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Instructions for written inquiries



OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

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PURPOSE OF THIS GUIDANCE DOCUMENT

These instructions will help you participate in an inquiry conducted by the Office of the Information and Privacy Commissioner (OIPC).

Definitions for many of the terms used in these instructions are listed in the glossary at the end. You can find definitions of other terms in Schedule 1 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and section 1 of the *Personal Information Protection Act* (PIPA).

These are the general procedures that apply to most inquiries. However, not all cases are the same and procedures may differ depending on the circumstances. If you have any questions about our inquiry process after reading these instructions, please call the OIPC at (250) 387-5629 (or toll-free through the Enquiry BC line at 604-660-2421 in Greater Vancouver; and 1 800 663 7867 elsewhere in BC) and ask to speak with a **Registrar of Inquiries**.

WHY DOES THE OIPC HOLD INQUIRIES?

On occasion, **parties** cannot resolve their issues during the OIPC's review (i.e., investigation and mediation) of a public body or organization's decision under FIPPA or PIPA. In that case, the person or third party who initiated the review may request that the Commissioner decide the matter at an inquiry. The Commissioner may decide all questions of fact and law at issue at an inquiry.

Most inquiries are based on written materials and the parties do not appear in person or by telephone.

WHO PARTICIPATES IN AN INQUIRY?

The person or third party who requested a review of a public body's decision under FIPPA or an individual requesting a review of an organization's decision under PIPA are always provided an opportunity to participate in the inquiry. So too are the responding public body or organization. The Commissioner will also give a copy of the request for review and an opportunity to make representations during the inquiry to any other person that the Commissioner considers appropriate under s. 54(b) of FIPPA or s. 48 of PIPA.

From this point forward in the instructions, all of the inquiry participants are collectively referred to as parties. Parties may be represented at the inquiry by legal counsel or an agent.

HOW LONG DOES AN INQUIRY TAKE?

The time to complete an inquiry and issue an order (i.e., the decision) will vary depending on a number of factors including the complexity of the issues raised, how many other inquiries are underway, and whether there are any procedural delays, such as the need for additional submissions or other steps.

Please note that, when a request for review is received, the time frames set out at s. 56(6) of FIPPA and s. 50(8) of PIPA are adjourned to allow for mediation, as most files are resolved in the mediation period. If the file is not resolved, then the 90-day period begins once the inquiry commences. Additionally, the OIPC considers these time frames to be directory rather than mandatory, meaning the OIPC does not lose jurisdiction to conduct an inquiry if it takes longer than 90 days. This is based on a well-established rule of statutory interpretation.[1]

HOW DO I PREPARE FOR A WRITTEN INQUIRY?

Notice of inquiry

After a request for an inquiry is received, the Registrar sends all parties a notice of inquiry, a copy of the OIPC investigator's fact report, if one was produced, and instructions about when and where to send written submissions.

The investigator's fact report provides a summary of the agreed facts and the issues still in dispute, but deliberately excludes the **investigator's** opinion on the merits of the case or details about what happened during mediation. This is so the inquiry is not influenced by anything that happened during the mediation phase.

The notice of inquiry contains the following information:

- names and contact information of the inquiry parties, except in cases where a party's identity or contact information must be kept private from other parties;
- the sections of FIPPA or PIPA that will be considered at the inquiry;
- the issues to be decided; and
- the timeline for delivery and exchange of submissions.

New issues

If a party wants to add a new issue into an inquiry (i.e. an issue that was not listed on the notice of inquiry), they must first obtain the OIPC's permission to do so. In general, new issues raised in a party's inquiry submission without the OIPC's prior authorization will not be considered by the adjudicator.

[1] See, for example, *Peters v East 3rd Street North Vancouver Limited Partnership,* 2023 BCSC 879 at paragraph 27.

Requests to add a new issue must be made to the Registrar, in writing, not later than **two weeks** prior to the date for initial submissions. Requests should include detailed reasons.

The party making the request should copy all other parties to the inquiry. The Registrar will then give the other parties an opportunity to explain their position on the request (i.e. whether they consent, oppose or take no position).

A delegate of the commissioner will decide whether to approve the request. This may be a Registrar or an adjudicator.

The delegate will decide if it is fair to add the new issue to the inquiry. Relevant considerations include, but are not limited to:

- the positions of the parties on adding the new issue;
- whether it was feasible for the request to have been made earlier in the process, and if so, why the request to add the new issue was not made earlier;
- whether adding the new issue will prejudice any party in some way; and
- the nature of the new issue.

If the delegate decides to approve the request, the Registrar will amend the notice of inquiry to include the new issue. This may include an amended schedule for submissions.

Written submission

The purpose of a written submission is to allow each party an opportunity to persuade the Commissioner to see the evidence and the law in the way that the party does. The party who has the burden of proof is responsible for persuading the Commissioner of its claims about the case in dispute. Section 57 of FIPPA and s. 51 of PIPA clarify who has the burden of proof for most of the issues that arise in inquiries. Parties are encouraged to consult previous orders to determine how similar inquiries have been decided and on what basis.

The sequence of submissions is generally as follows:

1. The public body or organization provides the **initial submission**. Other parties may also be asked to provide an initial submission if the Registrar considers it appropriate. A party's initial submission should include its argument about how the relevant sections of the legislation apply in the circumstances of their case and explain how the evidence supports its position.

2. The person or third party who initiated the inquiry then provides a **response submission**. It should focus on the issues set out in the notice of inquiry and the information provided by the other parties in their initial submissions. Response submissions should not raise any new issues or exceptions that were not listed in the notice of inquiry.

3. The parties that provided initial submissions are then given the opportunity to provide a **reply submission**. The reply submission must only reply to what is contained in the response submission.

Submissions must also include:

- a copy of any supporting documentary evidence (i.e., letters, meeting minutes, transcripts, etc.);
- a copy of any website material referenced; and
- for any books, articles and academic journals, a copy of the relevant section, chapter or article and complete bibliographic information with the title, author, publisher and date of publication; and
- any approved *in camera* material (see below) must be clearly marked in accordance with the OIPC's decision and instruction regarding such material.

Please contact the Registrar directly if you have any questions or concerns about any of these requirements.

Evidence

Evidence is what a party provides, in addition to their arguments, during the inquiry to prove or disprove the issues in dispute. As OIPC inquiries are conducted through written submissions, parties can provide documentary evidence, such as **affidavits**, expert reports, news articles, meeting minutes, policy documents or contracts. The OIPC will also consider the record in dispute as evidence.

As an administrative tribunal, the OIPC is not bound by the ordinary rules of evidence; however, where a party is submitting an individual's written evidence, it is preferable in affidavit form. Whenever possible, the person with direct knowledge of the facts, or who made the statements, should be the one to swear to those facts or statements in an affidavit.

In camera submissions and evidence

The Commissioner may allow a party to submit parts of their evidence or arguments *in camera*. This means that only the Commissioner will see the *in camera* material, and the other parties will receive the evidence or arguments with the *in camera* material redacted. Further, the *in camera material* will not be revealed publicly in the order. If a party wishes to submit material *in camera*, they must first make a formal application to the Commissioner for permission to do so.

It is a fundamental principle of procedural fairness that a party has the right to know the opposing party's case and respond to it. Accepting material *in camera* departs from this general rule because a party cannot fully and fairly respond to arguments or allegations if they are not

told what those arguments or allegations are. Therefore, receiving permission to submit material *in camera* is an exception to the rule.

In general, the Commissioner may accept material *in camera* if it:

- would reveal the information in dispute in the inquiry; or
- is information that a public body or organization would be required or authorized to refuse to disclose under FIPPA or PIPA.

The Commissioner will also consider whether accepting material *in camera* is procedurally fair. In particular, the Commissioner will consider the effect that *in camera* material will have on the opposing party's right to know the case to meet and to respond to it. Accepting materials *in camera* also constrains the Commissioner's ability to provide clear and intelligible reasons. For these reasons, the Commissioner exercises the discretion to accept *in camera* material sparingly and only to the extent necessary to ensure fairness during the inquiry process.

Prior to submitting an application for permission to have material accepted *in camera*, parties should consider whether they meet all of the above criteria. To promote procedural fairness, parties should consider whether they can word their evidence or arguments in a way that presents their case fully and effectively without relying on *in camera* material. Parties should also identify and address any relevant legal tests to establish that the requested information could arguably be subject to an exception under FIPPA and PIPA.

If a party decides to apply to have material accepted *in camera*, the application must be delivered to the Registrar by the date set out in the notice of inquiry and must include:

a) a cover letter explaining why each individual portion of the proposed *in camera* material meets the criteria set out above. If a party wants the *in camera* material to be kept from only some of the other parties, this must be explained clearly; and

b) a full copy (i.e., not excerpts) of the submission and/or evidence with the proposed *in camera* portions clearly identified by highlighting, bolding or underlining. The proposed *in camera* material must not be blacked out because the Commissioner needs to see it in order to decide whether it should be accepted *in camera*.

The Registrar will inform all inquiry parties if the Commissioner decides to accept material *in camera*.

There is no need to request approval to submit the actual records in dispute *in camera*. The records and information in dispute will always be *in camera* because it would defeat the purpose of the inquiry to reveal them. See below for how the records in dispute must be prepared and submitted in the inquiry.

Mediation material

"Mediation material" refers generally to communications that relate to offers or attempts to resolve the matter during mediation. The Commissioner will not consider mediation materials

in reaching a decision and issuing an order. To preserve the integrity of the "without prejudice" nature of the mediation process, a party may not, without the written consent of the other parties, refer to or include in its submissions any mediation materials, including any opinions or recommendations an investigator expressed during mediation. However, it is permissible to refer to information which is not mediation material, for instance an investigator's decisions about the issues and the scope of the records that will proceed to inquiry, or an investigator's decision in complaints. Parties may include information about such factual outcomes in their submissions.

Precedent/legal research

The OIPC's orders, and any judicial review decisions regarding them, can be found on our website at oipc.bc.ca. In addition, if you want to do legal research, the Canadian Legal Information Institute has a website that provides a free searchable database of Canadian case law and legislation at canlii.org. If you use AI, you should check to ensure that you are not relying on AI generated hallucinations (e.g., made-up case authorities, quotes that do not exist and inaccurate summaries).

Exchanging submissions

As instructed by the notice of inquiry, parties must deliver a copy of their submissions to the OIPC and to the other parties. There may be cases where a party's identity or contact information must be kept private from other parties, and in these cases, the Registrar will accept and exchange submissions on behalf of parties.

Please contact the Registrar directly if you have any questions or concerns regarding the process of exchanging submissions. Any objections regarding the procedure for exchanging submissions must be raised with the Registrar upon receipt of the notice of inquiry.

Adjournment requests

Any request for an adjournment or extension of timelines should be made in writing to the Registrar (with reasons for the requested change) promptly, and no later than three (3) business days prior to the deadline in question. Before contacting the Registrar, parties should attempt to obtain the consent of the other parties to the proposed date change.

Preparing the records in dispute for the OIPC

A copy of the records in dispute should be sent to the OIPC along with the public body or organization's initial submission, and must be prepared as follows:

- The records must have clear page numbers.
- Information and pages that have been severed and withheld must be clearly marked by bolding, underlining or highlighting. The information that is in dispute must be clearly legible and must not be blacked-out or obscured by any markings. In short, the entire record must be visible to the Commissioner.

- The sections or subsections of FIPPA or PIPA being relied on to withhold information must be clearly marked immediately next to the information that was severed or adjacent to it in the margins.

It is also a best practice for the public body to provide a table listing the records in dispute along with the sections and subsections of FIPPA or PIPA that have been applied.

Correspondence with the OIPC

All inquiry-related correspondence should be directed to the attention of the Registrar of Inquiries. As a general rule, parties must copy each other on any inquiry-related correspondence they send to the OIPC. Applications to submit materials *in camera* (see above for more information about *in camera* materials), however, do not need to be copied to the other parties.

The OIPC's approach to anonymity at inquiry

The identities of the participants in an OIPC inquiry will typically be shared with the other participants. This ensures the inquiry process is as open and transparent as possible, with each participant receiving sufficient information to respond to the issues and know the other participants' positions. Therefore, the starting presumption is openness and full disclosure of participants' identities in an inquiry. However, in appropriate circumstances, the OIPC may allow a participant to conceal their identity from one or more of the other participants.

Making a request to participate anonymously

A participant requesting to be granted anonymity at inquiry (Requestor) must notify the OIPC's registrar of inquiries (Registrar) of their request within 30 days of being informed by the OIPC investigator that their matter has been forwarded to inquiry. However, there may be circumstances where the Registrar determines a later timeline is acceptable, for instance when the OIPC invites a participant into the inquiry after the 30 days has elapsed.

Involvement of the other inquiry participants

The Registrar will inform the other inquiry participants that there is a request to remain anonymous at inquiry and ask them if they want to make a submission about the anonymity request. If another participant wants to provide a submission, the Registrar will set a timeline for the exchange of submissions about the anonymity request.

The Requestor must provide contact details that the OIPC and the other participants can use for the purpose of exchanging submissions and communicating about the anonymity request. For example, the Requestor could create an email account with a generic and non-identifying email address or provide the contact information of someone who is willing to act on their behalf, such as a lawyer or other representative.

What information should the Requestor include in their submission requesting anonymity

It is up to the Requestor to provide the OIPC with specific and compelling reasons to support their request to remain anonymous. Therefore, at the very least, the Requestor's submission should include:

- A written explanation for why it is necessary to have their identity hidden in the inquiry process, including what aspects of their identity they want hidden and from which participants;
- What alternative measures the Requestor considered to address their concerns and why those measures will not work; and
- Any evidence or information the Requestor wants to provide to support their request for anonymity.

The following is a non-exhaustive list of factors the OIPC may consider in deciding whether to grant a request to participate anonymously. In addition to what is described above, participants may wish to address these and any other relevant factors in their submissions.

- Would disclosing the identity of the Requestor reveal the actual information in dispute in the inquiry?
- Is the degree and risk of harm from not allowing the Requestor to remain anonymous serious and well beyond a mere possibility or is it minor and speculative?
- Is the Requestor's identity protected in another proceeding (e.g., an order of a court or tribunal)?
- Is anonymity required to protect a whistleblower or the identities of confidential informants?
- Is it apparent that the Requestor's identity is already known to the other participants or is easily inferred based on the circumstances of the case?
- Would anonymity significantly undermine another participant's ability to understand the issues and another participant's position or prevent them from providing arguments about the issues in dispute?
- Would anonymity negatively impact the adjudicator's ability to provide reasons?
- Are there alternative methods to address the concerns underlying the Requestor's request for anonymity?
- Is the Requestor an organization or company?
- Is the Requestor acting in a professional capacity (e.g. journalist)?
- What is the nature of the information in dispute in the inquiry (e.g., sensitive personal information, technical business information)?

What if the Requestor wants to keep parts of their anonymity submissions confidential from the other participants?

In general, participants must openly exchange their submissions (i.e., their evidence and argument) with one another. That includes submissions in support of anonymity requests.

However, in special circumstances, the OIPC may allow a participant to make submissions that cannot be seen by the other participants. These are called *in camera* submissions. For further explanation about how to request permission to make *in camera* submissions see the section further above under the heading "In camera submissions and evidence".

The OIPC recognizes that in some cases, to explain the basis for requesting anonymity, a Requestor may need to provide information to the OIPC that might reveal their identity to the other participants. Accordingly, in the context of an anonymity request, in addition to the usual bases for granting permission to make *in camera* submissions, the OIPC may also accept information *in camera* if disclosing that information during the anonymity submission process would reveal the Requestor's identity.

The anonymity decision
Once all submissions are received from the inquiry participants, the OIPC will decide if the Requestor may remain anonymous. The Registrar will provide all participants with a copy of the OIPC's decision.

RESPECTFUL CONDUCT

The OIPC has the obligation to protect the integrity of its processes and to ensure that all participants are treated respectfully. All parties to OIPC proceedings, whether represented by lawyers or self-represented, are expected to behave and communicate respectfully and in compliance with the OIPC's directions. Disrespectful conduct during OIPC proceedings may result in the OIPC imposing restrictions on a party's continued participation in the proceedings and may even result in the cancellation of an inquiry.

For more information see the OIPC's *Respectful Conduct Policy,* which is available on our website under "OIPC Policies."

FREQUENTLY ASKED QUESTIONS

Who makes the decisions?
The Commissioner or an Adjudicator makes the decision.

What do I need to know about the decision-making process?
In general, the Commissioner will consider the following material when making a decision and accompanying order:

- the initiating request for access to, or correction of, records, any third party notice and response under ss. 23 and 24 of FIPPA, the public body or organization's responding decision, and the request that the Commissioner review the decision;

- the notice of inquiry;
- the investigator's fact report;
- the parties' submissions and supporting facts/evidence;
- copies of the records in dispute; and
- other material or correspondence relevant to the inquiry.

The Commissioner may request further submissions from parties where necessary or desirable.

The Commissioner's order making powers are found in s. 58 of FIPPA and s. 52 of PIPA. The Commissioner can, among other things, order a public body or organization to:

- withhold or disclose all or part of the requested record;
- refuse or give an individual access to all or part of his/her personal information;
- disclose the ways personal information has been used and the names of the individuals and organizations to whom it was disclosed;
- in the case of a credit reporting agency, disclose the source of the personal information; and
- reconsider its decision.

The Commissioner's orders are written and each party is sent a copy. Orders are also posted on the OIPC's website and, in some cases, the OIPC may issue a news release about the order.

Section 59 of FIPPA and s. 53 of PIPA provide that "not later than 30 days" after being given a copy of an order, the public body or organization concerned or the service provider to whom the order is directed, as applicable, must comply with the order unless an application for judicial review of the order is brought before that period ends. The definition of "day" in FIPPA and PIPA excludes Saturdays, Sundays and holidays.

Can I dispute the decision?

Orders are final and binding. However, a party may apply to the British Columbia Supreme Court for judicial review of an order before the end of the period for compliance set out in the order (s. 59 of FIPPA and s. 53 of PIPA).

A judicial review is a review of a decision that has been made by an administrative tribunal or an administrative decision maker. A Supreme Court Justice decides whether the tribunal or decision maker had the authority to make the decision it did.

How does the OIPC protect my privacy?

The notice of inquiry, investigator's fact report, and the order will name the public body or organization whose decision was the subject of the inquiry. They also name any parties who are businesses or other corporate bodies. Individual applicants or third parties who are individuals

are not usually named. An individual applicant's identifying information may also be removed from their request for review form or letter before it is sent to other parties.

The OIPC does not give the public access to the submissions or correspondence related to inquiries and will refer any request for a copy of such documents to the party who prepared them.

GLOSSARY

adjudicator: An individual to whom the Commissioner has delegated his or her inquiry and decision making duties, powers and functions.

affidavit: A written statement of facts sworn or affirmed before a commissioner for taking affidavits in British Columbia. The British Columbia Evidence Act specifies who can commission affidavits. Lawyers, notaries, government agents, and municipal city clerks, among others, are commissioners for taking affidavits in British Columbia.

applicant: A person who makes a request under FIPPA or PIPA for access to records. Also a person who makes a request for correction of personal information in a record that is held by a public body (or organization).

appropriate person: An individual or organization the Commissioner considers appropriate to receive notice of a request for review, under s. 54 of FIPPA or s. 48 of PIPA. In general, an appropriate person is someone who has a direct interest in the records or issues in dispute. For example, in the case of a third-party request for review, the individual who requested access to the records is considered to be an appropriate person. Appropriate persons are given an opportunity to make submissions during the inquiry.

evidence: Information submitted to prove or disprove a fact or allegation. This may include documents, physical evidence and recorded or written testimony. Evidence received in an inquiry by affidavit is sworn evidence. Evidence received in an inquiry without an affidavit is unsworn evidence.

inquiry: An adjudicative process in which a decision maker receives submissions from parties, considers and determines all questions of fact and law in relation to the review, and disposes of the issues in the form of a written order.

in camera: In private. Evidence, argument or records presented to the adjudicator in private are considered to be *in camera*.

investigator: An OIPC staff member responsible for conducting reviews, investigating complaints and mediating disputes between parties.

party: The person or organization who requested the inquiry, the responding public body or organization and any appropriate person.

Registrar of Inquiries: The OIPC staff member who is responsible for all administrative aspects of inquiries.

third party: In relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than the person who made the request, or a public body.

These guidelines are for information purposes only and do not constitute a decision or finding by the Office of the Information and Privacy Commissioner for British Columbia. These guidelines do not affect the powers, duties, or functions of the Information and Privacy Commissioner regarding any complaint, investigation, or other matter under PIPA.

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