KING'S BENCH FOR SASKATCHEWAN

Citation: 2025 SKKB 37

Date: **2025 03 07**
File No.: KBG-WB-00020-2023
Judicial Centre: Weyburn

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BETWEEN:

RANDOLPH DEAN SCHILLER

PLAINTIFF

- and -

SASKATCHEWAN HEALTH AUTHORITY

DEFENDANT

Appearing:

Randolph Schiller	self-represented plaintiff
Sara Knowles	for the defendant

JUDGMENT — DAWSON J.
MARCH 7, 2025

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[1] The applicant, Randolph Dean Schiller [applicant], brought an Originating Application against Saskatchewan Health Authority [SHA] for an order pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 [*LAFOIP*], s 47, seeking the following relief, as set out in the applicant's application:

a. That SHA be compelled to comply with s. 5, right of access, and s. 5.1, duty to assist, of the *LAFOIP*.

b. That SHA accept the recommendations of the Commissioner of

the Office of the Saskatchewan Information and Privacy Commissioner [OIPC] as set out in his report of October 5, 2023 [Review Report].

c. That SHA release “records of accuracy” and if no records for public exist, an order that SHA create a record extrapolated from collected data for public viewing.

d. That SHA be compelled to release records requested by Mr. Schiller through the *LAFOIP* as follows:

i) Provide PCR testing records of accuracy with respect to SARS-COVID-2, COVID-19 and all variants;

ii) Provide Whole Genome Sequencing Test records of accuracy with respect to SARS-COVID-2, COVID-19 and all variants;

iii) Provide SARS-Cov-2 Variant of Concern (NAAT) N501Y records of accuracy;

iv) Provide SARS-Cov-2 Variant of Concern Confirmation (sequencing) records of accuracy;

v) Provide policy and procedures for conducting COVID-19 PCR test;

vi) Provide primer sequences that were used in COVID-19 PCR test;

vii) Provide policy and procedures for conducting COVID-19 Whole Genome Sequencing test;

viii) Provide policy and procedures for conducting SARS-Cov-

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2 Variant of Concern (NAAT) N501Y test;

ix) Provide primer sequences for conducting SARS-COV-2 Variant of Concern testing;

x) Provide policy and procedures for conducting SARS-Cov-2 Variant of Concern Confirmation (sequencing) test;

e. Costs.

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[2] In response to the applicant's application, the SHA brought an application seeking to strike out some of the applicant's evidence and in particular:

a) An order pursuant to Rule 6-1(b) of *The King's Bench Rules* permitting this application to be made;

b) An order striking out:

i) The sections of the Affidavit of Randolph Dean Schiller underlined in the affidavit.

ii) Exhibits "T", "V", "W" and "X" to the Affidavit of Randolph Dean Schiller.

iii) The Written Questions filed by Mr. Schiller on January 3, 2024.

iv) The Statement Re Expertise and Expert Report filed by Mr. Schiller on January 17, 2024.

c) The SHA also sought costs in the amount of $1,500 and an order dispensing with the requirements of Rule 10-4.

[3] The applicant then brought an application seeking the following orders:

a. An order pursuant to Rule 6-1(b) permitting the application to be made.

b. An order striking out the sections of the Affidavit of Dr. Jessica Minion, in particular:

> 6. … It would take a Clinical Microbiologist weeks to months of work to summarize the data and write reports to make the raw data understandable or to explain its meaning to anyone external to Roy Romanow Provincial Laboratory.

c. Costs of $500.00.

[4] I will deal firstly with the applications to strike out portions of the parties' evidence.

I. SHA'S APPLICATIONS TO STRIKE

ISSUES

1. Should the Court order that Part 6 and Rule 6-1(b) of *The King's Bench Rules* apply to the application?

2. Should the Court strike out impugned sections of the Affidavit of Randolph Dean Schiller?

3. Should the Court strike out the Written Questions filed by the applicant on January 3, 2024?

4. Should the Court strike out the Statement Re Expertise and Expert Report filed by the applicant on January 17, 2024?

5. Should the Court award costs to SHA?

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DISCUSSION

1. Should the Court order that Part 6 and Rule 6-1(b) of The King's Bench Rules apply to the application?

[5] SHA seeks an order pursuant to Rule 6-1(b) allowing its application to strike to be made. Rule 6-1(b) states:

> 6.1 This Division:
>
> …
>
> (b) does not apply to originating applications unless the parties agree otherwise or the Court orders otherwise.

[6] Part 6 of *The King's Bench Rules* is designed to resolve issues and questions arising in the course of a Court action. The original application of the applicant here was brought by originating motion. The applicant filed affidavit and other evidence in support of his Originating Application. The SHA filed its Notice of Application to strike certain materials and portions of the applicant's affidavit filed in support of the Originating Application. The applicant then brought an application to strike portions of SHA's material. As both parties have brought applications to strike, one might assume that they each agree to the use of this process and Part 6. But even without stated agreement by the applicant and respondent, I am satisfied that it is appropriate to apply Part 6 to allow SHA to bring the application to strike material filed in support of the applicant's action commenced by originating motion. This is the process by which the parties and the Court must address whether the materials filed by each of the parties are in contravention of *The King's Bench Rules*. I order Part 6 to apply.

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2. Should the Court strike out impugned sections of the Affidavit of Randolph Dean Schiller?

[7] Rules 13-30 and 13-33 govern the content of an affidavit in proceedings in the Court of King's Bench. It provides as follows:

> **Affidavit to be on knowledge or belief**
>
> 13-30(1) Subject to subrule (2), an affidavit must be confined to facts that are within the personal knowledge of the person swearing or affirming the affidavit.
>
> (2) In an interlocutory application, the Court may admit an affidavit that is sworn or affirmed on the basis of information known to the person swearing or affirming the affidavit and that person's belief.
>
> (3) If an affidavit is sworn or affirmed on the basis of information and belief in accordance with subrule (2), the source of the information must be disclosed in the affidavit.
>
> (4) The costs of every affidavit that unnecessarily sets forth matters of hearsay or argumentative matter, or copies of or extracts from documents, must be paid by the party filing the affidavit.
>
> (5) If an affidavit based on information and belief is filed and does not adequately disclose the grounds of that information and belief, the Court may direct that the costs of the affidavit shall be paid personally by the lawyer filing the affidavit.
>
> (6) An affidavit filed in a subsequent proceeding for the same action must not repeat matters filed in earlier affidavits, but may make reference to earlier affidavits containing those matters.
>
> …
>
> **Scandalous matter**
>
> **13-33** The Court may order any matter that is scandalous to be struck out from any affidavit.

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[8] The Saskatchewan Court of Appeal in *Yashcheshen v Teva Canada Ltd.*, 2022 SKCA 49, [2022] 8 WWR 60 said the following about the requirements of affidavits:

> [75] Affidavit evidence must comply with the Rules. Rule 13–30(1) provides that affidavits, other than those filed in interlocutory applications, must be confined to facts that are within the personal knowledge of the affiant. An application to strike a statement of claim is not an interlocutory application. As such, affiants are generally limited to providing evidence within their personal knowledge.
>
> [76] Further, the evidence proffered must be relevant and should not contain speculation, argument, or conclusions. In addition, affiants are not generally entitled to express opinions, though there are exceptions to that rule.
>
> [77] A matter is speculative when it has no factual foundation; it is argumentative when it asserts how facts, or a disputed matter, should be resolved; and it is conclusionary when it suggests an outcome. Opinion evidence is evidence of what a witness thinks, believes, or infers as a result of a given set of facts.

[9] Justice Tholl in *Thomas v Input Capital Corp.*, 2020 SKCA 67, 82 CBR (6th) 9 said the following about how a Court should deal with an application to strike:

> [32] In any Chambers application, it is necessary for the record to be clear with regard to the evidence that is admitted and that which is not. The reasons for this proposition, and the associated procedure, are succinctly described in *Wongstedt v Wongstedt*, 2017 SKCA 100, [2018] 4 WWR 82 [*Wongstedt*]:
>
>> [38] … Where objections are taken to affidavit evidence, the judge who hears them should briefly articulate which portions of a contested affidavit are not in conformance with *The Queen's Bench Rules* and what has been struck from the record. There are many ways this could be done effectively … but the key is to plainly identify what is or is not in evidence, giving a very short reason for striking any material that has been struck from the record (i.e., argument, speculation, opinion, irrelevant, rhetoric, hearsay, etc.). Indeed, a judge may

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> simply strike out offending material by hand, noting the reason therefor, on the affidavit itself.

[10] With this law in mind, I will deal with the impugned portions of Mr. Schiller's evidence that SHA seek to strike:

a) Paragraphs 12 and 16 of Mr. Schiller's affidavit:

> 12. …The SHA holds little regard for the law, nor for the public it serves.
>
> 16. … The SHA continues to ignore provincial legislation.

- The applicant in paras. 12 and 16 simply makes assertions of opinion and argument. These statements are argumentative, amount to opinion and are scandalous. These two statements are struck from the affidavit.

b) Exhibit "T" (referenced at para. 26):

- This is a duplicate of Exhibit "O" and should be struck for redundancy.

c) Paragraph 27:

> 27. ….the Saskatchewan Health Authority's poorly written letter …

- The adjectives "poorly written" amount to no more than opinion and are argumentative. They are struck.

d) Paragraph 28 and Exhibit "V" references a Lisbon Court of Appeal decision which suggests the scientific community's conclusions on PCR efficacy should be questioned:

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- The conclusions made by the Lisbon Court of Appeal are not evidence and are not within the personal knowledge of the applicant and this paragraph is struck.

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e) Paragraph 29 and Exhibit “W” asserts the applicant’s belief that the SHA misreported his COVID symptoms. Exhibit “W” is an investigation profile report in relation to the applicant:

> 29. On or about March 9, 2022, I received records concerning e-Health and Panorama audits. Within those health records, many documents stated that I had a confirmed case of Coronavirus on March 16, 2021 (tested March 15, 2021); and that my **Coronavirus symptoms began March 01, 2021**. Those same documents also stated I had a **cough, nasal congestion, and pharyngitis**. Those same documents stated: **“Transmission Start date of February 27th.”**
>
> [Emphasis in original]

- This paragraph and Exhibit “W” are struck as they are not relevant to the application and are immaterial to the application.

f) Paragraph 30 is the applicant’s assertion that he was mandated to quarantine during a period of time:

> 30. I make statement that I was asymptomatic during the period of February 27th, 2021 thru [*sic*] the period I was mandated to quarantine against my rights and freedoms as guaranteed within the *Canadian Charter of Rights and Freedoms, 1982*; and/or the *Canadian Bill of Rights, 1960*.

- This is immaterial and irrelevant to the application and is struck.

g) Paragraphs 31- 33 and Exhibit “X” relate to SHA’s response to a different access to information request:

31. On or about November 4, 2023, I received a response and records from the SHA concerning *FOIP* request 23-24-01014. My request asked:

> 1. With respect to Randolph Dean Schiller and COVID nasal swab, provide the Chain of Custody documents from time of collection on March 15, 2021 through the periods of assorted testing (PCR testing, Molecular Diagnostic testing, SARS-COVID-2 NAAT N501Y testing. SARS-COVID-2 VOC Sequencing testing. DNA testing; and any or all SHA testing, including third-party testing) -- until said nasal swab was destroyed.
>
> 2. Provide all policies associated with SAR-COVID-2 and or the associated variants with respect to nasal swab testing chain of custody.
> Exhibit X PW To Requestor 23-24-01014 redacted.pdf

32. Documents within FOIP request 23-24-01014, stated I was **asymptomatic during my COVID test** on March 15, 2021.

33. Furthermore, the SHA's response letter also claimed:

We do not have a written documentation that outlines the chain of custody with respect to nasal swabs. The record that you are requesting does not exist and this notification has been provided pursuant to clause 7(2)(e) of the LAFOIP.

[Emphasis in original]

- That access to information request referred to is not the subject of the application or the Review Report of the OIPC that gives rise to this matter and is irrelevant. Paragraphs 31-33 are struck for immateriality.

h) Paragraph 34 of the applicant's affidavit states:

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> "both entities have a practice of not fulfilling their duties to share records, especially in a timely fashion"

- This is opinion and as such is struck.

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3. Should the Court strike out the Written Questions filed by the applicant on January 3, 2024?

[11] SHA contends that the Written Questions should be struck pursuant to Rule 5-32 and Rule 3-51 of *The King's Bench Rules*.

[12] Rule 5-32 provides an applicant with the right to serve written questions in conjunction with an application. Rule 3-51, however, states that Parts 4 and 5 of *The King's Bench Rules* do not apply to actions commenced *via* originating application unless by agreement of the parties or order of the Court. The applicant here has not sought an order of the Court that Parts 4 and 5 apply to his Originating Application.

[13] Rule 3-53 gives the Court discretion to have Parts 4 and 5 of *The King's Bench Rules* apply to originating applications. The principles which underlie that discretion were set out in *Hildebrand v Hattum,* 2021 SKQB 136:

> [44] The modern context established by the authorities which have interpreted the new originating application Rules have provided a framework from which to determine the way forward. It is accepted that a chambers judge considering an originating application is entitled to make findings of credibility based on disputed affidavit evidence in some originating application-based matter. However, the primary basis on which this should proceed is that there is a sufficient amount of confidence given the evidence presented, the issues undecided, and the scale of the interests at stake that a fair and just determination can be made without additional procedural requirements such as exchange of documents, questioning or *viva voce* evidence. With this goal in mind the issues should be considered in the context of the evidence advanced and the applicable law.

> [45] One should not lose sight of the foundational rules nor the concern addressed through *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 even though that decision was in the context of a summary judgment decision. The foundational rules confirm that where justice might be accomplished with a less involved and onerous process, that ought to be utilized. However, the goal of ensuring justice is accomplished in light of the issues at play, the amount that is involved in the contest and the complexity of the facts underlying such determination should not be compromised if that is not the appropriate outcome.
>
> [46] It is also important to keep in mind that Rules 3-51 and 3-53 of *The Queen's Bench Rules* provide a discretion to the court including whether to order that aspects of Part 4 and Part 5 of the Rules ought to apply to an originating application. This discretion extends to the court ordering that any Rules applying to an action by statement of claim apply to the action started by originating application. These should, however, only be applied where a triable issue that is not capable of a fair and just resolution on the basis of the materials submitted, given the scale of the interests at issue, exists. Where additional procedural steps should be put in place in order to enable an appropriate, fair and just result then that should happen.
>
> [47] It is also important, therefore, to consider the applicable law as against the evidence presented, the facts which can be ascertained and the facts which must still remain undecided to determine if a fair and just determination can be made in the circumstances or whether a genuine issue for trial remains.
> [Emphasis added]

[14] Rule 5-32(6) provides that if a party objects to a written question on the grounds that it will not further the purpose and intention of these Rules, it may apply to the Court to strike out the written questions. In *Globe-Elite Electrical Contractors Ltd. v Centre Square Developments GP Inc.*, 2019 SKQB 197, the Court applied the criteria articulated in *Tse-Ching v Wesbild Holdings Ltd.* (1994), 98 BCLR (2d) 92 (BCSC) identifying the requirements for and limitations on questions. They include that they must be relevant to a matter in issue in the action, are not to be in the nature of cross-examination, should not include a demand for the discovery of documents, and should

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not duplicate particulars. The purpose must be to obtain admissions of fact in order to establish the applicant's case.

[15] Here, the applicant's Written Questions are a reiteration of the applicant's original access to information request and as such, are a duplication. None of the questions nor answers to such questions will assist the Court in arriving at a conclusion on the application. They do not meet criterion for questions. As such, I do not see any persuasive reason to rebut the inapplicability of Parts 4 of 5 here. The Written Questions are struck and the applicant's application to have the questions answered is dismissed.

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4. Should the Court strike out the Statement Re Expertise and Expert Report filed by the applicant on January 17, 2024?

[16] The SHA contends that the Expert Report of Dr. Natalie K. Bjorklund-Gordon should be struck pursuant to Rule 3-51 or in the alternative, pursuant to Rules 5-40(2) and (4) and Rule 5-41(1).

[17] Rule 3-51 has been discussed earlier and so I will not reiterate its function. Rules 5-40(2) and (4) and Rule 5-41(1) state the following:

> 5-40(1)If a party intends to use the evidence of an expert at trial, the expert's report must be served as described in subrule (2).
>
> (2) Unless the Court otherwise orders, expert reports must be served as follows:
>
> > (a) a party who intends to use the evidence of an expert at trial shall serve on each of the other parties the report of that party's expert not less than 60 days before the date scheduled for a pre-trial conference; and
> >
> > (b) the other party or parties who intend to use the evidence of an expert at trial in rebuttal shall serve their expert's rebuttal report, if any, not less than 30 days before the date scheduled for a pre-trial conference.
>
> …

> (4) Unless the Court otherwise orders, expert evidence must not be presented at trial unless subrule (2) or (3) has been complied with.
>
> 5-41(1) A party who receives an expert's report shall notify the party serving the report of:
>
>> (a) any objection to the expert's qualifications, or the admissibility of the expert's report, that the party receiving the report intends to raise at trial; and
>>
>> (b) the reasons for the objection.

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[18] SHA objects to Dr. Bjorklund-Gordon's qualifications. It takes the position that it does not agree to the Statement Re Expertise or Expert Report.

[19] The Expert Report is prepared by Dr. Bjorklund-Gordon who is a veterinarian. While she may be knowledgeable in genetics, that knowledge applies to animals and it has not been established how it is relevant to the application. Her opinion relates to issues about how the Government of Saskatchewan used PCR testing during the pandemic and it has no relevance as to whether the documents should be given to the applicant. The Statement Re Expertise and Expert Report are struck.

5. Should the Court award costs to SHA?

[20] SHA is pursuing costs on two bases: First, that the affidavit of the applicant falls within Rule 13-30(4) in that it "unnecessarily sets forth matters of hearsay or argumentative matter" and should be struck pursuant to that provision. Second and in the alternative, that the Court should exercise its discretion under Rule 11-1 to award costs in the amount of $1,500.00.

[21] Having regard to my findings with respect to the Affidavit of Mr. Schiller, the striking of the Written Questions, and the striking of the Statement Re Expertise and Expert Report, it is apparent that costs should be ordered here. Costs of $500.00 are ordered to be paid by Randolph Dean Schiller to the respondent Saskatchewan

Health Authority.

II. APPLICANT'S APPLICATION TO STRIKE SECTIONS OF THE AFFIDAVIT OF DR. JESSICA MINION

ISSUES

1. Should the Court order that Part 6 and Rule 6-1(b) of *The King's Bench Rules* apply to the application?

2. Should the Court strike out impugned sections of the Affidavit of Dr. Jessica Minion?

3. Should the Court award costs to SHA?

DISCUSSION

1. Should the Court order that Part 6 and Rule 6-1(b) of The King's Bench Rules apply to the application?

[22] The applicant filed an application to strike out portions of the Affidavit of Dr. Jessica Minion. The evidentiary rules which applied to SHA's application to strike referred to above also apply here. For the reasons expressed earlier, I am satisfied that it is appropriate to allow Part 6 to apply to this application.

2. Should the Court strike out the impugned sections of the Affidavit of Dr. Jessica Minion?

[23] The applicant contends that a portion of para. 6 of Dr. Minion's Affidavit should be struck out because it contains opinion. Specifically, the impugned portion reads as follows:

> 6. … It would take a Clinical Microbiologist weeks to months to work to summarize the data and write reports to make

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> the raw data understandable or to explain its meaning to anyone external to Roy Romanow Provincial Laboratory.

[24] Dr. Minion is a medical doctor that specializes in Medical Microbiology. She has served as the Division Head of Microbiology in Regina for the SHA. She is the Provincial Clinical Lead of Public Health, in the Department of Laboratory Medicine of the SHA. In that capacity she oversees laboratory testing and has a personal knowledge of the facts that she attests to.

[25] Here the applicant made a request for a number of records and also seeks an order that SHA be ordered to extrapolate data from SHA records and prepare a document that is not in existence. Dr. Minion affirms that she oversees laboratory testing for diseases and has personal knowledge of the matters deposed to. Dr. Minion identifies that it is not clear what information the applicant is seeking but if he is seeking reports that summarize and explain the validation studies to which the raw spreadsheets data pertains, it would take weeks to months to summarize that data and write reports. Clearly as the principal lead she would be aware of the burden of time and effort to create a document that is not part of the record keeping of the SHA. The paragraph is not struck. The application is dismissed.

3. Should the Court award costs to SHA?

[26] The applicant is not entitled to costs on the application to strike the affidavit.

III. APPLICANT'S APPLICATION PURSUANT TO S. 46 OF THE *LAFOIP*

Background Facts

[27] On June 14, 2022, the applicant made an Access to Information Request pursuant to s. 6 of the *LAFOIP* for information possessed by the SHA. The information

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requested by the applicant included the following:

- PCR testing records of accuracy with respect to SARS-COVID-2; COVID-19 and all variants.

- Provide Whole Genome Sequencing Test records of accuracy with respect to SARS-COVID-2; COVID-19, and all variants.

- Provide SARS-Cov-2 Variant of Concern (NAAT) N501Y records of accuracy.

- Provide SARS-Cov-2 Variant of Concern Confirmation (sequencing) records of accuracy.

- Provide policy and procedures for conducting COVID-19 PCR test.

- Provide primer sequences that were used in COVID-19 PCR test.

- Provide policy and procedures for conducting COVID-19 Whole Genome Sequencing test.

- Provide policy and procedures for conducting SARS-Cov-2 Variant of Concern (NAAT) N501Y test.

(Affidavit of Randolph Dean Schiller, Exhibit “A”)

[28] SHA provided 1201 pages of records in response to the applicant’s original request.

[29] On March 23, 2023, the SHA identified that it withheld redacted portions of the requested records pursuant to ss. 14(1)(m), 16(1)(d) and 17(1)(b) of *LAFOIP*, as

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well as ss. 27(1) of *The Health Information Protection Act*, SS 1999, c H-0.021. SHA indicated that it redacted personal health information that appeared in the records. It identified that it also redacted file path addresses/links, database system usernames, passwords and barcodes. SHA did not provide "records of accuracy" and advised the applicant that no such records existed and that the SHA was not obligated pursuant to the *LAFOIP* to create a record that does not exist.

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[30] The Saskatchewan OIPC reviewed the matter and issued a Review Report. At paras. 67-69, the OIPC stated the following:

> [67] I recommend that SHA continue to withhold the usernames and passwords it severed pursuant to subsection 14(1)(m) of the LA FOIP and release the rest of the records to the Applicant within 30 days of receiving this Report.
>
> [68] I recommend that SHA continue to withhold the usernames and passwords it severed pursuant to subsection 17(1)(b) of the LA FOIP and release the rest of the records to the Applicant within 30 days of receiving this Report.
>
> [69] I recommend that SHA determine if the requested information described in paragraph [54] of this Report is raw information or not by following the search guidelines described in paragraph [51] of this Report, and if responsive records are found, to provide them to the Applicant within 30 days of receiving this Report after applying any relevant exemptions.

[31] SHA accepted the recommendations of the OIPC in part. SHA continued to withhold personal health information as the OIPC confirmed it should. SHA advised that it was going to continue to withhold file path addresses/links, database system usernames, passwords and barcodes.

[32] The SHA in response to the applicant's request for records of accuracy and the Saskatchewan OIPC recommendation that the SHA determine if the requested information is raw data and if there are such records to provide them, took the position that no such records existed and the responsive information would have to be extracted

from the records to create a record and that it was not reasonably practicable to do so. SHA also took the position that it was not obligated to create a record.

[33] The applicant then filed the within Originating Application.

[34] The applicant's affidavit filed in support of his Originating Application confirms that he has admitted that he received certain of these records. In para. 19 of the applicant's affidavit and Exhibit "Q", attached to para. 19, the applicant identifies that he has received the following information from the SHA in response to his requests:

(i) Policy and procedures for conducting COVID-19 PCR test;

(ii) Policy and procedures for conducting COVID-19 Whole Genome Sequencing test;

(iii) Policy and procedures for conducting SARS-Cov-2 Variant of Concern (NAAT) N501Y test; and

(iv) Policy and procedures for conducting SARS-Cov-2 Variant of Concern Confirmation (sequencing) testing.

As the above information has been provided to the applicant, it is not necessary to consider the application in relation to that information.

[35] That leaves the following information that the applicant is seeking as outlined in the originating motion:

c. That SHA release "records of accuracy" and if no records for public exist, an order that SHA create a record extrapolated from collected data for public viewing.

d. That SHA be compelled to release records requested by Mr. Schiller through the *LAFOIP* as follows:

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i) Provide PCR testing records of accuracy with respect to SARS-COVID-2, COVID-19 and all variants;

ii) Provide Whole Genome Sequencing Test records of accuracy with respect to SARS-COVID-2, COVID-19 and all variants;

iii) Provide SARS-Cov-2 Variant of Concern (NAAT) N501Y records of accuracy;

iv) Provide SARS-Cov-2 Variant of Concern Confirmation (sequencing) records of accuracy;

. . .

vi) Provide primer sequences that were used in COVID-19 PCR test;

. . .

ix) Provide primer sequences for conducting SARS-COV-2 Variant of Concern testing;

. . .

[36] SHA's complete response in relation to each of the requests in the balance of the applicant's Originating Application is set out in para. 2 of SHA's brief.

ISSUES

1. Should the Court exercise its discretion under ss. 47(5) of *LAFOIP* to order the head of SHA to provide the requested records?

a) Was the SHA justified in withholding information under

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ss. 14(1)(m) and ss. 17(1)(b) of the *LAFOIP*?

b) Did the SHA conduct a reasonable search for records?

2. Should the Court exercise its discretion under Part 11 of *The King's Bench Rules* to award costs?

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DISCUSSON

1. Should the Court exercise its discretion under ss. 47(5) of LAFOIP to order the head of SHA to provide the requested records?

[37] The applicant, in his material, has made apparent that the applicant is not seeking the personal health information contained in the records and I need not address that.

[38] Section 46 of *LAFOIP* provides a statutory right of appeal from the decision of an institution head. Section 47 sets out the powers of the Court and establishes that such an appeal will be heard on a *de novo* basis (ss. 47(1)(a)). As such, standard of review is not at issue.

[39] Justice Gabrielson in *Hande v University of Saskatchewan* (21 May 2019) Saskatoon, QBG-SA-01222-2018 (Sask QB) as quoted in *Saskatoon Police Service (Re)*, 2024 CanLII 119903 (Sask IPC) said the following about the purposes of the legislation:

> [15] As can be seen, the *Act* attempts to strike a balance between the public's right to access information which the Government of Saskatchewan (or a body holding delegated authority from the government) has to ensure accountability to persons affected by the information and the corresponding need to protect the privacy of individuals or other legitimate interests that may be impacted by the release of such material. It starts with the proposition that a person has access to all government records subject to limitations established by the *Act*. The

> limitations are set out in Part III of the *Act* which is entitled "Exemptions". The exemptions define circumstances under which the head of a government or a government institution is required to refuse access to information contained in a record. Part IV of the *Act*, which is entitled "Protection of Privacy" deals with the balancing of the right of access to information with the protection of the interests of the individual in their own personal information.

[40] In *Tompson v Saskatoon*, 2023 SKKB 247 [*Tompson*] Danyliuk J. considered the process of an appeal under s. 46 of the *LAFOIP*. He stated, and I quote in detail:

> ***2. What is the proper scope and process of this appeal under s. 46 of LAFOIP?***
>
> [19] This appeal is not a standard appeal on the record nor is it a classic judicial review application. It is a *de novo* proceeding, taken pursuant to ss. 46 and 47 of *LAFOIP* which read as follows:
>
>> 46(1) Within 30 days after receiving a decision of the head pursuant to section 45 that access is granted or refused, an applicant or a third party may appeal that decision to the court.
>>
>> (2) A head who has refused an application for access to a record or part of a record shall, immediately on receipt of a notice of appeal by an applicant, give written notice of the appeal to any third party that the head:
>>
>>> (a) has notified pursuant to subsection 33(1); or
>>>
>>> (b) would have notified pursuant to subsection 33(1) if the head had intended to give access to the record or part of the record.
>>
>> (3) A head who has granted an application for access to a record or part of a record shall, immediately on receipt of a notice of appeal by a third party, give written notice of the appeal to the applicant.
>>
>> . . .
>>
>> 47(1) On an appeal, the court:

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(a) shall determine the matter *de novo*; and

(b) may examine any record *in camera* in order to determine on the merits whether the information in the record may be withheld pursuant to this Act.

(2) Notwithstanding any other Act or any privilege that is available at law, the court may, on an appeal, examine any record in the possession or under the control of a local authority and no information shall be withheld from the court on any grounds.

(3) The court shall take every reasonable precaution, including, where appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid disclosure by the court or any person of:

(a) any information or other material if the nature of the information or material could justify a refusal by a head to give access to a record or part of a record; or

(b) any information as to whether a record exists if the head, in refusing to give access, does not indicate whether the record exists.

. . .

(5) Where a head has refused to give access to a record or part of it, the court, if it determines that the head is not authorized to refuse to give access to the information or part of it, shall:

(a) order the head to give the applicant access to the record or part of it, subject to any conditions that the court considers appropriate; or

(b) make any other order that the court considers appropriate.

(6) Where the court finds that a record falls within an exemption, the court shall not order the head to give the applicant access to the record, regardless of whether the exemption requires or merely authorizes the head to refuse to give access to the record.

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…

> [20] I reviewed the proper process under a *LAFOIP* appeal in *Britto v University of Saskatchewan*, 2017 SKQB 259 [*Britto 2017*]. That case has been adopted and applied in other decisions and I adopt it here. On the question of process, paragraphs 18 to 21 apply:
>
> > [18] I take these provisions to mean that **under the *Act* there is, essentially, a two-step process involved in an appeal to this court. First, under s. 47(1)(b), this court decides whether to review the disputed records *in camera*. If so, then the court goes on to review the records in light of the parties' submissions and the applicable law, then determine whether any records ought to be released to the applicant** pursuant to s. 47(5) or make any other appropriate order. The court may also declare records exempt from disclosure (s. 47(6)).
> >
> > [19] Further, I agree with University counsel's submission that **because it is a *de novo* process and because the Commissioner's findings are non-binding, there is no duty of substantial deference to the Commissioner's decision**. Members of this court are entitled, even obligated, to look at this matter afresh.
> >
> > [Emphasis in original]

[41] The principles arising from *Tompson* include that this is a *de novo* proceeding. No deference is given to the OIPC Commissioner's decision. There is a two-step process: the first is that the Court determines whether to review the records *in camera*. Secondly, the Court determines whether any records are to be released to the applicant or whether any other appropriate order ought to be made.

<u>Step 1: Whether to view the records *in camera*</u>

[42] SHA has identified that it has redacted personal information. It appears that the redaction of personal information is not in issue and the personal information is not being sought by the applicant.

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[43] SHA has also redacted the file path addresses/links, database system, usernames, password and barcodes on the documents it has provided to the applicant. The question is whether the Court should view the records of the redacted file path addresses/links, database system, usernames and barcodes *in camera.*

[44] The Affidavit of Mr. Vivek Verma, Chief Security Officer for eHealth Saskatchewan attests that the redacted information consists of IT infrastructure information such as file paths, host/server names, directory structures, credentials and the like. Mr. Verma attests that such information, if produced to someone outside of SHA, could be used by individuals who have access to SHA's systems to facilitate and/or expedite a security breach of the system.

[45] In this instance, it is not necessary for the Court to review the file path addresses/links, database system, usernames and barcodes *in camera*. The nature of the information is clear and seeing the particular file paths etc. is not of assistance. It is not necessary for the Court to review those records *in camera*.

[46] The second type of records relate to the applicant's request for records of accuracy. There are no "records of accuracy." SHA identified that it did not provide the applicant with the raw data as it is not clear that the raw data is what the applicant is requesting. Rather it appears that he seeks to have SHA create records from the raw data. If the applicant seeks to have records created from raw data, then the request does not depend on the raw data records at issue and so there is no need for the Court to review them. If the applicant is seeking the raw data, he has not made that clear, nor has he made it clear the specific raw data he is seeking and so I do not intend to look at the records on the assumption that the applicant is seeking specific data when such specific data has not been identified. If that is the case, the applicant can bring an application for raw data, specifying with particularity what he seeks access to.

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[47] As such, it is not necessary for the Court to review the records *in camera*, on this application.

Step 2: Should any of the records be released to the applicant

[48] SHA takes the position that it need not produce any further records on this application.

a) Was the SHA justified in withholding information under ss. 14(1)(m) and ss. 17(1)(b) of the LAFOIP?

[49] SHA takes the position that it is not required to provide the file path addresses/links, database system, usernames, passwords and barcodes on the records based on ss. 14 and 17 of the *LAFOIP*.

[50] Section 14(1)(m) of the *LAFOIP* states:

> 14(1) A head may refuse to give access to a record, the release of which could:
>
> . . .
>
> (m) reveal the security arrangements of particular vehicles, buildings or other structures and systems, including computer or communication systems, or methods employed to protect those vehicles, buildings, structures or systems.

[51] It is of note that in the OIPC Review Report, the Commissioner recommended that the SHA continue to withhold usernames and passwords, since they could reveal security methods employed to protect SHA's computer and communication systems. While the OIPC's position is not binding on this Court, that position appears in line with ss. 14(1)(m) of the *LAFOIP*.

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[52] It is clear from Mr. Verma's affidavit that providing usernames and passwords, file path addresses/links, database system, usernames, passwords and barcodes would reveal the security arrangements of computer and communication systems or methods employed to protect those systems.

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[53] Further, ss. 17(1)(b) of the *LAFOIP* states*:*

> **17(1)** Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclosed:
>
> …
>
> (b) financial, commercial, scientific, technical or other information:
>
> (i) in which the local authority has a proprietary interest or a right of use; and
>
> (ii) that has monetary value or is reasonably likely to have monetary value;

[54] Section 17 says that access can be refused where it "could reasonably be expected to disclose" information listed in the exemptions. This phrase was considered in the context of harm-based privacy exemptions in a case from Ontario dealing with Ontario legislation. In *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner),* 2014 SCC 31, [2014] 1 SCR 674 [*Ontario Safety*] the Court said:

> [54] This Court in *Merck Frosst* [2012 SCC 3, [2012] 1 SCR 23] adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how

> much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences".

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[55] While the exceptions contained in ss. 17(1) are not all harm-based exceptions, the excerpt from *Ontario Safety* provides a useful framework for consideration of that phrase.

[56] SHA states that "the redacted information would reveal the security arrangements of the computer systems, as it shows a file path or a password" (Review Report at para. 22). The Affidavit of Mr. Verma sets out at para. 4(b) that the redacted information could be used by persons who already have access to SHA's systems, but do not currently have access to the redacted information, as well as malicious actors should they be able to breach the SHA's safeguards and systems.

[57] Subsection 17(1)(b) of the *LAFOIP* permits refusal of access in situations where release of a record could reasonably be expected to disclose financial, commercial, scientific, technical or other information which the local authority has a proprietary interest or a right of use and which has monetary value or is reasonably likely to have monetary value. The information that SHA has withheld includes information technology, infrastructure information such as host/server names, directory structures, credentials, file path addresses/links, database system, usernames, and passwords.

[58] Consideration of ss. 17(1)(b) of the *LAFOIP* entails a three part test:

1. Does the information contain financial, commercial, scientific, technical or other information?

[59] Technical information is information relating to a particular subject, craft or technique. Examples are system design specifications and the plans for an

engineering project. It is information belonging to an organized field of knowledge, which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering, or electronics. It will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.

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[60] The information withheld by SHA under ss. 17(1)(b) includes “file path addresses/links and barcodes within the documents that describe the process of accessing information/data stored in specific databases on a computer system” (Review Report at para. 24). The Commissioner determined this information qualified as technical information.

[61] The redacted information consists of IT infrastructure information, including host/server names, directory structures, credentials, barcodes, addresses/links, data system usernames and passwords and file paths. I am satisfied that the redacted information sought is technical information within the meaning of ss. 17(1)(b).

2. Does the local authority have a proprietary interest or a right to use the information?

[62] There are two parts of this element which require clarification: “proprietary interest” or “right of use”. A proprietary interest “is the interest held by a property owner together with all appurtenant rights, such as a stockholder’s right to vote the shares” (Bryan A. Garner, *Black’s Law Dictionary*, 11th ed (St. Paul, Minn.: West Group, 2019) at 1474). A right of use “means a legal, equitable or moral title or claim to the use of property, or authority to use” (Office of the Saskatchewan Information and Privacy Commissioner, *Guide to LAFOIP*, March 2023 [*Guide to LAFOIP*] Chapter 4, “Exemptions from the Right of Access” at page 144, citing an adaptation from *The Shorter Oxford English Dictionary on Historical Principles*, vol 1

(Oxford University Press: 1973) at 2582). In effect, this means the local authority must demonstrate rights to the information.

[63] The Commissioner found that the SHA had not established a proprietary interest in the withheld information relying on the following excerpt from Order MO-1746 of the Ontario Information and Privacy Commissioner's Office:

> The Assistant Commissioner has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary in it either in a traditional intellectual property sense – such as copyright, trademark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplies lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. …
>
> (*Guide to LAFOIP*, c 4, at 143)

[64] However, the Affidavit of Mr. Verma addresses this. He attests at para. 4 that the redacted information creates "an instruction manual for any person with access to SHA's systems to quickly and effectively identify and access locations on SHA's systems that contain sensitive personal and personal health information and other sensitive security information, but also provides user credentials to facilitate access to that information".

[65] Clearly the information would provide access to sensitive information, personal health information and security information, as well as user credentials, and is information that the SHA has a substantial interest in protecting from misappropriation

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by another party. It is confidential technical information which no doubt resulted from the expenditure of money and application of skill and effort to develop. I am satisfied that the SHA has a proprietary interest of the file path addresses/links, barcodes, host/server names, directory structures, credentials etc.

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[66] I am also satisfied that the SHA has a right to use the information in that it has a legal claim to the use of the information and an authority to use it. The SHA has a right to use it, while others do not. Releasing this information would create a reasonable expectation of probable harm. This is more than a mere possibility of harm. The evidence satisfied me that there is a real probability of harm and that the harm would be serious. SHA has a "proprietary interest" and/or "right of use" of the redacted information.

3. Does the information have monetary value for the local authority or is it reasonably likely to?

[67] Monetary value requires that the information itself have intrinsic value. The phrase "reasonably likely to" operates to require an applicant to produce evidence that establishes a monetary value of the requested information on a balance of probabilities (*Guide to LAFOIP*, c 4 at 144).

[68] The Affidavit of Mr. Verma states at para. 4(c) that:

> … the Redacted Information is a high value target for actors who seek to do harm to SHA and its systems and individuals who use SHA's services and release of the Redacted Information would expose SHA and its systems and individuals who use SHA's services to a number of risks including cybersecurity attacks, financial and other damages including fraud, identity theft, discrimination, and reputation damage.

[69] The evidence establishes on a balance of probabilities, by inference of the risk of financial damage, that the redacted information has a monetary value.

[70] I am satisfied that the requirements of s. 14 and ss. 17(1)(b) have been met. I decline to order the SHA to produce the said information to the applicant. The application is dismissed.

b) Did the SHA conduct a reasonable search for records?

[71] The final substantive issue on this application is whether SHA conducted a reasonable search for records. Subsection 5(1) of *LAFOIP* requires a local authority to respond to an access to information request "openly, accurately and completely" (Review Report, para. 46). This means that in addition to seeking out the records, the local authority must explain the process it went through in undertaking that search.

[72] A local authority is expected to provide an explanation for the process and individuals involved in conducting a search. The following is a non-exhaustive list of information to set out the search process:

> a) For general requests – tie the subject matter of the request to the departments/divisions/branches/committees/boards included in the search. In other words, explain why certain areas were searched and not others.
>
> b) Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
>
> c) Explain how the records management system is organized (both paper and electronic) in the departments/divisions/branches/committees/boards included in the search.
>
> d) Describe how records are classified within the records management system. For example, are the records classified by:
>
> > i) Alphabet

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ii) Year

iii) Function

iv) Subject

e) Consider providing a copy of your organization's record schedule and screen shots of the electronic directory (folders and subfolders).

f) If the record has been destroyed, provide copies of record schedules and/or destruction certificates.

g) Explain how you have considered records stored off-site.

h) Explain how records that may be in the possession of a third party but in the local authority's control have been searched such as a contractor or information management service provider.

i) Explain how a search of mobile electronic devices was conducted (i.e., laptops, smartphones, cell phones, tablets).

j) Explain which folders within the records management system were searched and how these folders link back to the subject matter requested. For electronic folders, indicate what key terms were used to search if applicable.

k) Indicate the calendar dates each employee searched.

l) Indicate how long the search took for each employee.

m) Indicate what the results were for each employee's search.

n) Consider having the employee(s) that is searching provide an affidavit to support the position that no record exists or to support the

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details provided.

[73] It should be noted that even where a local authority claims a record does not exist, it should demonstrate that it attempted to locate it.

[74] The SHA argued that its search was reasonable and responded as follows:

> The requested records were for:
>
> a) Provide PRC testing records of accuracy with respect to SARS-COVID-2, COVID-19 and all variants.
>
> b) Provide Whole Genome Sequencing Test records of accuracy with respect to SARS-COVID-2, COVID-19, and all variants.
>
> c) Provide SARS-Cov-2 Variant of Concern (NAAT) N501Y records of accuracy.
>
> d) Provide SARS-Cov-2 Variant of Concern Confirmation (sequencing) records of accuracy
>
> The information that was requested above was not provided to the applicant, as the SHA is not obliged to create a record in order to respond to an access to information request. The Operational Area advised that the requested information is not found in a record that can be produced using the normal computer hardware of software of the SHA; therefore as per clause 10(2)(a) of LA FOIP, the record does not exist.
>
> (Review Report, para. 54)

[75] The applicant has sought "records of accuracy" and the SHA identifies that no such records exist. The SHA indicated it is prepared to provide a summary validation report or spreadsheets of raw validation data after appropriate redactions are applied. It says that it does not have reports that summarize or explain the raw data and the amount of time it would take to prepare such reports is prohibitive, as Dr. Minion attested to in her affidavit.

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[76] At the outset of its reasons, the Commissioner indicated that SHA had failed to conduct a reasonable search. The Commissioner then undertook an analysis of whether SHA conducted a reasonable search. A "reasonable search" is "one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request". A "reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances". (*Guide to LAFOIP*, c 3 at 12 and 14)

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[77] SHA in response relied on ss. 10(2) of *LAFOIP*, reproduced below:

> 10(2) Subject to subsection (3), if a record is in electronic form, a head shall give access to the record in electronic form if:
>
> (a) it can be produced using the normal computer hardware and software and technical expertise of the local authority;
>
> (b) producing it would not interfere unreasonably with the operations of the local authority; and
>
> (c) it is reasonably practicable to do so.

[78] In reviewing this submission, the Commissioner clarified that the three subsections to ss. 10(2) are not to be read separately, but instead in conjunction with one another.

[79] SHA asserts that while data exists, it is not consolidated and so production of the requested record would require its creation. A local authority is not obligated to produce new records, but should provide the raw data to be amalgamated in those records if it is in possession of them. SHA argues that requiring it to create a record extrapolated from the collected data is not an order that can be made under the *LAFOIP*. If such an order is permitted, the SHA argues that it is not an order that should be made given the significant time that would be required to be away from their duties to create

it (SHA's Brief of Law, page 18).

[80] The evidence filed by the SHA provide an explanation for the process and individuals involved in conducting a search for the information. It is clear that the requested information (records of accuracy) do not exist and would have to be created. The SHA has identified that such a record cannot be produced using normal hardware and software and technical expertise of the SHA (ss. 10(2)(a) of *LAFOIP*). It has provided evidence that producing it would unreasonably interfere with the operation of the SHA (ss. 10(2)(b) of *LAFOIP*) and evidence that it is not reasonably practical to do so
(ss. 10(2)(c) of *LAFOIP*).

[81] The applicant seeks records of accuracy which do not exist. As stated, the SHA indicated that it could provide raw data, if it was clear what raw data the applicant was seeking. In my view it is not appropriate to assume what information it is that the applicant is seeking. The applicant is free to bring a further request identifying the specific information.

[82] In the circumstances there will be no order for the SHA to comply with the right of access and duty to assist provisions of the *LAFOIP*. The application is dismissed.

2. Should the Court exercise its discretion under Part 11 of The King's Bench Rules to award costs?

[83] The SHA seeks costs and an order dispensing with the requirements of Rule 10-4 of *The King's Bench Rules*.

[84] Mr. Schiller is ordered to pay costs to the SHA in the fixed sum of $1,000, plus the $500 costs for the striking application for a total of $1,500.

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Conclusion

[85] The applicant's application is dismissed. The applicant shall pay costs to SHA relating to all applications in the sum of $1,500.

[86] Should the SHA wish to take out a formal order, Rule 10-4 is waived.

J.

C.L. DAWSON

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