

SASKATCHEWAN

**OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER**

INVESTIGATION REPORT LA-2012-002

Regina Qu'Appelle Regional Health Authority

Summary:

A number of complaints were received by the Office of the Information and Privacy Commissioner with respect to the Internet publication of the names and precise salaries of \$50,000 or more paid to all employees of the Regina Qu'Appelle Regional Health Authority (RQRHA) commencing in 2005. The Commissioner determined that the information published on the Internet was not captured by the definition of "personal information" for purposes of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) since an exception for the salaries of employees of any local authority applied. He further found that even if it had qualified as "personal information", there was authority for the Internet publication. This authority was explicit for the salary information of "members, officers and senior employees" of RQRHA. For all other employees the authority was by means of a delegation of authority to the Minister of Health who in turn required such Internet publication by means of the combined effect of *The Regional Health Services Act*, *The Regional Health Services Administration Regulations* and the *Annual Report Content Requirements* issued by the Ministry of Health. Notwithstanding the existence of legal authority for the Internet publication practice, the Commissioner determined that:

1. there were significant risks to individuals by virtue of the indiscriminate Internet publication of the names and salary information;
2. there exist privacy enhancing technologies that may significantly reduce the risk to individual employees, but these have not heretofore been required or employed by regional health authorities, the Ministry of Health or the Information Technology Office; and
3. RQRHA, the Ministry of Health and the Information Technology Office should consider utilizing the web robot exclusion protocol and

other technologies to make more difficult the misuse of that published information about identifiable individuals.

Statutes Cited: *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c.L-27.1, ss. 2(f)(xiii), 3, 4, 23, 28(2)(i)(i); *The Local Authority Freedom of Information and Protection of Privacy Regulations*, c. L-27.1, Reg. 1, ss. 9, 10; *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c.F-22.01, s. 21; *The Health Information Protection Act*, S.S. 1999, c. H-0.021, s. 2(m); *The Financial Administration Act, 1993*, S.S. 1993, c.F-13.4; *The Regional Health Services Act*, S.S. 2002, c.R-8.2, ss. 16(2), 55, 64; *The Regional Health Services Administration Regulations*, c.R-8.2 Reg 1, s. 9.1; Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, Chapter F.31, s. 21; Australia's *Information Privacy Act 2000*, Act No. 98/2000

Authorities Cited: Saskatchewan OIPC Review Report LA-2007-002, Investigation Report LA-2012-001, Investigation Report F-2005-001; *Canadian Charter of Rights and Freedoms*; Ontario Court of Appeal in *Jones v. Tsige*, 2012 ONCA 32; *Brown v. Entertainment Merchants Association*, 564 U.S. (2011); *Germain v. Automobile Injury Appeal Commission*, 2009 SK QB 106; *R. v. Trapp*, 2011 CarswellSask 785 (Sask.C.A.); *R. v. Spencer*, 2011 CarswellSask 786 (Sask C.A.)

Other Sources Cited:

Saskatchewan OIPC, *2010-2011 Annual Report*; Saskatchewan OIPC, *FOIP FOLIO* (August 2004); Saskatchewan OIPC, *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*; British Columbia IPC, *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*; Office of the Privacy Commissioner of Canada, *A Matter of Trust: Integrating Privacy and Public Safety in the 21st Century*, November 2010; Office of the Privacy Commissioner of Canada, *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*; Regina Qu'Appelle Health Region, *2010/2011 Annual Report*; Information Technology Office, *Information Technology Office Security Policy – Version: Final, Effective Date: October 1, 2004*; Information Technology Office, *Information Protection Security Controls*, October 2011; Information Technology Office, *Security Controls for Protection of Personal Information*, April 2005; Regina Qu'Appelle Health Region, *The Inside Story*; Regina Qu'Appelle Health Region, *2010-2011 Annual Community Report*; Ministry of Health, *Annual Report Content Requirements 2011-12: For the Regional Health Authorities' annual report to the Minister of Health*, February 10, 2012; Hansard, No. 23 – June 18, 2010 Standing Committee on Public Accounts; Ministry of Health, *2006-07 RHA Annual Report to*

the Minister of Health Guide; Open Government: Resolution of Canada's Access to Information and Privacy Commissioners, September 1, 2010; Givens, Beth, The Privacy Rights Clearinghouse, Public Records on the Internet: The Privacy Dilemma; Legislative Assembly of Saskatchewan Library, Report of The Honourable E.M. Culliton, Former Chief Justice of Saskatchewan On the Matter of Freedom of Information and Protection of Privacy in the Province of Saskatchewan; Ministry of Government Services of Ontario, Report of the Commission on Freedom of Information and Individual Privacy; Office of the Victorian Privacy Commissioner, Public Registers and Privacy – guidance for the Victorian Public Sector; Government of Saskatchewan, An Overarching Personal Information Privacy Framework For Executive Government, September 2, 2003; Government of Saskatchewan, Privacy of Personal Information: A Manager's Reference Guide: Creating a culture of privacy, PowerPoint slide deck developed by R. Hischebett, R. Langgard, D. Herperger 2003; Government of Saskatchewan, Privacy of Personal Information: A Manager's Reference Guide: Provincial Privacy Legislation, PowerPoint slide deck developed by R. Hischebett, Crown Counsel, Saskatchewan Justice, 2003; European Commission Working Party on the Protection of Individuals with Regard to the Processing of Personal Data, Opinion No 3/99 on Public sector information and the protection of personal data; Law Office of Kris Klein, The right to seclusion in Jones v. Tsig: a moral victory for privacy January 20, 2012 issue; CCAF-FCVI, Reporting Principles: Taking Public Performance Reporting to a New Level; CCAF-FCVI, Consultations on Improving Public Performance Reports in Alberta; Automobile Injury Appeal Commission, Internet Posting Policy; Google, Blocking Google; Yahoo, One Standard Fits All: Robots Exclusion Protocol for Yahoo!, Google and Microsoft; Bing, Robots Exclusion Protocol: joining together to provide better documentation; Canadian Internet Policy and Public Interest Clinic, Online Posting Practices of Administrative Tribunals: Pension Appeals Board; Office of the Umpire (Employment Insurance appeals)

I BACKGROUND

[1] Starting in the fall of 2005, our office received a number of similar complaints from employees of the Regina Qu'Appelle Regional Health Authority (RQRHA). The subject of all of these complaints was the practice of RQRHA in publishing the name and salary paid to employees. A sample of the complaints is as follows:

- I would like to voice my disapproval of the use of my Name and Personal Salary figures as an available resource to the World Wide Web by the Regina Qu'Appelle Health Region.
- I am concerned that the names of health professionals and their salaries are posted on the Regina Qu'Appelle Health Region (RQHR) internet site (under Annual Report) and that this information is available in print format at the libraries. This information is easily accessible not only to the citizens of Saskatchewan, but worldwide....My concern is that the availability of a person's name and salary in public documents makes this individual vulnerable to telemarketers, credit card company solicitors, business people, fundraisers and criminals intent on identity theft and fraud.
- My entire name & yearly salary is posted on the internet which is easily accessible which puts me at risk for fraud and identity theft.
- My income from the Regina Qu'Appelle Health Region has been posted on the internet by the Health Region. A google search of my name immediately displays my income. This is an enormous violation of my privacy. I can easily become a target of theft.
- I object to having my salary posted on the Net by the Regina Qu'Appelle Health District.
- Please review the privacy implications of posting the wage & name of all employees >\$50,000 year in Regina Qu'Appelle Health Region on-line! Why does the law require only >\$50,000/yr? Why can't they use an employee number? Why does it have to be on the internet? With all the internet scams & stealing of personal information why put us out there as targets? I am sure there are ways to provide this information without identifying us to every wacko on the web. Thank you!
- Thank you for listening to my concern regarding inclusion of payee list in 2004-2005 Annual Report from RQHR. I believe that the names should not be included. I am looking forward to your investigation findings.

- I am sure there is a more discreet way to be transparent and responsible to the public without directly violating the personal privacy of its employees.
- Approximately 90% of the [name of health region] employees are women. Some of these women are single, divorced, or separated. By posting there [sic] wages and corresponding names on the web you have placed these women who are living on their own in a very vulnerable position....Some of the married women don't want there [sic] husbands to know exactly how much they are making for personal safety issues. Lets do a couple of scenarios:
 - A single woman or man making 50 thousand plus dollars a year. Living alone in a high crime area, working shift work, they now become an easy target. Thanks to the web posting the criminal element now know how much the individual makes and if you look in the phone book you can find there [sic] exact address. This makes a very easy target.
 - A divorced woman leaves a province because of spousal abuse. Manages to escape the abusive husband and finds work at [name of health region]. She lives quietly and peacefully for a time. Now type in her name on the computer and POOF, she is found working for the [name of health region] and making over 50 thousand dollars a year. I have worked at hospitals where the security personal [sic] have a picture of the ex-husband because she was beat up and now has a restraining order against him. Did the region think at all about these kinds of safety issues?
- I formerly worked for [name of health region] and I'm aware that my salary for each year of service has been posted on the internet for some time. I have a great deal of concern with this practice breaching my privacy.

[2] In addition we started to receive similar complaints in 2005 and later years from employees of a number of the 13 regional health authorities (RHA) in Saskatchewan other than RQRHA. In each case we advised complainants in respect to other RHAs that we had already commenced an investigation into the same issue in this matter and would ensure that they would be notified when our report is issued.

[3] On August 30, 2005, this office wrote to the FOIP Coordinator for RQRHA in part as follows:

Please be advised that we have received a letter from an employee of your organization dated August 29, 2005 alleging that a breach of privacy under *The Local Authority Freedom of Information and Protection of Privacy Act* has been committed by the Regina Qu'Appelle Health Region.

The complainant alleges that personal information relating to their name and annual salary has been disclosed without consent and posted on the internet.

[4] September 9, 2005 RQRHA advised in part as follows:

As I noted when we spoke on the telephone on September 6, 2005, the Regina Qu'Appelle Health Region and its predecessor entity, the Regina Health District, have made payee lists public for the past four fiscal years.

Two such lists are made available each year in connection with the release of the organization's annual report. One list discloses payments made to vendors through the organization's accounts payable system and the other shows payments to employees through the payroll system.

Other than a revision by government of the level above which payments needed to be reported, the only difference for the most current reporting year (2004-2005) is that our annual report exists primarily on-line at our Web site (www.rqhealth.ca), as opposed to being hard-copy. Consequently, the payee lists are also on-line.

In brief, the Region makes payee lists available to the public for three reasons:

- A belief that transparency is a part of sound stewardship of public funds.
- Advice from the Provincial Auditor that public accountability calls for it.
- A requirement from Saskatchewan Health that we must do so.

The Provincial Auditor has long called for public bodies in Saskatchewan to make payee information public. On February 13, 2003, the Provincial Auditor issued a report on the disclosure of payee information by CIC Crown corporations. In this report, the Auditor states that the Saskatchewan Information and Privacy Commissioner has confirmed that information related to salary is not "personal information" under relevant legislation. The Provincial Auditor states, at page 10:

"In addition, some Crowns said that they think employee salaries are personal information and should not be disclosed. However, section 24 of *The Freedom of Information and Protection of Privacy Act* states that an employee's salary and classification and the financial or other details of a personal services contract are not personal information. Accordingly, such information can be made public under this Act. This interpretation has been confirmed by the Commissioner."

As you are aware, Section 23(2)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* contains essentially the same provision, making clear that "personal information" does not include information that discloses "the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a local authority."

For its part, the Government of Saskatchewan, through the Minister of Health, has established a series of goals for the health care system of the province. The fourth goal is "a sustainable, efficient, accountable quality health system." Amongst the objectives the Minister has set in pursuit of that goal is "appropriate governance, accountability and management of the health sector." One of the actions required by

government in support of this objective is tabling by the health regions of annual reports, including payee disclosure lists.

For 2004-2005, this requirement was articulated to the health regions through Saskatchewan Health's *Financial Reporting Guide, Fiscal Year-March 31, 2005* which noted the need for disclosure and the department's *Regional Health Authority 2004-2005 Annual Report Guidelines*, Appendix D of which detailed Saskatchewan Health's expectation of how the payee disclosures would be made. A copy of the appendix is attached to this letter.

So, in summary, the Regina Qu'Appelle Health Region does make salary-related information publicly available - in this case, on its Internet Web site, as well as through its library system. We do so in support of the Region's concept of stewardship, in alignment with the Provincial Auditor's call for public accountability, and in response to direction by Saskatchewan Health. In all this, we are enabled by *The Local Authority Freedom of Information and Protection of Privacy Act* which gives clear legislative authority for our action.

- [5] Attached to the letter was a two page document entitled *Appendix D: Payee Disclosure Requirements*. These payee disclosure documents relate to payments in excess of \$50,000 made for the fiscal year. This captures funds for "personal services" but also a range of other payments such as those to suppliers. The note with respect to *Personal Services* is as follows:

Personal Services – disclose the name and amount paid of individuals who received salaries, wages, honoraria and compensation for personal service. This category includes unionized and non-unionized employees. Ensure Board Remuneration and Senior Management individual amounts match corresponding amounts in *Schedule 5 of the Financial Reporting Guide* (exceptions may occur due to severances or extraordinary items).

- [6] With transfers, there is a note: "do not disclose details for programs of a confidential and personal nature (e.g. individualized funding for home care)." There are payee disclosure details but the format for *Personal Services* is: *Last Name, First Name.....Amount Paid*.

- [7] I was unable to find in any of the materials cited initially by RQRHA any reference to authority for the publication of employee salary information on the Internet.

- [8] If one did a Google search on the Internet using only the first and last name of an RQRHA employee in August 2005 you would be taken to the following entry:

[PDF] Payee Lists.xls

File Format: PDF/Adobe Acrobat

[last name], [first name], [sum of money]

www.rqhealth.ca/annual_report/payee/list1.pdf-Similar_pages

[9] In our letter of August 5, 2010 we identified the specific issue and harms related to Internet publication. We addressed the key issue in this investigation as follows:

The primary concern to the complainants is the posting of the employee name plus other information (i.e. salary information) to the Internet where it could be combined (data-mined) with other publicly available personal information from public registries, etc. could be used without consent for secondary purposes such as marketing or solicitations, or for more nefarious purposes such as identity theft or fraud. Another concern raised is the following: I object to the exclusive listing of only payees who earn \$50,000 or more.

In the Region's aforementioned submission, the following are offered as reasons why it makes payee lists available to the public:

- A belief that transparency is part of sound stewardship of public funds.
- Advice from the Provincial Auditor that public accountability calls for it.
- A requirement from [the Ministry of Health] that we must do it.

In light of those concerns noted, we would appreciate hearing from the Region as to why it *must* post payee disclosure lists to the Internet and why making less accessible (i.e. provide in print form upon request or have copies available at specific locations only) could not achieve its goals of public accountability and transparency. Also, if the Region incorporates any technical solutions to limit online searches, please advise. For example, we took the following from the Automobile Injury Appeal Commission Internet Posting Policy on its website: "Appropriate software is available and used by others (i.e. CanLII) to prevent a general Google (or other search engine) search from linking names to cases on the website. Similar software will be placed on our website, if possible and if necessary, in light of the changes in this policy."

Once we have received your response, we will proceed with completing our preliminary assessment as indicated.

Thank you for your anticipated cooperation and your patience.

[10] On October 19, 2010, RQRHA furnished additional information. This included advice that it had posted the RQRHA Annual Report on the RQRHA internet site since 1995. Included within the RQRHA Annual Report is the RQRHA Payee list.

- [11] RQRHA takes the position that it is required to post this information because of the following direction from the Ministry of Health (the Ministry):

Publishing payee lists is a long standing practice and has been mandated by the Legislature. Payee lists are a key component of public sector transparency and accountability. There is a significant public interest in this information, not only for the public service, but for private corporations as well.

- [12] This above-mentioned letter included the following:

In 2010 the RQHR received concerns regarding the lack of a technical safeguard on the RQHR internet site to prevent searches at the individual payee level. In response to these concerns, the RQHR ceased posting the Payee List portion of the RQHR Annual report on the RQHR internet site. The RQHR Annual report is posted on the Ministry of Health's internet site which does have the technical safeguard required to prevent searches at the individual payee level. Under "Payee List" in the "RQHR Annual Report" posted on the RQHR internet site, readers are directed through a link to the RQHR Annual Report on the Ministry of Health's internet site (see enclosed).

- [13] We understand that the concern raised with the RQRHA Vice President of Human Resources was from a staff member concerned that a Google search of her last name directed searchers to the RQRHA payee list available online.

- [14] When we sought clarification as to the "technical safeguard" RQRHA explained that the safeguards would include the ability for a portable document format (PDF) file¹ not to be indexed for a direct search by search engines at the individual payee level. This was explained as a feature to 'lock' the contents of a PDF file to prevent searches of the PDF files posted on its website. We were advised by the RQRHA that they have learned from the Ministry that its website is maintained by the Information Technology Office (ITO) and that the technology used within the Ministry website "can deny the return of specific files within search engine searches, thus preventing searches at the individual payee level".

¹Portable Document Format (PDF) is file format that can be created and/or displayed by various software applications using almost any computer operating system. This feature of a PDF file facilitates easy electronic document exchange while ensuring that the integrity of the original document remains intact.

[15] The RQRHA much later in our investigation acknowledged that, although it had initially advised us that it would not publish its payee information on its website until the technical safeguard required to prevent searches at the payee level is incorporated into the RQRHA internet site or until instructed otherwise by the Ministry, this had not occurred. In other words, the RQRHA *2010/2011 Annual Report*² included the payee list and was posted in its entirety on the RQRHA website.

[16] RQRHA advised further that after discussion about Internet publication with the Ministry officials that it was directed by the Ministry to post the Annual Report in its entirety including the payee list on the RQRHA internet site.

[17] The RQRHA advised that it was directed by the Executive Director, Financial Services Branch, Ministry of Health as follows:

As a result, the Ministry, as directed by the Legislature, continues to require all health regions to make payee lists publicly accessible through websites and other media as part of their annual report. That is, this information should be no less accessible than any other component of the entities annual report. Whatever form the financial tables and other annual report information is provided in, the payee list should have equal public access and disclosure. Any attempt to hide this information, bury in a website or in any other manner reduce its public accessibility is unacceptable.

[18] By a letter dated October 29, 2010 RQRHA furnished a screen shot of the RQRHA Annual Report that is posted on the RQRHA internet site with the link to the RQRHA Annual Report posted on the Ministry's internet site.

[19] We received further information from RQRHA by its letter dated March 9, 2012. This included the following new information:

From the records currently available to us it would appear that the Annual Community Report has been placed on our internet since 1997; the Annual Legislative Report has been posted on line since 2001 when the Region was the Regina Health District.

²Regina Qu'Appelle Health Region, *2010/2011 Annual Report*, available at http://www.rqhealth.ca/inside/publications/history/pdf_files/rqhr_ar_2010_11.pdf.

The **2001/2** Annual Legislative Report does not contain PAYEE information; however, it does contain the following statement:

The Report can also be found on our Web site at www.reginahealth.sk.ca. In addition, the District has made public two payee lists for fiscal year 2001-2002. One list shows total payments to employees through the payroll system and the other provides the total amounts paid to vendors through the accounts payable system. These payee lists may be viewed upon request, during regular business hours, at any of the District's Health Sciences Libraries. These are located at the Pasqua and Regina General hospitals and at the Wascana Rehabilitation Centre.

The **2002/3** ALR does not contain PAYEE information; however, it does contain the following statement:

As part of its commitment to openness, the Region will be making public two payee lists for fiscal year 2002-2003. One list shows total payments to employees through the payroll system and the other provides the total amounts paid to vendors through the accounts payable system. These payee lists will be available for viewing upon request, during regular business hours, at any of the Region's Health Sciences Libraries. These are located at the Pasqua and Regina General hospitals and at the Wascana Rehabilitation Centre.

The **2003/4** does not contain PAYEE information, however, it does contain the following statement on page 5 under the heading Public Transparency:

The payee lists will once again be made public. The two lists show total payments made to employees through the payroll system and the total amounts paid to vendors through the accounts payable system. The lists will be available for viewing, upon request, during regular business hours at any of the Region's Health Sciences Libraries, located at the Regina General and Pasqua hospitals and the Wascana Rehabilitation Centre.

The **2004/5** does include PAYEE information as an addendum.

The payee lists will once again be made public. The two lists show total payments made to employees through the payroll system and the total amounts paid to vendors through the accounts payable system. The lists will be available for viewing, upon request, during regular business hours at any of the Region's Health Sciences Libraries, located the Regina General and Pasqua hospitals and the Wascana Rehabilitation Centre. The lists will also be posted to the website rqhealth.ca with this annual report.

The **2005/6** report contains a heading called Payee Disclosure List with the following link

Payee Disclosure List

For a copy of the RQHR payee disclosure list, go to http://www.health.gov.sk.ca/ph_rha_reporting.html

The **2006/7** report contains a heading called Payee Disclosure List with the following link

Payee Disclosure List

For a copy of the RQHR payee disclosure list, go to http://www.health.gov.sk.ca/ph_rha_reporting.html

The **2007/8** report contains the PAYEE list as part of the complete report (p. 61)

Governance and Transparency:

Establishing a trustworthy and accountable organization

Payee Disclosure List

Personal Services

Listed are individuals who received payments for salaries, wages, honorariums, etc. which totaled \$50,000 or more.

[20] Given the apparent role of the Ministry in the decision by RQRHA to publish the salary information on the Internet, I canvassed the Ministry for its views. On January 25, 2012 the Ministry advised as follows:

As per by [sic] below message, this is public information and subject to FOIP and LAFOIP. The Ministry does not require the RHAs to use any specific IT posting method. That would really depend on their IT structures, protocols and expertise. The direction from the Provincial Auditor is that a payee list holds the organization accountable for public money spent. Furthermore, this is the direction that other jurisdictions are moving in. Specifically a survey on salary disclosure (excludes suppliers) was recently completed by other jurisdictions sent to us from the Ministry of Finance.

A summary of the thresholds identified are as follows:

BC - \$125,000 for Crowns, Schools, Universities, Colleges and Hospitals; \$75,000 for the "GRF" and remainder of government entities

MB - \$50,000

Ontario - \$100,000

Quebec – ranges only for senior civil servants

NS - \$25,000

AB, PEI, NFLD, Canada, Yukon, Nunavut – do not publish annual salary disclosure information

NB - \$60,000 (from Ministry of Finance research – they did not respond to the survey)

Based on the above Saskatchewan is not too far off from other provinces.

Crown Corporations in Saskatchewan also disclose this information. This is the link where SaskPower and other Crown Corps payee lists are reported: http://www.cicorp.sk.ca/publications/cic_corporate/2010 (look for the Payee Disclosure Report).

Additionally, we believe that release of this information is consistent with proactive disclosure and/or the Open Government principles outlined in the Open Government Resolution of Canada's Access to Information and Privacy Commissioners on September 1, 2010.

[21] Our office responded to the Ministry on January 25, 2012 as follows:

Thanks for the information.

I take it from your email that the position of your Ministry is that Internet publication is not different than the information being available in hard-copy form and that nothing different is required to protect the privacy of individual employees.

Thanks for any clarification you can provide. I want to be able to accurately reflect Health's position in the report.

[22] On January 30, 2012 the Ministry advised as follows:

I have been in contact with the Ministry of Finance who create the Public Accounts document posted on line you are referring to. They let me know they create the document by running a query on MIDAS which rolls up the relevant information on all of the government ministry's [sic]. The only time a ministry is involved is to verify the information of their staff is correct. Therefore, the Ministry of Finance is the creator and custodian of the information in the Public Accounts document. Once the document has been made final the internal business unit of the Comptroller's office in the Ministry of Finance publishes the document online.

I have also been in contact with the Information Technology Office (ITO) who is responsible for housing all government websites. They made me aware that they recommend all government websites include Privacy statements (located at <http://www.gov.sk.ca/privacy/>). The ITO is the information technology service delivery provider for its customers. In this arrangement the ministry owns the data while ITO is the custodian. Therefore, the ministry identifies the level of protection the information requires and ITO provides that level of protection (in this case, Finance). Public accounts and other such information is public information and is thus classified as such, which means it is made available to the public.

As mentioned above, the Ministry of Finance creates the Public Accounts documents and also are responsible for publishing them on the Internet. Once published, in paper or electronic form, this information is available to the public to consume in whichever manner they choose.

According to ITO, information posted to gov.sk.ca is the responsibility of Executive Council, while individual ministry websites (e.g. finance.gov.sk.ca) are the responsibility of that ministry. ITO notes that one can compare publicly available information published in paper format to that published to the Internet.

The ITO has created and made available the Government of Saskatchewan – A Guide to Information Classification to assist ministries in determining the classification of their information based on its availability, integrity and confidentiality requirements. To supplement this, ITO has also created the Information Protection Security Controls document which identifies the minimum security controls for each level of classification. I have attached a copy of ITO's data classification document and a copy of ITO's security policy for your information. Should you have any questions regarding these documents I suggest you contact them directly.

ITO informed me they have and continue to create and update security policies, standards and specification which align with the ISO framework.

[23] I subsequently reviewed the *ITO Information Protection Security Controls* documents.³ This relates almost exclusively to internal security features and does not appear to address Internet publication of information about identifiable individuals.

[24] I have explored with ITO the possibility of utilizing technological tools to eliminate or discourage public search queries by name and have been advised that these kinds of features exist but no decision has been made by the Saskatchewan Government to adopt such privacy enhancing technologies (PETs).

II ISSUES

- 1. Is there a legal requirement for Internet publication of the salaries of Regina Qu'Appelle Regional Health Authority employees?**
- 2. Is the salary information about regional health authority employees excluded from *The Local Authority Freedom of Information and Protection of Privacy Act* by reason of section 3?**

³a) *Information Technology Office Security Policy* – Version: Final, Effective Date: October 1, 2004.

b) *Information Protection Security Controls*, ITO October 2011, Date Issued: November 1, 2011.

c) *Security Controls for Protection of Personal Information*, ITO, April 2005.

3. **Is the salary information about regional health authority employees excluded from *The Local Authority Freedom of Information and Protection of Privacy Act* by reason of section 4?**
4. **Is the salary information about employees “personal information” of those employees for purposes of section 23 of *The Local Authority Freedom of Information and Protection of Privacy Act*?**
5. **Does the Internet publication of the salary information conform to section 28 of *The Local Authority Freedom of Information and Protection of Privacy Act*?**
6. **Does the goal of Open Government require disclosure of the identifiable information?**
7. **Have all reasonable mitigation measures been taken to minimize the risk of prejudice to the affected employees?**
 - (a) **Web robot exclusion protocol (REP)**
 - (b) **Alternative privacy enhancing technologies (PETs)**

III DISCUSSION OF THE ISSUES

1. **Is there a legal requirement for Internet publication of the salaries of Regina Qu’Appelle Regional Health Authority employees?**

[25] The RQRHA has not brought to my attention any explicit statutory obligation to publish the salary information in question on the Internet.

[26] What is the legislative requirement for publishing salary information of employees in hard-copy format? I am mindful that *The Financial Administration Act, 1993*⁴ specifically requires the publication of salary information of employees of provincial

⁴*The Financial Administration Act, 1993*, S.S. 1993, c.F-13.4.

government bodies. *The Regional Health Services Act* section 16(2)⁵ however clarifies that “(2) *The Financial Administration Act, 1993* does not apply to a regional health authority.”

[27] There is a type of reporting requirement however in section 55 of *The Regional Health Services Act* as follows:

55(1) In each fiscal year, a **regional health authority shall**, in accordance with *The Tabling of Documents Act, 1991*, **submit to the minister:**

(a) a **report on the activities of the regional health authority for the preceding fiscal year;** and

(b) a financial statement showing the business of the regional health authority for the preceding fiscal year in any form that may be required by the minister.

(2) Without limiting the generality of subsection (1), the report must contain:

(a) financial information respecting any health care organizations with which the regional health authority has an agreement pursuant to section 33.1 or 34.1;

(b) **prescribed information respecting the remuneration and benefits paid to members, officers and senior employees of the regional health authority;** and

(c) any other information required by the minister.

(3) **The minister shall, in accordance with *The Tabling of Documents Act, 1991*, lay before the Legislative Assembly each report and statement submitted to the minister pursuant to this section.**⁶

[emphasis added]

[28] In addition there is regulation making authority in section 64 of *The Regional Health Services Act*⁷ that includes the following:

...

(u) for the purposes of clause 55(2)(b), prescribing information respecting remuneration and benefits paid to members, officers and senior employees of regional health authorities and the cancer agency to be included in annual reports;

...

⁵*The Regional Health Services Act*, S.S. 2002, c.R-8.2 at section 16(2).

⁶*Ibid.* at section 55.

⁷*Ibid.* at section 64.

(dd) prescribing any matter or thing required or authorized by this Act to be prescribed in the regulations;

[29] In *The Regional Health Services Administration Regulations* (the Regulations), there is further clarification of the obligations in *The Regional Health Services Act*. In particular, section 9.1 provides as follows:

9.1(1) For the purposes of clause 55(2)(b) of the Act and in this section, “senior employee”:

(a) means:

(i) the chief executive officer; or

(ii) an employee performing senior management functions who reports directly to:

(A) one or more members of the regional health authority;

(B) the chief executive officer; or

(C) an employee performing senior management functions who reports directly to a the chief executive officer; and

(b) includes a person performing senior management functions whose services are engaged on a contract basis or a fee-for-service basis and who reports directly to a person described in paragraph (a)(ii)(A), (B) or (C).

(2) For the purposes of clause 55(2)(b) of the Act and in this section, a reference to a member, officer or senior employee includes a former member, a former officer or a former senior employee, as the case may be.

(3) Commencing with the report for the 2005-2006 fiscal year, the report and financial statement required by subsection 55(1) of the Act must be prepared in accordance with this section.

(4) The disclosure of remuneration and benefits required by clause 55(2)(b) of the Act:

(a) must be made on an individual basis by name and position title;

(b) must include payments of monthly retainers and payments with respect to attendance at meetings, travel and sustenance and travel time;

(c) must include the total of all payments and benefits paid as severance to a senior employee on the termination of the person's employment or contractual relationship with the regional health authority; and

(d) must be reported in a schedule to the financial statement mentioned in clause 55(1)(b) of the Act.⁸

[30] Clearly there is legislative authority then for the publication of the salary information of “members, officers and senior employees” of the regional health authority. As noted above, there is a clear definition of “senior employees” in the Regulation. I take “member” to refer to a member of the governing Board of the particular regional health authority. I take “officer” to be the senior executive of the Board. In this regard, I rely on the description of the governing body of the region that appears on the website of RQRHA as follows:

Regina Qu'Appelle Regional Health Authority

The Regina Qu'Appelle Regional Health Authority (RQRHA) is the governing body of the Regina Qu'Appelle Health Region. The nine members of the Authority are appointed by the Minister of Health under the Regional Health Services Act. Under the Act the RQRHA has responsibility for ensuring all health care programs are effectively and efficiently planned, delivered, monitored and evaluated on behalf of the residents of the RQHR. All Authority members are residents of the Regina Qu'Appelle Health Region.

...

Information About Authority Meetings

The Regina Qu'Appelle Regional Health Authority holds monthly business meetings. These meetings are open to the public.

Authority Committee Structure

In fulfilling its responsibilities, the Authority has established a Committee of the Whole. The purpose of the Committee of the Whole is to provide an opportunity for all Board members to be involved in presentations, discussions and decisions on strategic matters.

The Committee shall function in an advisory capacity to the RQRHA by recommending policy and advice on matters under its purview. The Board may from time to time establish special or ad hoc committees that will assist the Board in carrying out specific functions.⁹

⁸*The Regional Health Services Administration Regulations*, c.R-8.2 Reg 1, section 9.1.

⁹Regina Qu'Appelle Health Region, *The Inside Story*, available at http://www.rqhealth.ca/inside/about_us/regional_authority/index.shtml.

- [31] I note that it is the nine persons who currently sit on the Board of RQRHA that are referred to as the “members”. I find that this would not be broad enough to capture all employees of RQRHA.
- [32] I also note that the *2010-2011 Annual Community Report*¹⁰ issued by RQRHA describes the individuals who comprise the governing body of the RQRHA as “board members of the RQRHA”. The same document describes a senior management team comprised of nine persons, one of whom is the Chief Executive Officer and President and then eight other Vice Presidents. I find that the nine members of the senior management team would be officers within the meaning of section 55(2)(b) of *The Regional Health Services Act*.¹¹
- [33] Senior officers are clearly defined in *The Regional Health Services Act* by means of their reporting structure and not by means of their salary.
- [34] I find that that there is legislative authority for the publication on the Internet of the salaries paid to three groups, namely, “members” of the Board of the RQRHA, “officers” of the Board of the RQRHA including the CEO and President and the eight Vice Presidents and then the “senior employees” who meet the qualification set out in section 9.1(1) of the Regulations.¹²
- [35] It appears that many of the approximate 3,600 names that appear in the public accounts would correspond to employees of RQRHA who would not be members of the Board, officers of RQRHA nor senior employees who report directly to the chief executive officer within the meaning of section 9.1 of the Regulations.¹³ Since there are about 7,000 current employees of the RQRHA, approximately one half of those employees have their salaries posted on the Internet.

¹⁰Regina Qu’Appelle Health Region, *2010-2011 Annual Community Report* at p. 4, available at www.rqhealth.ca/inside/publications/history/pdf_files/healthnews_fall_winter2011.pdf.

¹¹*Supra* note 5 at section 55(2)(b).

¹²*Supra* note 8 at section 9.1(1).

¹³*Supra* note 8 at section 9.1.

[36] The *Annual Report Content Requirements 2011-12: For the Regional Health Authorities' annual report to the Minister of Health (Annual Report Content Requirements 2011-12)*¹⁴ however contemplates an entirely different criterion, namely those earning \$50,000 or more in the reporting year. I find that most of the employees caught by that threshold or criterion would not qualify as “members” or “officers” or “senior employees”. The Ministry asserts however that the Minister has the authority:

...under subsection 7(2), 42(2), section 54 and clause 55(2)(c) of *The Regional Health Services Act*, the Minister has the authority to require material and provide written guidelines and directions the health authorities must follow. The Minister has the ability to determine reporting and as such since 2005 the Minister [sic] has required that the health authorities provide reporting consistent with that of the provincial public accounts as seen in *The Financial Administration Act, 1993*. That written direction is found in *Annual Report Content Requirements 2011-2012 For the Regional Health Authorities' Annual Report to the Minister of Health*.¹⁵

[37] I note that at a Standing Committee on Public Accounts meeting held on June 18, 2010, a delegation from the Ministry, led by the Deputy Minister of Health, appeared before the committee and answered questions.¹⁶ The Minutes from that meeting confirm that a motion was passed: “That the committee adhere to the \$50,000 threshold, in regard to payee disclosure reporting, that was set under the previous administration.” This followed debate in which reference is repeatedly made to the \$50,000 threshold adopted for disclosure of contracts over \$50,000 by the Public Accounts Committee and by the Crown Corporations Committee “as part of their policy”.¹⁷ I note that although there was discussion of public accounts and the threshold of \$50,000 for contracts for goods and services there was no mention of the criteria discussed above and prescribed by the Regulations.

[38] There appears to be no explicit statutory or regulatory requirement and the only legal authority is the delegated power in subsection 55(2)(c) of *The Regional Health Services*

¹⁴Ministry of Health, *Annual Report Content Requirements 2011-12: For the Regional Health Authorities' annual report to the Minister of Health*, February 10, 2012.

¹⁵Ministry of Health submission to SK OIPC on March 20, 2012.

¹⁶Hansard, No. 23 – June 18, 2010 Standing Committee on Public Accounts, pp.357 to 358, available at <http://www.legassembly.sk.ca/legislative-business/legislative-calendar/?month=6&day=18&year=2010>.

¹⁷*Ibid.* at pp. 357 to 358.

*Act.*¹⁸ What seems odd is that there is clear direction as to the publication of remuneration and benefits paid to the three groups identified in subsection 55(2)(b) but not to other groups. The Regulations suggest that there was a characteristic of these three groups that would justify a higher level of transparency. Perhaps it is a greater salary or greater decision making power or more discretionary power than most employees. Those groups identified would obviously be the leaders and senior administrators in the regional health authority. Certainly, one might reasonably expect that “any other information required by the Minister” would address or capture other kinds of information and that if the intention of the legislature was that there would be other groups of employees who do not have leadership or senior management roles whose salary information should be public record material that this would have been also specified in statute or at least the Regulations and not left to the kind of residual power in subsection 55(2)(c).

[39] Furthermore, what would have been the point in detailing the criteria for determining who is a senior employee as has been done in section 9.1 of the Regulations if the intent was to allow publication of all employees regardless of position or degree of responsibility who made more than \$50,000?

[40] Since the power to require that information about employees salaries be published as a public record as opposed to being available in response to a request for access is a significant matter, one might have expected that it would not be treated as a completely discretionary matter for the Minister of Health.

[41] A further feature that warrants consideration is that there are several references in the *Annual Report Content Requirements 2011-12* document that seem to acknowledge responsibility of the RQRHA to address confidential information and personal information. These are as follows:

No need to “disclose details for programs of a confidential and personal nature” in item #2 on page 18

¹⁸*Supra* note 5 at section 55(2)(c).

A direction not to disclose details for programs of a confidential and personal nature which should be instead grouped using a generic name in the note at the bottom of page 18.¹⁹

[42] Of the 5 documents referred to in the list of Principle-Based Reporting Resources on the final page of the document, two of the 5 do reference “privacy and safety” or “privacy and security” considerations.

[43] There is no question that there is explicit authority for the publication in public accounts of the salary paid to members, officers and senior employees. It appears that there is delegated power to the Minister of Health to require “other information” and in this case the Minister has required the publication of salaries of \$50,000 and over by means of the *Annual Report Content Requirements 2011-12* document issued by the Ministry since 2005 and referenced in paragraph [36].²⁰ I have been provided with a copy of the 2011-2012 version of this instrument and have been advised that this is similar to earlier versions. In the 2011-2012 version it is stated that:

These guidelines focus on the Annual Report’s content and has been written with best practices of principle-based reporting in mind. The intention is for RHAs to create annual reports that are more interesting to read and more relevant to the users of the reports.

...

These guidelines set out minimum content requirements for the reports....²¹

[44] One concern is that although we were dealing with RQRHA on this investigation since August 2005 and with the Ministry since January 2012, neither public body identified any statutory authority for the Internet publication of staff salaries. In fact it was only in March 2012 that our office independently learned of the provision for publication in the Regulations.²² Up to that point, the assertion from both RQRHA and the Ministry was

¹⁹*Supra* note 14 at page 18.

²⁰The Appendix to this Report is a copy of the 2006-2007 Payee Disclosure Requirements in Appendix D of the *2006-07 RHA Annual Report to the Minister of Health Guide* (the Guide). The Guide can also be found here: <http://www.health.gov.sk.ca/adx/adxGetMedia.aspx?DocID=1402,94,88,Documents&MediaID=858&Filename=rha-annual-report-guidelines.pdf&l=English>. Pages 5 and 6 of the Guide require that Regional Health Authorities (RHA) post their Annual Reports on their websites. Page 14 of the Guide explicitly instructs the RHAs that the payee list “be included online on Health’s website....”.

²¹*Supra* note 14 at page 3.

²²*Supra* note 8 at section 9.1.

Internet publication was a policy decision made by the Ministry and a policy direction to regional health authorities independent of specific legislative authority. The scheme of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP)²³ is that it is for the public body and not the oversight body (OIPC) to identify any relevant statutory authority for its actions involving the collection, use and disclosure of personal information. The failure to do so both undermines the efficacy of the privacy oversight function and contributes to protracted delays in concluding breach investigations.

[45] There is a need to next consider the specific privacy legislation²⁴ that applies to RHAs.

[46] The RQRHA qualifies as a “local authority” and therefore is subject to LA FOIP by reason of section 2(f)(xxiii) that provides as follows:

2 In this Act:

...

(f) “local authority” means:

...

(xiii) a regional health authority or an affiliate as defined in *The Regional Health Services Act*²⁵

[47] There are certain exclusions in LA FOIP that must be addressed on these facts. I have stated previously that an exclusion should be treated like a mandatory exemption²⁶ and needs to be addressed by me regardless of whether it is raised by the local authority on the review.

2. Is the salary information about regional health authority employees excluded from *The Local Authority Freedom of Information and Protection of Privacy Act* by reason of section 3?

²³*The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.

²⁴RQRHA is also subject to *The Health Information Protection Act* (HIPA) but since the information in question does not qualify as “personal health information” within the meaning of subsection 2(m) of HIPA, HIPA is not engaged in the subject investigation.

²⁵*Supra* note 23 at section 2(f)(xiii).

²⁶Office of the Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Report LA-2007-002 at [16], available at <http://www.oipc.sk.ca/Reports/LA-2007-002.pdf>.

[48] Section 3(1)(a) and (b) of LA FOIP provide as follows:

3(1) This Act does not apply to:

(a) published material or material that is available for purchase by the public;

(b) material that is a matter of public record²⁷

[49] Section 3(1)(c) is clearly not applicable in this case since no archival purpose is engaged.

[50] I repeat herein and incorporate by reference my analysis of this section in my recent Investigation Report LA-2012-001.²⁸

[51] The RQRHA has not established that the salary information of its employees was published or available for purchase in bulk form by the public prior to 1994.²⁹ That disposes of subsection 3(a).

[52] Subsection 3(b) however turns on the definition of “public record”. I find that the definition adopted by Mr. Justice Ottenbreit in the *Germain v. Automobile Injury Appeal Commission* decision at 2009 SK QB 106 should be followed by me. He quoted with approval a definition that a public record is “[a] record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse. Public records are generally open to view by the public.”³⁰

[53] That begs the question - is the bulk information about employee salaries something that “a governmental unit is required by law to keep”? The closest instrument appears to be the obligation noted earlier in section 55 of *The Regional Health Services Act*.³¹ This appears to conform to the definition adopted by Justice Ottenbreit in that the report once submitted to the Legislative Assembly by the Minister of Health effectively renders the

²⁷*Supra* note 23 at section 3.

²⁸SK OIPC Investigation Report LA-2012-001 at [11] to [24], available at <http://www.oipc.sk.ca/Reports/IR%20LA-2012-001.pdf>.

²⁹LA FOIP was proclaimed on July 1, 1993. It came in force immediately for municipal bodies. LA FOIP, then, came in force on July 1, 1994 for healthcare facilities, and on September 1, 1994 for educational facilities.

³⁰*Germain v. Automobile Injury Appeal Commission* 2009 SKQB 106 at [69].

³¹*Supra* note 5 at section 55.

report and salary information “generally open to view by the public”. *The Regional Health Services Act*³² however was not in force prior to 2002. Given the approach of the courts, which has been to consider whether statutory authority existed prior to the proclamation of LA FOIP, I therefore find that neither section 3(a) nor (b) would apply in this case.³³

3. Is the salary information about regional health authorities employees excluded from *The Local Authority Freedom of Information and Protection of Privacy Act* by reason of section 4?

[54] We also need to consider the grandfathering provision in section 4 of LA FOIP that provides as follows:

4 This Act:

(a) complements and does not replace existing procedures for access to information or records in the possession or under the control of a local authority;

(b) does not in any way limit access to the type of government information or records that is normally available to the public;

(c) does not limit the information otherwise available by law to a party to litigation;

(d) does not affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents;

(e) does not prevent access to a registry operated by a local authority where access to the registry is normally allowed to the public.³⁴

³²*Supra* note 5.

³³Shortly before this Report was issued, we provided relevant excerpts to RQRHA, Ministry of Health and ITO for fact checking. At that time in April, 2012 the Ministry of Health asserted that there was statutory authority for publication of health region employees’ salaries preceding LA FOIP. The Ministry alleges that by means of now repealed legislation, including *The Health Districts Act* and *The Hospital Standards Act*, payments and salaries for \$20,000 or more were required to be reported as early as the 1996/1997 fiscal year. It alleged that the threshold was changed in the 2002/2003 reporting year to salaries greater than \$25,000 and then in 2004/2005 the threshold was set at \$50,000 or more. Given our analysis of sections 23 and 28 of LA FOIP, I have determined there is little value in reopening this part of our investigation given this new information received not from RQRHA but from the Ministry of Health.

³⁴*Supra* note 23 at section 4.

[55] I find that subsections (c) and (d) clearly have no application to this case. That leaves for consideration the other subsections, (a), (b) and (e).

[56] In this regard, I repeat and incorporate herein my analysis of these subsections in my Investigation Report LA-2012-001.³⁵ This relied to a large extent on the analysis done by Mr. Justice Ottenbreit in *Germain v. Automobile Injury Appeal Commission*.³⁶

[57] To summarize that earlier analysis, to successfully invoke section 4(a), (b) or (e) the RQRHA would need to show that the salary information of the employees of the RQRHA had routinely been publicly available prior to the proclamation of LA FOIP for healthcare facilities on July 1, 1994³⁷ and that this availability was lawful and had not been prohibited by statute.

[58] In this case, leaving aside Internet publication, the evidence is that the information about employee salaries has been publicly available since approximately 2001. Later in the investigation, the RQRHA asserted that this started as early as 1995. Either way, it seems clear that the publication in hard copy form of the employee salaries commenced subsequent to the date when LA FOIP came into force for purposes of the RHAs or their forerunners, health districts.

[59] In the result none of sections 4(a), (b) or (e) would apply.

4. Is the salary information about employees “personal information” of those employees for purposes of section 23 of *The Local Authority Freedom of Information and Protection of Privacy Act*?

[60] Personal information is defined in section 23 of LA FOIP as follows:

³⁵*Supra* note 28 at [28] to [31].

³⁶*Supra* note 30.

³⁷*Supra* note 29.

23(1) Subject to subsections (1.1) and (2), “**personal information**” means personal information about an identifiable individual that is recorded in any form, and includes:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) information that relates to health care that has been received by the individual or to the health history of the individual;

(d) any identifying number, symbol or other particular assigned to the individual;

(e) the home or business address, home or business telephone number, fingerprints or blood type of the individual;

(f) the personal opinions or views of the individual except where they are about another individual;

(g) correspondence sent to a local authority by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;

(h) the views or opinions of another individual with respect to the individual;

(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;

(j) information that describes an individual’s finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.

(1.1) On and after the coming into force of subsections 4(3) and (6) of *The Health Information Protection Act*, with respect to a local authority that is a trustee as defined in that Act, “**personal information**” does not include information that constitutes personal health information as defined in that Act.

(2) **“Personal information” does not include information that discloses:**

(a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a local authority;

(b) the personal opinions or views of an individual employed by a local authority given in the course of employment, other than personal opinions or views with respect to another individual;

(c) financial or other details of a contract for personal services;

(d) details of a licence, permit or other similar discretionary benefit granted to an individual by a local authority;

(e) details of a discretionary benefit of a financial nature granted to an individual by a local authority;

(f) expenses incurred by an individual travelling at the expense of a local authority;

(g) the academic ranks or departmental designations of members of the faculties of the University of Saskatchewan or the University of Regina; or

(h) the degrees, certificates or diplomas received by individuals from the Saskatchewan Institute of Applied Science and Technology, the University of Saskatchewan or the University of Regina.

(3) Notwithstanding clauses (2)(d) and (e), **“personal information”** includes information that:

(a) is supplied by an individual to support an application for a discretionary benefit; and

(b) is personal information within the meaning of subsection (1).³⁸

[emphasis added]

[61] The information in this case includes the name of the employee and their annual salary. This could qualify as personal information under section 23(1)(b) or (j) as “information relating to financial transactions in which the individual has been involved” (section 23(1)(b)) or even “employment history” (s. 23(1)(b)) or “information that describes an individual’s finances... financial history or activities” (s. 23(1)(j)).

³⁸*Supra* note 23 at section 23.

[62] Notwithstanding section 23(1), I must next consider whether section 23(2) applies. If it does, what might otherwise appear to qualify as “personal information” is carved out of subsection 23(1) and is not considered as “personal information”.

[63] Subsection 23(2)(a) provides that personal information does not include information that discloses “the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a local authority.” In this case, it appears to be common ground that the information of concern to the Complainants constitutes “salary”. Section 23(2)(a) therefore applies. In the result, the information in question is not “personal information” and the limitations in LA FOIP on when and how personal information can be disclosed have no application.

[64] Although that finding could dispose of the complaint, if in the future a superior court should disagree with my conclusion, I will proceed to undertake the following analysis in the event that the information in question were to qualify as “personal information” and would therefore be caught by subsection 23(1) and not by subsection 23(2)(a).

[65] Notwithstanding the statutory definition of “personal information” for purposes of LA FOIP, this does not operate to extinguish any privacy interest that employees of regional health authorities may have.³⁹ There may well be a privacy interest that is protected by common law and the *Canadian Charter of Rights and Freedoms*⁴⁰ (the *Charter*).

5. Does the Internet publication of the salary information conform to section 28 of *The Local Authority Freedom of Information and Protection of Privacy Act*?

³⁹Unlike most other Canadian provinces and territories that utilize a more nuanced definition of “personal information”, there is not the opportunity for either the Commissioner or a court in Saskatchewan to assess whether a particular disclosure would constitute “an unreasonable invasion of privacy”. For example, in Ontario’s *Freedom of Information and Protection of Privacy Act*, the definition of “personal information” captures the salary information even of government employees but then applies a test of whether disclosure of that information would constitute an “invasion of privacy”. *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, Chapter F.31, section 21.

⁴⁰*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

[66] The rules for disclosure of personal information by a local authority are set out in section 28 of LA FOIP.⁴¹ That provides as follows:

28(1) No local authority shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 29.

(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:

(a) for the purpose for which the information was obtained or compiled by the local authority or for a use that is consistent with that purpose;

(b) for the purpose of complying with:

(i) a subpoena or warrant issued or order made by a court, person or body that has the authority to compel the production of information; or

(ii) rules of court that relate to the production of information;

(c) to the Attorney General for Saskatchewan or to his or her legal counsel for use in providing legal services to the Government of Saskatchewan or a government institution;

(d) to legal counsel for a local authority for use in providing legal services to the local authority;

(e) for the purpose of enforcing any legal right that the local authority has against any individual;

(f) for the purpose of locating an individual in order to collect a debt owing to the local authority by that individual or make a payment owing to that individual by the local authority;

(g) to a prescribed law enforcement agency or a prescribed investigative body:

(i) on the request of the law enforcement agency or investigative body;

(ii) for the purpose of enforcing a law of Canada or a province or territory or carrying out a lawful investigation; and

(iii) if any prescribed requirements are met;

(h) pursuant to an agreement or arrangement between the local authority and:

⁴¹More disclosure provisions can be found in sections 9 and 10 of *The Local Authority Freedom of Information and Protection of Privacy Regulations* but they have no application in this case.

- (i) the Government of Canada or its agencies, Crown corporations or other institutions;
- (ii) the Government of Saskatchewan or a government institution;
- (iii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;
- (iv) the government of a foreign jurisdiction or its institutions;
- (v) an international organization of states or its institutions; or
- (vi) another local authority;

for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(h.1) for any purpose related to the detection, investigation or prevention of an act or omission that might constitute a terrorist activity as defined in the *Criminal Code*, to:

- (i) a government institution;
- (ii) the Government of Canada or its agencies, Crown corporations or other institutions
- (iii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;
- (iv) the government of a foreign jurisdiction or its institutions;
- (v) an international organization of states or its institutions; or
- (vi) another local authority;

(i) for the purpose of complying with:

- (i) an Act or a regulation;**
- (ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; or**
- (iii) a treaty, agreement or arrangement made pursuant to an Act or an Act of the Parliament of Canada;**

(j) where disclosure is by a law enforcement agency:

- (i) to a law enforcement agency in Canada; or
- (ii) to a law enforcement agency in a foreign country;

pursuant to an arrangement, a written agreement or treaty or to legislative authority;

(k) to any person or body for research or statistical purposes if the head:

(i) is satisfied that the purpose for which the information is to be disclosed is not contrary to the public interest and cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates; and

(ii) obtains from the person or body a written agreement not to make a subsequent disclosure of the information in a form that could reasonably be expected to identify the individual to whom it relates;

(l) where necessary to protect the mental or physical health or safety of any individual;

(m) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;

(n) for any purpose where, in the opinion of the head:

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or

(ii) disclosure would clearly benefit the individual to whom the information relates;

(o) to the Government of Canada or the Government of Saskatchewan to facilitate the auditing of shared cost programs;

(p) where the information is publicly available;

(q) to the commissioner;

(r) for any purpose in accordance with any Act or regulation that authorizes disclosure; or

(s) as prescribed in the regulations.⁴²

[emphasis added]

[67] I find that subsection 55(2)(c) of *The Regional Health Services Act*⁴³ would justify the non-consented disclosure of the salary information of RQRHA employees via the Internet on the strength of subsection 28(2)(i)(i) of LA FOIP.

⁴²*Supra* note 23 at section 28.

6. Does the goal of Open Government require disclosure of the identifiable information?

[68] In its submission the Ministry has asserted that the objective of Open Government requires the Internet publication of the salary information of regional health authorities. In fact, the Ministry has cited in support the following 2010 Resolution unanimously adopted by Canada's Information and Privacy Commissioners:

**Open Government
Resolution of Canada's Access to Information and Privacy Commissioners
September 1, 2010, Whitehorse, Yukon**

CONTEXT

Calls for greater openness and transparency are exerting increasing pressure on governments to transform their traditional, reactive information dissemination methods into a mode that facilitates proactive disclosure. Furthermore, governments around the world are recognizing the value of sharing information with the public in accessible, open formats. They understand that collaborating with citizens, businesses and non-government organizations to enrich their information resources improves communication channels, promotes citizen engagement, instils trust in government, fosters economic opportunities and ultimately results in more open and responsive democratic government.

Technology now affords public institutions the opportunity to directly engage citizens, to proactively disclose information and to support the renewal of the social contract between government and citizens.

Open government is linked to access to information legislation. However, it extends the concepts inherent in these laws to promote an entirely new way of viewing the role of government and the participation of citizens in it. While access to information provides a right of access to government information, the laws are fundamentally reactive because access is granted only after a request is made.

Access to information and privacy commissioners are advocates for open government and promote the paradigm shift from reactive to proactive disclosure, and ultimately to open government.

The basic tenets of a sound open government strategy are:

- **Commitment of governments** at all levels to lead a cultural change conducive to open government. Governments should anchor the principles in statutory and policy instruments that provide clear objectives, assign

⁴³*Supra* note 5 at section 55(2)(c).

responsibility and accountability, and prescribe specific timeframes. Governments should develop robust programs to ensure that access mechanisms are built into the design and implementation stages of all new programs and services to facilitate and enhance proactive disclosure of information. The **instruments should also include due consideration for privacy, confidentiality**, security, Crown copyright and all relevant laws.

- Participation of the public through **ongoing, broad-based public consultations**. Governments should consult the public to determine what information they need to assess their accountability. Consultation should become the basis for establishing priorities for the disclosure and exploitation of information resources.
- **Open, accessible and reusable information**. This means that information should be disseminated free or at minimal cost, and supported by data structures to assist in the discovery, understanding and interpretation of the information. It should be provided in open standard formats that are adaptable and reusable. Governments should also collaborate with and encourage citizens, businesses and non-government organizations to participate in the development and maximize the use of technology to enrich their information resources.

IN THIS CONTEXT, CANADA'S ACCESS TO INFORMATION AND PRIVACY COMMISSIONERS ("COMMISSIONERS") RESOLVE AS FOLLOWS:

1. The Commissioners endorse and promote open government as a means to enhance transparency and accountability which are essential features of good governance and critical elements of an effective and robust democracy.
2. The Commissioners call on the federal and all provincial and territorial governments to declare the importance of open government, including specific commitments for stronger standards for transparency and participation by the public.
3. Governments should build access mechanisms into the design and implementation stages of all new programs and services to facilitate and enhance proactive disclosure of information.
4. Through ongoing consultations with the public, governments should routinely identify data sources and proactively disclose information in open, accessible and reusable formats. Public access to information should be provided free or at minimal cost.
5. In implementing open government policies, the federal and **all provincial and territorial governments should give due consideration to privacy, confidentiality**, security, Crown copyright and all relevant laws.⁴⁴

[emphasis added]

⁴⁴*Open Government: Resolution of Canada's Access to Information and Privacy Commissioners*, September 1, 2010, available at http://www.priv.gc.ca/media/nr-c/2010/res_100901_e.asp.

[69] Open Government was a prominent theme in our latest Annual Report (2010-2011).⁴⁵ It is very encouraging that the Ministry is embracing this theme. It is important however to recognize that, as with all 13 of the other access and privacy regimes in Canada, as important as is the obligation of our public bodies to operate transparently, there is a dual responsibility to also protect the information privacy of Saskatchewan residents when they deal with those same public bodies. Both of these themes are manifest in LA FOIP and neither is paramount to the other. The challenge for all public bodies is to achieve both robust transparency and hence accountability to citizens while also taking reasonable measures to protect the information privacy of those same citizens. Open Government as this is practiced in Australia, the United Kingdom, the United States (federal level) and in the province of British Columbia and the Government of Canada recognizes that all information to be made more accessible to citizens still requires vetting to ensure that personal information of individuals is not improperly disclosed. In fact laws like LA FOIP that has been in force for 19 years provide the tried and proven forum and the mechanisms for resolving conflicts between access to information and privacy.

[70] As noted in the underlined passages of the Resolution, the Commissioners of all Canadian jurisdictions including Saskatchewan acknowledged in the quoted resolution that the rules prescribed by our existing access and privacy laws as well as model practices or best practices need to guide all open government initiatives. In implementing open government policies, due consideration must still be afforded privacy and confidentiality of individuals.

7. Have all reasonable mitigation measures been taken to minimize the risk of prejudice to the affected employees?

[71] I have found that the salary information of employees of RQRHA was not “personal information” for purposes of LA FOIP and therefore not protected from disclosure. I also found that even if the salary information qualified for protection as “personal information” there was authority for making some of this salary information at least for

⁴⁵SK OIPC, *2010-2011 Annual Report*, available at <http://www.oipc.sk.ca/Annual%20Reports/2010-2011%20Annual%20Report%20-%20FINAL.pdf>.

“members, officers and senior employees” available to the public by a combination of section 55 of *The Regional Health Services Act*⁴⁶ and section 28(2)(i)(i) of LA FOIP⁴⁷. I further found that by reason of section 55(2)(c), the Regulations and the *Annual Report Content Requirements 2011-12*⁴⁸ issued annually by the Ministry the RQRHA had no choice but to publish the salary information of all employees who earned \$50,000 or more on the Internet. It appears that the RQRHA questioned the requirement for Internet publication in response to complaints from staff and this investigation but was then specifically directed by the Ministry to proceed to publish in that fashion.

[72] I should note that the Ministry has argued that since our concern is with employee safety and protection from data profiling:

...when tested against “Danger to Health & Safety” section 21 of FOIP and section 20 of LA FOIP, one is mindful the overarching criteria must be one of an **immediate** health and safety risk(s).

...

The Ministry looked to your reports F-2007-001 and F-2008-001 that defined the protocol used for section 21 of FOIP and section 20 of LA FOIP.⁴⁹

[73] Section 21 of *The Freedom of Information and Protection of Privacy Act* (FOIP)⁵⁰ and section 20 of LA FOIP however are in Part III of their respective statutes and are concerned exclusively with whether an applicant under FOIP or LA FOIP is entitled access to a desired record. Neither section would be engaged on the facts of this complaint file. In any event, I have already determined that the publication of the salary information does not appear to violate LA FOIP.

[74] Does that dispose of the matter and the issues raised by this complaint? It might perhaps do so but mindful that my mandate is that of an ombudsman and not an administrative tribunal it would be both appropriate and timely to provide commentary on the implications for the privacy of the individuals affected by the Internet publication of the

⁴⁶*Supra* note 5 at section 55.

⁴⁷*Supra* note 23 at section 28(2)(i)(i).

⁴⁸*Supra* note 14.

⁴⁹Ministry of Health submission to OIPC March 20, 2012.

⁵⁰*The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c.F-22.01, section 21.

salary information. This oversight office is mandated to receive submissions and advice from the public⁵¹ and then to offer advice to the bodies we oversee as well as the Legislative Assembly that I report to. It is in that spirit I offer the following commentary.

[75] The nature of the Internet, that is after all a relatively new element of our transition to a digital society, is that the employee may be injured or prejudiced at some future date in ways that cannot even be imagined in 2012. That possibility is inherent to the Internet. This is also the reason why caution must be exercised by public bodies. I note a very useful and relevant analysis done by Beth Givens of the Privacy Rights Clearinghouse. Ms. Givens urges the following approach to public bodies contemplating the publication of public information on the Internet:

Government agencies must examine the public policy objectives they are attempting to accomplish by making records available on the Internet - the prime one being government accountability. If there are ways to limit the amount of personal information provided online without undermining the public policy objectives of providing access, then such approaches should be considered.⁵²

[76] We need to recognize that LA FOIP may have become law in 1993⁵³ after being passed by the Legislative Assembly the year previous but it is modelled on even older instruments. This would be the 1981 *Report of The Honourable E.M. Culliton, Former Chief Justice of Saskatchewan On the Matter of Freedom of Information and Protection of Privacy in the Province of Saskatchewan* (Culliton Report).⁵⁴ The Culliton Report in turn borrowed much from the 1980 *Report of the Commission on Freedom of Information and Individual Privacy*⁵⁵ from Ontario. 1980 and 1981 would have been a time of blissful innocence insofar as information privacy would be concerned. This antedates the

⁵¹Section 48 of LA FOIP incorporates by reference section 45 of FOIP and the power to: “(a) engage in or commission research into matters affecting the carrying out of the purposes of this Act; ... (c) receive representations concerning the operation of this Act.”

⁵²Givens, Beth, *Public Records on the Internet: The Privacy Dilemma*, p. 10; available online at www.privacyrights.org. The Privacy Rights Clearinghouse is a nonprofit consumer information, research and advocacy program based in San Diego, California.

⁵³*Supra* note 29.

⁵⁴Legislative Assembly of Saskatchewan Library; AG. 890.81. F10.

⁵⁵Publications Centre, Ministry of Government Services, Queen’s Park, Toronto ON; Volume 2:0-7743-5434-8.

ubiquity of the Internet, the computer, powerful search engines,⁵⁶ data profiling, identity theft, data matching, online predators, the surveillance society, electronic health records to mention but a few later developments.

[77] Although our provincial privacy legislation has not yet been amended to take account of the radical changes in information technology over the past twenty years, in 2003 the Saskatchewan Government did adopt a policy to help bridge the gap between our much older legislation and modern privacy requirements and best practices. This took the form of *An Overarching Personal Information Privacy Framework for Executive Government* (the Privacy Framework).⁵⁷ This has not been rescinded and still forms part of the training materials utilized by the Access and Privacy Branch within the Ministry of Justice and Attorney General. In this document the purpose is clearly defined as follows:

This Privacy Framework is designed to **place Saskatchewan at the strongest possible privacy protection policy position**, while balancing the Government's need to meet its public policy obligations.⁵⁸

[emphasis added]

[78] The document also describes the Privacy Framework this way:

This Framework is the overarching corporate government mechanism for setting out its direction with respect to privacy matters. It is intended to ensure a balance between the privacy rights of individuals with respect to personal information and the legitimate needs of government departments and agencies in fulfilling their public interest mandate. At the same time, the **purpose is to raise, for individual citizens, the level of protection of their personal information.**⁵⁹ [emphasis added]

⁵⁶In its publication, *Public Registers and Privacy – guidance for the Victorian Public Sector*, the Office of the Victorian Privacy Commissioner in Australia states: “Internet search engines are powerful tools that perform searches of much web-based information through simple and extended search facilities. Entering as little as a first and last name can often reveal vast amounts of information about an individual, gathered from different websites and assembled by the search engine. Even when web-based information is removed from a webpage, search engines may have archived the page and may continue to store and reproduce it. This may depend on how the information was originally presented, and how often the search engine’s ‘robot’ crawls through the web to archive material that is in cyberspace at the time of the robot’s crawl. In some cases, a website, or document on it can be designed to reduce the effectiveness of some search engines” at page 23, available at [http://www.privacy.vic.gov.au/privacy/web2.nsf/files/public-registers-and-privacy-guidance/\\$file/guideline_08_04.pdf](http://www.privacy.vic.gov.au/privacy/web2.nsf/files/public-registers-and-privacy-guidance/$file/guideline_08_04.pdf)

⁵⁷Government of Saskatchewan, *An Overarching Personal Information Privacy Framework For Executive Government*, September 2, 2003, available at <http://www.gov.sk.ca/news-archive/2003/9/11-648-attachment.pdf>.

⁵⁸*Ibid.* at p. 6.

⁵⁹*Ibid.* at p. 3.

[79] In the slide deck utilized by Executive Government in presenting the Privacy Framework to Deputy Ministers and senior administrators in late 2003, the notes accompanying the slides include the following:

Privacy is an issue whose time has come.

The media is regularly exposing new privacy scandals.

In this age, **information can be used by criminals** to build new identities so they can fraudulently obtain credit cards, employment insurance, welfare or old age pensions.⁶⁰

Legislation creates the structure or framework upon which policy is developed.

It also creates the floor of what can be accepted – **policy allows for the raising of the level of expectation.**⁶¹

[emphasis added]

[80] I take useful guidance from the Privacy Commissioner of Canada (*A Matter of Trust: Integrating Privacy and Public Safety in the 21st Century* - November 2010) who has offered the following commentary on the larger context for considering the privacy of Canadians:

As new technologies emerge, the concept of personal information has been expanded. By carrying and communicating through a new generation of connective devices, individuals produce constant data about themselves. This means that even biometric data (such as fingerprints and voiceprints), digital video footage (such as of a person's home or movements), Internet Protocol (IP) address information or geo-location data (e.g. place points collected from a radio frequency identification tag (RFID) or Global Positioning System (GPS)) could be considered personal information in certain circumstances. Though granular, ambient data points may not necessarily say much about an individual in pure isolation, a clear privacy issues arises when these data streams are generated constantly or combined with other data. Indeed, these data trails or emissions can be highly revealing if broadly collected, consolidated with personal profiles and analysed for patterns or behavioural insights.

When is there a reasonable expectation of privacy?

⁶⁰Government of Saskatchewan, Privacy of Personal Information: A Manager's Reference Guide: *Creating a culture of privacy*, PowerPoint slide deck developed by Rick Hischebett, Randy Langgard, Don Herperger 2003, at page 2.

⁶¹*Ibid.* at page 7.

Despite not containing the word “privacy”, the *Canadian Charter of Rights and Freedoms* protects various privacy rights and interests.

For example, privacy interests have been found to form part of the right to life, liberty and security of the person protected by section 7 of the *Charter*, with respect to control over our bodies and our personal information. The Supreme Court of Canada has suggested that the right to privacy might itself be a principle of fundamental justice, and has recognized that the right to privacy and maintaining the privacy of information about ourselves is an essential aspect of liberty in a free and democratic society.⁶²

[81] Our Saskatchewan Court of Appeal in two recent decisions⁶³ has affirmed that a Saskatchewan resident has a reasonable expectation of privacy even in respect to their IP address⁶⁴ and their name and contact information associated with that IP address.

[82] Canadian privacy oversight offices have routinely adapted an analysis first developed by the Supreme Court of Canada in the context of determining whether a prima facie violation of the *Charter* is justifiable under section 1 of the *Charter*.⁶⁵ This incorporates four different elements:

- **Necessity:** there must be a clearly defined necessity for the use of the measure, in relation to a pressing society concern (in other words, some substantial, imminent problem that the measure seeks to treat).
- **Proportionality:** that the measure (or specific execution of an invasive power) be carefully targeted and suitably tailored, so as to be viewed as reasonably proportionate to the privacy (or other rights) of the individual being curtailed.
- **Effectiveness:** that the measure be shown to be empirically effective at treating the issue, and so clearly connected to solving the problem, and finally,

⁶²Office of the Privacy Commissioner of Canada, *A Matter of Trust: Integrating Privacy and Public Safety in the 21st Century*, November 2010, at page 6, available at http://www.priv.gc.ca/information/pub/gd_sec_201011_e.pdf.

⁶³*R. v. Trapp*, 2011 CarswellSask 785 (Sask. C.A.); *R. v. Spencer*, 2011 CarswellSask 786 (Sask C.A.).

⁶⁴An Internet Protocol address is a unique number assigned by Internet Service Providers to a single computer or a network of computers.

⁶⁵Section 1 of the *Canadian Charter of Rights and Freedoms* states as follows: “Rights and freedoms in Canada”
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”, available at http://www.priv.gc.ca/information/pub/gd_sec_201011_e.pdf.

- **Minimal intrusiveness:** that the measure be the least invasive alternative available (in other words, ensure that all other less intrusive avenues of investigation have been exhausted).⁶⁶

[83] If I apply that test to the case at hand I would determine as follows:

- **Necessity:** I accept that there is clearly defined necessity for the publication of information about public monies paid to senior public servants and that this is an important feature of transparency and accountability of those public bodies to the larger public.
- **Proportionality:** I believe that making such salary information readily available to Saskatchewan residents is proportional. Making such salary information of not only senior public servants but anyone earning \$50,000 or more readily available to the world for all time and for all purposes to which such information may be used or abused would not be proportional to the objective of transparency and accountability. In other words, making the salary information so readily available to identity thieves or data profilers in some other part of the world would not be a proportional measure.⁶⁷
- **Effectiveness:** I believe that making such salary information readily available to Saskatchewan residents is effective in terms of transparency and accountability but again, making such information indiscriminately available for the entire world for all time and for all purposes would not be effective in promoting accountability of Saskatchewan public bodies to Saskatchewan residents.
- **Minimal intrusiveness:** I find that less intrusive means of publication and the use of privacy enhancing technologies such as web robot exclusion protocols have not even been considered. In other words, the failure of the RQRHA, the Ministry and the ITO to consider the web robot exclusion protocol or other alternative mitigation measures that would limit the opportunity for web crawlers⁶⁸ to collect personal information by employee name indicates that this part of the test has not been satisfied.

⁶⁶*Supra* note 62 at p. 10.

⁶⁷In its *Opinion No 3/99 on Public sector information and the protection of personal data*, the European Commission Working Party on the Protection of Individuals with Regard to the Processing of Personal Data states: “The Internet has caused an information explosion at international level and a corresponding increase in information sources. This globalisation of information may generate a particular type of risk. The distribution of information which is legitimate public information in one country can seriously endanger the privacy of physical safety of individuals if disseminated worldwide” at page 7, available at <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/1999/wp20en.pdf>.

⁶⁸A web crawler is technology that is used by search engines to gather, or “crawl,” contents from webpages saved on web servers. Crawling enables search engines to index, or process, the gathered contents. Indexing enables search engines to make contents searchable.

[84] To the extent that there appears to have been no direction to the ITO nor to the RHAs that maintain their own websites with respect to identifying and adopting privacy enhancing technologies to eliminate or reduce the risk of world-wide collection of personal information of employees in Saskatchewan, there should be such direction.

[85] Courts in Canada and elsewhere have started to consider the implications of information communication technology on the privacy of citizens. Consider the following recent observation of the Ontario Court of Appeal in *Jones v. Tsige*:

For over one hundred years, technological change has motivated the legal protection of the individual's right to privacy. In modern times, the pace of technological change has accelerated exponentially. Legal scholars such as Peter Burns have written of 'the pressing need to preserve 'privacy' which is being threatened by science and technology to the point of surrender': "The Law of Privacy: the Canadian Experience" at p.1. See also Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967). The internet and digital technology have brought an enormous change in the way we communicate and in our capacity to capture, store and retrieve information. As the facts of this case indicate, routinely kept electronic data bases render our most personal financial information vulnerable.⁶⁹

[86] In the January 20, 2012 issue of *Privacy Scan*, one commentator in assessing the implications of the *Jones v. Tsige* decision observed as follows:

Either way, in stark contrast to the motions judge, the Court of Appeal was clearly of the view that the law needs to continue to evolve to address privacy issues, and that courts have a role to play in defining how that evolution occurs.⁷⁰

[87] A similar message was provided by Justice Alito of the Supreme Court of the United States in *Brown v. Entertainment Merchants Association*:

...In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new

⁶⁹Ontario Court of Appeal in *Jones v. Tsige*, 2012 ONCA 32 at [67], available at <http://www.ontariocourts.ca/decisions/2012/2012ONCA0032.htm>.

⁷⁰*The right to seclusion in Jones v. Tsige: a moral victory for privacy*, published by Law Office of Kris Klein, January 20, 2012 issue at page 3.

technology is fundamentally the same as some older thing with which we are familiar...⁷¹

- [88] If this province is committed to raising the level of privacy protection and if courts in both Canada and the United States are acknowledging the need to take rapidly evolving information technology into account in their judicial role, should we countenance any less from our 13 RHAs, the Ministry and the ITO?
- [89] I assume that the motivation for publishing salary information of employees of public bodies is to ensure that Saskatchewan citizens who pay for those services and salaries can better hold their public bodies accountable. The fundamental question raised by this investigation is whether that goal can be achieved in ways that do not expose employees of RQRHA to risks of identity theft, data profiling by criminals and miscreants, and misuse by persons who not only do not live in our province but who have no legitimate need to know the precise salary that a health care employee in Regina, Saskatchewan earned last year. If there are technical steps that can reasonably be taken to minimize the risk of abuse and harm to individual employees on what basis should our public bodies be allowed to ignore those technical steps or refuse to implement them?
- [90] In the course of this investigation, we found somewhat troubling a lack of awareness of Internet risks to individuals and the corresponding responsibility of public sector organizations to protect those individuals where this can be done without compromising accountability. For example, the material produced by the Ministry, in particular the *Annual Report Content Requirements 2011-12*⁷² appears to make no distinction between those payees that are corporations or at least businesses that may be suppliers of goods or services and those payees who are individuals employed by the RQRHA. Corporations have no right of privacy which is uniquely centered on the individual. Yet perhaps surprisingly, there is direction in the *Annual Report Content Requirements 2011-12*: “*Do not disclose details for programs of a confidential or personal nature, instead

⁷¹*Brown v. Entertainment Merchants Association*, 564 U.S. (2011) at p. 1, available at <http://www.supremecourt.gov/opinions/10pdf/08-1448.pdf>.

⁷²*Supra* note 14.

*group the information using a generic name**”.⁷³ As well, another note on page 18 of the same document when dealing with transfers instructs: “Do not disclose details for programs of a confidential and personal nature”.⁷⁴ Finally, as noted earlier, several of the resources listed on the final page of this instrument highlight the need to consider “privacy and security” and “privacy” and “privacy and safety”.⁷⁵ The direction from the Ministry Financial Services Branch to RQRHA quoted earlier that “[a]ny attempt to hide this information, bury in a website or in any other manner reduce its public accessibility is unacceptable” seems difficult to reconcile with the explicit declarations in the Privacy Framework.

[91] This Internet publication practice may prove problematic in other ways. One of the major challenges facing trustees in achieving strong *Health Information Protection Act* (HIPA)⁷⁶ compliance is motivating their employees to pay particular attention to HIPA and health privacy best practices. One might reasonably ask whether it might make it more difficult to persuade RHA employees to take the time and effort to do an excellent job in terms of HIPA compliance if those same employees perceive that their employer refuses to respect their privacy.

[92] With indiscriminate Internet publication of such salary information, there are risks to the individuals involved. These kinds of risks were detailed in our Investigation Report F-2005-001⁷⁷ and also in a variety of articles, books and periodicals many of which are included in the *Resources* tab at our website: www.oipc.sk.ca. Part of the risk to the individual is that the personal information once published on the Internet immediately becomes available to persons not just in this province but all over the globe. That information can never be successfully recalled or purged. It can be used by anonymous individuals in any nation for all kinds of purposes and applications including many we

⁷³*Supra* note 14 at p.18.

⁷⁴*Supra* note 14 at p.18.

⁷⁵CCAF-FCVI, *Reporting Principles: Taking Public Performance Reporting to a New Level*, at pp. 22 and 82, available at http://www.ccaf-fcvi.com/attachments/267_ReportingPrinciples-EN.pdf ; CCAF-FCVI, *Consultations on Improving Public Performance Reports in Alberta*, at p. 32, available at http://ccaf-fcvi.com/attachments/255_IPPRinAlberta.pdf.

⁷⁶*The Health Information Protection Act*, S.S. 1999, c. H-0.021.

⁷⁷SK OIPC Investigation Report F-2005-001, available at <http://www.oipc.sk.ca/Reports/IR2005-001.pdf>.

cannot even catalogue at this stage. That includes persons who use this information for criminal and abusive purposes. We should anticipate that with the rapidly increasing capability and sophistication of Internet search engines, the risks to individuals will increase as well.

- [93] There are plenty of examples of governments and courts starting to come to terms with the threats posed by indiscriminate Internet publication without PETs to mitigate those threats. This office has in fact prepared a list of resources dealing with risks of Internet publication that is available at our website. In the State of Victoria, Australia there is a law⁷⁸ that requires the government to assess all of its long-standing public registries to determine whether all of the data elements that are now common to those registries are still necessary and appropriate for unlimited public access.⁷⁹ Here in Canada, our office, the Privacy Commissioner of Canada and colleagues in other parts of this nation have developed a set of guidelines⁸⁰ to assist administrative tribunals determine how they can achieve openness and transparency but not at the cost of exposing individuals to harm.
- [94] Our Investigation Report F-2005-001⁸¹ dealt with Internet publication of highly sensitive and prejudicial information of citizens appearing before the Automobile Injury Appeal Commission (the Commission). Subsequent to our Report and recommendations, the Commission adopted all of our recommendations to address the risks of Internet publication.⁸² Mr. Justice Ottenbreit⁸³ subsequently commented favourably on those

⁷⁸Victoria, Australia's *Information Privacy Act 2000* Act No. 98/2000 available at [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/edfb620cf7503d1aca256da4001b08af/4BE13AE4A4C3973ECA256E5B00213F50/\\$FILE/00-098a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/edfb620cf7503d1aca256da4001b08af/4BE13AE4A4C3973ECA256E5B00213F50/$FILE/00-098a.pdf)

⁷⁹SK OIPC, *FOIP FOLIO* (August 2004), at p. 3, available at <http://www.oipc.sk.ca/FOIPFOLIO/August2004.pdf>.

⁸⁰SK OIPC, *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*, available at <http://www.oipc.sk.ca/Resources/FAQs%20regarding%20Administrative%20Tribunals%20and%20the%20Internet%20publication%20of%20decisions.pdf>; Office of the Privacy Commissioner of Canada, *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*, available at http://www.priv.gc.ca/information/pub/gd_trib_201002_e.cfm; British Columbia IPC, *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*, available at http://www.oipc.bc.ca/pdfs/public/FAQs_regarding_Administrative_Tribunals_and_the_Internet_publication_of_decisions.pdf.

⁸¹*Supra* note 77.

⁸²Automobile Injury Appeal Commission, *Internet Posting Policy* available at <http://www.autoinjuryappeal.sk.ca/webpostingpolicy>.

⁸³*Supra* note 30.

mitigation measures taken by the Commission and was critical of the dilatoriness of the Commission in taking that action.

[95] My office has urged Saskatchewan public bodies and health trustee organizations to be cautious about Internet publication. If it is deemed appropriate and useful to publish to the Internet, then we urge those bodies to implement PETs such as the web robot exclusion protocol (REP) to reduce as much as possible the negative impacts of Internet exposure. This includes what is commonly known as PETs or privacy enhancing technologies. For example, three popular search engines, Google, Yahoo and Bing, all claim to support and obey the REP.⁸⁴

[96] Examples of PETs include the following:

(a) Web robot exclusion protocol (REP)

[97] One PET is the utilization of the REP to reduce the opportunity for web crawlers to crawl and compile information on web servers for purposes of profiling individuals. This PET was a key recommendation in our Investigation Report F-2005-001 (the Commission). I note that this has also been a recommendation of the Privacy Commissioner of Canada in the context of federal administrative tribunals that post decisions to the Internet.⁸⁵

[98] I understand that the REP, or robots.txt, is an unofficial standard and is voluntary. The file robots.txt may disallow access to some directories or files on the web server. It is up to the search engine whether or not to obey it. However, based on the claims mentioned above, Google, Yahoo and Bing – three popular search engines - will comply with the

⁸⁴Google, *Blocking Google*, available at <http://support.google.com/webmasters/bin/answer.py?hl=en&answer=93708>; Yahoo, *One Standard Fits All: Robots Exclusion Protocol for Yahoo!*, Google and Microsoft, available at <http://www.ysearchblog.com/2008/06/03/one-standard-fits-all-robots-exclusion-protocol-for-yahoo-google-and-microsoft/>; Bing, *Robots Exclusion Protocol: joining together to provide better documentation*, available at http://www.bing.com/community/site_blogs/b/webmaster/archive/2008/06/03/robots-exclusion-protocol-joining-together-to-provide-better-documentation.aspx.

⁸⁵Canadian Internet Policy and Public Interest Clinic, *Online Posting Practices of Administrative Tribunals: Pension Appeals Board; Office of the Umpire (Employment Insurance appeals)*, available at <http://www.cippic.ca/en/privacy-act-complaints>.

robots.txt file. I am advised that those three sites represent roughly 90% of current web robot⁸⁶ traffic. A weakness of the REP, though, is that you could potentially disclose the name of a sensitive file to malicious robots. It may be advisable to place the sensitive file into a directory with a meaningless name and disallow that directory to be crawled in the robots.txt file.

[99] An important qualification with the use of a robots.txt is that although it represents a means to prevent the contents of a sensitive file from appearing in search results, the contents of the sensitive file can be crawled if another webpage links to the sensitive file without having placed the sensitive file into a directory that is disallowed by the other webpage's robots.txt file.

[100] The Ministry has responded that since the REP is not likely to screen out all persons intent on criminal use of personal information on the Internet this is not seen as an appropriate or useful measure. This however is a little like saying that there is no point in locking the doors to your home since a thief can still break a window and get access to your home contents in spite of the locked door.

(b) Supplementary PETS

[101] Using bot⁸⁷ detecting techniques can enable public bodies to detect unwanted web robot traffic. Once detected, the bot's IP⁸⁸ address can be blocked through server level configuration or directory-level configuration. Examples of bot detecting techniques include installing a hidden link of a webpage which only robots but not humans will follow. This link could then take the robot to a page that logs its IP address to a database. Or firewalls with bot detection capabilities can be used to detect bots.

⁸⁶Or web crawler.

⁸⁷A bot is software technology used to complete repetitive tasks. In the case of search engines, a bot (or web crawler) is used to gather contents on webpages saved on web servers.

⁸⁸*Supra* note 64.

[102] Utilization of tools such as CAPTCHA⁸⁹ can verify that it is a real person accessing the site and not a bot. This would require the user to type characters from a distorted image that appears on the screen. I recognize that this tool does not guarantee 100% that only humans will access a site because there are automatic optical character recognition programs that might be successful in breaking the CAPTCHA patterns but it will minimize access by unwanted bots.

[103] Another method closely related to the REP would be the use of HTML Meta Tags.⁹⁰ This method, in particular, the “noindex” meta tag is another means of preventing the contents of a webpage from being indexed by search engines. However, the use of HTML Meta Tags is only possible with html pages. However, like the REP, obeying the HTML Meta Tags is voluntarily done by search engines.

[104] I recognize that there are a host of other PETs but ones which would also obstruct the easy access by Saskatchewan residents to the Internet published information of RHA employees. These would include explicit access controls such as a requirement for a name or email address from those searching for RHA employee information. I expect that such safeguards would be seen as inconsistent with the policy decision that has been made by the Ministry and I am not therefore recommending them.

[105] My view is that allowing anyone to visit the website of the Government of Saskatchewan or that of RQRHA and view the name and salaries of those employees earning \$50,000 or more achieves the goals of transparency and accountability. To go further and allow those same employees and their precise annual income to be readily searched via the Internet by any person attempting to profile the individual for any purpose whatsoever seems misguided.

⁸⁹CAPTCHA stands for Completely Automated Public Turing Test to Tell Computers and Humans Apart. It is a program that can generate and grade tests that humans can pass but current computer programs cannot. For more information, see <http://www.captcha.net/>.

⁹⁰HTML Meta Tags are a method that influences how web crawlers gather contents from a webpage.

[106] As a result of a number of discussions with the ITO of the Government of Saskatchewan as well as the RQRHA, it appears that none of these mitigation strategies have been implemented.

[107] I recommend that such mitigation strategies be identified, implemented and reinforced by the Government of Saskatchewan and all regional health authorities.

V FINDINGS

[108] I can find only delegated authority that the Regina Qu'Appelle Regional Health Authority publish on the Internet the salary information of its employees, other than members, officers and senior employees, and no explicit statutory requirement as would be warranted given the risks associated with indiscriminate Internet publication.

[109] I find that the information published is not excluded from *The Local Authority Freedom of Information and Protection of Privacy Act* on the basis of sections 3 and 4 which have no application to this case.⁹¹

[110] I find that the salary information in question was not “personal information” within the meaning of subsection 23(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* and that subsection 23(2)(a) applied to the salary information and consequently that the provisions limiting disclosure of such information in section 28 would not apply.

VI RECOMMENDATIONS

[111] That Regina Qu'Appelle Regional Health Authority, the Ministry of Health and the Information Technology Office consider the tools and resources with respect to Internet publication by administrative tribunals currently available on our website to adapt best practices to address the prejudice associated with Internet publication of the name and

⁹¹Ministry of Health submission to SK OIPC dated March 20, 2012.

salary information in question. This would include appropriate notification to employees of the policy and the steps taken to protect the privacy of those employees.

[112] That the Regina Qu'Appelle Regional Health Authority, the Ministry of Health and Information Technology Office immediately undertake steps to utilize a web robot exclusion protocol to mitigate the risk to individual employees and that it immediately cease publishing this information on the Internet until the protocol is in place and operational.

[113] That the Legislative Assembly review the current inadequacies in *The Local Authority Freedom of Information and Protection of Privacy Act* to address the “enormous change in the way we communicate and in our capacity to capture, store and retrieve information” described by the Ontario Court of Appeal in *Jones v. Tsige*, 2012 ONC 32.

[114] That if there is to be a requirement that an employee's salary is to become a public record, this should be authorized explicitly by legislation or regulation as has been done for members, officers and senior employees of the regional health authority.

[115] That these recommendations be considered by all of the other 12 regional health authorities in the province.

Dated at Regina, in the Province of Saskatchewan, this 9th day of May, 2012.

R. GARY DICKSON, Q.C.
Saskatchewan Information and Privacy
Commissioner

APPENDIX

The following is Appendix D: Payee Disclosure List from the *2006-07 RHA Annual Report to the Minister of Health Guide*.⁹²

Appendix D: Payee Disclosure List

Payee Disclosure Requirements

Regions are required to disclose payments by payee for the fiscal year in the annual report. The Government of Saskatchewan Treasury Board determines the threshold for payees requiring disclosure, for the 2006-07 fiscal year **the minimum threshold is \$50,000**. Payees are to be sorted into the following 4 categories and include the following information:

1. **Personal Services - disclose the name and amount paid** to individuals of the **RHA** who received salaries, wages, bonuses, honoraria and compensation for personal service. This category includes unionized and non-unionized employees, senior management (that are also included in Schedule 5 of the Audited Financial Statements), and contracts where an 'employee/employer relationship' is established.

The amount paid includes the following:

- **Salaries** - regular base pay, overtime, lump sum payments, honoraria/retainers/per diems, severance pay, non-taxable career assistance, education leave allowance, taxable employee education expenses, car allowances, and any other direct cash remuneration including sick leave, short-term disability, vacation, and differentials.
 - **Contracts** – the total amount paid (over the threshold) if an '**employee/employer**' relationship exists. If the relationship does not exist and the payment is over the minimum threshold, report the amount as a 'Supplier Payment'
2. **Transfers** – disclose the payees name and amount paid for each payee receiving payments for: program grants, funding, foundations, donations, sponsorships and HCOs, over the minimum threshold. Do not disclose details for programs of a confidential and personal nature (e.g. individualized funding for home care lists the program name with a total of payments greater then \$50,000, not the total for the program). Transfers amounts for each Affiliate equals **the total grant (or funding) less the amount recorded in the previous section for personal services for that affiliate.**

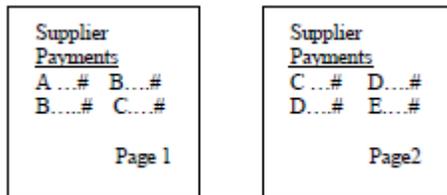
⁹²*Supra* note 20 at p. 30.

- 3. **Supplier Payments** - disclose payees name and amount paid for the provision of goods and/or services to the RHA. Also, include contracts over the minimum threshold of contracts where an 'employer/employee' relationship does NOT exist.
- 4. **Other Expenditures** - disclose payees name and amount paid for expenditures of the RHA above the threshold not included in other categories.

Payee Disclosure Format

- Use two columns to minimize the number of pages and fully justify the columns.
- Use headings for each of the 4 categories listed above.
- Within each category list the corresponding details alphabetically on each page.

Example:



- Round the amounts paid to dollars, use zero decimal places and thousand separators.
- The format for *Personal Services* is: *Last Name, First Name.....Amount Paid*
- The format for all *other categories* is: *Payee.....Amount Paid*

Do not disclose details for programs of a confidential and personal nature, instead group the information using a generic name

This is an electronic template for the payee disclosure list:


"Payee List
Template.xls"

(See Sample Format Below)

Appendix D Continued:

Sample Format

**XXX REGIONAL HEALTH AUTHORITY
PAYEE DISCLOSURE LIST
For the Year Ended March 31, 2007**

As part of government's commitment to accountability and transparency, the Department of Health and Regional Health Authorities disclose payments of \$50,000 or greater made to individuals, affiliates and other organizations during the fiscal year. These payments include salaries, contracts, transfers, supply and service purchases and other expenditures.

Personal Services

Listed are individuals who received payments for salaries, wages, honorariums, etc. which total \$50,000 or more

Bekker, Corinne	\$	123,456
Brown, Carl		72,456
Doe, Jane		81,762
Doogood, Dr. Frank		50,001
Evans, Todd		99,999
Henry, John		52,132
Johnson, Ken		225,132
Line, Drew		68,795
Nielson, Leslie		75,186
Nightingale, Florence		52,332
Ralston, Jack		129,524
Smith, Bob		65,487
Van de Sype, Jaqueline		97,861

Transfers

Listed, by program, are transfers to recipients who received \$50,000 or more.

Individualized Home Care Funding	\$	221,222
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Supplier Payments

Listed are payees who received \$50,000 or more for the provision of goods and services, including office supplies, communications, contracts and equipment.

John's Janitorial Supplies	\$	68,992
Penner Office Supplies		50,002
Sask Energy		3,456,789
Saskpower		1,234,567
Smith's Medical Supplies		2,345,678

Other Expenditures

Listed are payees who received \$50,000 or more for expenditures not included in the above categories.

???	\$	55,089
???		68,782