

Helpful Tips

Best Practices for Public Bodies/Trustees for the Processing of Access Requests



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GENERAL CONSIDERATIONS

What is a Record?

For the purposes of *The Freedom and Information and Protection of Privacy Act* (FOIP)¹, *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP)², and *The Health Information Protection Act* (HIPA)³, a record is information in any form or format and includes documents, letters, papers, e-mail, photos, drawings, voice-mail, etc., but does not include the computer programs or other mechanisms that produce records. The record is the package of documents that would be responsive to the applicant's access request that are in the public body's possession or control, or the trustee's custody or control. A summary, condensation, or secondary document, should not be substituted for source documents.

Responding to Access to Information Requests

Saskatchewan's access to information and protection of privacy legislation requires that government institutions and local authorities (public bodies) and trustees provide a formal response to access to information requests made under those laws to the applicant.⁵ The requirements of these responses are explicitly established at section 7 of both FOIP and LA FOIP, and section 36 of HIPA. A number of tools and resources including training materials are available at the Access and Privacy Branch website, <http://www.justice.gov.sk.ca/accessandprivacy>.

Claiming Exemptions

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

Our practice is that we will not consider a new discretionary exemption once we commence our review unless the public body/trustee can demonstrate that this will not prejudice the applicant.

¹ *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01.

² *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.

³ *The Health Information Protection Act*, S.S. 1999, c. H-0.021.

⁴ To view the noted legislation, visit our website www.oipc.sk.ca.

⁵ See section 7 of FOIP and LA FOIP and section 36 of HIPA.

In claiming exemptions it is important for public bodies/trustees to remember that they bear the onus of demonstrating that a claim exemption applies to the withheld information.⁶

Notification of Third Parties

The public body must make an early assessment whether there is a third party that needs to be notified of the review. “Third party” must be a person (including an incorporated entity) other than an applicant or a government institution or local authority.⁷ Third parties have the right to make representations to the Commissioner in the course of a review.⁸ Providing notice to third parties allows them the opportunity to make representations on whether or not access should be allowed to records that contain their information.⁹

FOIP and LA FOIP require that third parties be notified if a public body intends to give access to records which may contain third party information.¹⁰ Section 52 of FOIP and 41 of LA FOIP require that the third party be given written notice by the public body of a review by the OIPC.¹¹ This notice is independent of any previous third party notices given during the access process prior to the review. When a review is underway which involves third parties, public bodies should provide the Commissioner’s office with contact information for the involved third parties so that the Commissioner’s office may contact these third parties directly.

Identity of Applicant is Protected Personal Information

Some public bodies/trustees have asked whether there are any rules around the identity of someone who has made an access request. You will have noticed that in our formal Reports, we refer to the ‘applicant’ and do not identify that person. At the initial stage of a request for access a couple of considerations apply. Our view is that a public body/trustee should not disclose the identity of the applicant to anyone who does not have a legitimate ‘need to know’. A legitimate need to know relates to the specific knowledge an individual requires in order to process an access request. For example, if the applicant is making an access request for their own personal information then their identity is clearly relevant when searching for records. On the other hand, if the applicant is requesting access to general information their identity would almost always be irrelevant, and few outside of the FOIP/HIPA Coordinator should have a need to know their identity.

⁶ See section 61 of FOIP, section 51 of LA FOIP and section 47 of HIPA.

⁷ Section 2(l)(j) FOIP < section 2(k) LA FOIP

⁸ Section 53(2)(b) FOIP, section 42(2)(b) LA FOIP

⁹ Section 36 FOIP, section 35 LA FOIP

¹⁰ Section 34 FOIP, section 33 LA FOIP

¹¹ HIPA does not contain the same provisions for providing notification to third parties to a review.

Our view is that it is improper to treat applicants differently depending on who they are or what organization they may represent. It would also be improper to broadcast the identity of an applicant throughout a public body/trustee or to disclose the identity outside of that particular department. To avoid differential treatment, we encourage the FOIP/HIPA Coordinator to mask the applicant's identity. This approach is consistent with direction from the Federal Court of Canada and practices in other provinces.¹²

Why does an Applicant want Access; Does it Matter?

FOIP, LA FOIP and HIPA create a right to access information. Our office takes the position, consistent with the practice in other Canadian jurisdictions, that public bodies/trustees are not therefore entitled to require an applicant to explain why certain records/information are sought. Although the applicant does not need to give a reason for seeking a record, this does not prevent a FOIP/HIPA Coordinator from inviting the applicant to share his/her reason for the purpose of ensuring that the public body/trustee knows exactly what records would be responsive to the request and to minimize cost to the applicant.

Duty to Assist the Applicant

FOIP and LA FOIP do not stipulate a duty to assist applicants. The OIPC however takes the position that there is an implied duty on the part of public bodies to take reasonable steps to ensure that they respond to access requests openly, accurately and completely.¹³ The duty to assist is explicit in HIPA.¹⁴

While applicants have a responsibility to *“specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject matter to identify the record,”* many applicants do not have detailed knowledge about the types of records a public body/trustee maintains. In our view this kind of implied duty to assist is essential to meet the purpose of FOIP and LA FOIP. This is the standard that is clearly stated in HIPA.

It may be useful for a FOIP/HIPA Coordinator to contact an applicant directly to determine (a) if what the applicant is looking for is clear; (b) if the request can be accommodated informally outside of the FOIP, LA FOIP or HIPA; and (c) if the request can be clarified in the interests of focusing on certain key records and avoiding unnecessary costs to the applicant.

¹² There is a useful discussion of this issue in the Annual Report of the Information Commissioner of Canada 2001-2002 at pages 22 to 24.

¹³ OIPC Reports F-2005-005; F-2004-007; F-2004-005; F-2004-003; and L-2004-001

¹⁴ OIPC Report H-2006-001

Adequate Search for Records

The public body/trustee has a duty to search for, identify and consider all responsive records. We highly recommend that public bodies/trustees thoroughly document their search efforts. To ensure a complete and adequate search, the public body/trustee should utilize a search strategy which considers the following:

- Were records in any form or format considered (i.e. electronic, paper, other)?
- Is the original access request very broad and could include information developed over a wide open time period? If so, how did you define the search?
- How did you search for records in the public body's possession?
 - Did you search yourself?
 - Did you delegate others to do the search? If so, how can you be sure that the search was comprehensive?
 - Did you send out an email to other units, etc?
- Could records also exist that are responsive to this access request that are not in your possession, but in your control?
 - Did agents, consultants or other contracted services have any role in the project the access request is referencing?
 - If yes, are these records included in the package provided to the OIPC?

There have been instances where instead of providing the applicant with responsive records, public bodies/trustees offer summaries of the information requested, thus creating new records. This may be in fact what the applicant is looking for. However, a formal access request under either the FOIP or LA FOIP entitles the applicant to documents in their original form. FOIP and LA FOIP are clear that access rights under these laws is to *"records that are in the possession or under the control"* of that public body. In other words, the access provisions in both Acts are *"record-driven"* and not *"information-driven."* There is no responsibility under either Act to create records that do not otherwise exist.

If a summary document is what the applicant seeks, then an informal request by phone may be sufficient. Only requests for access in the prescribed form may be appealed to the Commissioner in the form of a request for review. Under HIPA, an applicant may make an oral request for access. However, only when the applicant has submitted a written request for access in accordance with section 34 may the OIPC eventually undertake a review if the applicant is dissatisfied with the result.

FEES AND FEE ESTIMATES

The fees which exist in FOIP, LA FOIP and HIPA implicitly create a “user-pay” system. Fees however, should not become a barrier to access to information. The Commissioner has stated his belief in the importance of access to information legislation in fostering openness, transparency and accountability in public bodies. As such he has stated that fees should not impose barriers to the use of the legislation:

“I want to ensure that fees do not present an unreasonable barrier to access to information in Saskatchewan. Consequently, this office will expect that fees should be reasonable, fair and at a level that does not discourage any resident from exercising their access rights. At the same time, the fee regime should promote and encourage applicants to be reasonable and to cooperate with government institutions in defining and clarifying their access requests.”¹⁵

Burden of Proof

Having regard to the purpose of the Acts and the practice in other Canadian jurisdictions, the head of the public body/trustee bears the burden of establishing the reasonableness of the fee (Report 2005-005[29]).

Applicable Fees

Each head of a public body/trustee must determine whether in any given case it will assert a claim for the fees prescribed by the applicable Act and Regulations.

Fees should be reasonable, fair and at a level that does not discourage any applicant from exercising his/her access rights. At the same time, the fee regime should promote and encourage applicants to be reasonable and to cooperate with public bodies in defining and clarifying their access requests.

Under the three different Acts in Saskatchewan, there may be four different kinds of fees:

1. application fees;
2. fees for searching for a responsive;
3. fees for preparing the record for disclosure; and
4. fees for the reproduction of records

¹⁵ Saskatchewan OIPC, Report 2005-005 at [24] available online: <http://www.oipc.sk.ca/Reports/F-2005-005.pdf>

Note: HIPA does not include a specific fee schedule. Rather, section 39 provides that “a trustee may charge a reasonable fee not exceeding the prescribed amount to recover costs incurred in providing access to a record containing personal health information.” In 2004, a fee schedule was proposed by Saskatchewan Health though not yet implemented. For information on the Commissioner’s view with respect to the proposed schedule review the Commissioner’s *Report on The Health Information Protection Act Draft Regulations, September 2004*.¹⁶

Section 6(3) of FOIP Regulations appears to be unique to Saskatchewan. This provision reads:

Where a search and retrieval of electronic data is required to give access to a record requested by an applicant, a fee equal to the actual cost of the search and retrieval, including machinery and operator costs, is payable at the time when access is given.”

This provision contemplates recourse to remote equipment that involves data stored in a fashion that restricts access to dedicated computer technicians.

Section 8(1) of the Regulations states:

8(1) No fees are payable where access to a record is refused

Section 8 of FOIP contemplates a situation where a government institution refuses all access to a record. If the government institution is prepared to provide access to a record from which portions have been severed, the government institution is entitled to charge fees for search and preparation of the record in accordance with the balance of the fee regulations.

Also refer to the Commissioner’s comments with respect to fees in Report H-2006-001¹⁷ starting at [50].

Application Fee

There is no application fee for an access request under FOIP. There is a \$20 application fee for an access request under LA FOIP.

Under HIPA (section 39) a trustee may charge a reasonable fee not exceeding the prescribed amount (there is no prescribed amount as of September 27, 2010) to recover costs incurred in providing access.

¹⁶ Available at: <http://www.oipc.sk.ca/Reports/TheHIPADraftRegulations.pdf>. See also Report H-2008-001 See also Report H-2008-001[50]-[54]

¹⁷ Available at www.oipc.sk.ca under the Reports tab.

Searching for a Record

- Under FOIP, the fee for searching for records and preparing them for disclosure is calculated at the rate of \$15 for 30 minutes.
- Under FOIP, there is no fee for the first two hours of work in responding to an access request.
- Under LA FOIP, the fee for searching for records and preparing them for disclosure is calculated at the rate of \$15 for 30 minutes.
- Under LA FOIP, there is no fee for the first hour of work in responding to an access request.

This relates to the personnel time involved in finding a responsive record. Search time does **not** include time spent:

- Reproducing the records;
- Traveling to off site locations;
- Reviewing the records;
- Discussing the scope of the request with the applicant; or
- Providing guidance on the search to employees of the public body.

Preparing the Record for Release

Preparing the record for release includes time spent physically severing exempt information from records. Time spent reviewing records for release and identifying records that require severing are activities that should be considered part of the government institution's general responsibilities under the Act. That time is not compensable as defined by the phrase, "preparing a record for release" in section 6(2) of the FOIP Regulations and section 5(3) of LA FOIP Regulations.

The major work that would constitute "preparation of the record" is the physical severing of portions of a record in accordance with mandatory or discretionary exemptions in the statute. The Regulations contemplate a charge for actually severing a record. It would not contemplate time for:

- Deciding whether or not to claim an exemption;
- Identifying records requiring severing;
- Identifying and preparing records requiring third party notice;
- Packaging records for shipment;
- Transporting records to the mailroom or arranging for courier service;
- Time spent by a computer compiling and printing information;
- Assembling information and proofing data;
- Photocopying; and
- Preparing an index of records.

Fee Waiver

If an applicant requests a fee waiver of a public body/trustee, the onus is on the applicant to demonstrate that a fee waiver is warranted. While objective measures of what would constitute a financial hardship have not been found to exist amongst IPC's and public bodies/trustees in fee waiver deliberations, such measures do exist in other areas¹⁸ and may be applied in these matters.

Fees can be waived if:

1. Payment of the fees would constitute a substantial hardship; **AND**
2. A waiver would be in the public interest or the information is personal information of the applicant.

All fee waiver determinations must be carried out by public bodies/trustees on a case-by-case basis. Public bodies/trustees must inform applicants of the criteria they will apply to determine if they will grant a fee waiver so the applicant knows what to submit for its consideration. Public bodies/trustees and applicants should attempt to work together to lower fees whenever possible. In this way a waiver of fees should not create an unreasonable burden for public bodies/trustees to bear in providing access to information.

Fee Estimates

1) Form

An appropriate written fee estimate notice to an applicant should include the following information:

- Time required to search electronic records;
- Time to prepare electronic records for disclosure;
- Time required to search other records;
- Time required to prepare other records for disclosure; and
- Number of persons that will be involved in the search or preparation for disclosure activities that will be claimed as compensable and an explanation as to why more than one person is required to be involved in either search or record preparation activities.

¹⁸ For an example please refer to the low-Income Cut-Offs (LICOS).

2) Timing

It is implicit in the Acts that the estimate should be provided to the applicant before the services are provided. Once the work has been done, the fees would be precisely calculated and there would be no point in estimating fees. It would also make little sense to put the government institution to the considerable work of preparing the record for disclosure if the applicant was unwilling to pay the appropriate costs that the government institution is permitted to charge before providing access to the applicant.

A fee estimate can facilitate discussion between the applicant and the public body to ensure a clear understanding of what is required under the request. The information in an estimate:

- Allows the applicant an opportunity to modify the request and minimize the fees; and
- Prevents the public body/trustee from doing more work than necessary, especially early on.

Sections 9(2), (3) and (4) of FOIP and section 7(1) of the FOIP Regulations provide that when the estimated fees exceed \$50:

- The head of a government institution must provide *“a reasonable estimate of the amount”* of fees; and the applicant shall not be required to pay an amount greater than the estimated amount;
- The 30 day period to respond to an access request is suspended *“until the applicant notifies the head that the applicant wishes to proceed with the application”*.

One half of the estimated amount must be paid before the processing of the application proceeds and the balance must be paid before the delivery of the records. If the fee estimate *“exceeds the actual amount of fees”* incurred in fulfilling the request, *“the actual amount of fees is the amount payable.”*

3) Interim Notice

The fee estimate should be accompanied by an interim notice¹⁹. An interim notice would provide:

- The applicant with an indication of whether access is likely to be granted in whole or in part; and
- What exemptions are likely to apply to the records.

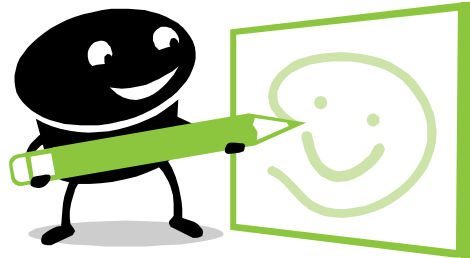
This information would greatly assist the applicant to determine whether he/she wishes to proceed with the entire request. Such an interim notice would not be a decision that could be the subject of a request for review by this office.

For a full discussion for fees and fee estimates under FOIP, see Report F-2005-005.

¹⁹ Report F-2005-005; F-2007-001

CONTACT INFORMATION

If you have any questions or concerns during any stage of the review process, please contact the OIPC at 1.877.748.2298 or 306.787.8350 or by writing to:



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Check out our website at www.oipc.sk.ca