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Instructions for Written Inquiries



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

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INTRODUCTION

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).

If you have any questions about our inquiry process after reading these instructions, please call the **Registrar of Inquiries** (Registrar) direct at 250-356-7953, or toll-free through the Enquiry BC line at 604-660-2421 (for Greater Vancouver) or 1-800-663-7867 (elsewhere in BC).

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.

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). 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.

HOW DO I PREPARE FOR A WRITTEN INQUIRY?

A. 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, 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.
- the timeline for delivery and exchange of submissions.

B. New Exceptions or Issues

Parties may not add new exceptions or issues into the inquiry without the OIPC's prior consent. Any request to add a new issue or exception must be made in writing to the Registrar prior to the date for initial submissions. If the OIPC decides to approve the request, the Registrar will amend the notice of inquiry and dates for submissions accordingly. Only in exceptional circumstances will the OIPC accept new exceptions or issues raised for the first time in a party's submission.

C. 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 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 you reference; 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.

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.

D. 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,¹ 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.

E. *In Camera* Submissions and Evidence

A party may want certain information to be considered privately – or *in camera* – by the Commissioner. If the Commissioner agrees to consider *in camera* evidence and arguments, they will be kept from the other parties and will not be revealed publically in the order.

If a party wishes to submit *in camera* material during the inquiry, it must first seek permission from the Commissioner to do so. Parties should limit the proposed *in camera* material to the minimum necessary to protect the information in question.

In order for the Commissioner to receive material *in camera* it must be information that:

- if revealed, would result in the disclosure of some or all of the details of the disputed information in the record; or
- discloses information that might itself be subject to an exception under FIPPA or PIPA.

A request for permission to submit *in camera* material must be delivered to the Registrar by the date set out in the notice of inquiry and include:

- a) a cover letter explaining why the material indicated should be accepted into the inquiry *in camera*. 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 copy of the proposed *in camera* submission and/or affidavits with the proposed *in camera* portions highlighted, bolded or underlined. The proposed *in camera* material must not be blacked-out because it needs to be visible to the Commissioner.

The Registrar will inform all inquiry parties if the Commissioner has agreed to accept material on an *in camera* basis.

¹ Evidence is provided at the same time, and in addition to, arguments.

There is no need to request prior approval to submit the actual records in dispute on an *in camera* basis. See below for how the records in dispute must be prepared and submitted in the inquiry.

F. 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 information or records related to the mediation process and attempts to settle the issues, including the OIPC investigator’s opinions or recommendations on the issues. If the party has not obtained written consent from the other parties to include mediation material, the Registrar will remove any mediation material from the submission.

However, it is permissible to refer to the factual outcomes of mediation, for example changes in the issues or legislative exemptions claimed, the scope of the disputed records, or the fees assessed by the public body. Parties may include information about such factual outcomes in their submissions.

G. 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.

H. 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.

I. Adjournment Requests

Once the inquiry is scheduled, the OIPC will only grant adjournments or extensions of timelines in exceptional circumstances. Any request for an adjournment or extension of timelines must 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.

J. 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 should 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.

K. 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.

FREQUENTLY ASKED QUESTIONS

A. Who makes the decisions?

The Commissioner or the Adjudicator makes the decision.

B. 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
- parties' submissions and supporting facts/evidence
- copies of the records in dispute
- 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
- 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.

C. 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.

D. 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 oral 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.

