneficial to all parties involved as it can expedite resolution for the applicant and reduce the amount of work for both the public body/trustee and IPC.

When a request for review is first received by the IPC, it will receive a file number and be assigned to an ERO. The ERO will first verify that the IPC had received all the necessary information from the applicant and documents. The ERO will then contact both the applicant and the public body/trustee in order to facilitate a possible informal resolution. Some of the ways an ERO might facilitate an informal resolution are as follows:

- Ensure all possible records have been provided to the applicant
- Clarify what kind of records the applicant is seeking.
- Clarify the applicant's objectives with the public body/trustee.
- Facilitate negotiations between the applicant and public body/trustee.
- Clarify the role of the IPC.
- Identify the possible outcomes of a review.
- Narrow the scope of a review if informal resolution is not successful.

If an ERO is not able to reach an informal resolution within a week, notification letters will be sent and the file will be assigned to an Analyst. However, the IPC will be open to reaching informal resolution at any stage of the review process.

If at any time during a review the public body/trustee decides to release new responsive records to the applicant, please do so as soon as possible and let the ERO or Analyst know

When informal resolution is achieved, the Commissioner will not issue a Report. **Note:** In most cases, informal resolution is achieved at the discretion of the applicant.



NOTIFICATION OF THE REVIEW

When the IPC issues a formal notification letter to the public body/trustee, it will advise that a review is underway, ask for preliminary objections and advise that the IPC requires a copy of the record at issue, and Index of Records and a submission. The submission is the public body/trustee's arguments supporting its decision to withhold records. An Index of Records is a list of the records and exemptions that have been applied (see below). The Index of Records will be shared with the applicant. See more information about the Index of Record below.

If a third party exemption (section 19 of FOIP and section 18 LA FOIP) has been applied to the record, we will ask for the contact information for third parties as they have the right to make representation to the IPC. Once the contact information is received, the IPC will notify the third party. Providing notice to third parties allows them the opportunity to make representations on whether or not access should be allowed to records that contain its information.

Please note that FOIP and LA FOIP require that third parties be notified if a public body/trustee intends to give access to records which may contain third party information. Section 52 of FOIP and 41 of LA FOIP require that the third party be given written notice by the public body/trustee of a review by the IPC. This notice is independent of any previous third party notices given during the access process prior to the review. When a review is underway which involves third parties, public bodies/trustees should provide the Commissioner's office with contact information for the involved third parties so that the Commissioner's office may contact these third parties directly.

PREPARING THE RECORD/INDEX OF RECORDS

Record

The IPC requires a copy of any responsive records to conduct the review.

The public body/trustee must provide the Commissioner's office with a copy of the entire package of withheld records responsive to the applicant's access request. **The records that have been provided to the IPC will NOT be released to the applicant.**

There is no need to send the IPC records that have already been released to the applicant.

If any information has been withheld from the applicant, the public body/trustee must provide a copy of the record to the IPC with:

- the withheld information outlined or highlighted, and
- the relevant section number(s) of the applicable Act clearly indicated beside or near the withheld information.

All the pages should be numbered in sequence. However, this may not always be practical. For example, with two binders of documents, each one may already have pages numbered in



sequence. In that case, if the Record is identified, the pages need no further numbering. A loose collection of documents should be numbered in sequence.

Index of Records

In facilitating the review, it is required that the public body/trustee prepares an “Index of Records” in table form.

(Below has been stolen from the recent blog on Indexes)

The IPC has indicated that it will ask the public body whether the submission can be disclosed to the applicant. If the public body says no, that position will be respected and the submission will not be sent to the applicant. **The IPC does not and will not disclose the actual records.**

Please note the IPC may not consider any new discretionary exemptions raised after receiving the public body/trustee’s Index of Records.

The index of records is in a different position. It is not the representation. It is a list of the records which the public body is refusing to give the applicant.

The index of records allows the applicant to see the exact number and types of records involved and the exemptions applied to each. Sharing this with the applicant provides my office with an opportunity to clarify if the records listed are what the applicant is interested in but also gives us the ability to explore the possibility of narrowing his or her request. This may result in less effort down the road by all and result in a more timely resolution. This modification of practice will result in narrowed requests, less work and earlier resolution of reviews by my office. Finally, if a report is issued, it is easier to point out whether or not this office agrees to exemptions applied to specific records, page and line items and make recommendations accordingly.

When preparing its index of records, this office recommends the public body include the following elements in table form:

- Page numbers/range;
- Description of the records (i.e. letter, email, memo, handwritten notes, report) along with date, job titles and organization affiliation of those involved;
- Status: released in full, in part, or withheld in full; and
- Exemptions applied.

For an example of an Index of Records, please see the IPC blog entitled [NOTICE: Change of Practice – Index of Records](#).

The public body should NOT provide any confidential comments in the index of records. Those confidential comments should be included only in the submission. This includes content to which a mandatory exemption would apply (i.e. third party personal information or information to which section 19 of FOIP would apply). Subject lines may help further in describing the



records but this and other content may be omitted from the index of records if it would reveal information to which an exemption applies.

The wording of the access to information request may also be inserted into the table header to be clear which request the records relate to. This is, of course, optional.

Email threads/strings may be tricky to capture in an index of records as they may go back and forth for a long period of time and involve a number of different individuals (cc'd as well). To simplify, this office recommends that instead of listing every date involved in the discussion that the date range is offered only.

In our experience, other elements may be helpful to include in the index of records. For instance, if one page has multiple redactions with multiple exemptions applied, it may be helpful for all parties involved if each severed portion is marked with a different sequential number. You may also wish to further distinguish the type of documents with a record or document number or letter. Listing a generic subject of the record (i.e. advice sought) at issue too could help an applicant identify records that he has no interest in and eliminate from the review.

It also may be easier to include all records on the index of records even if released in full to the applicant. Though this office does not need copies of records released in full, an index of records that details the full record may prove as a useful reference in ongoing dialogue with the parties. A quick check of the index of records and records on file is a helpful way to double check to ensure nothing is overlooked.

If a record is large, consider if only a representative sample would be enough to facilitate the review. Please call the Analyst to discuss.

Finally, once the review has concluded, the IPC will destroy copies of the record in its possession six months after a final report has been issued unless the public body's decision is appealed.

PREPARING THE SUBMISSION

The purpose of the submission is to inform the Commissioner about the main arguments of the case and to present supporting information.

Most exemptions found in FOIP and LA FOIP have established tests and criteria used by the IPC in analyses for reviews. The IPC has prepared the resource [IPC Guide to Exemptions](#) which lists the tests that have been used in the past. These tests can be used by public bodies/trustees as a guide in preparing submissions. Public bodies/trustees will also need to provide any supporting information to meet the relevant tests.

The Commissioner will use this information and material to base his decision. The amount or type of material required in order to convince the Commissioner will vary dependent on the



particular facts, issues and circumstances. If a public body/trustee fails to convince the Commissioner, he will recommend the release of the record at issue. For more information on burden of proof, please see the burden of proof section later in this document.

A submission can contain the following:

- Table of Contents;
- Relevant tests and arguments in support of your position;
- Supporting documents, authorities and other relevant information; and
- Appendices (e.g. Affidavits) if necessary.

Do not hesitate to contact an Analyst if you require assistance in identifying the relevant tests and types of supporting documentation required to complete a submission.

A typical submission is about 10 pages (excluding the record). We ask that both public bodies/trustees and applicants limit submissions to 40 pages or less, if possible. We discourage extensive discussion of philosophy or principles in the submission. We are applying legislation is 23 years old. It is best if public bodies focus their submissions on the relevant sections, and criteria and tests contained in the exemptions guide.

Please note the IPC may not consider any new discretionary exemptions after receiving the public body/trustee's submission. Mandatory exemptions will be considered at any time.

See also our blogs on preparing a submission: [*Tips for a Good Submission*](#) and [*What Makes a Good Submission?*](#)

TIMELINES AND ESCALATION POLICY

In order not to delay the right of access, the IPC requires the index of records, record and submission from the public body/trustee within 14 calendar days of the date of the notification letters.

Please notify us as soon as possible if this timeline is not achievable. On a case-by-case basis, small extensions are negotiable.

If the index of records, record and submission are not forthcoming, the IPC has an escalation policy in place as follows:

1. First, the Analyst will attempt to receive materials within 14 calendar days or a negotiated timeframe.
2. The Analyst will escalate to the DoC – DoC will attempt to get materials within seven calendar days before escalating it to the Commissioner;
3. If escalated to the Commissioner – the Commissioner may contact the 'head'.



SHARING OF SUBMISSIONS

The review may be better facilitated by sharing the index of records and submission with the Applicant which can assist with informal resolution. **Please note that the index of records and submission is separate and distinct from the record. Only the index of records and submission may be shared with the public body/trustee’s permission. The record will not.**

Some benefits of sharing the submission are as follows:

- The applicant may gain a better understanding of the public body/trustee’s arguments which may lead to a narrowing of the scope or end the review.
- The applicant may feel there is increased procedural fairness.

Please indicate clearly if we may share the index of records and/or submission as follows:

“Submission can be shared”

OR

“Submission cannot be shared”

Please note that the exchange of submissions will not impede the IPC timeline. The Analyst will proceed with the analysis while waiting for a response from the applicant if the index of records and/or submission has been shared. The analysis may be changed at a later stage in the process once a response is received.

DRAFT REPORT

Once finished, the Analyst will present a draft report to the public body/trustee which includes analysis of the file, findings and recommendations.

The public body/trustee can respond to the draft report indicating if it agrees with the findings and whether it will follow the recommendations. Please provide any final arguments at this time.

We ask for a response from public bodies/trustees within seven calendar days. If you cannot respond within that time please call the Analyst to discuss. If there is no response, the Analyst will move the review forward to a final report.

Please note that the Commissioner may paraphrase or quote from a public body/trustee or Applicant’s submission, letter or e-mails in the draft or final report.



COMMISSIONER'S REPORT

Once an Analyst has received the response to the draft report from the public body/trustee, he/she will make final changes to the report and pass it to the Commissioner for his final approval.

The Commissioner will issue a report for every review file that is not resolved informally. All parties involved in the Review will receive a copy of this report (eg. public body/trustee, applicant, third parties, etc.). A copy of the report will also be sent to the Ministry of Justice other relevant ministries and/or associations such as the Saskatchewan School Boards Association, Saskatchewan Association of Rural Municipalities or Saskatchewan Urban Municipalities Association.

All reports will be posted to the website on the date designated by the Commissioner (typically 3 days after issuance). However, the Report may be posted on the date of issuance.

As set out in the legislation, the public body/trustee then has 30 days to provide a response to the relevant parties.

THE IPC IS PAPERLESS

The IPC has gone paperless. As such we prefer to receive correspondence, submissions, copies of the record and other documentation electronically. Any documentation could be sent by e-mail or by mail on a CD or USB key.

Please password protect any sensitive PDF or Word documents, especially if they contain personal information or personal health information. Please do not hesitate to contact us if you require support.

Finally, please do not transmit the password in the same e-mail as the documents. Please send it in a separate e-mail or call the IPC.

MAKING YOUR CASE

As noted above, the public body/trustee's submission is its opportunity to convince the Commissioner that certain exemptions apply to the records at issue. In legal terms, this is sometimes called meeting the "burden of proof".

A public body/trustee has the burden of proof pursuant to section 61 of FOIP, section 51 of LA FOIP and/or section 47 of HIPA if it claims that access to records should or must be refused. In other words, the public body/trustee must convince the Commissioner that exemptions apply. The burden is not on the applicant to establish that an exemption does not apply.



For example, if a government institution applies section 19(1)(a) of FOIP to refuse access to certain records, it falls to the government institution to bring forward arguments that disclosure could reasonably be expected to disclose a trade secret. If the government institution is able to convince the Commissioner of this, the government institution will have met the burden of proof.

To assist public bodies/trustees to meet the burden of proof, the IPC has created document [IPC Guide to Exemptions](#) which identifies definitions, tests, criteria and factors to consider when arguing the application of each exemption.

Other information that would be useful in meeting the burden of proof:

- Arguments in support of the relevant tests for an exemption.
- Excerpts from relevant legislation or regulations that apply to the operations of the public body/trustee and that relate to the issues under review.
- Excerpts from policy manuals that set out practices or policies followed by the public body/trustee that relate to the issues under review.
- Relevant court decisions or past Reports of the IPC. The IPC publishes on its website some reports and recommendations issued when it concludes a review of a decision of a public body/trustee that is not informally resolved.
- Decisions made by Information and Privacy Commissioners in other jurisdictions that may be of assistance to the Commissioner in his consideration of the issues.

In some instances, an affidavit can strengthen a public body/trustee's arguments. This is especially helpful when establishing records were obtained in confidence and showing that a proper search has been performed. For more information on affidavits please see the IPC resource [Using Affidavits in a Review with the IPC](#).

CONTACT INFORMATION

If you have any questions or concerns during any stage of the review process, please contact us:

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