

ENVIRONMENTAL RIGHTS IN ALBERTA: A RIGHT TO A HEALTHY ENVIRONMENT

Module 4: Access to Environmental Information

A publication of the Environmental Law Centre's Environmental Rights Program



PREPARED BY

ASTRID KALKBRENNER

ENVIRONMENTAL LAW CENTRE (ALBERTA)

JULY 2017



Environmental
Law Centre

FRONT COVER PHOTO: © FALLSVIEW | DREAMSTIME.COM - ELBOW RIVER VALLEY IN AUTUMN

The Environmental Law Centre (Alberta) Society

The Environmental Law Centre (ELC) believes that law is the most powerful tool to protect the environment. Since it was founded in 1982, the ELC has been and continues to be Alberta's only registered charity dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta. The ELC's mission is to educate and champion for strong laws and rights so all Albertans can enjoy clean water, clean air and a healthy environment.

Environmental Law Centre

410, 10115 – 100A Street

Edmonton, AB T5J 2W2

Telephone: (780) 424-5099

Fax: (780) 424-5133

Toll-free: 1-800-661-4238

Email: elc@elc.ab.ca

Website: www.elc.ab.ca

Blog: <http://elc.ab.ca/blog/>

Facebook: <http://www.facebook.com/environmentallawcentre>

Twitter: https://twitter.com/ELC_Alberta

To sign up for the ELC e-newsletter visit:

<http://elc.ab.ca/newsandmedia/news/>

Charitable Registration #11890 0679 RR0001

JULY, 2017

© ELC, ASTRID KALKBRENNER, 2017

Acknowledgements

The Environmental Law Centre would like to thank the Alberta Law Foundation for its support of the ELC's Environmental Rights program. The ELC is publishing a series of educational modules concerning legal rights related to environmental quality. This work is in support of enacting laws that will foster environmental quality for future generations of Albertans.

PROGRAM SUPPORTER: ENVIRONMENTAL BILL OF RIGHTS IN ALBERTA

Alberta **LAW**
FOUNDATION

Executive Summary

Information is power. To obtain information is a basic human right. Information is crucial to enjoy and make use of other basic human rights such as the right to freedom of speech and the right to public participation. Only access to information allows for freely forming an opinion and participating in public debates. The right to obtain information is essential for a healthy economy and social development. The right to access to information as it belongs to the corpus of human rights is a precondition for a democratic society and good public governance. Citizens' right to access to information ensures that governments' actions will be transparent and governments will be held accountable for their actions.

A strong access to information regime should be based on the following key design features:

- maximum information disclosure and transparency of governmental (and sometimes private) information,
- narrow, limited and justifiable exceptions to deny access to information,
- access must be free of charge or at reasonable cost,
- access provided within a reasonable time, and
- remedies for denial of access to information.

We recommend the following improvements in Alberta's *Freedom of Information and Protection of Privacy Act* (FOIP) with regards to the right to access to (environmental) information.

Recommendation #1: Fundamental Right

Alberta should give the right to access to information a status of a fundamental right under the *Constitution of Alberta*.

Recommendation #2: Access to Environmental Information

Environmental Information

The right to access to information should explicitly include environmental information. Environmental information should be defined broadly as all information concerning the physical elements of the environment (such as air, atmosphere, water, landscape, biological diversity); information about activities, administrative measures, agreements, policies, legislation, plans, and programs likely to affect the environment; and the state of human health, safety and conditions of life.

Information vs. Records

In order to provide maximum information disclosure the right should entail access to information and not only to records. Information is a broader term than records. Alternatively, the FOIP should reduce its comprehensive list of exceptions of what does not constitute a record.

Recommendation #3: Reduction of Exemptions and Exceptions to Disclosure

Alberta's FOIP contains too lengthy lists of exceptions to the disclosure of records. Exceptions should be narrow, limited and justified. We recommend a reduction in the exceptions, along with insertion of an explicit interpretation statement into the FOIP that requires exemptions and exceptions to be interpreted in a very restrictive manner.

Recommendation #4: Appropriate Costs

The access to environmental information should be free of charge or costs should be at least appropriate. The current applicable fees are not appropriate (too many different fees and above commercial rates) and thus constitute an obstacle to make use of the right to access to information.

Recommendation #5: Timeliness

The FOIP's theoretical framework with regards to the response time after receipt of an access request compares with international standard. However, in reality the time extension requests by government bodies have skyrocketed over the past years. Another issue is the trend of increased non-response. Government bodies must adhere to the provisions of the FOIP by responding to all access request and improving their time management.

Recommendation #6: Duty to Document

An essential aspect of the right to access to information is that government bodies are documenting decisions, actions, plans and so forth. The recommendation by the Information Commissioners of Canada, including that in Alberta, to introduce an obligation to document into the FOIP should be followed.

Table of Contents

| | |
|--|----|
| PART 1: INTRODUCTION..... | 9 |
| 1.1 Importance of Information | 9 |
| 1.2 Access to Information – A Fundamental Right? | 10 |
| 1.3 Access to Environmental Information..... | 11 |
| PART 2: A FRAMEWORK FOR ACCESS TO ENVIRONMENTAL INFORMATION | 15 |
| 2.1 What makes a Strong Right to Access to Environmental Information? | 15 |
| 2.1.1 Right of Access – A fundamental Right? | 15 |
| 2.1.2 Scope of the Right..... | 16 |
| 2.1.3 Passive and Active Right’s Dimension | 17 |
| 2.1.4 Restrictions on Access..... | 17 |
| 2.1.5 Time Frame..... | 17 |
| 2.1.6 Costs | 18 |
| 2.1.7 Remedies | 18 |
| PART 3: COMPARATIVE REVIEW OF ACCESS REGIMES | 18 |
| 3.1 Aarhus Convention..... | 18 |
| 3.1.1 Scope of the Right to Access to Environmental Information | 19 |
| 3.1.2 Exemptions | 20 |
| 3.1.3 Time Frame..... | 21 |
| 3.1.4 Costs | 21 |
| 3.1.5 Remedies | 21 |
| 3.1.6 Other Obligations | 22 |
| 3.2 Canada..... | 22 |
| 3.2.1 Scope of the Right to Access to (Environmental) Information | 22 |
| 3.2.2 Exemptions | 24 |
| 3.2.3 Time Frame..... | 25 |
| 3.2.4 Costs | 25 |
| 3.2.5 Remedies | 26 |
| 3.3 Alberta | 26 |
| 3.3.1 FOIP | 27 |
| 3.3.1.1 Scope of the Right to Access Information under FOIP..... | 27 |
| 3.3.1.2 Exemptions and Exception under the FOIP | 28 |
| 3.3.1.3 Time Frame..... | 31 |
| 3.3.1.4 Costs..... | 32 |
| 3.3.1.5 Active Information Right..... | 32 |
| 3.3.1.6 The Information and Privacy Commissioner | 33 |
| 3.3.1.7 Remedies..... | 34 |
| 3.3.2 Access to Environmental Information under the EPEA..... | 35 |
| 3.4 Comparative Review and Comments..... | 36 |
| 3.4.1 Fundamental Right | 36 |
| 3.4.2 Maximum Information Disclosure and Transparency | 37 |
| 3.4.3 Narrow, Limited and Justifiable Exceptions to Deny Access to Information | 38 |
| 3.4.4 Access must be Free of Charge or at Reasonable Cost..... | 38 |
| 3.4.5 Access provided within a reasonable Time | 39 |

3.4.6 Remedies for Denial of Access to Information.....39
3.4.7 Comments40
PART 4: RECOMMENDATIONS FOR ALBERTA’S APPROACH TO ACCESS TO ENVIRONMENTAL
INFORMATION AS PART OF A FUTURE PROVINCIAL ENVIRONMENTAL BILL OF RIGHTS
.....42

Part 1: Introduction

1.1 Importance of Information

Citizens' right to access to information ensures that governments' actions will be transparent and governments will be held accountable for their actions.

Information is power. To obtain information is a basic human right. Information is crucial to enjoy and make use of other basic human rights such as the right to freedom of speech and the right to public participation. Only access to information allows for freely forming an opinion and participating in public debates. The right to obtain information is essential for a healthy economy and social development. The right to access to information is a precondition for a democratic society and good public governance. Citizens' right to access to information ensures that governments' actions will be transparent and governments will be held accountable for their actions.

The right to information has been declared in many international and national treaties, covenants, agreements and national acts. For example, the *International Covenant on Civil and Political Rights* (1966) declares in Article 19:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.¹

¹ *International Covenant on Civil and Political Rights of 19 December 1966*, 6 ILM 368, 374, Art. 19. Canada accessed to the Covenant on May 19, 1976. The Covenant entered into force March 23, 1976.

The right to hold opinions or freedom of expression also includes the right to seek information and ideas of all sorts. Access to information refers to information from public offices and those that exercise public functions. The Covenant also called on states to publish and make available to everybody information of public interest. Based on the Covenant, many states introduced Freedom of Information Acts allowing the right to access to information to be restricted only in very narrow cases.

1.2 Access to Information – A Fundamental Right?

Historically, Sweden was the first country in the world to adopt an access to information law in 1766.² The *Freedom of the Press Act, 1766* is widely considered the oldest piece of freedom of information legislation in the world.³ Today, it is part of Sweden's Constitution. The Act entitles everyone, including companies and foreign citizens, to gain access to official documents. An official document may be a text, a picture, a sound clip, a movie, a computer-readable file, or any other piece of information.

The first international recognition or reference was made in 1946 by the UN General Assembly Resolution 59(1) on Freedom of Information:

Freedom of Information is a fundamental right and is the touchstone of all the freedoms to which the United Nations is consecrated. Freedom of Information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world.

In 1948 followed the *Universal Declaration of Human Rights*⁴ (UDHR, 1948). Article 19 of the UDHR stipulates the right to freedom of opinion and expression, which includes the freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers." As mentioned above, the *International Covenant on Civil and Political Rights*⁵ (1966) in Article 19 proclaims the right to freedom of opinion and expression, similar to UDHR.

² Access Info Europe, "History of Right of Access to Information", online: <<https://www.access-info.org/uncategorized/10819>>.

³ University College London (UCL), "The Constitution Unit – Sweden", online: <<https://www.ucl.ac.uk/constitution-unit/research/foi/countries/sweden>>.

⁴ *Universal Declaration of Human Rights*, G.A. Res. 217A, Art 19, UN GAOR, 3d Sess., 1st plen. mtg., UN Doc. A/810 (Dec 10, 1948) [UDHR].

⁵ *International Covenant on Civil and Political Rights*, supra note 1, Art. 19(2).

Regional conventions proclaimed the right to access information such as the *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁶ (1950) which in Article 10 states the right to freedom of expression and includes “to receive and impart information and ideas without interference by public authority and regardless of frontiers.” The *American Convention on Human Rights*⁷ (1969) in Article 13 and the *African Charter on Human and Peoples’ Rights*⁸ (1981) in Article 9 both state that every individual shall have the right to receive information.

The United States of America adopted its *Freedom of Information Act*⁹ in 1966. The *Freedom of Information Act* is a federal law that establishes the public’s right to obtain information from federal government agencies. Canada also belongs to one of the early countries to adopt a Freedom of Information Act. In 1985, the Canadian *Access to Information Act*¹⁰ entered into force.

1.3 Access to Environmental Information

The above section explored the basic origin of the right to access information. This section specifically deals with the question whether there is a specific right to access environmental information and where we can find its roots.

One starting point is the *Stockholm Declaration’s* (1972) opening principle 1: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”¹¹

This famous principle can be considered as an important starting point in the development and evolution of environmental rights (as human rights). However, today we are still far away from a

⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, ETS No. 5, 213 UNTS 222, entered into force 3 September 1953.

⁷ *American Convention on Human Rights*, 1969, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969) entered into force 18 August 1978.

⁸ *African Charter on Human and Peoples’ Rights*, 27 June 1981, 1520 UNTS 217 (1982).

⁹ *Freedom of Information Act*, 5 USC § 552.

¹⁰ An Act to extend the present laws of Canada that provide access to information under the control of the Government of Canada, RSC 1985, c A-1 [*Access to Information Act*].

¹¹ 1972 *Stockholm Declaration on the Human Environment*, UN Doc A/CONF. 48/14/Rev.1 (1973) at principle 1.

universal acknowledgement of environmental rights as human rights and in particular the acknowledgement of an independent right to a healthy environment in international law.¹²

The rationale and objective behind environmental participatory rights is that environmental protection requires not only government actions but also civic participation in public affairs and it serves transparency of governmental decisions and actions.

Environmental rights do not form a single category. But, one view is to classify them as part of civil and political rights under the human rights categories protection for life, private life, and property from environmental harm.¹³ A categorization as human rights entails not only prohibitions on government interference with these rights but also a positive duty to take actions to secure these rights. However, especially in the environmental context many governments have failed to take such measures by legislating about the environment or enforcing environmental law.¹⁴

Aside from the current stand that there is no universal substantive human right to a healthy environment and that individuals seeking environmental justice have to revert back to some of the basic human rights, there is another dimension of environmental rights that are currently better developed: participatory rights in environmental matters. The rationale and objective behind environmental participatory rights is that environmental protection requires not only government actions but also civic participation in public affairs and it serves transparency of governmental decisions and actions.

Birnie, Boyle and Redgwell argue in favour of participatory rights because “governments which operate with openness, accountability, and civic participation are more likely to promote environmental justice,

¹² Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, 3rd ed, (Oxford: Oxford University Press, 2009) at 282.

¹³ Birnie, Boyle and Redgwell, *ibid* at 271, 272.

¹⁴ Birnie, Boyle and Redgwell, *ibid* at 282.

to balance the needs of present and future generations in governmental decisions, and to implement and enforce existing environmental standards.”¹⁵ Concerning participation rights, the *Rio Declaration*¹⁶ (1992) made a crucial statement in its principle 10:

[a]t the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.

The *Rio Declaration* gave the impetus for the adoption of the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*¹⁷ (1998). Since then, the *Aarhus Convention* developed as a benchmark framework for providing access to environmental information. So far, it is a regional convention, but open for all countries to join.¹⁸

The *Aarhus Convention* is one of a few international treaties that deals in essence with environmental rights. Due to the Convention’s importance this paper canvasses its approach to access to information to contextualize and compare the approach taken in Alberta and Canada. The *Aarhus Convention* is important because it has extended and strengthened environmental rights and human-rights in the environmental context, particularly environmental participatory rights.¹⁹

Besides the *Aarhus Convention* there are other international conventions that recognize a right to access environmental information. The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*²⁰ (1988) states in Art. 15(2) that the public has a right to certain information on chemical handling, accident management and alternatives.

¹⁵ Birnie, Boyle and Redgwell, *ibid* at 289.

¹⁶ United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, *Rio Declaration on Environment and Sustainable Development*, UN Doc. A/CONF.151/26/Rev.1 (Vol I) (12 August 1992).

¹⁷ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 30 October 2001, 2161 UNTS 447 [*Aarhus Convention*].

¹⁸ Currently 47 parties ratified the *Aarhus Convention* (March 2017). Canada is not a Party to the Convention. See for the status of ratification, online at <https://www.unece.org/env/pp/ratification.html>.

¹⁹ Birnie, Boyle and Redgwell, *supra* note 12 at 274.

²⁰ *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 10 September 1998, 2244 UNTS 337 [PIC]. PIC, Art. 15(2): “Each Party shall ensure, to the extent practicable, that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III.”

The *Stockholm Convention on Persistent Organic Pollutant (PoPs)*²¹ (2001) in Art. 10(1) also states that the public has the right to public information on PoPs. Similarly, the *United Nations Framework Convention on Climate Change (UNFCCC)*²² in Art. 6(a)(ii) lays out that state parties shall promote and facilitate public access to information on climate change and its effects. The latest international agreement to reiterate the importance for a right to access to (environmental) information is the *Paris Agreement*.²³

There are a few international treaties (Aarhus Convention) and also principle 10 of the Rio Declaration that have given an important impetus in the evolution of environmental participatory rights.

The above focus was primarily on the right to access to environmental information as an internationally acknowledged universal right. Currently, there is no such right that is binding on governments, for example as customary international law. However, there are a few international treaties (*Aarhus Convention*) and also principle 10 of the *Rio Declaration* that have given an important impetus in the evolution of environmental participatory rights. However, the main importance in the development of these rights is not to be found in international law but how it is implemented in national law. The next section explores the question what makes a strong right to access to environmental information?

²¹ *Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001, 2256 UNTS 119. 1, into force on 17 May 2004 at Art 10(1): "Each Party shall, within its capabilities, promote and facilitate: (b) Provision to the public of all available information on persistent organic pollutants.

²² *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 [UNFCCC].

²³ *Paris Agreement*, 12 December 2015, entry into force 4 November 2016 at Art. 12, online: <http://unfccc.int/paris_agreement/items/9485.php>. "Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement."

Part 2: A Framework for Access to Environmental Information

2.1 What makes a Strong Right to Access to Environmental Information?

This section reviews what is considered to be a model design of the right to access to environmental information. A review of the literature identifies some key elements on how to build a strong access regime. The Centre for Law and Democracy has developed guidelines and questions that assist in determining and framing the scope of the right to access to information.²⁴

2.1.1 *Right of Access – A fundamental Right?*

To which degree does the legislative framework recognize access to information as a fundamental right?²⁵ Ideally the right to access should be recognized as a freestanding right, only limited to protect other overriding rights.²⁶ Further, the right to access information should clearly oblige the respective holder of the information to disclose such information. Exemptions to disclosure should be very limited and the legislation should also state that the objective of the right to access to information is to provide transparency and to hold the government accountable.²⁷

Ideally the right to access information should be recognized as a freestanding right, only limited to protect other overriding rights.

²⁴ Centre for Law and Democracy, *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions* (Halifax, NS: Centre for Law and Democracy, 2012), online: <<http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada-report-on-RTI.pdf>>.

²⁵ Centre for Law and Democracy, *ibid* at 6.

²⁶ In Canada such overriding right would be section 1 of the *Canadian Charter of Rights and Freedoms*. Centre for Law and Democracy, *ibid* at 6.

²⁷ Centre for Law and Democracy, *ibid* at 7. The Centre for Law and Democracy recommends recognizing the right to access to information “as being fully protected under the Constitution of Canada, subject to restrictions only in accordance with the test for restrictions which applies to all rights.”

2.1.2 Scope of the Right

Who is the beneficiary of the right to access to information? Does the right of access apply to all persons, legal entities, and foreigners?²⁸ Which categories of information are covered by the right?²⁹ Ideally, the information should include any recorded material that public bodies hold or have access to.³⁰ Another aspect of the scope is which public authorities are obliged to disclose information?³¹ Some laws exclude the duty to disclose information for major public authorities.³² Another common exclusion from the scope of the right to access information applies to the legislature, the judiciary, boards and agencies.³³

However, most importantly, the access right should not require an obligation to demonstrate a special interest in the information.³⁴ In addition, a strong access regime should be built on clear, fair and efficient procedures for access.³⁵ For example, public officials should assist applicants with their requests if needed.³⁶

A strong access regime should be built on clear, fair and efficient procedures for access.

²⁸ Centre for Law and Democracy, *ibid* at 8. For example, Canada's federal law only grants the right to access to information to persons and legal entities based in Canada.

²⁹ Centre for Law and Democracy, *ibid* at 8.

³⁰ Centre for Law and Democracy, *ibid* at 8.

³¹ Centre for Law and Democracy, *ibid* at 8.

³² In Canada such an exemption applies to the Canadian Federal Cabinet. Centre for Law and Democracy, *ibid* at 8.

³³ Centre for Law and Democracy, *ibid* at 9. The Centre for Law and Democracy (at 9, 10) points out that "the exclusion of major public authorities is a significant shortcoming and represents one of the biggest cross-jurisdictional weaknesses uncovered by this Analysis. (...) Every jurisdiction in Canada should amend their access to information law so that it covers all public authorities. This should, in particular, include the executive, legislature and judiciary, as well as statutory boards and tribunals, crown corporations, and private entities that perform a public function or receive significant public funding."

³⁴ Svitlana Kravchenko, "Is Access to Environmental Information a Fundamental Human Right?" (2009) 11 Oregon Review of International Law 227 at 237, 241. See also Aarhus Convention, *supra* note 17, Art. 4(1(a)).

³⁵ Centre for Law and Democracy, *supra* note 24 at 10.

³⁶ Centre for Law and Democracy, *ibid* at 10.

2.1.3 *Passive and Active Right's Dimension*

The right to access to information entails two dimensions: one passive and one active. The passive access to information refers to a system where information must be requested before they are released.³⁷ An active access to information right refers to regimes that require governmental entities or even specific private entities to disclose certain types of information to the public such as release of pollutants and emissions.³⁸ Examples for such active access to information rights can be found in the *Kyiv Protocol on Pollutant Release and Transfer Registers*,³⁹ European Pollutant Release and Transfer Register⁴⁰ (PRTR), US Toxic Release Inventory⁴¹ and other multilateral environmental agreements (MEAs), such as the UNFCCC⁴² and the *Kyoto Protocol*⁴³ for example.

2.1.4 *Restrictions on Access*

The grounds for exemptions should be very restrictive. Typical exemptions are international relations, national defense, public security, state secrets; commercial secrets and intellectual property; information in the course of completion (material that is not yet finalized); and internal communications (internal information that has not been published yet).⁴⁴ The exact definitions and interpretations of these typical exemptions vary between jurisdictions.

2.1.5 *Time Frame*

Public bodies should provide access to information as soon as possible. Internationally, many access to information regimes require information disclosure to the requestor of the information within one month after submission of the request.⁴⁵

³⁷ Kravchenko, *supra* note 34 at 243.

³⁸ Kravchenko, *ibid* at 242. For information from private entities see Juliana Zuluaga Madrid, "Access to Environmental Information from Private Entities: A Rights-Based Approach" (2017) 26:1 RECIEL 38.

³⁹ UNECE, *Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 21 May 2003, 2626 UNTS 119.

⁴⁰ Commission Regulation 166/2006, Concerning the Establishment of a European Pollutant Release and Transfer Register and Amending Council Directives, 2006 OJ (L 33) 1 (EC).

⁴¹ Established under the *Emergency Planning & Community Right-to-Know Act* (1986), 42 USC § 11001 (2006).

⁴² UNFCCC, *supra* note 22.

⁴³ *1997 Kyoto Protocol to the UN Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 148, 37 ILM 22 (1998), entry into force 16 February 2005.

⁴⁴ See a list in Kravchenko, *supra* note 34 at 245 – 251.

⁴⁵ Kravchenko, *ibid* at 255.

2.1.6 Costs

Access to information should be free of charge or at reasonable costs.

2.1.7 Remedies

The effectiveness of an access to information regime also requires the availability of remedies against denied access to information requests. An oversight of denied information requests can be conducted by an independent administrative review, appeal body, or a court.⁴⁶ Kravchenko recommends creating a special, independent body within the government for dealing with information requests and clear procedures on such information requests.⁴⁷

Part 3: Comparative Review of Access Regimes

After getting an idea of what elements compose a solid right to access to information, this section canvasses select access to information regimes. One of the most important and famous regimes is the regional *Aarhus Convention* that has created a widely accepted model regime to grant access to information. The two other access regimes explored here are the federal Canadian *Access to Information Act*⁴⁸ and Alberta's *Freedom of Information and Protection of Privacy Act*.⁴⁹ With a comparative review of the three regimes we aim to identify in particular the areas for improvement in Alberta's regime.

3.1 Aarhus Convention

The *Aarhus Convention* is an international multilateral environmental agreement. The Convention establishes a legal framework which has to be transposed into national law by the Contracting Parties (States). That means the *Aarhus Convention* does not confer direct rights to individuals. The individuals must refer to their domestic law. The *Aarhus Convention's* objective is to guarantee rights of access to

⁴⁶ See also Environmental Law Centre (ELC), "Third Party Oversight and Environmental Rights" (Edmonton: ELC, 2016). For more information on the design of remedies see Kravchenko, *ibid* at 258-262.

⁴⁷ Kravchenko, *ibid* at 252.

⁴⁸ *Access to Information Act*, *supra* note 10.

⁴⁹ *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25.

information, public participation in decision-making and access to justice in environmental matters.⁵⁰ It sets only minimum standards. Contracting parties are free to guarantee broader and more comprehensive access to information rights.⁵¹

The Aarhus Convention's objective is to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters.

3.1.1 Scope of the Right to Access to Environmental Information

A very important feature of the Convention is that the right to access to environmental information can be requested without the duty to demonstrate a specific interest in that information.⁵² The object of the request has to be "environmental information".

Environmental information has a broad legal definition and includes information concerning:

- the physical elements of the environment (such as air, atmosphere, water, landscape, biological diversity);
- information about activities, administrative measures, agreements, policies, legislation, plans, and programmes likely to affect the environment; and
- the state of human health, safety and conditions of life.⁵³

The request to access information must be directed to a public authority. The *Aarhus Convention* defines a public authority as:

- a government (national, regional or other level),
- natural or legal persons performing public administrative functions under national law, especially regarding the environment, and
- any other natural or legal persons having public responsibilities or functions, or providing public services, especially regarding the environment.⁵⁴

⁵⁰ *Aarhus Convention*, Art 1.

⁵¹ *Aarhus Convention*, Art 3 (5).

⁵² *Aarhus Convention*, Art 4 (1)(a).

⁵³ *Aarhus Convention*, Art 2 (3).

3.1.2 Exemptions

The general assumption of the *Aarhus Convention* is that access to information is provided. However, there are reasons to deny access to information. The exemptions are:

- the public authority does not hold requested environmental information,
- the request is unreasonable or formulated in too general a manner, or
- the requested information is material in the course of completion or internal communications of public authorities.⁵⁵

Article 4(4) of the *Aarhus Convention* also stipulates reasons for refusal of access if disclosure would adversely affect:

- the confidentiality of the proceedings of public authorities (where confidentiality is provided for under national law),
- international relations, national defence or public security,
- course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature,
- confidentiality of commercial and industrial information (however, information on emissions which is relevant for the protection of the environment shall be disclosed),
- intellectual property rights,
- confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public,
- interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material, or
- the environment to which the information relates, such as the breeding sites of rare species.

The grounds for refusal and exemptions must be interpreted in a restrictive way, taking into account the public interest served by the disclosure and taking into account whether the information requested relates to emissions into the environment.⁵⁶

⁵⁴ *Aarhus Convention*, Art 2 (2).

⁵⁵ *Aarhus Convention*, Art 4 (3).

⁵⁶ *Aarhus Convention*, Art 4(4).

3.1.3 Time Frame

Access to information has to be given as soon as possible, not exceeding one month after submission of the request.⁵⁷ However, in special circumstances when the requested volume and the complexity of information are of such a great extent the *Aarhus Convention* extends the processing time up to two months in total after the submission of the request.⁵⁸

3.1.4 Costs

Under the *Aarhus Convention* public authorities are allowed to make reasonable charges for supplying information.⁵⁹ The Aarhus Convention Compliance Committee held that a fee of Euro 2.05 per copy was not in compliance with the *Aarhus Convention*.⁶⁰ In an information request, the Information Tribunal of the United Kingdom ruled that 50 pence (almost 1 CA\$) per copy was excessive.⁶¹

3.1.5 Remedies

The Aarhus Convention's other main pillar is to ensure access to justice.

The *Aarhus Convention's* other main pillar is to ensure access to justice. Contracting parties must ensure that any person, who makes a request for access to information under Article 4 which is ignored, denied, refused or otherwise not dealt with, will have the option to access a review procedure before a court of law or another independent and impartial body established by law.⁶² The review procedure must be expeditious, and free of charge or inexpensive.

⁵⁷ *Aarhus Convention*, Art 4 (2).

⁵⁸ *Aarhus Convention*, Art 4 (2).

⁵⁹ *Aarhus Convention*, Art 4(8).

⁶⁰ See Kravchenko, *supra* note 34 at 257; Aarhus Convention Compliance Committee, Communicant Intervention on the Communication to the Aarhus Convention Compliance Committee concerning compliance by Spain with the Provisions of the Convention in Connection with Decisions-Making on a Residential Development Project in the City of Murcia, Spain, UN Doc. ACCC/C/2008/24, 3 (1 April 2009).

⁶¹ *David Markinson v Info. Comm'r* (2006) Information Tribunal, Appeal No. EA/2005/0014, 44 (b)-(c), online: <<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i161/Markinson.pdf>>.

⁶² *Aarhus Convention*, Art 9(1).

3.1.6 Other Obligations

Public authorities are obliged to possess and update environmental information that is relevant to their functions.⁶³ In the event of any imminent threat to human health or the environment, all information which could enable the public to take measures to prevent or mitigate harm arising from that threat and which is held by a public authority must be disseminated immediately and without delay to members of the public who may be affected.⁶⁴

3.2 Canada

At the federal level, Canada grants a right to access information under the *Access to Information Act*.⁶⁵ The Act's objective is to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of government information should be reviewed independently of government.⁶⁶ The provisions in the Act complement existing access to information procedures.⁶⁷

Government information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of government information should be reviewed independently of government.

3.2.1 Scope of the Right to Access to (Environmental) Information

The Act stipulates a right to access to records as opposed to the *Aarhus Convention's* approach which grants access to information.⁶⁸ Record means any documentary material, regardless of medium or form.⁶⁹ The right to access records was initially granted only to Canadian citizens and permanent

⁶³ *Aarhus Convention*, Art 5(1)(a).

⁶⁴ *Aarhus Convention*, Art 5(1)(c).

⁶⁵ *Access to Information Act*, *supra* note 10.

⁶⁶ *Access to Information Act*, s 2(1).

⁶⁷ *Access to Information Act*, s 2(2).

⁶⁸ *Access to Information Act*, s 4(1).

⁶⁹ *Access to Information Act*, s 3.

residents but was later extended by a Governor in Council order to all individuals who are present in Canada (even if not Canadian citizens or permanent residents) and to all corporations that are present in Canada.⁷⁰

Government institutions are obliged to assist persons in making a request for access to a government held record, respond to the request accurately and completely, and to provide timely access to the record.⁷¹ The Act does not require that the person seeking disclosure has a specific interest in the record.

The Act requires a request to be made in writing and to provide sufficient detail to enable the identification of the record.⁷²

Related to the right to access to environmental information, the *Canadian Environmental Protection Act* (CEPA)⁷³ stipulates certain information duties regarding the release of pollutants. Under the *CEPA*, the Minister publishes data and maintains the national inventory of releases of pollutants (NPRI).⁷⁴ A person who must provide information to the Minister for publication in the NPRI may request that the information be treated as confidential.⁷⁵ Reasons that allow for confidentiality are:

- the information constitutes a trade secret;
- the disclosure of the information would likely cause material financial loss to, or prejudice to the competitive position of, the person providing the information or on whose behalf it is provided; and
- the disclosure of the information would likely interfere with contractual or other negotiations being conducted by the person providing the information or on whose behalf it is provided.⁷⁶

The Minister's decision must consider whether:

- the disclosure is in the interest of the protection of the environment, public health or public safety; and

⁷⁰ *Access to Information Act*, s 4(1)-(2); Order Extending the Right To Be Given Access under Subsection 4(1) of the *Access to Information Act* to Records under the Control of a Government Institution, SOR/89-207, s 2.

⁷¹ *Access to Information Act*, s 4(2.1).

⁷² *Access to Information Act*, s 6.

⁷³ *Canadian Environmental Protection Act*, 1999, SC 1999, c 33 [CEPA].

⁷⁴ *CEPA*, s 48 (ss 48-53).

⁷⁵ *CEPA*, s 51.

⁷⁶ *CEPA*, s 52.

- the public interest in the disclosure outweighs in importance
 - any material financial loss or prejudice to the competitive position of the person who provided the information or on whose behalf it was provided, and
 - any damage to the privacy, reputation or human dignity of any individual that may result from the disclosure.⁷⁷

However, only the person requesting to keep the information confidential may file for a review in a court in case the Minister rejects the request for confidentiality.⁷⁸

3.2.2 Exemptions

The *Access to Information Act* contains numerous lengthy and comprehensive exemptions to the right to access records.⁷⁹ The exemptions deal with:

- information obtained in confidence from other public institutions,
- disclosure of information which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs,
- records that disclose information which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, or the detection, prevention or suppression of subversive or hostile activities,
- law enforcement and investigations,
- records relating to investigations, examinations and audits,
- investigations, examinations and reviews under the Canada Elections Act,
- safety of individuals,
- economic interests of Canada and of certain government institutions,
- personal information,
- third party information,
- advice or recommendations developed by or for a government institution, a minister of the Crown, and so forth,
- testing procedures, tests and audits, and
- information subject to solicitor-client privilege.

⁷⁷ *CEPA*, s 53(3).

⁷⁸ *CEPA*, s 53(5).

⁷⁹ *Access to Information Act*, ss 13 - 24.

3.2.3 Time Frame

Within 30 days of the receipt of the request to access a record, the person who made the request receives a written notice as to whether or not the access to the record will be given, and in case that access is to be given, the requesting person receives access to the record.⁸⁰ The time limit of 30 days can be extended for a reasonable period of time if:

- the request entails the provision of a large number of records or requires a search of a large number of records and thus would unreasonably interfere with the operations of the government institution,
- consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or
- third parties are involved.⁸¹

For an extension of more than 30 days, notice also has to be given to the Information Commissioner.⁸²

3.2.4 Costs

Governmental institutions are allowed to charge various fees from persons requesting access to a record:⁸³

- application fee of \$ 5, not exceeding \$25, is charged at the time the request is made,
- before any copies are made, such fee as may be prescribed by regulation reflecting the cost of reproduction calculated in the manner prescribed by regulation;
- before the record is converted into an alternative format or any copies are made in that format, such fee as may be prescribed by regulation reflecting the cost of the medium in which the alternative format is produced;
- additional payment calculated in the manner prescribed by regulation, for every hour in excess of five hours that is reasonably required to search for the record or prepare any part of it for disclosure, and may require that the payment be made before access to the record is given.

The government institution may require the requesting person to pay a reasonable proportion of the fees as a deposit before the search or production of the record is undertaken.⁸⁴ However, the head of

⁸⁰ *Access to Information Act*, s 7. For a refusal to access the requested record see also s 10.

⁸¹ *Access to Information Act*, s 9.

⁸² *Access to Information Act*, s 9(2).

⁸³ *Access to Information Act*, s 11(1); Regulations Respecting Access to Information, SOR/83-507, s 7 [Access to Information Regulations].

the respective government institution may waive the payment of a fee or may make a refund.⁸⁵ The *Access to Information Regulations* sets out a fee schedule for the most common record formats. For example, a photocopy of a page with dimensions of not more than 21.5 cm by 35.5 cm, costs \$0.20 per page, and a microfiche duplication, non-silver, \$0.40 per fiche.⁸⁶ The *Access to Information Regulations* also stipulate further fees for non-computerized records which are calculated per time unit.

3.2.5 Remedies

Persons affected in their rights under the *Access to Information Act* can file a written complaint with the Information Commissioner.⁸⁷ With the Information Commissioner, the *Access to Information Act* has established its own oversight body.⁸⁸ The Information Commissioner receives the complaints and carries out investigations.⁸⁹ The Commissioner informs the head of the respective government institution about the findings and makes appropriate recommendations. The Commissioner may also request to get notice of any action that has been taken or proposed.⁹⁰ Another available remedy is to request a review by the Federal Court in case the Information Commissioner has refused the complaint.⁹¹

3.3 Alberta

Alberta's general access to information framework consists of three pieces of legislation: the *Freedom of Information and Protection of Privacy Act*,⁹² the *Health Information Act*⁹³ and the *Personal Information Protection Act*.⁹⁴ For the focus of this paper, the FOIP is the relevant statute to examine.⁹⁵ In addition,

⁸⁴ *Access to Information Act*, s 11(4).

⁸⁵ *Access to Information Act*, s 11(6).

⁸⁶ *Access to Information Regulations*, *supra* note 83, s 7.

⁸⁷ See the details in *Access to Information Act*, ss 30, 31.

⁸⁸ *Access to Information Act*, ss 54 – 66.

⁸⁹ The Information Commissioner's powers are detailed in *Access to Information Act*, s 36.

⁹⁰ *Access to Information Act*, s 37.

⁹¹ *Access to Information Act*, s 41.

⁹² *Freedom of Information and Protection of Privacy Act*, *supra* note 49.

⁹³ *Health Information Act*, RSA 2000, c H-5.

⁹⁴ *Personal Information Protection Act*, SA 2003, c P-6.5.

⁹⁵ See also a previous ELC publications concerning environmental information under the FOIP for real estate buyers: Adam Driedzic, *What lies beneath? – Access to Environmental Information in Alberta* (Edmonton: ELC, 2014), online: <<http://elc.ab.ca/media/94632/Access-Final.pdf>>; ELC, *Buyer Beware? Where and how to find Environmental Information about a Property in Alberta* (Edmonton: ELC, 2015), online: <http://elc.ab.ca/media/96806/Buyer_beware_web_22.pdf>.

there are specific access to environmental information provisions in the Alberta *Environmental Protection and Enhancement Act*⁹⁶ and its *Disclosure of Information Regulation*.⁹⁷

3.3.1 FOIP

3.3.1.1 Scope of the Right to Access Information under FOIP

The FOIP aims for several objectives, among others, to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in the FOIP.⁹⁸

The FOIP provides additional access to information rights and thus does not replace existing procedures for access to information or records.⁹⁹ It does not affect access to records deposited in the Provincial Archives of Alberta or archives of a public body that were unrestricted before the Act's coming into force.¹⁰⁰ The FOIP also regulates its relationship to other acts. Generally, it provides that the FOIP prevails if provisions are inconsistent or in conflict with provisions of other enactments. But, another act or a regulation under the FOIP can expressly provide that they prevail over the FOIP.¹⁰¹

A requestor of information (called applicant) has the right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.¹⁰² Alberta's FOIP briefly stipulates to which records the act applies. The FOIP applies to all

⁹⁶ *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [EPEA].

⁹⁷ *Disclosure of Information Regulation*, Alberta Regulation 273/2004.

⁹⁸ FOIP, s 2(a). Section 2 stipulates more objectives than access to information, such as:

(b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information,

(c) to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body,

(d) to allow individuals a right to request corrections to personal information about themselves that is held by a public body, and

(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.

⁹⁹ FOIP, s 3(a).

¹⁰⁰ FOIP, s 3(b).

¹⁰¹ FOIP, s 5.

¹⁰² FOIP, s 6(1).

records in the custody or under the control of a public body, including court administration records.¹⁰³ The Act does not provide a definition of the term information and what type of information are covered. But it defines record as “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.¹⁰⁴ However, the right to access records does not extend to all records. A list of exempted records is given in the following section of this report.

Applicant has the right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

The right of access to a record does not extend to information excepted from disclosure (see ss 16 – 29). However, if that excepted information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.¹⁰⁵

A person who wants to access a record must make a written and detailed request to the public body that the person believes has custody or control of the record.¹⁰⁶ The applicant may request to examine or get a copy of the record. Public bodies are obliged to assist applicants in their requests.¹⁰⁷

3.3.1.2 Exemptions and Exception under the FOIP

The FOIP contains several exemptions from the right to access records.

¹⁰³ FOIP, s 4(1).

¹⁰⁴ FOIP, s 1(q).

¹⁰⁵ FOIP, s 6(2).

¹⁰⁶ FOIP, s 7(1),(2). For continuing requests see s 9.

¹⁰⁷ FOIP, s 10.

3.3.1.2.1 Non-records, Non-eligible Records

The first group of what essentially qualifies as exemptions deals with the definition of records and items that do not qualify as a record. In other words, information in these records is not covered by the right to access records because under the FOIP they are not considered to be an eligible record. The list to which records the FOIP does not apply is lengthy.¹⁰⁸ Therefore, the following list presents only the general categories:

- information in a court file or a record of a judge;
- a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity;
- a quality assurance record;
- 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;
- information that is collected under the control of the Ethics Commissioner;
- questions to be used on an examination or test and teaching materials;
- records relating to ongoing prosecutions;
- a record made from information specific registries;
- a personal record or constituency record of an elected member of a local public body;
- a personal record of an appointed or elected member of the governing body of a local public body;
- a personal record or constituency record of a member of the Executive Council;
- 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 control of the Legislative Assembly Office;
- a record created by or for a member of the Executive Council, Legislative Assembly, or a chair of a Provincial agency;
- a record in the custody or control of a treasury branch other than a record that relates to a non-arm's length transaction between the Government of Alberta and another party;
- a record relating to the business or affairs of Credit Union Central Alberta Limited and certain information under the *Credit Union Act*; and
- 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 defined in the *Health Information Act*.

¹⁰⁸ FOIP, s 4(1).

3.3.1.2.2 Extent of Information Right

The second group of exemptions lists cases to which the right to access to records does not extend:¹⁰⁹

- a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry, or
- a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly.
- 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 the administration of the Chief Internal Auditor of Alberta, irrespective of whether the record was created by or for or supplied to the Chief Internal Auditor of Alberta.

3.3.1.2.3 Records Excepted from Disclosure

In a third group, the FOIP includes multiple exceptions to the right of access records.¹¹⁰ Again, the list of exceptions is too comprehensive to be covered here in detail. The respective sections of the FOIP provide more explanations or details on these exemptions. Here, we only provide the main categories of exceptions to disclose information:

- disclosure is harmful to business interests of a third party,¹¹¹
- disclosure harmful to personal privacy,¹¹²
- disclosure harmful to individual or public safety,¹¹³
- confidential evaluations,¹¹⁴
- disclosure harmful to law enforcement,¹¹⁵
- disclosure harmful to intergovernmental relations,¹¹⁶
- cabinet and Treasury Board confidences,¹¹⁷
- local public body confidences,¹¹⁸
- advice from officials,¹¹⁹
- disclosure harmful to economic and other interests of a public body,¹²⁰
- testing procedures, tests and audits,¹²¹

¹⁰⁹ FOIP, s 6(4)-(8).

¹¹⁰ See FOIP, Part 1, division 2, ss 16 - 29.

¹¹¹ FOIP, s 16.

¹¹² FOIP, s 17.

¹¹³ FOIP, s 18.

¹¹⁴ FOIP, s 19.

¹¹⁵ FOIP, s 20.

¹¹⁶ FOIP, s 21.

¹¹⁷ FOIP, s 22.

¹¹⁸ FOIP, s 23.

¹¹⁹ FOIP, s 24.

¹²⁰ FOIP, s 25.

¹²¹ FOIP, s 26.

- privileged information,¹²²
- disclosure harmful to the conservation of heritage sites, etc.,¹²³ and
- information that is or will be available to the public.¹²⁴

3.3.1.3 Time Frame

Generally, the public body must make every reasonable effort to respond to a request not later than within 30 days of receipt of the request.¹²⁵ The time for responding to the request can be extended for another 30 days upon permission of the Commissioner if:¹²⁶

- the request was not detailed enough and the public body was unable to identify the requested record,
- a large number of records are requested or must be searched and responding within 30 days would unreasonably interfere with the operation of the public body,
- more time is needed for consultation with a third party or other public bodies, or
- a third party asks for a review.

If the public body does not respond within the time period or any extended period than the request is treated as a decision to refuse access to the record.¹²⁷ If the time for responding to a request is extended, the head of the public body must tell the applicant the reason for the extension and when a response can be expected, as well advise that the applicant may make a complaint to the Commissioner or to an adjudicator, as the case may be, about the extension.¹²⁸

¹²² FOIP, s 27.

¹²³ FOIP, s 28.

¹²⁴ FOIP, s 29.

¹²⁵ FOIP, s 11(1).

¹²⁶ FOIP, s 14.

¹²⁷ FOIP, s 11(2).

¹²⁸ FOIP, s 14(4). The term head of a public body is defined in FOIP, s 1(f) as:

“(i) if the public body is a department, branch or office of the Government of Alberta, the member of the Executive Council who presides over it,

(ii) if the public body is an agency, board, commission, corporation, office or other body designated as a public body in the regulations, the person designated by the member of the Executive Council responsible for that body to act as the head of that body or, if a head is not so designated, the person who acts as the chief officer and is charged with the administration and operation of that body,

(iii) if the public body is a local public body, the person or group of persons designated under section 95(a) as the head, and

(iv) in any other case, the chief officer of the public body.”

3.3.1.4 Costs

Public bodies are entitled to charge fees for making available records.¹²⁹ The *Freedom of Information and Protection of Privacy Regulation*¹³⁰ (*Regulations*) stipulates the fees for services.¹³¹ For a request to access a record of non-personal information, the Regulation prescribes mandatory initial upfront fees: an initial fee of \$25 for a non-continuing request, or an initial fee of \$50 for a continuing request.¹³² In addition to the initial fees, Schedule 2 of the *Regulations* sets out other fees that the public body can charge if the estimate exceeds \$150.¹³³

If an applicant is required to pay fees for services, the public body must give the applicant an estimate of the total fee before providing the services.¹³⁴ However, the applicant can request to not pay all or part of a fee for services.¹³⁵ The FOIP stipulates several reasons for excusing the applicant from paying fees. One reason to excuse from paying is if the record relates to a matter of public interest, including the environment or public health or safety.¹³⁶ This is one of the very few references that the FOIP makes to the environment.

3.3.1.5 Active Information Right

FOIP obliges public bodies, regardless of an information request and without any delay, to disclose information to the public, to an affected group of people, to any person or to an applicant regarding: information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or information disclosure is, for any other reason, clearly in the public interest.

¹²⁹ FOIP, ss 6(3), 93.

¹³⁰ *Freedom of Information and Protection of Privacy Regulation*, Alta Reg 186/2008.

¹³¹ *Freedom of Information and Protection of Privacy Regulation*, s 10: "Where an applicant is required to pay a fee for services, the fee is payable in accordance with sections 11, 12, 13 and 14."

¹³² *Freedom of Information and Protection of Privacy Regulation*, s 11(2)-(3). See s 12 for fees for personal information.

¹³³ *Freedom of Information and Protection of Privacy Regulation*, s 11(4).

¹³⁴ FOIP, s 93(3).

¹³⁵ FOIP, s 93(3.1).

¹³⁶ FOIP, s 93(4)(a).

The majority of provisions in the FOIP govern the passive right to obtain access to information. However, in one case the FOIP stipulates an active right to obtain information in public health and safety matters. The FOIP obliges public bodies, regardless of an information request and without any delay, to disclose information to the public, to an affected group of people, to any person or to an applicant regarding:

- information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or
- information disclosure is, for any other reason, clearly in the public interest.¹³⁷

This obligation to disclose information applies despite any other provision of the FOIP.¹³⁸ However, this obligation to actively disclose information also requires the public body, before disclosing information, to notify any third party that is affected by the disclosure and to notify the Information and Privacy Commissioner.¹³⁹ In addition, the third party must get an opportunity to make representations.¹⁴⁰ Only if this is not practicable, a written notice of the disclosure to the third party and the Information and Privacy Commissioner is sufficient.¹⁴¹

3.3.1.6 The Information and Privacy Commissioner

The FOIP establishes the Office of the Information and Privacy Commissioner.¹⁴²

General duties of the Commissioner are to monitor the administration of the FOIP and how the objectives are achieved.¹⁴³ The Commissioner may

- conduct investigations¹⁴⁴ to ensure compliance with any provision of FOIP or compliance with rules relating to the destruction of records,
- make an order described in section 72(3) whether or not a review is requested,
- inform the public about FOIP,
- receive comments from the public concerning the administration of the FOIP,

¹³⁷ FOIP, s 32(1).

¹³⁸ FOIP, s 32(2).

¹³⁹ FOIP, s 32(3).

¹⁴⁰ FOIP, s 32(3).

¹⁴¹ FOIP, s 32(4).

¹⁴² FOIP, Part 4, ss 44-64.

¹⁴³ FOIP, s 53(1).

¹⁴⁴ For the purpose of investigations and inquiries, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act*. FOIP, s 56(1). Anything said, any information supplied or any record produced by a person during an investigation or inquiry by the Commissioner is privileged in the same manner as if the investigation or inquiry were a proceeding in a court. FOIP, s 58.

- engage in or commission research into anything affecting the achievement of the purposes of the FOIP, and
- give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under the FOIP.

The Commissioner may investigate and attempt to resolve complaints that:

- a duty to assist applicants has not been performed,
- an extension of time for responding to a request is not in accordance with section 14, and/or
- a fee required under the FOIP is inappropriate.¹⁴⁵

The Commissioner gives advice and recommendations to the head of a public body.¹⁴⁶

Applicants who have requested the head of a public body to access to a record or the correction of personal information can ask the Commission to review any decision, act or failure to act of the head that relates to the request.¹⁴⁷

3.3.1.7 Remedies

The power and actions taken by the Commissioner are part of the remedies for affected persons. In addition, the Commissioner may involve a mediator to investigate and settle any issue that is subject of the review.¹⁴⁸

Unless there is a mediation settlement, the Commissioner closes an inquiry with an order.¹⁴⁹ In the order the Commissioner can require, among other things, the head of a public body to grant access to the records or to refuse requested access; the head of a public body to perform a duty imposed by the FOIP or the regulations; reduce or extend a time limit; and/or reduce a fee or order a refund.¹⁵⁰

The Commissioner gives a copy of the order to the person who asked for the review, to the head of the public body concerned, to any other person given a copy of the request for the review, and to the

¹⁴⁵ FOIP, s 53(2).

¹⁴⁶ FOIP, s 54.

¹⁴⁷ FOIP, s 65(1).

¹⁴⁸ FOIP, s 68.

¹⁴⁹ FOIP, s 72(1).

¹⁵⁰ FOIP, s 72(2)-(4).

Minister.¹⁵¹ An order issued by the Commissioner is final.¹⁵² The head of the public body must comply with the order within 50 days of the receipt of a copy of the order.¹⁵³ However, the head must not take any compliance steps with the order until the period for bringing an application for judicial review ends.¹⁵⁴

Each person who received a copy of the order (see above) can apply for a judicial review of that order. The judicial review must be filed within 45 days after the receipt of a copy of the order.¹⁵⁵ Once a judicial review is submitted, the Commissioner's order is stayed until the court has dealt with the matter.¹⁵⁶

3.3.2 Access to Environmental Information under the EPEA

The *EPEA* regulates a specific track to access to environmental information. Documents and information in the possession of the Department that are provided to the Department in the administration of the *EPEA* must be disclosed to the public.¹⁵⁷ Documents and information that must be disclosed entail among other things:

- information concerning proposed activities under the *EPEA*,
- documents and information in the environmental assessment registry,
- information provided for applications for a registration or certificate, and
- environmental and emission monitoring data.¹⁵⁸

In addition the following documents that are created by the Department shall be disclosed to the public:

- approvals and registrations,
- certificates of qualification and certificates of variance,
- environmental and emission monitoring data and the processing information that is necessary to interpret that data,
- reclamation and remediation certificates, and
- enforcement orders, and environmental protection orders.¹⁵⁹

¹⁵¹ FOIP, s 72(5).

¹⁵² FOIP, s 73.

¹⁵³ FOIP, s 74(1).

¹⁵⁴ FOIP, s 74(2).

¹⁵⁵ FOIP, s 74(3).

¹⁵⁶ FOIP, s 74(4).

¹⁵⁷ *EPEA*, *supra* note 96, s 35(1)(a).

¹⁵⁸ *EPEA*, s 35(1)(a).

¹⁵⁹ *EPEA*, s 35(1)(b).

The *EPEA* stipulates exemptions for the disclosure of information if they relate to

- a trade secret,
- process or technique that the person submitting the information keeps confidential, and
- the person submitting the information requests that the information is kept confidential and may not be disclosed.¹⁶⁰

According to the *Disclosure of Information Regulation* the respective responsible person (Director and Minister) are entitled to publish the document or information regardless whether there is a request for disclosure.¹⁶¹ Within 30 days after the receipt of a written request for a document or information the responsible person notifies the requestor whether the document or information will be released.¹⁶² Costs for the processing of information requests are charged in accordance with the FOIP.¹⁶³ The *Disclosure of Information Regulation* expired on June 30, 2017.¹⁶⁴

3.4 Comparative Review and Comments

This section compares the three access regimes reviewed in this paper and comments on them with a special focus on the regime of Alberta.

3.4.1 Fundamental Right

The *Aarhus Convention* must be transposed into national law. It is dependent on the contracting states as to whether or not the right to access to information is granted legal status of a fundamental right. In Canada (which is not party to the *Aarhus Convention*), the right to access to information has not been granted the status of a fundamental right at either a federal or a provincial level.

¹⁶⁰ *EPEA*, s 35(4).

¹⁶¹ *Disclosure of Information Regulation*, *supra* note 97, s 2(1).

¹⁶² *Disclosure of Information Regulation*, s 2(2).

¹⁶³ *Disclosure of Information Regulation*, s 4; FOIP, Schedule 2.

¹⁶⁴ *Disclosure of Information Regulation*, s 6;

3.4.2 Maximum Information Disclosure and Transparency

*Access to Information Act and FOIP grant a right to access to records
as opposed to information.*

Clearly, the definition of environmental information in the *Aarhus Convention* is broader than under the federal *Access to Information Act* or the FOIP. The *Access to Information Act* and the FOIP grant a right to access to records as opposed to information. This approach is more restrictive because the only available information is that found on a record which is a legally narrowly defined term. Thus, some information is already excluded by virtue of being on a “non-record”. That is particularly the case in Alberta’s FOIP which dedicates a lengthy list to what does not constitute a record.¹⁶⁵

Another observation is that only the *Aarhus Convention* explicitly (and exclusively) provides access to environmental information. The *Access to Information Act* and the FOIP establish an access regime to information or records in general. The only reference made to the term environment under the *Access to Information Act* is found in the section stipulating a disclosure prohibition regarding third party information.¹⁶⁶ In that particular provision, the Act deals with environmental testing and with the disclosure of records in the public interest. Under very narrow circumstances the disclosure of specific records, or parts thereof, that otherwise are not open for the public is justified if:

- (a) the disclosure would be in the public interest as it relates to public health, public safety or **protection of the environment**; and {emphasis added}
- (b) the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations.¹⁶⁷

This is the only relevant reference in the entire Act concerning records relating to the protection of the environment.

¹⁶⁵ FOIP, s 4(1).

¹⁶⁶ *Access to Information Act*, s 20.

¹⁶⁷ *Access to Information Act*, s 20(6).

The FOIP contains a similar provision that allows the disclosure of personal information if it is likely to promote public health and safety or the protection of the environment.¹⁶⁸ Also the FOIP has provisions relating to environmental testing and whether disclosure might be permissible.¹⁶⁹ For the purpose of public and health and safety, records must be disclosed to the public (with or without a request by an applicant) without delay, on a risk of significant harm to the environment or the health or safety of the public.¹⁷⁰

3.4.3 *Narrow, Limited and Justifiable Exceptions to Deny Access to Information*

All regimes have implemented sets of reasons that exempt the information holder to release the requested information. However, the *Aarhus Convention* explicitly states that exemptions must be interpreted in a restrictive way.¹⁷¹ In comparison to the *Aarhus Convention*, the federal *Access to Information Act* stipulates more and broader exemptions. The FOIP provides by far the most exemptions for disclosure of records/information as compared to the *Aarhus Convention* and the federal Act. The FOIP's complicated framework of several exemption groups provides a strong indication that the right to access to information is rather weak. The exemptions to disclosure allowed by FOIP are anything but narrow and limited and, as such, are likely not justified. The list of exemptions gives the impression that most of the Alberta Government's work is exempted from public disclosure.

3.4.4 *Access must be Free of Charge or at Reasonable Cost*

Under both the federal and Alberta access regimes, fees or costs can be charged. The *Aarhus Convention* requires that the costs charged are reasonable. As mentioned above, a photocopy fee of \$0.54 has been considered as excessive.¹⁷² The *Access to Information Act* and its *Regulations Respecting Access to Information* set out various types of fees and also a fee schedule. Under that fee schedule, a standard photocopy costs \$0.20 per page. It is questionable whether this is appropriate in light of the prices charged by commercial photocopy shops. It is notable that the *Access to Information Act* does not require the costs to be appropriate. Applications fees are due when the request is made.

¹⁶⁸ FOIP, s 17(5).

¹⁶⁹ FOIP, s 24.

¹⁷⁰ FOIP, s 32(1).

¹⁷¹ *Aarhus Convention*, Art 4(4).

¹⁷² See above 3.1.4.

There are several fees applicable under FOIP: mandatory initial upfront fees of \$25 to \$50, and fees for searching, locating and retrieving a record of \$6.75 per 1/4 hr.¹⁷³ A standard copy black and white costs \$0.25 per page. Alberta's FOIP clearly charges for every working step in the record retrieval. Upfront payments and possibly inappropriate fees seem to be more of an obstacle to file an access to information request than an invitation to make use of this right.

3.4.5 Access provided within a reasonable Time

The *Aarhus Convention* sets a clear standard of a one months or at maximum two months period from the submission of the request to the delivery of the information.¹⁷⁴ The federal *Access to Information Act* also requires the public body to accommodate the access request within 30 days but offers the possibility of a time extension under specific circumstances.¹⁷⁵ The structure of the FOIP is very similar and also sets 30 days as the standard response time to provide or to deny access. The FOIP offers an extension for another 30 days if specific circumstances are given.¹⁷⁶ In essence, both regimes try to provide access within similar time frames.

3.4.6 Remedies for Denial of Access to Information

If access is refused or otherwise restricted, the *Aarhus Convention* requires Contracting Parties to provide access to a review procedure before a court or another independent impartial body.¹⁷⁷ The *Access to Information Act* has established the office of an Information Commissioner who is mandated, among other things, to deal with complaints under the Act and to carry out investigations.¹⁷⁸ As an additional remedy, a review by the Federal Court may be requested if the Information Commissioner refuses the complaint. Similarly, the FOIP has established the office of the Information and Privacy Commissioner. The Commissioner investigates and resolves complaints and reviews access decisions.¹⁷⁹ As well, under FOIP another option is to file for judicial review.¹⁸⁰

¹⁷³ *Freedom of Information and Protection of Privacy Regulation*, Schedule 2.

¹⁷⁴ *Aarhus Convention*, Art 4(2).

¹⁷⁵ *Access to Information Act*, ss 7, 9.

¹⁷⁶ FOIP, s 14.

¹⁷⁷ *Aarhus Convention*, Art 9(1).

¹⁷⁸ See above at 3.2.5.

¹⁷⁹ See above at 3.3.1.6.

¹⁸⁰ See above at 3.3.1.7.

3.4.7 Comments

This paper has mainly focused on the theoretical framework of access to information regimes. One major difference between the *Aarhus Convention* and the federal and Alberta access regime is that the Canadian regimes do not provide specifically access to environmental information but records in general. The above used criteria for strong access regimes have assisted in an overall evaluation of the theoretical framework of the here analyzed access regimes.

The Centre for Law and Democracy analyzed federal Canadian access to information regime in 2012 and summarized its findings with the statement: "It is hardly revolutionary to suggest that Canada's approach to transparency is problematic."¹⁸¹ Further:

*In 1982, when Canada's national law was first adopted, Canada was among the first countries to boast this important democratic achievement. But while standards around the world have advanced, Canada's access laws have stagnated and sometimes even regressed.*¹⁸²

The analysis of Alberta's legislative access framework illustrates weaknesses in most of the evaluation criteria applied in this report. A maximum information disclosure, and thus transparency of governmental actions, is not given to the best possible level. One identified reason is the definition of records and vast exemptions of what does not constitute a record.

This ties in with the other criterion that exemptions from access be narrow and limited. The FOIP provides lengthy lists of exemptions and exceptions from the right to access records. In Alberta, access to records is generally not free of charge under the FOIP with some exceptions where fees can be waived. The various fee types, payment by time used to retrieve records, and fees for records that are more expensive than commercial photocopy shops provide barriers to accessing information.

Theoretically, the timeliness of access requests is comparable to other pieces of legislation such as the

¹⁸¹ Centre for Law and Democracy, *supra* note 24 at 2.

¹⁸² Centre for Law and Democracy, *ibid* at 3.

Aarhus Convention and the federal *Access to Information Act*. Finally, Alberta's regime provides several methods to review access decisions by public authorities.

Briefly summarized, the access to information regime under the FOIP has serious deficits in the scope of the right to access environmental information, due to its vast exemptions and inappropriate charging of fees.

Aside from a theoretical view of FOIP's access right, comments made by Jill Clayton (Alberta's Information and Privacy Commissioner, responsible for the administration, implementation and enforcement of the FOIP) in her last Annual Report 2015/2016 are revealing. In her very opening statement of this report she bluntly remarks: "access to information in Alberta is fast approaching a crisis situation."¹⁸³ She concludes her opening statement with:

My own 2014 investigation to review how the government handles access requests resulted in the government providing only heavily redacted documents to me and, as noted above, remains stalled in the courts. What I do know is that Albertans are not receiving timely responses (or any response, in some cases) to their requests for access to information. I am calling on this government, and public bodies in all sectors, to reverse the course we are on and to demonstrate to Albertans respect for the values of transparency, accountability, and the law.¹⁸⁴

The annual report points that the requests for time extensions under the FOIP from public bodies have increased by 60% (from 63 in 2014-15 to 101 in 2015-16).¹⁸⁵ The vast majority of time extension requests were made by government ministries. The Commissioner also complains about a significant increase of deemed refusal files, which means that applicants have not received any response. She states: "I do not believe I should have to order public bodies to comply with a clear obligation under the law."¹⁸⁶

In February 2016, in light of recent developments and trends in Alberta,¹⁸⁷ other provinces and US states, the Information Commissioners of Canada called on governments at all levels to create a

¹⁸³ Jill Clayton, Information and Privacy Commissioner, *Annual Report 2015/2016* (Edmonton: Office of the Information and Privacy Commissioner, 2016) at 6 [OIPC 2015/16].

¹⁸⁴ OIPC 2015/16, *ibid* at 7.

¹⁸⁵ OIPC 2015/16, *ibid* at 7.

¹⁸⁶ OIPC 2015/16, *ibid* at 7.

¹⁸⁷ In 2015 an alleged improper destruction of records by Alberta Environment and Sustainable Resource Development surfaced: "In the wake of the 2015 provincial election, a number of traditional and social media

legislated duty to document, which obliges public bodies to “document matters related to their deliberations, actions and decisions.”¹⁸⁸ The Alberta Information Commissioner made a similar recommendation to the Government of Alberta in 2013 proposing changes to the FOIP to “create such records as are reasonably necessary to document their decisions, actions, advice, recommendations and deliberations” and “ensure that all records are covered in records retention and disposition schedules.”¹⁸⁹

Part 4: Recommendations for Alberta’s Approach to Access to Environmental Information as Part of a future Provincial Environmental Bill of Rights

A strong access regime should be based on the following key design features:

- maximum information disclosure and transparency of governmental (and sometimes private) information,
- narrow, limited and justifiable exceptions to deny access to information,
- access must be free of charge or at reasonable cost,
- access provided within a reasonable time, and
- remedies for denial of access to information.

From the above comparative review, analysis and comments the following recommendations are made for the improvement of Alberta’s approach to the right to access to information.

Recommendation #1: Fundamental Right

Alberta should give the right to access to information a status of a fundamental right under the *Constitution of Alberta*.

reports surfaced about the widespread destruction of government records. The Commissioner also received letters expressing concern about the alleged improper destruction of records. Further, a disclosure of wrongdoing was made to the Public Interest Commissioner in relation to Alberta Environment and Sustainable Resource Development (ESRD).” Investigations were initiated and resulted in the findings and recommendations. OIPC 2015/16, *ibid* at 35.

¹⁸⁸ OIPC 2015/16, *ibid* at 18.

¹⁸⁹ Office of the Information and Privacy Commissioner, *Becoming a Leader in Access and Privacy - Submission to the 2013 Government of Alberta, FOIP Act Review* (Edmonton: Office of the Information and Privacy Commissioner, 2013) at 8.

Recommendation #2: Access to Environmental Information

Environmental Information

The right to access to information should explicitly include environmental information. Environmental information should be defined broadly as all information concerning the physical elements of the environment (such as air, atmosphere, water, landscape, biological diversity); information about activities, administrative measures, agreements, policies, legislation, plans, and programs likely to affect the environment; and the state of human health, safety and conditions of life.

Information vs. Records

In order to provide maximum information disclosure the right should entail access to information as opposed to access to records. Information is a broader term than records. Alternatively, the FOIP should reduce its comprehensive list of exceptions of what does not constitute a record.

Recommendation #3: Reduction of Exemptions and Exceptions to Disclosure

Alberta's FOIP contains too lengthy lists of exceptions to the disclosure of records. Exceptions should be narrow, limited and justified. We recommend a reduction in the exceptions, along with insertion of an explicit interpretation statement into the FOIP that requires exemptions and exceptions to be interpreted in a very restrictive manner.

Recommendation #4: Appropriate Costs

The access to environmental information should be free of charge or costs should be at least appropriate. The current applicable fees are not appropriate (too many different fees and above commercial rates) and thus constitute an obstacle to make use of the right to access to information.

Recommendation #5: Timeliness

The FOIP's theoretical framework with regards to the response time after receipt of an access request compares with international standard. However, in reality the time extension requests by government bodies has skyrocketed over the past years. Another issue is the trend of increased non-response. Government bodies must adhere to the provisions of the FOIP. Thus, they must respond to all access requests and improve their time management.

Recommendation #6: Duty to Document

An essential aspect of the right to access to information is that government bodies are documenting decisions, actions, plans and so forth. The recommendation by the Information Commissioners of Canada, including that in Alberta, to introduce an obligation to document into the FOIP should be followed.