

# 1.

## PURPOSES AND SCOPE OF THE FOIP ACT

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### Overview

This chapter covers

- the purposes of the *Freedom of Information and Protection of Privacy Act* (the *FOIP Act*);
- the scope of the *FOIP Act*;
- the records that are subject to the *FOIP Act*;
- the meaning of custody or control of records;
- excluded records;
- records to which a paramountcy applies.

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### 1.1 Purposes of the FOIP Act

The basic objectives of the *Freedom of Information and Protection of Privacy Act* (the *FOIP Act*) are

- to ensure that public bodies are open and accountable to the public by providing a right of access to records; and
- to protect the privacy of individuals by controlling the manner in which public bodies collect, use and disclose personal information.

**Section 2** of the Act sets out five purposes.

***A right of access to records.*** The first purpose is to establish a right of access by any person to records in the custody or under the control of a public body, subject to limited and specific exceptions, which are set out in the Act. This right of access is the cornerstone of openness and accountability and should be taken into account when making any decision about disclosing records in response to a FOIP request.

The limited and specific exclusions and exceptions set out in the Act, and a small number of provisions of other legislation that take precedence over the Act, provide the only basis for refusing access to records and should always be interpreted with a view to giving as much access as possible to the records requested.

***Protection of personal privacy.*** The second purpose is to control the manner in which a public body may collect, use and disclose the personal information of individuals. This purpose also requires public bodies to ensure that personal information that is used to make a decision about an individual is accurate and complete, that it is retained long enough to enable the individual to obtain access to it, and that it is protected and properly disposed of. These privacy protection measures are often referred to as fair information practices.

***A right of access to an individual's own personal information.*** The third purpose is to create a right of access for individuals to personal information about themselves, again subject to limited and specific exceptions set out in the Act. Public bodies

should interpret the exceptions with a view to giving an individual as much access as possible to his or her own personal information.

**A right to request a correction.** The fourth purpose is to allow individuals a right to request corrections to personal information about themselves that is held by a public body.

**Independent review of decisions.** The fifth purpose is to provide for the independent review of decisions made by public bodies under the Act and for the investigation of complaints. Independent review is provided by the Information and Privacy Commissioner.

### **Scope of the Act**

The *FOIP Act* applies to all public bodies. **Section 1** of the Act contains a number of definitions that set out which bodies are and are not public bodies for the purposes of the Act. Bodies that are subject to the Act have statutory duties with regard to access to information and protection of privacy.

**Section 4** of the Act establishes which records are subject to the Act and which records are excluded. **Section 4** is discussed in detail in section 1.5 of this chapter.

#### **Public body**

*Section 1(p)* A public body is defined in the Act to mean:

- a department, branch or office of the Government of Alberta;
- an agency, board, commission, corporation, office, or other body designated as a public body in the regulations (**Schedule 1** of the FOIP Regulation);
- the Executive Council Office;
- the office of a member of the Executive Council;
- the Legislative Assembly Office;
- the office of the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner, or the Information and Privacy Commissioner; or
- a local public body.

The *FOIP Act* came into force for public bodies other than local public bodies on October 1, 1995.

#### **Local public body**

*Section 1(j)* A local public body is defined in the Act to mean:

- an educational body;
- a health care body; or
- a local government body.

#### **Educational body**

*Section 1(d)* An educational body is defined in the Act to mean:

- a university as defined in the *Post-secondary Learning Act*;

- a technical institute as defined in the *Post-secondary Learning Act*;
- a public college as defined in the *Post-secondary Learning Act*;
- the Banff Centre as defined in the *Post-secondary Learning Act*;
- a board as defined in the *School Act*;
- a charter school as defined in the *School Act*; or
- a regional authority as defined in the *School Act*.

The *FOIP Act* came into force for educational bodies other than post-secondary institutions on September 1, 1998 and for post-secondary institutions on September 1, 1999.

### **Health care body**

**Section 1(g)** A health care body is defined in the Act to mean:

- the board of an approved hospital as defined in the *Hospitals Act*, other than an approved hospital that is owned and operated by a regional health authority under the *Regional Health Authorities Act*;
- the operator of a nursing home as defined in the *Nursing Homes Act*, other than a nursing home that is owned and operated by a regional health authority under the *Regional Health Authorities Act*;
- a provincial health board established under the *Regional Health Authorities Act*;
- a regional health authority under the *Regional Health Authorities Act*;
- a community health council established under the *Regional Health Authorities Act*; or
- a subsidiary health corporation as defined in the *Regional Health Authorities Act*.

As of April 1, 2009, there is one regional health authority. The name of the body corporate is Alberta Health Services and the name of the area served by the regional health authority is the Alberta Health Region.

Hospitals and nursing homes directly owned and operated by a regional health authority are part of the regional health authority, that is, Alberta Health Services. Other public hospitals and nursing homes are separate local public bodies.

The Alberta Alcohol and Drug Abuse Commission (AADAC) and the Alberta Cancer Board have been dissolved and their functions have been assumed by Alberta Health Services.

The *FOIP Act* came into force for health care bodies on October 1, 1998.

### **Local government body**

**Section 1(i)** A local government body is defined in the Act to mean:

- a municipality as defined in the *Municipal Government Act*;
- an improvement district under the *Municipal Government Act*;
- a special area as defined by the *Special Areas Act*;

- a regional services commission under Part 15.1 of the *Municipal Government Act*;
- a board established under the *Drainage Districts Act*;
- a board established under the *Irrigation Districts Act*;
- a management body established under the *Alberta Housing Act*;
- a Metis settlement established under the *Metis Settlements Act*;
- the Metis Settlements General Council established under the *Metis Settlements Act*;
- any commission, police service or policing committee as defined in the *Police Act*;
- any municipal library board, library system board, federation board or joint municipal library board established or continued under the *Libraries Act*; or
- any board, committee, commission, panel, agency or corporation that is created or owned by any of the bodies listed above and all the members or officers of which are appointed or chosen by that body.

The *FOIP Act* came into force for local government bodies on October 1, 1999.

### **Bodies excluded from the definition of “public body”**

**Section 1(p)** specifically excludes the following from the definition of “public body” and therefore from the scope of the Act:

- the office of the Speaker of the Legislative Assembly;
- the office of a Member of the Legislative Assembly; and
- the Court of Appeal of Alberta, the Court of Queen’s Bench of Alberta and The Provincial Court of Alberta.

Since government departments are public bodies and the Executive Council Office is a public body, but the office of a Member of the Legislative Assembly is not, some records of Members of the Executive Council (Cabinet members) will fall within the scope of the Act and others will not. The records of Members of the Executive Council that relate to their duties in Cabinet and in the administration and operation of a public body are within the scope of the Act, but records that relate to their duties as MLAs are not.

**Section 1(i)** defines local government body to exclude certain agencies from the Act.

EPCOR Utilities Inc. and ENMAX Corporation and any of their subsidiaries that own a gas utility, a generating unit, transmission facility or electric distribution system, or whose primary business activity is providing electricity services, are excluded from the scope of the *FOIP Act*. However, these organizations are subject to the provisions of the *Personal Information Protection Act* for collection, use, disclosure, retention and protection of personal information inside Alberta and to the provisions of the federal *Personal Information Protection and Electronic Documents Act* for personal information that is disclosed outside Alberta.

As well, community library boards established under the *Libraries Act* are not public bodies under the Act. However, if a community library board receives assistance from a municipality or a government department, records relating to that assistance may be available from the municipality or government department.

The RCMP is not a public body under the *FOIP Act*. The RCMP is a “government institution” subject to the federal government’s *Access to Information Act* and *Privacy Act*. RCMP detachments operating as municipal police services are not local government bodies under the *FOIP Act*.

A First Nation’s Police Service is not a public body under the *FOIP Act* and is not subject to the federal government’s access and privacy legislation.

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**1.2**  
**Application**  
**of the Act**

***Existing procedures for access***

The *FOIP Act* is in addition to and does not replace existing procedures for obtaining access to information or records held by public bodies (**section 3(a)**). However, any routine disclosure of personal information by public bodies must be in compliance with **Part 2** of the Act.

Routine disclosure of information is discussed in more detail in section 2.4 of Chapter 2.

***Archival records***

The Act does not affect access to records in the Provincial Archives of Alberta, or any other archives of a public body, if public access to the records was not restricted before the Act came into force with respect to those archives (**section 3(b)**).

If an archival institution serving a public body declared records in a certain class or date range open to public access before the public body became subject to the Act, those records may remain open to public access. There is no need for a person to make an access request under the *FOIP Act* to see these records or for the archives to apply the Act when disclosing the records.

***Legal proceedings***

The Act does not limit the information otherwise available by law to a party to legal proceedings (**section 3(c)**).

*Legal proceedings* are activities governed by rules of court or rules of judicial or quasi-judicial tribunals which can result in a judgment of a court or a ruling by a tribunal.

The Act does not prevent or limit the use of legal processes such as examination for discovery to gather information about a party in a lawsuit. It is relatively common for persons involved in a criminal or civil legal action to make a FOIP request to a public body for records relating to the case. Such a request should be processed as a FOIP request, applying the provisions of the Act.

If an action proceeds to discovery, or if some other legal procedure is invoked to obtain disclosure of records, the rules governing that legal procedure will apply. The access provisions of the *FOIP Act* are applicable only to requests made under the

FOIP Act and not to other legal processes. It is common to have both processes going on at the same time. See, for example, the discussion in *IPC Order 97-009*.

The provisions of the Act do not override the power of any court or tribunal in Canada to compel a witness to testify or to compel the production of documents (**section 3(d)**).

### **Disposition of records**

The Act does not prohibit the transfer, storage or destruction of a record in accordance with an enactment of Alberta or Canada, or, in the case of local public bodies, as sanctioned by a bylaw, resolution or other legal instrument by which a local public body acts (**section 3(e)**). This provision permits the orderly disposition of records by public bodies in accordance with records retention and disposition schedules. If a local public body has no bylaw, resolution or other legal instrument with respect to the transfer, storage or destruction of records, it may carry out these functions in accordance with a policy authorized by its governing body.

See Chapter 8 for more discussion on records and information management, including the effect of **section 35(b)** of the Act on the disposition of records.

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## **1.3 Records Subject to the Act**

The Act applies to all the records *in the custody or under the control* of a public body, including court administration records (**section 4(1)**). This means that a public body does not need to have both custody and control of a record for the Act to apply to it (see *IPC Order 2000-005*).

### **Record**

**Section 1(q)** Record means a record of information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers, and any other information that is written, photographed, recorded or stored in any manner but does not include software or any mechanism that produces records (**section 1(q)**).

Any recorded information, including handwritten notes and electronic correspondence or messages, which is in the custody or control of a public body is a record for the purposes of the Act.

Despite the reference to “books” in the definition of a record, the Act does not apply to published works collected by a library of a public body in accordance with the library’s acquisition of materials policy (**section 4(1)(j.1)**).

### **Personal information**

**Section 1(n)** The Act defines personal information as recorded information about an identifiable individual, including, but not limited to

- the individual’s name, home or business address or home or business telephone number;
- the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations;
- the individual’s age, sex, marital status or family status;

- an identifying number, symbol or other particular assigned to the individual;
- the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics;
- information about the individual's health and health care history, including information about a physical or mental disability;
- information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given;
- anyone else's opinions about the individual; and
- the individual's personal views or opinions, except if they are about someone else.

*Biometric information* is defined in **section 1(b.1)** to mean information derived from an individual's unique, measurable characteristics. Biometric information is collected through fingerprinting, facial and voice recognition programs, iris and retinal scans and a range of other methods designed to capture individual characteristics. This type of personal information is increasingly used in law enforcement and fraud prevention, for access to premises and for computer network security. As with all types of personal information, biometric information may be collected, used and disclosed only in accordance with **Part 2** of the Act.

*Genetic information* includes an individual's DNA information. This term was added to the definition of personal information to clarify that the *FOIP Act* applies to information obtained as a result of DNA analysis. Matters concerning ownership of DNA, the collection of DNA under the federal *DNA Identification Act* and the use of DNA in a commercial context are outside the scope of the *FOIP Act*.

#### 1.4 Custody or Control

A public body has *custody* of a record when the record is in the physical possession of the public body (see *IPC Orders 2000-003* and *2000-005*).

A record is in the *possession* of a public body if the public body is physically holding or retaining the record. Some examples of records in the possession of a public body are: active records in an employee's office filing cabinet or in a central filing system on the public body's premises; inactive records in a records storage centre that may be located off the public body's premises; working papers in an employee's desk drawer; and electronic records located on an employee's computer at work.

A record is under the *control* of a public body when the public body has the authority to manage the record, including restricting, regulating and administering its use, disclosure or disposition.

Some indicators that a record may be in the custody or under the control of a public body are as follows:

- the record was created by an officer, employee or member of the public body;
- the record was created by an outside contracted consultant for the public body;
- the record is specified in a contract as being under the control of a public body;
- the record is in the possession of the public body;
- the record is closely integrated with other records of the public body;

- the content of the record relates to the public body's mandate and functions;
- the public body has the authority to regulate the record's use and disposition;
- the public body has relied upon the record to a substantial extent; or
- a contract permits the public body to inspect, review or copy records produced, received or acquired by a contractor as a result of a contract.

(See *IPC Order 99-032*.)

In *IPC Order 99-020*, the Information and Privacy Commissioner considered whether certain records were under the control of the Auditor General. The Commissioner decided that the typewritten notes were created by the Auditor General and were under the control of that Officer. However, he decided that handwritten notations on a public body's copies of those records must be considered separate and distinct from the typewritten portions of the records. The notations changed the character of the records and provided additional information. They were neither created by the Auditor General nor in the Auditor General's custody or control.

The most common situation where a public body may have control, but not custody, of a record is in the case of contracted services. The record may have been created by and may be in the possession of the contractor, but the public body has control of the record because it relates to a service performed by the contractor on behalf of the public body. In most cases, matters of custody and control would be addressed in the contract.

For example, if a contract requires the contractor to make records available to a public body to audit the services provided or to justify the payment of contractor's invoices, the records used by the public body to monitor or inspect the delivery of the services would likely be deemed to be under its control.

Administrative records relating to the business of a contractor would not normally be considered to be under the control of a public body unless this was specifically stipulated in the contract. If a contractor deals with a subcontractor, but a public body does not exercise any rights in regard to the records relating to the work of the subcontractor, those records will not be under the control of a public body.

A fuller discussion of FOIP and contract management is found in the publication *Managing Contracts under the FOIP Act: A Guide for Government of Alberta Contract Managers and FOIP Coordinators*, published by Access and Privacy, Service Alberta.



**All public bodies should ensure that their contracts and contracting practices adequately take the *FOIP Act* into account.**

Where a public body stores records in a records storage facility (e.g. the Alberta Records Centre for provincial government bodies), both control and custody will likely lie with the public body placing the records in the storage facility and not with the organization offering the storage service.

**1.5  
Records  
Excluded  
from the Act**

**Categories of excluded records**

Certain information and records in the custody or under the control of public bodies are excluded from the application of the Act. In some cases, another process is available to obtain access to these records. The exclusions are as follows.

***Certain categories of information in court and judicial records***

*Section 4(1)(a)* The *FOIP Act* does not apply to information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen’s Bench of Alberta, or The Provincial Court of Alberta, a record of a master of the Court of Queen’s Bench of Alberta, a record of a sitting or presiding justice of the peace, a judicial administration record, or a record relating to support services provided to the judges of any of the courts referred to above.

Information in a court file is not limited to the contents of the paper file accessible to the public by doing a search at the courthouse. It also includes any information taken from such a file and used to create another record, including a criminal docket (*Alberta (Attorney General) v. Krushell*, 2003 ABQB 252).

The term *judicial administration record* is defined in **section 4(3)** of the Act and appears in the **Definitions** in Appendix 1.

***Draft judicial or quasi-judicial decisions***

*Section 4(1)(b)* A personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity is not within the scope of the Act.

A *personal note* of a member of a judicial or quasi-judicial tribunal is one intended solely for the use of the person who wrote it (see *IPC Order 99-025*).

A *person who is acting in a judicial or quasi-judicial capacity* includes any authority designated by the Lieutenant Governor in Council that is subject to the *Administrative Procedures Act*.

This exclusion also applies to communications between the members of the judicial or quasi-judicial body themselves, and between members and support staff, when these communications relate to the judicial or quasi-judicial functions of the body.

**Section 4(1)(b)** does not apply to final decisions or reasons for decision of the judicial or quasi-judicial body, although another exclusion or exception may apply to these records.

The following criteria, which are not exhaustive, should be reviewed in determining whether a body is acting in a “judicial or quasi-judicial capacity”:

- Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
- Does the decision or order directly or indirectly affect the rights and obligations of persons?
- Is the adversarial process involved?

- Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

(See *IPC Order 99-025*.)

No one factor is decisive and it is necessary to consider the legislation under which a decision is made to determine whether the rules of natural justice apply. The nature of the issue to be decided and the importance of the decision for those affected should also be examined. Public bodies may wish to seek legal advice when making a decision as to whether a decision-maker is acting in a judicial or quasi-judicial capacity.

Examples of provincial public bodies that make quasi-judicial decisions are the Environmental Appeals Board, the Labour Relations Board and the Board of Reference. Examples at the local government level are a Subdivision and Development Appeal Board and an Assessment Review Board. Such bodies make rulings of a judicial, as opposed to an administrative, nature.

#### **Quality assurance records of health care bodies**

**Section 4(1)(c)** Quality assurance committees study, assess and evaluate the provision of health services with a view to continuous improvement. Under section 9 of the *Alberta Evidence Act*, certain records of, and documentation supplied to, quality assurance committees (as that term is defined in the *Alberta Evidence Act*) in health care bodies are not admissible as evidence in court. **Section 4(1)(c)** excludes these quality assurance records from the scope of the *FOIP Act*.

This exclusion applies only to records of quality assurance committees as defined in the *Alberta Evidence Act*, and not to other quality assurance committees established within health care bodies, and other public bodies, to monitor the quality of health services or other services.

The exclusion for the records of quality assurance committees does not extend to original medical and hospital records of a patient, even if they were supplied to a quality assurance committee. This means that health care bodies that are custodians under the *Health Information Act* would treat the medical records of individuals disclosed to a quality assurance committee as health information subject to the *Health Information Act*.

#### **Records of an officer of the Legislature**

**Section 4(1)(d)** A record that is created by or for or is in the custody or under the control of an officer of the Legislature, and relates to the exercise of that officer's functions under an Act of Alberta, is not within the scope of the *FOIP Act*.

Operational files and correspondence of the Auditor General, the Information and Privacy Commissioner, the Ethics Commissioner, the Chief Electoral Officer, and the Ombudsman are excluded from the coverage of the Act. Correspondence to and from these offices is excluded regardless of where the correspondence or files are located. This applies to letters and draft reports in the custody of a public body. Records created by employees and contractors for these officers are also excluded. (See *IPC Order 97-008*.)

The administrative files of these legislative offices, however, are subject to the Act. These include personnel information, contracts and general office management records.

**Records provided to the Ethics Commissioner**

**Section 4(1)(e)** Information is excluded if it is collected by or for the Ethics Commissioner, or is in the custody or under the control of the Ethics Commissioner, and relates to the disclosure statements of deputy ministers and other senior officers which have been deposited with the Ethics Commissioner. This provision covers records created or compiled from information provided to the Ethics Commissioner.

**Records created by or for the Ethics Commissioner**

**Section 4(1)(f)** Records are excluded if they are created by or for the Ethics Commissioner or are in the custody or under the control of the Ethics Commissioner and relate to any advice about conflicts of interest, whether or not the advice was given under the *Conflicts of Interests Act*.

**A question to be used on an examination or test**

**Section 4(1)(g)** A question to be used on an examination or test is not within the scope of the Act. This exclusion applies to questions that are to be used in the future and question banks from which questions are to be selected for future tests. The exclusion also applies to instructions and reading passages in an examination paper (*IPC Order F2002-012*). The exclusion applies to intelligence tests, but not to a subject's answers (*IPC Order F2004-015*).

The exclusion does not apply to test banks containing tests administered in the past that may be used as a source of future questions for tests.

**Teaching materials**

**Section 4(1)(h)** The Act does not apply to teaching materials of employees of a post-secondary educational body or of the post-secondary educational body itself. Nor does it apply to teaching materials of both employees and the post-secondary educational body. This exclusion is intended to ensure that the access provisions of the Act do not compromise the right to priority of publication of those responsible for the creation of post-secondary teaching materials.

*Teaching materials* include records produced or compiled for the purpose of providing systematic instruction to a person about a subject or skill and include records created or compiled to aid the instructor in imparting information or for distribution to students.

*Post-secondary educational body* means a university, a technical institute, a public college, and the Banff Centre, all as defined in the *Post-secondary Learning Act*.

**Research information of employees**

**Section 4(1)(i)** Also excluded from the scope of the *FOIP Act* is research information of an employee of a post-secondary educational body. This provision is intended to ensure that the access provisions of the Act do not compromise the right to priority of

publication or to register patents or industrial designs of those responsible for the creation of post-secondary research information.

*Research information* includes records produced or compiled as part of a research project, and include data, working papers, bibliographies and other materials used in the research process.

**Archival materials**

**Section 4(1)(j)** Material that has been deposited in the Provincial Archives of Alberta, or in the archives of a public body, by or for a person or entity other than a public body is not within the scope of the Act.

Individuals, corporations, labour unions, churches, and other groups may place collections of papers in the archives of public bodies. These materials may continue to be owned by the depositing body or may be given to the archives. These records are not subject to the Act.

For this exclusion to apply, a record must be deposited by or on behalf of a third party with no involvement by a public body except as a recipient of the record (see *IPC Order 2000-003*).

This provision also applies to records of Members of the Executive Council who held office prior to April 1, 1995, if the records relate to a term of office prior to that date and were donated to the Provincial Archives of Alberta. These records are considered to be private records. Records relating to a term of office after that date are subject to the Act.

**Published works collected by a library**

**Section 4(1)(j.1)** The *FOIP Act* does not apply to published works collected by a library of a public body in accordance with the library's acquisition of materials policy. This provision was added to the Act in 2006 in response to concerns about works being acquired by libraries from non-traditional sources. New information technologies have made it possible for individuals to "publish," and for libraries to collect and make publicly available, material that would previously have been confined to archives. This typically occurs when libraries accept donations of privately published memoirs and local histories and put them into circulation.

The Act now makes it clear that neither the access nor the privacy provisions of the Act apply to published works, but only if the library has collected those publications in accordance with an acquisitions policy. For further information on this exclusion, see FOIP Bulletin No. 18: *FOIP Amendment Act, 2006*, published by Access and Privacy, Service Alberta.

**Records relating to an ongoing prosecution**

**Section 4(1)(k)** The Act does not apply to a record relating to a prosecution, if all proceedings in respect of the prosecution have not been completed. Prosecution records are excluded until the appeal period has expired and, in a case where Crown counsel has stayed a criminal prosecution, until the one-year period from the stay has expired.

This exclusion allows for the disclosure of information during a legal proceeding to take place in accordance with the rules governing the proceeding. However, before the proceeding takes place, and after any stay or appeal period has expired, the *FOIP Act* applies to the records involved. See also Chapter 4, section 4.6 for records relating to the exercise of prosecutorial discretion.

### **Public registries**

**Section 4(1)(l)** The Act does not apply to a record made from information in:

- the Personal Property Registry;
- the office of the Registrar of Motor Vehicle Services;
- the office of the Registrar of Corporations;
- the office of the Registrar of Companies;
- a Land Titles Office;
- an office of the Director or of a district registrar as defined in the *Vital Statistics Act*; or
- a registry operated by a public body if that registry is authorized or recognized by an enactment and public access to the registry is normally permitted.

A number of public bodies are responsible for public registries that serve the public interest by maintaining records relating to a range of legal rights and duties, including the transfer of land, corporate ownership, the securing of debt, the registration of vehicles, and the licensing of drivers. These activities tend to be subject to regulatory frameworks that attempt to provide a balance between public and private interests with respect to the information contained in the particular registry.

**Section 4(1)(l)** excludes information in the listed registries from the access provisions under **Part 1** of the Act and the use and disclosure provisions under **Part 2**. This exclusion allows for the operation of other policies and procedures for access to information and the protection of personal information in registries. The Commissioner has interpreted **section 4(1)(l)** in a number of Orders.

The Commissioner considered the extent of the exclusion for registries in an Order relating to records made from information in the office of the Registrar of Motor Vehicle Services (**section 4(1)(l)(ii)**). He decided that, because the exclusion applied to records *made from* the information in the registry, the collection of information by the Registrar was *not* excluded from the *FOIP Act*. The collection of information in the first instance by Alberta Registries is subject to the Act (see *IPC Orders 2000-020, 2000-023 and 2001-029*).

For example, Vital Statistics was authorized under the *Vital Statistics Act* to collect certain prenatal information of mothers from the physician's notice of birth. The Commissioner had jurisdiction only to determine whether too much information was being collected (see *IPC Investigation Report 99-IR-001*).

A *registrar* means an officer who has the custody and charge of keeping a registry or register and is charged with keeping authoritative and reliable records (*IPC Order 2001-029*).

A *registry* means a book authorized or recognized by law, kept for recording or registration of facts or documents (*IPC Order 2001-029*).

The Commissioner has considered the meaning of the term *office* in two Orders. In a decision relating to Vital Statistics Services (**section 4(1)(I)(vi)**), the Commissioner found that the term *office* was not limited a physical office but applied to the functions and duties associated with that office (*IPC Order 2001-014*).

Similarly, the office of the Registrar of Motor Vehicle Services (**section 4(1)(I)(ii)**) includes not only the Registrar's physical office, but also the information systems that pertain to the Registrar's official capacities (*IPC Order 2001-029*).

*IPC Order 2000-022* defined a *record made from information in a Land Titles Office* to mean a record made from information that related to the search, registration or filing functions of a land titles office.

To be excluded under **section 4(1)(I)(vii)**, two conditions must be present. The registry operated by a public body must be authorized or recognized by an enactment, *and* public access to the registry must normally be permitted (*IPC Order 2001-029*).

The exclusion in **section 4(1)(I)** applies to any record made from information in such a registry, whether the record is in the custody of the public body operating the registry or of another public body.

The exclusion does not apply if the requested information is not the same as what is publicly available from that Registry (see *IPC Order 2000-024*).

#### **Records of elected officials of local public bodies**

**Section 4(1)(m)** A personal or constituency record of an elected official of a local public body, such as a school trustee, a municipal councillor or a Metis settlement councillor, is excluded from the *FOIP Act* (see *IPC Order 99-032*). The onus will be on the elected official to show that the records are not related in any way to the business of the municipality, school board, Metis settlement, or other local public body to which the official has been elected.

*Personal records* are records that relate to an official as a private individual rather than as an elected official of the local public body.

Examples of personal records of an elected official that may be located on the premises of a local public body include

- private correspondence of an elected official that has not been sent or received by the official in his or her capacity as an officer of the local public body;
- records related to a community organization or non-profit group to which the official belongs on a personal basis and not as a representative of the public body;
- records related to a commercial or private business enterprise in which the official is employed, holds office or of which he or she is an owner, director, shareholder or partner; and
- records of personal or family appointments or events, such as medical appointments, birthdays, vacations and financial transactions.

*Constituency records* are records that relate to an elected official's constituency business, persons who may have worked on an election campaign and details about the campaign (*IPC Order F2005-010*). Examples of such records include:

- records relating to the election campaign of an elected official of a local public body, other than those records required to be submitted to the authority governing the election; and
- personal notes created solely as a memory aid and not scheduled for retention by the public body.

The following are useful guidelines for elected officials in determining whether a record is excluded from the scope of the Act:

- the record is not deposited with the administration of the local public body;
- the local public body has no power to compel the elected official to produce the records, even when referred to in a meeting of elected officials;
- the local public body has no authority to regulate or dispose of the records;
- the record exists and is referred to as a part of the elected official's mandate to represent the constituent, not as a basis for action by the local public body;
- the record is not integrated with other local public body records in the office of the elected official.

For more information on this exclusion, see FOIP Bulletin No. 6: *Records of Elected and Appointed Officials of Local Public Bodies*, published by Access and Privacy, Service Alberta.

***Personal records of appointed or elected members of the governing body of a local public body***

**Section 4(1)(n)** Personal records of appointed or elected members of governing bodies of local public bodies are excluded from the Act.

*Governing body* means the body that has the statutory authority to govern and make decisions affecting the local public body. This includes charter school boards, irrigation district boards and boards of housing management bodies. For universities, technical institutes, public colleges and the Banff Centre, the term is defined in **section 4(2)** to mean the board of governors and the general faculties council or academic council of the post-secondary body, as applicable.

In addition to the relevant examples cited above with respect to elected officials (**section 4(1)(m)**), the exclusion for personal records of appointed governing body members might cover

- records related to a professional or similar organization to which the individual belongs or in which he or she holds office;
- biographical and historical material about the individual which has not been made public;
- records related to previous jobs or appointments of the appointee;
- references given to individuals not employed by the local public body; or

- research, speeches, lecture notes and similar items which are not related to the local public body and which were not produced at the expense of the local public body.

The exclusion does not apply to personal information in records related to the mandate and functions of the governing body or related to the member in his or her capacity as an employee.

For more information on this exclusion, see FOIP Bulletin No. 6: *Records of Elected and Appointed Officials of Local Public Bodies*, published by Access and Privacy, Service Alberta.

#### **Personal or constituency records of a member of the Executive Council**

**Section 4(1)(o)** A personal record or constituency record of a member of the Executive Council is not within the scope of the Act. This means that records that relate to the duties of a member of the Executive Council as an MLA are excluded from the scope of the Act, but records that relate to duties in Cabinet and in the administration and operation of a public body are within the scope of the Act. Examples of constituency records and the guidelines for elected officials are discussed in relation to **section 4(1)(m)** earlier in this chapter.

#### **Records of the Speaker or an MLA that are in the custody or control of the Legislative Assembly Office**

**Section 4(1)(p)** A record created by or for the office of the Speaker of the Legislative Assembly or the office of a Member of the Legislative Assembly that is in the custody or under the control of the Legislative Assembly Office is not within the scope of the Act (see *IPC Order 97-017*).

*Created by or for* has been interpreted by the Commissioner to mean created by or on behalf of (*IPC Order 97-007*).

#### **Correspondence of Ministers, MLAs and agency heads**

**Section 4(1)(q)** This provision excludes certain records created by or for

- a member of the Executive Council;
- a Member of the Legislative Assembly; or
- a chair of a Provincial agency, as defined in the *Financial Administration Act*, who is a Member of the Legislative Assembly.

*Created by or for* means created by or on behalf of a Minister, MLA or agency head. In order to be excluded from the scope of the Act, the record must have emanated from the office of the Minister, MLA or agency head and must have been sent, or be intended to be sent, to one of the persons listed above (see *IPC Order 97-007*).

This exclusion does not generally apply to records created by officials or employees performing their duties under their governing legislation. It also does not apply to reports (e.g. an investigation report under section 15.1 of the *Social Care Facilities Review Committee Act* or an annual report) that a **Schedule 1** public body must provide to a Minister.

**Section 4(1)(q)** allows for the exclusion of certain records of Cabinet Policy Committees, where information that may eventually form part of the discussions of the Executive Council, the Treasury Board or one of their respective committees is exchanged and is the subject of discussion, consideration, advice and recommendation. The provision also excludes certain records of boards and agencies chaired by an MLA. Examples include the Seniors Advisory Council for Alberta and the Northern Alberta Development Council.

The exclusion extends to copies of such records sent to others, including officials in a public body (see *IPC Order 99-005*).

The exclusion applies to an attachment only if **section 4(1)(q)** applies individually to the attachment. The fact that a Minister attaches a covering letter to a record authored by someone else (and not emanating from the Minister's Office) does not mean that the Minister "created" the record (see *IPC Order 2000-013*).

If a record is created by a person who acts on behalf of one of the classes of persons listed in **section 4(1)(q)**, the exclusion applies only if the record indicates that the individual is acting on that person's behalf, or this is evident in some other way (see *IPC Order 96-020*).

#### **Alberta Treasury Branch records**

**Section 4(1)(r)** Records in the custody or under the control of an Alberta Treasury Branch, other than a record that relates to a non-arm's length transaction between the Government of Alberta and another party, are excluded from the coverage of the Act. The Act does not apply to the banking records of individuals, corporations and organizations that deal with the Alberta Treasury Branches.

In order for this exclusion to apply, the record must be in the custody of the Alberta Treasury Branch or under its control. The Treasury Branch must either have possession of the original record or some authority to manage it (see *IPC Order 98-019*).

A *non-arm's length transaction* is defined, for the purposes of this provision, and the following provision concerning credit union records, as any transaction that has been approved by

- the Executive Council or any of its committees;
- the Treasury Board or any of its committees; or
- a member of the Executive Council (**section 4(4)**).

This definition does not apply to **section 16** of the Act (see *IPC Order 98-013*).

#### **Credit union records**

**Section 4(1)(s)** The following records relating to credit unions are excluded from the Act:

- records relating to the business or affairs of Credit Union Central Alberta Limited, a credit union or a dissolved credit union; and
- records relating to an application for incorporation as a credit union.

In both cases, the records must be obtained or produced in the course of administering or enforcing the *Credit Union Act* or the regulations under it, and must relate to a transaction that is not a non-arm's length transaction as described above with respect to **section 4(1)(r)**. See *IPC Order 97-003* for a further discussion of credit union records.

***Credit union records respecting loans assumed by the Credit Union Deposit Guarantee Corporation***

**Section 4(1)(t)** The Act does not apply to a record of information referred to in section 120(3) of the *Credit Union Act* (advertising of long-term unclaimed balances) or respecting loans made by a credit union that are subsequently assumed by the Credit Union Deposit Guarantee Corporation.

***Health information of a public body that is a custodian under the Health Information Act***

**Section 4(1)(u)** This provision excludes health information, as defined in the *Health Information Act*, that is in the custody or under the control of a public body that is a custodian, as that term is defined in the *Health Information Act*.

If a public body that is a custodian under the *Health Information Act*, such as Alberta Health Services, receives a request for access to an individual's own personal information, the rules regarding access to information under the *Health Information Act* apply to the individual's health information, as defined in section 1(1)(k) of the *Health Information Act*. The rules regarding access to information under the *FOIP Act* apply to the individual's other personal information, as defined in **section 1(n)** of the *FOIP Act*.

**Records excluded from Part 1 only**

In addition to the exclusions in **section 4**, which remove the specified records from the scope of the FOIP Act, **section 6** of the Act contains two partial exclusions. An applicant cannot request access to these records, but other provisions of the Act apply to the information, including all the privacy protections.

***Briefing books***

**Section 6(4)** The right of access under the *FOIP Act* does not extend to a record created solely for the purpose of briefing a member of the Executive Council assuming responsibility for a ministry (**section 6(4)(a)**).

Within the Government of Alberta, when a new Minister assumes responsibility for a ministry, the Department normally prepares a briefing book for the Minister. This briefing material is compiled to allow the Minister to quickly gain an overview of the ministry's functions that will allow him or her to assume leadership of the ministry, to report on the ministry in Cabinet, and to represent its interests.

The briefing material will generally include some information that is publicly available, such as the ministry's business plan and annual report, as well as information created specifically for the new Minister, such as current assessments of operations and analysis of issues affecting the ministry. An applicant cannot request a

new Minister's briefing book for a period of five years from the date of the Minister's appointment as head of the ministry (**section 6(5)**).

Departments generally also prepare briefing binders for the Minister in preparation for a sitting of the Legislature. The purpose of the briefing material is to update the Minister on the status of ministry initiatives and to provide information in a convenient form. This enables the Minister to respond in a timely way to questions in the Legislative Assembly.

An applicant cannot request a Minister's briefing book for a sitting of the Legislative Assembly (**section 6(4)(b)**). This exclusion applies for a period of five years from the beginning of the sitting for which the record was created (**section 6(6)**).

A public body is not obliged to provide access to either of these kinds of briefing binders *in their entirety*, since the record *as a whole* was created solely for the purpose of briefing the Minister for one of the purposes specified in this exclusion.

These exclusions for briefing books do not apply to other kinds of briefing notes, including an item in one of the excluded briefing books that also exists in another file.

#### **Records relating to an audit by the Chief Internal Auditor of Alberta**

**Section 6(7)** The role of the Chief Internal Auditor is to provide independent, objective assurance and advisory services to improve the effectiveness, efficiency and economy of government operations.

The exclusion in **section 6(7)** is a more limited version of the exclusion that applies to the Auditor General (**section 4(1)(d)**). The right of access to a record under the *FOIP Act* does not extend to a record relating to an audit by the Chief Internal Auditor of Alberta that is in the custody of the Chief Internal Auditor of Alberta or any person under his or her administration (e.g. an auditor employed under contract). The exclusion applies to records created by or on behalf of the Chief Internal Auditor as well as records supplied to the Chief Internal Auditor.

The exclusion under **section 6** does not apply

- if 15 years or more has elapsed since the audit to which the record relates was completed (**section 6(8)(a)**), or
- if the audit to which the record relates was discontinued or if no progress has been made on the audit for 15 years or more (**section 6(8)(b)**).

This exclusion does not apply to records relating to an audit by the Chief Internal Auditor that are in the custody of another public body. Those records are subject to **section 24(2.1)**, which is a mandatory exception to disclosure. For further information on **section 24(2.1)**, see section 4.10 in Chapter 4.

### Accounting for excluded records

Where excluded records or information form a portion of the records responsive to a FOIP request, a public body should consider whether the request for access to the information could be accommodated outside the FOIP process.



**Where the public body decides to disclose excluded records, the response to the applicant should explain that the records are excluded from the FOIP Act, and that the public body has decided to provide them outside the FOIP process in this case. Where an excluded record or part of a record forms a portion of the records responsive to a request and it will not be disclosed, the public body should indicate that the record, or part of the record, is excluded. (See Model Letter H in Appendix 3.)**

It is within the Commissioner's jurisdiction to determine whether an exclusion applies to a particular record or part of a record. The Commissioner has no jurisdiction over records that do not fall within the scope of the *FOIP Act* (see *IPC Order 99-034*).

If a public body applies an exclusion, it is not necessary to notify an applicant of all exceptions that the public body may claim if the Commissioner finds, on review, that the exclusion does not apply (see *IPC Order 99-033*).

If there is a request for review by the Commissioner, and the Commissioner finds that the information is not excluded, an opportunity will be given to the public body to consider any exceptions that may apply. See *IPC FOIP Practice Note 4: Section 4 – Exclusions from the Act*, published by the Office of the Information and Privacy Commissioner.

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#### 1.6 Relationship to Other Acts

#### Paramourncy

**Section 5** states that, if a provision of the *FOIP Act* is inconsistent or conflicts with another enactment, the provision of the *FOIP Act* prevails unless

- another Act; or
- a regulation under the *FOIP Act*

expressly provides that the other Act or regulation, or a provision of it, prevails over the *FOIP Act*.

A number of Alberta Acts contain paramourncy provisions that state that a provision of that Act prevails despite the *FOIP Act* (e.g. the *Municipal Government Act*, sections 299 to 301). (See the listing of the provisions of Acts and regulations that are paramount over the *FOIP Act* on the FOIP website: foip.alberta.ca). Other sections of Acts and regulations that prevail despite the *FOIP Act* are listed in **sections 15 and 17** of the FOIP Regulation.

**Section 5** of the FOIP Act provides the means for

- resolving an inconsistency or conflict between the *FOIP Act* and a provision of another Act or regulation, where neither the other Act nor the FOIP Regulation says that the other provision prevails despite the *FOIP Act*, or
- applying a provision in another Act or the FOIP Regulation that says that a provision of another Act or regulation prevails despite the *FOIP Act*.

When considering records that might be subject to a paramouncy provision in other legislation, a public body has to be sure that the record(s) being reviewed contain the kind of information that is referred to in the other Act or regulation. If the other Act or regulation refers to a certain category of information, such as a “report of a *Securities Act* investigator” or “adoption information” under the *Child, Youth and Family Enhancement Act*, the information requested must be able to be characterized in that way (see *IPC Order 99-027*).

The public body must then determine whether that other Act or the FOIP Regulation expressly states that the relevant provision of the other enactment prevails despite the *FOIP Act*. If so, this will mean that, in most cases, the public body will apply that other enactment on its own terms. For a more detailed discussion of how to apply paramouncy provisions, see FOIP Bulletin No. 11: *Paramouncy*, published by Access and Privacy, Service Alberta.

If the Information and Privacy Commissioner finds that a provision of an enactment prevails despite the *FOIP Act*, the Commissioner has no jurisdiction with respect to a matter that is subject to that provision (see *IPC Orders 99-034* and *F2005-007*).



**Public bodies considering making any provision of an Act or regulation paramount, in whole or in part, over the *FOIP Act*, must consult with Access and Privacy, Service Alberta, and with the Office of the Information and Privacy Commissioner during the consideration and drafting process.**

### **Copyright Act**

Section 32.1 of the *Copyright Act* (Canada) states that disclosure of a record pursuant to the *Access to Information Act* (Canada), or disclosure pursuant to any like Act of the legislature of a province, does not constitute an infringement of copyright. The *Copyright Act* may apply to the subsequent use or disclosure of that record by the recipient.

Public bodies are not infringing copyright by disclosing copyright material in response to a FOIP request. However, it may be relevant to consider the application of **section 29** of the *FOIP Act* (information that is or will be available for purchase by the public).

