



**Environmental
Law Centre**

Access to Information

**Increasing access and disclosure around
environmental decision-making.**

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April 29th, 2025

About the Environmental Law Centre

- The Environmental Law Centre (ELC) is a registered charity and has been seeking strong and effective environmental laws since it was founded in 1982.
- The ELC is dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in the Province of Alberta.

Acknowledgments

- This project is supported by the Alberta Law Foundation

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Presentation Outline:

Part One - *Freedom of Information and Protection of Privacy Act*

- Case Study: *Alberta Energy v Alberta (Information and Privacy Commissioner)*
- *Freedom of Information and Protection of Privacy Act* (FOIP)
- Standards and best practices for access to information legislation
- Challenges with FOIP and law reform recommendations
- *New* Bill 34 - *Access to Information Act* (AIA)

Part Two – Regulatory Disclosure

- *Canadian Environmental Protection Act*
- *Environmental Protection and Enhancement Act*
- *Water Act*

Introduction: Why does access to environmental information matter?

- Information has been called the “oxygen” of democracy
- Vital to democratic participation and government accountability
- Environmental information is key to enabling protection as it is necessary to both understand and evaluate government decisions with respect to the environment
- The law is supposed to help us access environmental information:
 - ✓ *Access to Information Act* (federal) and *Freedom of Information and Protection of Privacy Act* (FOIP) (provincial) facilitates public access to information held by government bodies
 - ✓ *Canadian Environmental Protection Act* (CEPA) (federal) and the *Environmental Protection and Enhancement Act* (EPEA) and *Water Act* (provincial) collects, creates and communicates environmental information to the public
- But do our current laws properly facilitate access to environmental information?

Case study: *Alberta Energy v Alberta (Information and Privacy Commissioner)*



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Facts

- In July 2020 group of individuals and ranchers requested records from Alberta Energy with respect to rescission of 1976 Coal Policy
- Numerous extensions sought by Alberta Energy until the Commissioner refused to grant another in October 2021
- On Oct 15 2021 Alberta Energy released 30 out of 6539 responsive records
- Numerous parts withheld under statutory exceptions to disclosure (s. 21, 22, 24 & 25)
- Requesting parties sought review from OIPC
- In April 2022 Adjudicator disallowed exceptions claimed by Alberta Energy and ordered production
- Also ordered Alberta Energy to explain discrepancy between records estimate of 6539 to new number of 2100
- Alberta Energy sought judicial review of OIPC decision

Court of King's Bench Decision

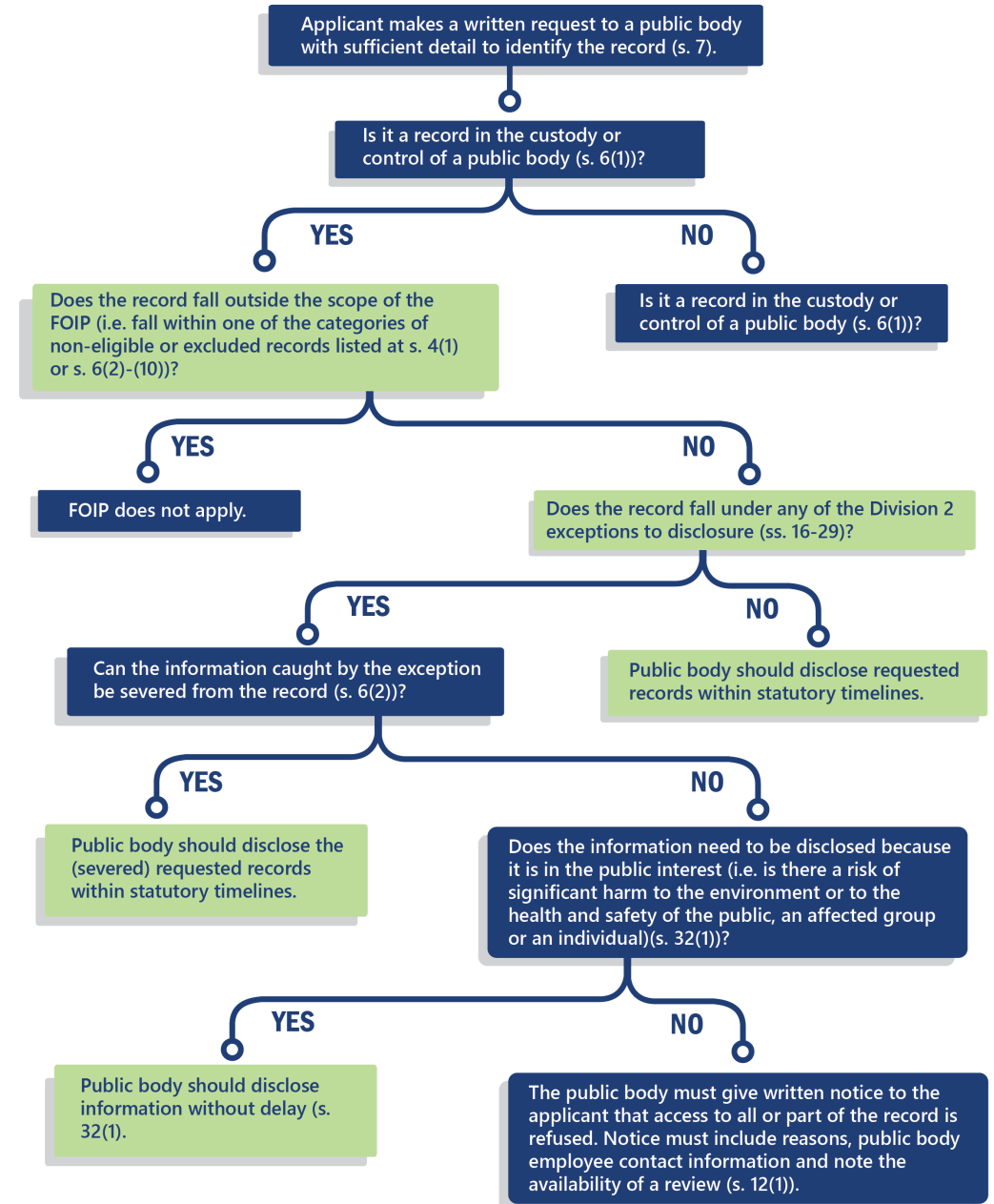
- Decided April 2024
- Judge found the decision of the OIPC Adjudicator to order production was reasonable and Alberta Energy had not met onus to prove its exceptions to disclosure
- The more aggressive the public body is in redacting records, the more onerous its obligation is to defend these redactions with compelling and clear evidence (para 28)
- Foundational premises of FOIP contemplate limited and narrow restraint on access (para 37)
- Court noted that for right of access to information to be meaningful it must be timely
- In this instance release of information "so slow as to be practically non-existent" (para 78)
- Judge noted most parties would not have had the money nor the stamina to see this case through
- "FOIP contemplates a regime that is prompt, accessible and fair" however it "can only function where the public body adopts the attitude of access imposed on it by the Legislature" (para 79)
- Application for judicial review dismissed

Outcome?

- Requesting parties waited four years for 30 pages of disclosure – left waiting for thousands more
- Timeliness of the issue may have passed (i.e. news cycle and/or political opportunities)
- Requesting parties out significant (?) legal fees
- Public still in the dark about environmental decision-making around coal policy
- No consequences for Alberta Energy

Freedom of Information and Protection of Privacy Act

The Anatomy of a FOIP Request



Challenges with FOIP

1. Limited scope of the Act
2. Overly broad exceptions
3. Timeline delays
4. Excessive fees
5. Weak oversight from the Office of the Information and Privacy Commissioner



What are “international standards”?

- Centre for Law and Democracy & Access Info Europe’s Right to Information Rating (RTI Rating)
- Report of the Office of the United Nations High Commissioner for Human Rights on Freedom of opinion and expression
- Organization of American States (OAS) Model Inter-American Law on Access to Information
- Council of Europe Convention on Access to Official Documents (CETS 205)
- UNECE Convention on Access to Information, Public Participation in Decision-making and Access Justice in Environmental Matters (*Aarhus Convention*)

1. Limited scope of the Act

International Standards

- Requestors have a right to ask for both information and records
- Right of access should apply to executive, legislative and judicial branches of government with no bodies excluded
- Right of access should also apply to any state-owned enterprises, public authorities and private bodies that perform a public function or receive significant public funding
- International best practices suggest that government should have a duty to document their decisions as well as a duty to proactively disclose select information

Alberta's FOIP

- Only applies to records (as opposed to information)
- Exempts various public authorities as well as some private entities that perform public functions or are significantly funded with public funds
- No duty to document or obligations for proactive disclosure

Recommendation No. 1 – Access to Environmental Information

- The right to access information should specifically include environmental information
- The term "environmental information" should be defined broadly

Recommendation No. 2 – Expand the Scope of the Act

- FOIP should apply to information AND records, meaning that applicants can make a request for information generally as well as specific documents;
- The right of access should apply to the executive branch, the legislature and the judiciary, with no bodies excluded;
- The Regulations should automatically designate private bodies that perform a public function and those that receive significant public funding as public bodies for the purpose of FOIP;
- FOIP should include a legislated duty to document that requires all public bodies to document matters related to deliberations, actions and decisions; and
- FOIP should include standards for the proactive disclosure of specific types of records held by public bodies with respect to their functions, powers, officials, decisions, budgets and other activities for which public funds are used or public functions are performed.

2. Overly broad exceptions

International Standards

- Select exceptions to the right of access are acceptable (i.e. national security, public health and safety, etc.) however states should always err on the side of disclosure
- Certain checks and balances should be in place to ensure exceptions are only used when absolutely necessary (i.e. harm tests, mandatory override, severability clause, time limits, etc.)
- Access to information legislation should be paramount to restrictions on information disclosure in other legislation

Alberta's FOIP

- FOIP excepts disclosure harmful to “intergovernmental relations” (s. 21) but inclusion of intra-national and inter-provincial relations as well as relationships with local government bodies and “government-like” entities falls outside of international standards
- FOIP lacks certain “check and balances”
- Adequate paramountcy provisions
- Overarching harm tests
- Sunset clause for as soon as an exception ceases to apply or information is 20 years or older

Recommendation No. 3 – Narrow the Exceptions in the Act

- Edit FOIP's exception for disclosure harmful to intergovernmental relations (s. 21) to apply to international intergovernmental relations only. Exceptions for intergovernmental relations within Canada or intra-governmental relations are not in line with international standards;
- Flag and have the OIPC review any new legislation that includes a paramountcy clause with respect to FOIP to determine it is necessary and justifiable;
- Add an over-arching harm test that applies to each and every exception so that disclosure is only refused when there is a risk of actual harm; and
- Include a general requirement that information must be released once an exception ceases to apply as well as a sunset clause excepting any information that is 20 years or older.

3. Timeline delays

International Standards

- Public authorities should be required to respond “as soon as possible” with clear and reasonable maximum timelines of 20 working days or less
- Time limits on extensions of 20 working days or less along with requirement that applicants be notified of extension and provided with reasons
- Opportunity for a simple, free internal appeal to be completed within 20 working days or less

Alberta’s FOIP

- FOIP provides head of public body “must make every reasonable effort to respond to a request not later than 30 days after receiving it”
- No requirement to respond “as soon as possible”
- Two 30-day timelines can run concurrently without requiring an extension from the OIPC (s. 14)
- No simple, free internal appeal
- No real consequences or remedies for failure to meet legislated timelines

Recommendation No. 4 – Improve Timeline Delays

- Tighten up existing deadlines for responding to requests, including changing the duty to respond to requests to “as soon as possible” and imposing a maximum timeline of 20 working days or less
- The head of a public body should not be able to unilaterally grant themselves a timeline extension pursuant to s. 14 of the Act
- Timelines extensions should be limited to upon request from the Commissioner and should also be limited to 20 working days or less

Recommendation No. 4 – Improve Timeline Delays (continued)

- If an applicant needs to appeal the decision there should be a simple, free internal appeal that is completed within clear timelines (20 working days or less)
- The Commissioner should be empowered to impose penalties (administrative or financial) for public bodies that fail to meet the timelines
- Most importantly, FOIP departments within public bodies must be sufficiently organized and funded so that they can meet the legislated timelines

4. Excessive fees

International Standards

- Should be free to file access to information requests
- Costs limited to actual cost of reproducing and sending information
- Fees set by central authority
- Fee waivers available for those that cannot pay

Alberta's FOIP

- Fees for filing access request (\$25 for non-continuing and \$50 for continuing request)
- Regulations include fees for much more than actual reproduction (i.e. searching, retrieving, preparing, supervising, etc)
- Fees often miscalculated by public bodies resulting in applicants being gross overcharged (i.e. fees not supposed to be charged for "reviewing" a record)

Recommendation No. 5 – Reduce Fees for Requests

- Amend FOIP to abolish fees for filing an access to information request
- Fees set out in the Regulation should be limited to recouping the actual cost of reproducing and sending information (plus free minimum order of at least 20 pages)
- Cost-benefit analysis of whether it is financially advantageous to administer fees at all?

5. Weak oversight

International Standards

- Strong oversight mechanisms along with powers to issue sanctions and penalties key to deterring non-compliance and holding public bodies accountable

Alberta's FOIP

- Alberta's OIPC has power to grant access to records, limit time extensions and reduce or waive fees and the Act provides sanctions for those that willfully act to undermine the access to information regime (i.e. making false statements, destroying records and contravening orders)(s. 92(1))
- Not adequately empowered to hold public bodies to account for issues such as poor recordkeeping, repeated and unnecessary use of exceptions and redactions, time extensions, overcharging, etc.
- No authority to review documents subject to solicitor-client privilege

Recommendation No. 5 – Strengthen the OIPC

To ensure there is meaningful and independent oversight of FOIP, the Act should be amended so that the OIPC is empowered to do the following:

- require the production of, and be permitted to review, records over which solicitor-client privilege is claimed; and
- issue administrative monetary penalties for serious and significant violations of the Act.

The Government of Alberta should also ensure that the OIPC is adequately staffed and funded to properly perform its functions.

Bill 34: Access to Information Act (AIA)

- Introduced in November 2024 – set to come into force in Spring 2025
- Splits existing FOIP into two acts: access to information (Bill 34) and protection of privacy (Bill 33)
- No substantial improvements to government transparency and accountability



Issues with new AIA

- Expanded exemptions to the scope
- Expanded exceptions to disclosure
- Longer timelines for responding to requests and authorizes public bodies to extend their timelines multiple times
- Expanded powers for public bodies to disregard requests
- Increased limits on the authority of the OIPC

Canadian Environmental Protection Act

- Environmental Registry
- National Pollutant Release Inventory
- s. 44

Recommendation No. 7 – Improve CEPA's Access to Information System

The NPRI should:

- reduce the exceptions to reporting, particularly by including facilities not meeting the employee hours threshold while providing support to these facilities;
- standardize the methods for the estimation of the amount of a substance that is released across industries and time, with clear and public reasons for the estimation methods chosen;
- require ECCC to proactively investigate alleged non-reporting and regularly validate and verify release data to ensure compliance with reporting requirements; and
- require the inclusion of information on greenhouse gas emissions, pesticides, and intensive agricultural operations within the NPRI in accordance with international standards.

CEPA's confidentiality section should be strengthened by:

- amending s. 313 such that that information provided to the Minister under the Act is presumed to be public until a confidentiality request is approved by the Minister with reasons; and
- providing for the proactive disclosure of detailed enforcement and compliance information, including warnings, tickets, inspections, and investigations.

Environmental Protection and Enhancement Act

- s. 35
- Environmental Assessment Registry
- s. 24
- s. 237.1
- s. 4(2)

Recommendation No. 8 – Improve EPEA's Access to Information System

We recommend that EPEA be amended to:

- proactively publish environmental information, including release of substances and enforcement information, in one accessible database with relevant search parameters;
- require proponents to respond to information requests for information to which the Act applies; and
- include a statutory appeal process for requestors.

Water Act

- s. 107(2.6)
- s. 152.1
- s. 148(1)(c) & (2)
- *Water (Ministerial) Regulation*

Recommendation No. 9 – Improve the Water Act's Access to Information System

The *Water Act* and select policies and procedures around it should be amended to include the following:

- the Government of Alberta should pursue a policy that details what constitutes a "public review" of water licence transfers;
- the Government of Alberta should ensure that WCOs and instream objectives are publicly reported; and
- the *Water Act* should be amended to extend the timeline or include an extension as of right for the submission of a statement of concern for *Water Act* approvals.



Questions?

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