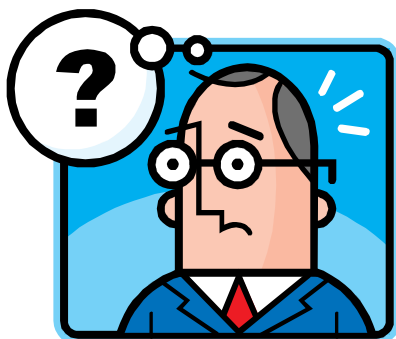


Helpful Tips

OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review



September 2010

Office of the Saskatchewan Information and Privacy Commissioner
503 – 1801 Hamilton Street
Regina, Saskatchewan S4P 4B4

Introduction

The office of the Information and Privacy Commissioner for Saskatchewan (OIPC) has found that many different approaches are taken by government institutions or local authorities (public bodies) and trustees in preparing materials for a review by the Commissioner under Part VII of *The Freedom of Information and Protection of Privacy Act* (FOIP), Part VI of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) or Part VI of *The Health Information Protection Act* (HIPA). This document has been prepared to outline best practices for those public bodies/trustees in the event of an OIPC review.

PROCEDURAL DEFECTS

A procedural defect occurs when a public body/trustee, in providing notice to an applicant, fails to meet one or more of the specific statutory requirements for this type of response. The OIPC has experienced a large volume of review files in which there are basic problems with compliance apart from any particular exemption. These procedural issues have historically been treated no differently than substantive issues related to the application of mandatory or discretionary exemptions. It is not uncommon that these files do not progress for a number of months because of delays in defining something as fundamental as which exemption the public body/trustee is relying on in denying access. There are then further delays of many months after the procedural defect has been cured but before the merits of the exemption have been resolved.

We have determined that these lengthy delays can be seen as rewarding public bodies/trustees that continue to deny access without having to meet the requirements in section 7 of FOIP and LA FOIP, and section 36 of HIPA. Applicants, on the other hand, can be seen as being penalized by excessive delays in addressing the merits of the exemption(s) claimed. All of this brings the legislation into disrepute and undermines public confidence in FOIP, LA FOIP and HIPA.

Specified Procedural Defects

The OIPC utilizes an expedited process to deal with requests for review that involve a failure of public bodies/trustees to meet the statutory requirements as interpreted by the Commissioner including:

- No identification of the specific statutory authority for a decision¹
- No explanation of the reason for a decision²
- No explanation of the reason for extension³
- No notice of the right to request a review by the Commissioner⁴
- Severance that fails to meet the requirements of section 8⁵
- Deficient fee estimate⁶
- Failure to respond to fee waiver request⁷
- Deemed refusal (failure of a head/trustee to respond to a written request for access within the statutory time period)

¹ OIPC Report F-2006-003 [22], [26], [27]

² OIPC Report F-2006-003 [22], [26], [27]

³ OIPC Report F-2006-003 [40]; OIPC Report F-2006-005 [33]

⁴ See Section 7(3) FOIP and LA FOIP; section 36(1)(c)(ii) of HIPA

⁵ OIPC Report F-2006-003 [15], [19], [21], [24], [25], [28]

⁶ OIPC Report F-2005-005 [38], [71], [72], [73], [74], [75], [76]; F-2007-001 [57], [58]

⁷ OIPC Report F-2007-001 [19] to [26]

Expedited Review Process

The Expedited Review Process includes the following steps:

1. In any of these situations, the public body's FOIP or HIPA Officer/Coordinator will be promptly notified by the OIPC of the procedural defect in the public body's/trustee's response to the access request and that the Request for Review will be designated for expedited treatment.
2. If the defect is not remedied within 7 business days from the date that notice is provided to the FOIP/HIPA Coordinator, the Portfolio Officer will immediately refer the file to the Commissioner.
3. In that case, the Commissioner will promptly notify the Deputy Minister, CEO or head of the public body/trustee of the procedural defect in the response to the access request.

In addition to this process, our office may comment in our Annual Report specifically on problems identified with any particular organization in meeting procedural statutory requirements of FOIP, LA FOIP and HIPA.

Preliminary Objection to Review

In the event that the public body/trustee has reason to believe that either the Commissioner does not have jurisdiction to deal with a request for review or that the application for review is frivolous, vexatious, not made in good faith or concerns a trivial matter⁸, the public body/trustee should raise a preliminary objection to the review and notify the Commissioner accordingly. The public body/trustee should provide particulars and any relevant evidence in support of the preliminary objection. Normally, the Commissioner will make a decision pursuant to section 50 of FOIP, 39 of LA FOIP, or 43 of HIPA with respect to that preliminary objection before proceeding further with the review. He will advise both the applicant and the public body/trustee of his decision.

⁸ OIPC Report F-2010-002

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.⁹ Third parties have the right to make representations to the Commissioner in the course of a review.¹⁰ 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.¹¹

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.¹² 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.¹³ 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.

PREPARING THE “RECORD”

What follows is a best practice for organizing and presenting materials for that purpose. There are usually two different documents involved in a formal review by the OIPC:

1. **Record:** documents responsive to an access request; and
2. **Submission:** written argument supporting the public body’s decision.

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

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

- a. The withheld information outlined or highlighted, and
- b. The relevant section number(s) of the applicable Act clearly indicated beside or near the withheld information.¹⁴

⁹ Section 2(1)(j) FOIP, section 2(k) LA FOIP

¹⁰ Section 53(2)(b) FOIP, section 42(2)(b) LA FOIP

¹¹ Section 36 FOIP, section 35 LA FOIP

¹² Section 34 FOIP, section 33 LA FOIP

¹³ HIPA does not contain the same provisions for providing notification to third parties to a review.

¹⁴ Commissioner’s Report F-2008-001 [26] to [29]

In preparing for the review, the public body/trustee should prepare an Index of the Record(s) in table form. That index should include the following:

1. All the pages should be numbered in sequence. However, this may not always be practical. For example, with two binders of documents, each one may already have pages numbered in sequence. In that case, if the Record is identified, the pages need no further numbering; identification as "Record A, page 2" is sufficient. A loose collection of documents should be numbered in sequence.
2. For each page upon which information has been withheld, identification of the section numbers of the applicable Act under which any information has been withheld is required.
3. A description of the document in which information has been withheld or disclosed, and
4. The page number(s) on which information has been withheld or disclosed. The index should account for every single page of the record.

A sample index appears below:

Sample Index of Records			
Page Number(s)	Description	Section(s)	Comments/Explanations
1	Plan showing building and grounds of detention centre dated Nov. 11, 1998.	15(1)(h) & 15(1)(m)	Since this record shows entrances & exits to bldgs & grounds, & other security-sensitive info, its release could reasonably be expected to facilitate escapes & to jeopardize the security of the detention centre, so both exemptions apply. As the Minister's policy is to prevent such security lapses, the head is exercising his discretion to apply the exemption & to withhold this record in its entirety.
6-18	Minister's report to Cabinet	16(1)	This report presents advice, analysis & policy options for consideration and was prepared in confidence to facilitate cabinet discussion. The head is withholding this entire report based on this mandatory exemption.
Record B	Justice opinion to Finance Minister	22(b)	Legal Counsel prepared this document to provide the Minister with legal advice about ... The head is exercising his discretion to exempt this document because the information is sensitive and subject to solicitor client privilege.

CLAIMING AN EXEMPTION

It is important that public bodies/trustees cite all of the relevant mandatory and/or discretionary exemptions they intend to rely on at the time they respond to an applicant's access request.¹⁵ The OIPC has encountered a number of cases where the public body/trustee decides to raise a number of new exemptions once our office provides notice that it is undertaking a formal review of a public bodies/trustees decision to withhold a record. This is unfair to the applicant.

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

PREPARING THE WRITTEN "SUBMISSION"

The OIPC has a large volume of case files. Please cite the OIPC file number when communicating with our office. The public body/trustee should attempt to make the case by supplementing the record with a *written submission*.

A submission should contain the following:

1. Table of Contents;
2. Arguments in support of your position;
3. Supporting documents, authorities and other relevant information; and
4. Appendices (e.g. Affidavits) if necessary.

The purpose of the submission is to inform the Commissioner and other parties to the review about the main issues of the case and to present evidence. Evidence here refers to information or material that establishes fact upon which the Commissioner will base his decision. The amount or type of evidence required in order for a party to meet its burden of proof will vary dependent on the particular facts, issues and circumstances. If a public body/trustee fails to meet the burden of proof, the Commissioner will recommend the release of the record at issue.

When it is said that a party has the "burden of proof," what is meant is that one party has a duty in law first to bring forward evidence that a particular fact or situation exists, and then to persuade the Commissioner that the evidence meets the necessary standard of proof.

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

¹⁵ Upon receipt on access request, public bodies/trustees have 30 days within which to provide a response to the Applicant (section 7(2) FOIP and LA FOIP, section 36(1) HIPA). Public bodies/trustees may extend the response time once by up to 30 days (section 12(1) FOIP and LA FOIP section 37(1) HIPA).

A public body/trustee has the burden of proof pursuant to section 61 of FOIP, section 51 of LA FOIP and/or section 47 of HIPA if it claims that access should or must be refused. The burden is not on the Applicant to establish that an exemption does not apply.¹⁶ This means that it is not enough to write the Commissioner and simply say “*access is denied because of section 19 [or some other mandatory or discretionary exemption],*” rather it is up to the public body/trustee to ‘make the case’ that a particular exemption(s) applies. That means presenting reasons why the exemption is appropriate for the part of the record that has been withheld. However, in certain circumstances, the burden may shift to the applicant (e.g. proving financial hardship when the applicant requests a fee waiver).

In Saskatchewan, the Commissioner is obliged to apply section 10 of *The Interpretation Act* that provides:

10 Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects.

The OIPC, consistent with other privacy and access oversight agencies in Canada, follows the “modern principle” in interpreting FOIP, LA FOIP and HIPA. This has been described the Alberta Information and Privacy Commissioner, when quoting the Supreme Court of Canada, as follows:

The “modern principle” says I must read the words in enactment “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament”¹⁷

The Commissioner will decide what evidence to rely on and how much weight to give that evidence. To be successful, the party will be required to prove certain facts and issues according to a particular standard of proof. The standard of proof is “on a balance of probabilities” or “on a preponderance of evidence.” A party will have proven its case on a “balance of probabilities” if the Commissioner is able to say: “*I think it more likely, or more probable, than not.*” This means that the Commissioner has considered and weighed the evidence presented by both parties and the Commissioner is convinced by the persuasiveness and/or accuracy of one party’s evidence over the others.

To give effect to this modern principle of statutory interpretation, the Commissioner will consider the way that the courts have been treating access to information and privacy and the *Charter of Rights and Freedoms* as well as the purpose and unique nature of these three laws. The Commissioner is also guided by the approach taken by other Information and Privacy Commissioners since such laws across our nation have far more in common than they exhibit differences. It will be useful to recognize that in the course of more than 25 years of Canadian experience with privacy and access law that certain terms have acquired particular meanings.

¹⁶ In certain circumstances the burden may shift to the Applicant (i.e. in requesting a fee waiver the Applicant may have to prove that a substantial financial hardship exists).

¹⁷ Alberta OIPC Order H2006-002, [28]. See also Ontario IPC Order PO-1879, British Columbia OIPC Ruling File No. 15884, Alberta Adjudication Order #3 (Review Numbers 2170 and 2234).

Information that would be useful in meeting the burden of proof:

- Excerpts from relevant legislation or regulations that apply to the operations of the public body/trustee and that relate to the issues under review.
- Excerpts from policy manuals that set out practices or policies followed by the public body/trustee that relate to the issues under review.
- Relevant court decisions or past Reports of the OIPC¹⁸. The OIPC publishes on its website the reports and recommendations issued when it concludes a review of a decision of a public body/trustee that is not informally resolved.
- Decisions made by Information and Privacy Commissioners in other jurisdictions that may be of assistance to the Commissioner in his consideration of the issues.

Each exemption under these Acts has certain requirements that must be satisfied. It is important for public bodies/trustees claiming an exemption or exemptions to address each component of these requirements. For every exemption claimed consider the following:

- Have you clearly identified the record or parts at issue?
- Have you identified the exemptions that apply to each part of the record which has been withheld from disclosure?
- Have you reviewed previous OIPC Reports and relevant court decisions to determine how the exemption has been interpreted in the past?

Where an exemption is discretionary,

- Have you considered whether the public body/trustee should rely on this exemption in the particular circumstances?
- If so, have you explained the basis for the head's exercise of discretion¹⁹

Where an exemption requires proof that a particular consequence would result from disclosure of the record (i.e. risk to physical health or mental health or safety),

- Have you identified the consequences in detail?
- Have you provided detailed and convincing evidence establishing a reasonable expectation of harm contemplated by the particular exemption?

¹⁸ Reports of the OIPC prior to November 2003 are indexed and available on the Access and Privacy Branch website, <http://www.justice.gov.sk.ca/accessandprivacy>

¹⁹ OIPC Report F-2004-002 at [24]. See also *Exercise of Discretion*. Office of the Chief Information Officer of British Columbia available at: http://www.cio.gov.bc.ca/cio/priv_leg/manual/exceptions/exercise_discretion.pag, and *Guidelines for Exercise of discretion in administrative decision-making*. Western Australia Ombudsman's Office available at <http://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Exercise-of-discretion-in-admin-decision-making-oct-09.pdf>

Where an exemption requires proof that a record was prepared for a particular purpose (i.e. cabinet confidence, solicitor client):

- Have you provided facts to support your claim?
- Have you identified the facts which apply to each component of the exemption?

Where proof is required that a record or 'information' was provided or received implicitly or explicitly in confidence:

- Have you provided details of the circumstances in which the record or information was provided or received?
- Have you provided evidence of the expectation of confidentiality and shown that this expectation was reasonable?

Where proof is required that a record is one of the types of records listed in the exemption or that it contains certain types of information (i.e. scientific, financial, and commercial):

- Have you identified the particular type of record?
- Have you provided reasons why the record fits into this category?

Where the personal information or personal health information exemption is claimed:

- Have you identified which information in the record constitutes personal information or personal health information, why it should be considered such and to whom it relates?
- Have you considered whether the record contains the requestor's personal information or personal health information? If this is so, did you consider the specific provisions of the applicable Act granting access to one's own personal information (section 31 of FOIP; 30 of LA FOIP; and 38 of HIPA)?
- Have you contacted the third party to see if there is any objection to the release of their information?²⁰

²⁰ Please see OIPC resource *Best Practices for the Public Bodies/Trustees for the Processing of Access Requests* for a discussion on the identity of the applicant as protected information.

EXCHANGING SUBMISSIONS BETWEEN THE PARTIES

A public body/trustee may ask to provide part or all of its written submission “in camera”, meaning that such material is provided to the Commissioner (and his staff) only and is not to be shared with the other parties. In such a case, the party making the request should provide reasons as to why part or all of a written submission should not be exchanged among the other parties. **Please note that the submission is separate and distinct from the record. Only the submission may be shared with the Applicant; and if appropriate, the Index of Record. The record will not.**

While the confidentiality provision in the Acts mandates that the Commissioner “*shall not disclose any information that comes to the knowledge of the Commissioner in the exercise of the powers, performance of the duties or carrying out of the functions of the Commissioner pursuant to this Act,*” the Acts also provides the discretion to disclose “*in the course of a review ..., any matter that the Commissioner considers necessary to disclose to facilitate the review.*”²¹ To facilitate the common law duty of fairness which requires that each party know the case to be met, an exchange of the submissions made by the parties to the review is reasonable and forms a rebuttable basis for a review by the OIPC. Therefore if a public body or trustee requests that its submission be held *in camera* it must provide persuasive reasons as to why the request should be granted.

The Commissioner decides whether to accept some or all of written submission in camera. The Commissioner will accept in camera the records or information a public body/trustee has withheld. The Commissioner will also accept in camera the personal information or confidential business information of other parties. If the Commissioner refuses an in camera submission, he will return the submission to the party, so that the party can decide what can be exchanged among the other parties.

A submission or part of a submission that a party wishes to have accepted by the Commissioner in camera should be sent under separate cover to the Commissioner. In that case, the submission should clearly be labeled either:

“Submission for the Commissioner only (“in camera” submission, not to be exchanged among the parties),

OR

“Submission to be exchanged among the parties”.

We will request instruction from the public body if in receipt of an unlabeled submission to be certain of intent, or if necessary, return for proper labeling. The Commissioner will not assume responsibility for what a party puts in a submission that is labeled, **“Submission to be exchanged among the parties”.**

²¹ FOIP section 46(3); LA FOIP section 48 adopts sections 45-47 of FOIP with necessary modifications.

AFFIDAVIT EVIDENCE

In reviews by the OIPC, evidence is provided to satisfy factual or legal requirements or to provide background information. Affidavit evidence may be desirable because, unlike other statements made to the Commissioner's office, an affidavit is evidence given under oath. In rare circumstances the Commissioner may choose to question a person under oath.²²

General

An affidavit is a written statement made under oath. Affidavits are a common method of providing evidence. An affidavit must be sworn or affirmed before a person who is qualified as a Commissioner for administering oaths or affirmations in the Province of Saskatchewan.

Use of Affidavit Evidence

On some occasions, the OIPC may request an affidavit to assist in determining factual issues in a review. This may be done in cases where there is a question as to whether a reasonable and adequate search has been undertaken for responsive records. An affidavit may be requested when the facts asserted by the public body are contradictory or inconsistent with other evidence. The Commissioner has the same ability as the Courts to compel production of documents or to take verbal evidence under oath [FOIP section 54; LA FOIP, section 43; HIPA section 46].

During a review, where a Portfolio Officer believes that an affidavit may help to resolve the issues, the Portfolio Officer may request a party to provide an affidavit to the OIPC. Where the OIPC requests an affidavit, the request will specify the relevant issues in the review and the types of information that should be included. The Portfolio Officer will seek consent from the party providing the affidavit to share a copy of that affidavit with the other party or parties involved in the review. If the party consents to sharing the affidavit, the OIPC will provide a copy to the other party or parties.

Even if the OIPC has not required the evidence in affidavit form, if a factual issue may be contentious, parties should consider providing their evidence concerning that issue to the OIPC in affidavit form.

An affidavit must contain information about the person swearing the affidavit, including the individual's name, residence and occupation. The affidavit must include an explanation of how he or she has knowledge of the evidence being presented in the affidavit (often satisfied by a description of the individual's qualifications and/or job responsibilities).

²² For example, see sections 54(2) of FOIP, 43(2) of LA FOIP and 46(2) of HIPA.

Affidavit evidence should be detailed enough to allow the OIPC and/or the other party or parties receiving it to fully understand its contents, and should, wherever possible, be confined to facts within the personal knowledge of the person swearing the affidavit. A sample format for an affidavit is attached.

For a sample of format for an affidavit, please refer to the Appendix at the end of this document.

INFORMAL RESOLUTION

Once all parties to a review have had an opportunity to make submissions, the Portfolio Officer assigned the file will complete his/her analysis and present these to the Commissioner for approval. Once approved, the Portfolio Officer will generally provide a decision letter to the public body/trustee with the OIPC's suggestions on how to proceed on the matter. This process provides the parties to a review and opportunity to informally resolve the review. If information resolution is successful, the review will be closed by letter only. If informal resolution is unsuccessful, a formal Report may be issued.

ISSUING A REPORT

In some circumstances, the Commissioner will issue a Report upon the completion of a review.²³ The Report will contain the findings and recommendations of the Commissioner. When a Report is issued by the Commissioner the parties to the review will receive an advance copy. After the parties to the review have received their advance copies, the Report will be posted on the Commissioner's website (www.oipc.sk.ca). This usually occurs approximately one or two weeks after the advance copies have been provided.

Within 30 days after receiving the Report, the public body/trustee must provide written notification to the applicant and the Commissioner of its decision to follow, or not to follow, the Commissioner's recommendations. Within 30 days of receiving the public body/trustee's decision, the applicant or third party may then appeal this decision to the Court of Queen's Bench.²⁴

Customarily, and in the interest of accountability, the Commissioner will identify in a Report the public body/trustee. In the interest of protecting the privacy of the applicant, the applicant's name will not be disclosed in a Report and that individual will be referred to as the Applicant.

²³ See section 55 FOIP, section 44 LA FOIP and section 48 HIPA.

²⁴ See section 57(1) FOIP, section 46(1) LA FOIP and section 50(1) HIPA.

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:



Office of the Saskatchewan Information and Privacy Commissioner

503 – 1801 Hamilton Street

Regina, Saskatchewan

S4P 4B4

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

APPENDIX

Sample Format for an Affidavit

AFFIDAVIT OF WITNESS

CANADA

Province of Saskatchewan

TO WIT:

I, (name of person swearing affidavit), of the (city, town, municipality) of (name of city, town or municipality), in the Province of Saskatchewan, (occupation)

Make oath and say:

1. That I am (description of individual including job title and employer where relevant). Because of (insert reasons), I have personal knowledge of the facts as set out in this affidavit.
2. (Set out relevant facts using single numbered paragraphs. Provide names and job titles where relevant.)
3. This affidavit is made for the purpose of reviewing (name of institution)'s decision with regard to (describe decision) and for no other purpose.

Sworn before me at the _____)

of _____)

in the Province of Saskatchewan)

this _____ day of _____)

signature of the person named above

A.D., 20 _____)

A Commissioner for Oaths, Notary Public or Justice of the Peace.