

# FOIP FOLIO

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September 2004

## Privacy Laws and Health Information – Conference Update

Although the conference is still one month away, Saskatchewan's first health information conference is already full. That means that almost 400 people have registered for *Privacy Laws and Health Information: Making it Work (Oct. 27 and 28)*.

We regret that many more who want to register can not be accommodated. Our capacity is limited by the venue and the fact that a small committee of volunteers is doing all of the organization work.

We will attempt to make speakers' notes and materials more widely available after the conference.

Since our August FOIP FOLIO we can confirm the following additional speakers:

- **Dr. Ben Chan** (CEO, Saskatchewan Health Quality Council)
- **Ms. Judith Dowler** (Director, Health Information and Analysis Strategic Policy, First Nations and Inuit Health Branch Health Canada)
- **Ms. Wendy Duggleby** (Associate Professor, College of Nursing, member of U. of S. Behavioral Ethics Review Board)
- **Ms. Roseanne Gallant** (Health Compliance Officer- Alberta OIPC)
- **Mr. Ron Guse** (Registrar, Manitoba Pharmaceutical Association)
- **Ms. Karina Guy** (Senior Manager, Enterprise Risk Services, Deloitte Touche)
- **Mr. Ray Joubert** (Registrar, Saskatchewan College of Pharmacists)
- **Ms. Nancy Love** (Manager, Compliance Investigation, Access and Privacy Division, Manitoba Ombudsman)
- **Mr. Ken Moore** (Executive Assistant, Saskatchewan Teachers' Federation)
- **Dr. Cordell Neudorf** (Medical Health Officer- Saskatoon Health Region, Public Health Services)
- **Dr. George Peacock** (former Registrar of Sk. College of Dental Surgeons)
- **Ms. Gail Perry** (Manager, Compliance Review, Access and Privacy Division, Manitoba Ombudsman)
- **Ms. Eithne Reichert** (Independent Consultant for the Client Registry Project)
- **Ms. Kim Riddell** (Compliance Investigator, Access and Privacy Division, Manitoba Ombudsman)
- **Ms. Karen Weisbaum** (Lawyer and Bioethicist - currently Project Manager for CIHR-funded study at Centre for Evaluation of Medicines (McMaster University) with teaching appointment at Queen's University)
- **Mr. Bill Werry** (Executive Director for Human Services Integration Forum)

## Privacy Laws and Health Information -- Conference Update (Cont'd)

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If you have already registered for the conference, we encourage you to download a copy of *The Health Information Protection Act* (HIPA) from our website: [www.oipc.sk.ca](http://www.oipc.sk.ca) under *Legislation* and bring this to the conference with you.

### Contracting Out

It is important to recognize that when your organization contracts on a fee for service basis with some other agency including a non-profit, you will want to carefully consider how access to information and privacy should be addressed. Your organization may well be in “control” of personal information and general information for purposes of *The Freedom of Information and Protection of Privacy Act* (FOIP) or HIPA even if this information is not actually in your possession. That may require specific provisions in your contract to meet your obligations under the FOIP or HIPA statutes.

A very useful guide, *Contractor's Guide to the FOIP Act* can be accessed at [http://www3.gov.ab.ca/foip/other\\_resources/publications\\_videos/contractor's\\_guide.cfm](http://www3.gov.ab.ca/foip/other_resources/publications_videos/contractor's_guide.cfm).

Recognize that this is written for the Alberta FOIP Act and there are some differences between our FOIP Act and the Alberta version.

### Duty to Assist the Applicant

The early experience of our office working with many government institutions is that access requests are being interpreted very narrowly. Our view is that this is inconsistent with the purpose of the FOIP Act. The fundamental right of access should not be frustrated by a failure to assist an applicant.

It is useful for a FOIP Coordinator to actually contact an applicant to see (a) if what the Applicant is looking for is clear; (b) if the request can be accommodated informally outside of the FOIP Act, and (c) if the request can be clarified in the interests of focusing on certain key records and avoiding unnecessary costs to the Applicant.

In a number of cases, we have found that government institutions or local authorities will provide summary or secondary documents when they should have provided the original source documents in responding to an access request.

The definition of a record is very broad in the FOIP Act. Unless the applicant has agreed to accept a summary or secondary document, you should be considering all records that may be responsive to the request.

## Claiming an Exemption

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We remind government institutions and local authorities that it is important to cite all relevant mandatory or discretionary exemptions when they respond to an access request. We have encountered a number of cases where the public body decides to raise a number of new exemptions once our office undertakes a formal review of their decision to withhold a record. This is unfair to the applicant.

Our practice is that we will not normally consider a new discretionary exemption once we commence our review unless the public body can demonstrate that this will not cause undue delay to the applicant and that it will not prejudice the applicant.

We will still consider mandatory exemptions at the review stage even if they were not raised by the public body in its response to the applicant.

## New Reports from OIPC

We want to highlight 3 new Reports resulting from formal reviews under *The Freedom of Information and Protection of Privacy Act* (FOIP). All of these Reports are available at [www.oipc.sk.ca](http://www.oipc.sk.ca) under the tab: *Reviews*.

### **Report 2004-004 (Saskatchewan Industry and Resources)**

The Applicant had sought information with respect to budget materials prepared in anticipation of the Wide Open Future advertising campaign. During a media scrum, the Premier verbally advised the Applicant that the documents he sought would be released. The Commissioner found that this did not constitute valid consent and the documents were properly withheld from disclosure as records created to present advice and recommendations to Executive Council.

### **Report 2004-005 (Executive Council)**

In this case the Applicant sought certain materials prepared by or for or held by Executive Council with respect to a public opinion survey in November 2003. Executive Council denied access on the basis that the information would be published within 90 days. The Commissioner found that the time had been calculated correctly. The Commissioner found that the Executive Council failed to meet its duty to assist the Applicant and failed to respond openly, accurately and completely. The Commissioner recommended that Executive Council provide access to the raw data related to the survey and to the cost of the survey

## New Reports from OIPC (Cont'd)

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### Report 2004-006 (Sask. Human Rights Commission)

The Applicant sought access to a file in the possession of the Saskatchewan Human Rights Commission. The file in question had been provided to the Commission in 2002 for the purposes of an investigation undertaken pursuant to the Saskatchewan Human Rights Code. This included material from an organization not subject to the FOIP Act. The Commission refused access on the basis of s. 15(1)(c) of the FOIP Act. The Commissioner found that 48 documents did not come within that exemption and should be produced to the Applicant after appropriate severing. The balance of the documents were properly withheld on the basis of the exemption cited by the Commission. The documents to be withheld included personal health information under HIPA. The Commissioner found that the personal health information had been collected principally in anticipation of a quasi-judicial proceeding and should not be released.

### **HIPA and Section 16**

All organizations that have been designated as a “government institution” for purposes of the FOIP Act are also “trustees” for purposes of HIPA. Those organizations are required to have policies and procedures to ensure compliance with HIPA by their employees [See section 16 of HIPA at <http://www.qp.gov.sk.ca/documents/english/Statutes/Statutes/H0-021.pdf> ].

If this applies to your organization, you are encouraged to work with Saskatchewan Health to achieve compliance as quickly as possible.

### **Health Information Protection Act Draft Regulations**

Saskatchewan Health published draft Regulations for *The Health Information Protection Act* in early August. The Regulations include 11 different items. They are available to the public at [http://www.health.gov.sk.ca/mc\\_hipa\\_reg\\_draftforconsultation.pdf](http://www.health.gov.sk.ca/mc_hipa_reg_draftforconsultation.pdf)

Comments are invited prior to September 30, 2004 and should be forwarded to Shelley Gibson HIPA Regulations, Policy and Planning Branch-Fax: (306) 787-2974 or Email: [ppbweb@health.gov.sk.ca](mailto:ppbweb@health.gov.sk.ca)

## Health Information Protection Act Draft Regulations (Cont'd)

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The draft regulations address the following matters:

- 1) Exempting Saskatchewan Archives Board from HIPA.
- 2) Retention of records with personal health information.
- 3) Designation of appropriate archives.
- 4) Disclosure of personal health information without consent for professional disciplinary hearings.
- 5) Disclosure of personal health information without consent re: condition reports by trustee.
- 6) Disclosure of registration information without consent to Saskatchewan Cancer Agency.
- 7) Disclosure of registration information without consent to ambulance operators.
- 8) Disclosure of registration information without consent to Dept. of Learning.
- 9) Fees for access.
- 10) Prohibition against disclosure of provider information by trustees.
- 11) Disclosure of registration information for fundraising.

Our office has published our commentary on the draft regulations at [http://www.oipc.sk.ca/whats\\_new.htm](http://www.oipc.sk.ca/whats_new.htm). We support Numbers 1, 2, 3 and 4. We have suggested modifications to Numbers 3, 4, 9 and 10. We oppose 5, are unclear on the need for 7 and suggest that Privacy Impact Assessments are required for 6 and 8. With respect to 11 -- fundraising, we contend that express consent of the individual should be required before personal information is disclosed by a health region to a fundraising organization.

### **Breach of Privacy Complaints**

Requests for Review and Breach of Privacy Complaints are two distinct and separate processes unique to the Office of the Information and Privacy Commissioner (OIPC). This article provides details on the breach of privacy complaint process.

The OIPC is a place of last resort. The complainant should exhaust all reasonable avenues in attempting to resolve the complaint with the body [government institution, local authority, or health information trustee] where the alleged breach of privacy occurred before contacting the OIPC. Normally this would involve contacting the FOIP/HIPA coordinator for that public body.

## Breach of Privacy Complaints (Cont'd)

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If all attempts fail, the complaint should be put in writing, with as many details as possible (date, witnesses, chronology of events, etc) and delivered in person or by mail to the Commissioner's Office. The OIPC will not normally initiate an investigation regarding a breach of privacy complaint that is communicated by phone, fax or email.

If too much time has passed since the alleged breach has occurred, it may be impractical for the Commissioner to investigate for a number of reasons including the unavailability of witnesses, or failing memories.

With the receipt of a breach of privacy complaint, the Commissioner's office will follow a standard process that includes:

1. Notifying the parties involved.
2. Gathering information to determine grounds and jurisdiction.
3. Investigating (Interviewing witnesses, site visits, reviewing records and documentation including policies, procedures or any other relevant materials)

During the investigation, mediation may be requested by any of the parties to the complaint, or suggested by the OIPC with the following results:

- If mediation is successful, then the complaint is resolved upon agreement of the parties involved and the file is closed; or
- If parties are dissatisfied with the results of mediation, then the Commissioner may prepare a report summarizing the details of the complaint and the Commissioner's recommendations.

If the issuing of a Report is necessary, it will be available on the OIPC website: [www.oipc.sk.ca](http://www.oipc.sk.ca). The complainant will not be identified in the Report. The public body may or may not adopt the recommendations listed in the Commissioner's Report. There is no avenue for appeal if the complainant is dissatisfied after this point.

## Identity of Applicant is Personal Information

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Some government institutions have asked whether there are any rules around the identity of someone who has made an access request. You will have noticed that in our formal Reports we refer to the “applicant” and do not identify that person. At the initial stage of a request for access a couple of considerations apply. Our view is that a government institution should not disclose the identity of the applicant to anyone who does not have a legitimate need to know. Need to know relates to the processing of the access request. Our view is that it is improper to treat applicants differently depending on who they are or what organization they may represent. It would also be improper to broadcast the identity of an applicant throughout a government institution or to disclose the identity outside of that particular department. To avoid differential treatment we encourage the FOIP coordinator to mask the Applicant’s identity. This approach is consistent with direction from the Federal Court of Canada and the practices in other provinces. There is a useful discussion of this issue in the Annual Report of the Information Commission of Canada 2001-2002 at pages 22 to 24.

### Future Events

- October 4** – *Health Privacy: New Compliance Requirements and Best Practices*, Calgary ([www.insightinfo.com](http://www.insightinfo.com) for conference details)
- October 14** – *Privacy Laws in a Nutshell*: Saskatchewan Legal Education Institute, Saskatoon. ([www.sklesi.org](http://www.sklesi.org) for seminar details)
- October 15** – *Privacy Laws in a Nutshell*: Saskatchewan Legal Education Institute, Regina. ([www.sklesi.org](http://www.sklesi.org) for seminar details)
- October 27 & 28** – *Privacy and Health Information – Making It Work*, Hotel Saskatchewan, Regina ([www.oipc.sk.ca](http://www.oipc.sk.ca) for conference details)
- December 1 & 2** – *Electronic Health and Medical Records*, Vancouver, British Columbia ([www.insightinfo.com](http://www.insightinfo.com) for conference details)

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