Environmental Law Centre

Access to Information:

Increasing access and disclosure around environmental decision-making

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The Environmental Law Centre (Alberta) Society

The Environmental Law Centre (ELC) 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. 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. Our vision is a society where laws secure an environment that sustains current and future generations.

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Executive Summary

Access to environmental information is vital to democratic participation and government accountability, as well as key to enabling environmental protections. Legislation such as the *Freedom of Information and Protection of Privacy Act* (FOIP) is supposed to facilitate public access to information held by government bodies. Meanwhile, legislation including the federal *Canadian Environmental Protection Act* (CEPA) and the provincial *Environmental Protection and Enhancement Act* (EPEA) and *Water Act* is also supposed to collect, create and communicate environmental information to the public. But how well do Alberta's laws actually facilitate access to environmental information?

This paper reviews Alberta's existing access to information and regulatory disclosure laws and makes recommendations on how they could be improved. Part One takes an in-depth look at Alberta's access to information regime under FOIP, including the challenges with FOIP and what international standards suggest could be done to address these challenges. The issues identified with Alberta's FOIP include a limited scope of the Act, overly broad exceptions, timeline delays, excessive fees, and weak oversight from the Office of the Information and Privacy Commissioner of Alberta.

Part One also includes four case studies that provide additional guidance on what has worked to improve access to information laws in other jurisdictions. The case studies include Newfoundland and Labrador, Mexico, the international *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998) and Norway. Finally, Part One reviews and briefly summarizes the most pressing issues with Alberta's proposed Bill 34 *Access to Information Act*, including expanded exemptions to scope and disclosure, timeline extensions, expanded powers for public bodies to disregard requests and increased limits on the authority of the Office of the Information and Privacy Commissioner of Alberta.

Part Two of this report looks at CEPA, EPEA and the *Water Act* and considers how these acts amass environmental information important to the public and reviews the challenges facing regulatory disclosure of this information. Challenges with respect to CEPA include issues with data quality and reliability in the National Pollutant Release Inventory, its confidentiality exceptions, and compliance and enforcement disclosure. Issues with EPEA include a lack of proactive environmental disclosure in a single, accessible database, barriers to disclosure such as a requirement to seek information from a proponent before making a request from the government, and the absence of a statutory appeal process for requestors. Meanwhile, the

Water Act has issues with a lack of public reviews of water allocation transfer applications and decisions, transparency in water conservation objective (WCO) tracking and reporting, as well as statutory timing around participation in approvals under the Act.

Finally, the report includes a broad range of recommendations aimed at the issues and challenges set out above. These recommendations are mainly derived from international standards and best practices, as well as other third-party feedback. Key recommendations include:

Recommendation No. 1 – Access to Environmental Information: FOIP should include a specific right of access to environmental information.

Recommendation No. 2 – Expand the Scope of the FOIP: FOIP should apply to "information" as well as records and the right of access should apply to the executive branch, the legislature and the judiciary, with no bodies excluded. The regulations should also automatically designate private bodies that perform a public function and those that receive significant public funding as public bodies for the purpose of FOIP. Moreover, FOIP should include a legislated duty to document and include standards for proactive disclosure of specific types of records by public bodies.

Recommendation No. 3 – Narrow the Exceptions in FOIP: edit FOIP's exception for disclosure harmful to intergovernmental relations (s. 21) to apply to international intergovernmental relations only, 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.

Recommendation No. 4 – Improve Timelines Delays under FOIP: tighten up existing deadlines for responding to requests to "as soon as possible" and impose a maximum timeline of 20 working days or less. Prohibit the head of a public body from unilaterally granting themselves a timeline extension and make them limited to upon request from the Commissioner. Create a simple and free timeline appeal process and empower the Commissioner to impose penalties for public bodies that fail to meet the timelines.

Recommendation No. 5 – Reduce Fees for Requests*:* amend the Act to abolish fees for filing an access to information request and limit fees set out in the regulations to those recouping the actual cost of reproducing and sending information.

Recommendation No. 6 – Strengthen the OIPC – amend the Act to empower the Office of the Information and Privacy Commissioner to review records subject to solicitor-client privilege and issue monetary penalties for violations of the Act. Fund and staff the Office of the Information and Privacy Commissioner so that it can properly fulfill its mission.

Recommendation No. 7 – Improve CEPA's Access to Information System*:* improve the reliability and accuracy of data in the National Pollutant Release Inventory by reducing reporting exceptions, standardizing methods for substance estimation, introducing greater compliance measures and requiring additional reporting information (i.e. greenhouse gas emissions, pesticides, etc.) in accordance with international standards. Improve CEPA by strengthening the confidentiality provisions and increasing proactive disclosures.

Recommendation No. 8 – Improve EPEA's Access to Information System: Amend EPEA to proactively publish environmental information in one accessible database, require proponents to respond to information requests and include a statutory appeal process for requestors.

Recommendation No. 9 – Improve the *Water Act*'s Access to Information System: implement public reviews of water licence transfers as per the Act, ensure that WCOs and instream objectives are publicly reported, and amend the Act to extend the timelines for statements of concern with respect to *Water Act* approvals.

The implementation of these recommendations, along with strong leadership from the heads of public bodies, would help to create the legislative and cultural change necessary for true government transparency and accountability in Alberta for environmental decision-making.

Introduction

"[A] democracy just can't work without the people having information. That is key to making decisions around how you vote. It's key to making informed decisions. We're in this age of social media where people are substituting opinions for facts. Facts are absolutely basic to good democratic governance and accountability."[1]

Beverly McLachlin, Former Chief Justice of the Supreme Court of Canada

Information has been called the "oxygen of democracy".[2] This is because information is considered essential for people to participate meaningfully in decision-making, to scrutinize and hold governments accountable and to combat corruption and misconduct.[3] At least 140 countries across the globe, including Canada and each of the provinces and territories, recognize the importance of information and have laws that enshrine access to various types.[4]

Within Canada, the Supreme Court has recognized that "[t]he overarching purpose of access to information legislation...is to facilitate democracy" and that these laws "operate on the premise that politically relevant information should be distributed as widely as reasonably possible."[5] For its part, Alberta introduced the *Freedom of Information and Protection of Privacy Act* (FOIP) in 1995 with the stated purpose of allowing "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".[6]

Environmental information, just like other types of information, is crucial for civic participation in public affairs. A right to environmental information is also key to enabling environmental protection.[7] This was recognized by the United Nations in the 1992 *Rio Declaration on Environment and Development,* which states at Principle 10:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to

[1] Robyn Doolittle "Beverley McLachlin: 'A democracy just can't work without the people having information'", *The Globe and Mail* (June 7, 2023) <www.secretcanada.com/news/beverley-mclachlin-access-information-democracy>.
[2] Article 19, "Public's Right to Know" (June 1, 1999), online: *Article 19* <www.article19.org/resources/publics-right-know/>.
[3] Article 19, "International standards: Right to information" (5 April 2012), online: *Article 19* <www.article19.org/resources/international-standards-right-information/>.
[4] Centre for Law and Democracy & Access Info, "By Country" online: *Global Right to Information Rating* <www.rti-rating.org/country-data/>.
[5] *Dagg v Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 SCR 403 at paras 60-61.
[6] *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 2(a) [FOIP].
[7] Article 19, "International standards: Right to information" *supra* note 3.

> 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. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[8]

The *Rio Declaration* paved the way for the adoption of various international conventions that also recognize a right to access environmental information, including the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998),[9] the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,*[10] the *Stockholm Convention on Persistent Organic Pollutant* (PoPs),[11] and the *Paris Agreement*.[12] In short, there is no question that access to information, including environmental information, is a vital and legitimate principle of democracy.

Select Alberta laws, such as the *Environmental Protection and Enhancement Act* (EPEA) and the *Water Act* do incorporate the disclosure of certain types of environmental information.[13] Yet access to information overall appears to be at a low in Alberta. In part, this is because Alberta's access to information laws are some of the weakest in the country.[14] Additionally, in recent years, the Government of Alberta seems to have taken a more restrictive view of transparency and disclosure. In 2021-22 the *Globe and Mail* performed an audit of every Canadian jurisdiction's freedom of information processes.[15] Entitled 'Secret Canada', the goal of the project was to examine each jurisdiction's performance on access and transparency.[16] Reporters

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[8] *Rio Declaration on Environment and Development*, Jun 14, 1992, UN Doc. A/Conf.151/26 (Vol. I)(1992), 31 ILM 874.

[9] *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*].

[10] *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 10 September 1998, 2244 UNTS 337.

[11] *Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001, 2256 UNTS 119. 1, into force on 17 May 2004.

[12] *Paris Agreement*, being an Annex to the *Report of the Conference of the parties on its twenty-first session, held in parties from 30 November to 13 December 2015--Addendum Part two: Action taken by the Conference of the parties at its twenty-first session*, 12 December 2015, UN Doc FCCC/CP/2015/10/Add.1, 55 ILM 740.

[13] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [EPEA]; *Water Act*, RSA 2000, c W-3 [*Water Act*].

[14] Centre for Law and Democracy, "Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions" (September 2012), at 3 online (pdf): <www.law-democracy.org/wp-content/uploads/2012/08/Canada-report-on-RTI.pdf>.

[15] Tom Cardoso & Robyn Doolittle, "Secret Canada: How Canada's FOI system broke under its own weight" (9 June 2023) online: *Globe and Mail* <www.theglobeandmail.com/canada/article-canada-freedom-of-information-laws/#:~:text=Canada%E2%80%99s%20access%20dysfunction%2C%20in%20numbers>.

[16] *Ibid*.

sent freedom of information requests to every federal, territorial, and provincial department and ministry in Canada – 253 in total. Every jurisdiction across the country supplied information except Alberta, where all 22 ministries denied the *Globe*'s request and claimed no records existed.[17] Initially, Alberta's Premier expressed concern and advised they had asked the deputy minister to investigate the matter.[18] However, several months later the province rejected a second series of access requests on the same basis (i.e. that no records existed) and this time the Premier's office did not respond to requests for comment.[19]

Afterwards, the *Globe and Mail* surmised that the province was intentionally testing the limits of the legislation and the government's "duty to assist" applicants outlined in FOIP.[20] Alberta's former Information and Privacy Commissioner denounced the outcome, and the current Office of the Information and Privacy Commissioner launched a review into potential non-compliance with the legislation.[21]

More recently, the Government of Alberta announced that it is updating FOIP and introducing new access to information legislation. However, the proposed legislation, Bill 34's *Access to Information Act*,[22] does not appear to be an improvement. Alberta's own Information and Privacy Commissioner cautioned they had "a number of concerns" and the legislation "should be re-considered and amended in order to ensure a well-functioning access to information system continues to operate in the province".[23]

Access to information appears to be at a crossroads in Alberta. Will Alberta continue down its current path or can law reform initiatives help to reinvigorate Alberta's access to information regime? This paper aims to review Alberta's existing access to information and regulatory disclosure laws and make recommendations on how they could be improved. Part One takes an in-depth look at Alberta's access to information regime under FOIP, including the challenges

[17] *Ibid*.
[18] Robyn Doolittle & Tom Cardoso, "Alberta rejects requests for data on freedom of information system a second time" (27 Sept 2023) online: *Globe and Mail* www.theglobeandmail.com/canada/article-alberta-foi-data-accountability/ .
[19] *Ibid*.
[20] *Ibid*.
[21] *Ibid*; Robyn Doolittle & Tom Cardoso, "Alberta's information watchdog opens systemic probe into ministries' handling of access requests" (15 Jan 2024) online: *Globe and Mail* <www.theglobeandmail.com/canada/article-alberta-information-commissioner-investigation/>.
[22] Bill 34, *Access to Information Act*, 1st Sess, 31st Leg, Alberta, 2024 [AIA].
[23] Office of the Information and Privacy Commissioner of Alberta, "Alberta Information and Privacy Commissioner calls for changes to new proposed public sector access and privacy legislation for Alberta" (20 Nov 2024), online: <oipc.ab.ca/alberta-information-and-privacy-commissioner-calls-for-changes-to-new-proposed-public-sector-access-and-privacy-legislation-for-alberta/>.

with FOIP and what international standards suggest could be done to address these challenges. Part One also includes four case studies that provide additional guidance on what has worked to improve access to information laws in other jurisdictions. Finally, Part One reviews and briefly summarizes the most pressing issues with Alberta's proposed Bill 34 *Access to Information Act*.

Part Two of this report takes a look at three other pieces of legislation that collect, create, and communicate environmental information to the public: the federal *Canadian Environmental Protection Act* (CEPA), the provincial *Environmental Protection and Enhancement Act* (EPEA) and the *Water Act*. Part Two describes how these acts amass environmental information important to the public, reviews the challenges facing regulatory disclosure of this information, and makes recommendations on how they could be improved.

Part One: Alberta's Freedom of Information and Protection of Privacy Act

Part One of the report reviews and makes recommendations with respect to Alberta's access to information regime. It consists of the following four sections:

a) **Access to Information Laws in Alberta** – reviews the applicable access to information legislation in Alberta. Namely, FOIP along with a brief review of the federal *Access to Information Act*;
b) **Challenges with Alberta's FOIP** – identifies issues and challenges with Alberta's FOIP and looks to international standards and best practices for recommendations on addressing the same;
c) **Case Studies** – a brief review of access to information laws in Newfoundland and Labrador, Mexico, the *Aarhus Convention*, and Norway's *Environmental Information Act* provides additional context and guidance on what has helped to improve access to information laws in other jurisdictions; and
d) **Bill 34: the *Access to Information Act*** – a review and summary of the issues with Alberta's proposed new access to information law.

a) Access to Information Laws in Alberta

The primary piece of provincial legislation that governs access to information in Alberta is FOIP. Meanwhile, the *Access to Information Act* (ATIA) applies at the federal level. This section provides a brief summary of both pieces of legislation. Note that while the focus of this report is on Alberta's FOIP, many of the same issues and challenges arise with the federal ATIA as well.

As previously mentioned, there are also other pieces of legislation that collect, create, and communicate environmental information to the public, including the federal *Canadian Environmental Protection Act* (CEPA), the provincial *Environmental Protection and Enhancement Act* (EPEA) and the *Water Act*. These acts are discussed in Part Two below.

i) The Freedom of Information and Protection of Privacy Act

Scope of the Right to Access Information

The objective of FOIP is to, among other things, 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 Act.[24]

FOIP is meant to provide additional access to information rights and thus does not replace existing government procedures for access to information or records.[25] 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.[26] FOIP also regulates its relationship to other acts. Generally, it provides that FOIP prevails if provisions are inconsistent or in conflict with provisions of other enactments. But, another act, or a regulation under FOIP, can expressly provide that they prevail over the Act.[27]

[24] FOIP, s 2(a).
[25] FOIP, s 3(a).
[26] FOIP, s 3(b).
[27] FOIP, s 5.

A requestor of information (the 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.[28] Alberta's FOIP briefly stipulates to which records the Act applies. FOIP applies to all records in the custody of or under the control of a public body, including court administration records.[29] The Act 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.[30]

The Act does not define the term "information". Moreover, the right to access records does not extend to all records. A list of exempted records is set out in the following section of this report. The right of access to a record does not extend to information excepted from disclosure.[31]

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.[32]

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.[33] The applicant may request to examine or get a copy of the record. Public bodies are obliged to assist applicants in their requests.[34]

[28] FOIP, s 6(1).
[29] FOIP, s 4(1).
[30] FOIP, s 1(q).
[31] FOIP, ss 16-29
[32] FOIP, s 6(2).
[33] FOIP, ss 7(1) & (2). For continuing requests see s 9.
[34] FOIP, s 10.

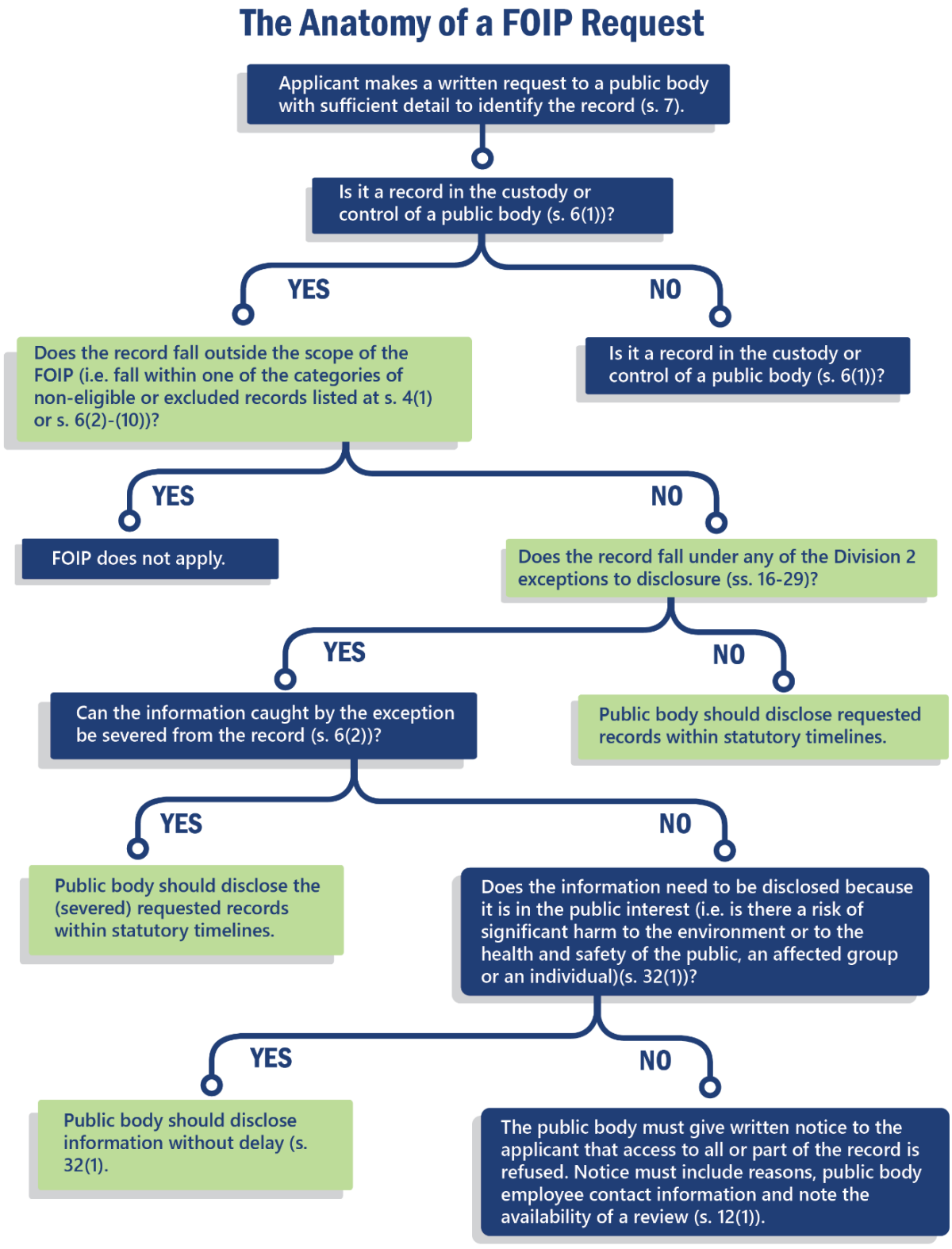

Figure 1: Anatomy of a FOIP Request

Exemptions and Exceptions under FOIP

FOIP contains several exemptions from the right to access records.

Non-records, Non-eligible Records

The first group of what are effectively exemptions deals with the definition of 'record' 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 they are not records to which the Act applies. This list of records is lengthy and includes the following:

- 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*.[35]

No Right of Access to Records

The second group of exemptions lists cases to which the right of access to a record does not extend including:

- a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry;
- a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly;[36]
- 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;[37]
- information in a record that would reveal the identity of a person who has requested advice about making a disclosure, made a disclosure or submitted a complaint of a reprisal or whose complaint has been referred to the Labour Relations Board pursuant to the *Public Interest Disclosure (Whistleblower Protection) Act*.[38]

Records Excepted from Disclosure

In a third group, FOIP includes multiple exceptions to the right to access records.[39] These are records that would be eligible for disclosure but for the fact that they fall within an exception in the Act. Again, the list of exceptions is too comprehensive to be covered here in detail. The main categories of exceptions to disclosure include:

- disclosure harmful to business interests of a third party,[40]

[35] FOIP, s 4(1).
[36] FOIP, s 6(4). Note FOIP, s 6(5)-(6) provides that records are not exempt if five or more years have elapsed in either scenario.
[37] FOIP, s 6(7). FOIP, s 6(8) provides that such records are not exempt if 15 years or more has elapsed since the audit, the audit was discontinued, or if no progress has been made for 15 years or more.
[38] FOIP, s 6(9). FOIP, s 6(10) clarifies that s 6(9) does apply to the person who requested advice about making a disclosure, etc.
[39] FOIP, ss 16 - 29.
[40] FOIP, s 16.

- disclosure harmful to personal privacy,[41]
- disclosure harmful to individual or public safety,[42]
- confidential evaluations,[43]
- disclosure harmful to law enforcement,[44]
- disclosure harmful to intergovernmental relations,[45]
- cabinet and Treasury Board confidences,[46]
- local public body confidences,[47]
- advice from officials,[48]
- disclosure harmful to economic and other interests of a public body,[49]
- testing procedures, tests and audits,[50]
- privileged information,[51]
- disclosure harmful to the conservation of heritage sites, etc.,[52] and
- information that is or will be available to the public within 60 days.[53]

Time Frame

Generally, the public body must make every reasonable effort to respond to a request within 30 days of receipt of the request.[54] The time for responding to the request can be extended for another 30 days upon permission of the Commissioner if:

- 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 operations of the public body,
- more time is needed for consultation with a third party or other public bodies, or

[41] FOIP, s 17.
[42] FOIP, s 18.
[43] FOIP, s 19.
[44] FOIP, s 20.
[45] FOIP, s 21.
[46] FOIP, s 22.
[47] FOIP, s 23.
[48] FOIP, s 24.
[49] FOIP, s 25.
[50] FOIP, s 26.
[51] FOIP, s 27.
[52] FOIP, s 28.
[53] FOIP, s 29.
[54] FOIP, s 11(1).

- a third party asks for a review.[55]

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.[56] 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 as advise that the applicant may make a complaint to the Commissioner or to an adjudicator, as the case may be, about the extension.[57]

Costs

Public bodies are entitled to charge fees for producing records.[58] The *Freedom of Information and Protection of Privacy Regulation* (FOIP Regulation)[59] stipulates the fees for services.[60] For a request to access a record of non-personal information, the FOIP 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.[61] In addition to the initial fees, Schedule 2 of the FOIP Regulation sets out other fees that the public body can charge if the estimate exceeds $150.[62]

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.[63] However, the applicant can request to not pay all or part of a fee for services.[64] 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, public health or safety.[65] This is one of the very few references that the Act makes to the environment.

Active Information Right

The majority of provisions in FOIP govern the passive right to obtain access to information. However, the Act also stipulates an active right to obtain information in public health and safety

[55] FOIP, s 14.
[56] FOIP, s 11(2).
[57] FOIP, s 14(4).
[58] FOIP, ss 6(3), 93.
[59] *Freedom of Information and Protection of Privacy Regulation*, Alta Reg 186/2008 [FOIP Regulation].
[60] FOIP Regulation, s 10.
[61] FOIP Regulation, s 11(2)-(3). See s 12 for fees for personal information.
[62] FOIP Regulation, s 11(4).
[63] FOIP, s 93(3).
[64] FOIP, s 93(3.1).
[65] FOIP, s 93(4)(b).

matters. 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 that is, for any other reason, clearly in the public interest.[66]

This obligation to disclose information applies despite any other provision of the Act.[67] However, the 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.[68] In addition, the third party must get an opportunity to make representations.[69] However, in the event this is not practicable, a written notice of the disclosure to the third party and the Information and Privacy Commissioner is sufficient.[70]

The Information and Privacy Commissioner

FOIP establishes the Office of the Information and Privacy Commissioner (OIPC).[71] The general duties of the Commissioner are to monitor the administration of FOIP and how the objectives are achieved.[72] The Commissioner may:

- conduct investigations to ensure compliance with any provision of *FOIP* or compliance with rules relating to the destruction of records;[73]
- 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 FOIP;
- engage in or commission research into anything affecting the achievement of the purposes of 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 FOIP.

[66] FOIP, s 32(1).
[67] FOIP, s 32(2).
[68] FOIP, s 32(3).
[69] FOIP, s 32(3).
[70] FOIP, s 32(4).
[71] FOIP, ss 44-64.
[72] FOIP, s 53(1).
[73] FOIP, s 56(1), 58.

The Commissioner may also investigate and attempt to resolve complaints that allege:

- 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 FOIP is inappropriate.[74]

The Commissioner also gives advice and recommendations to the head of a public body.[75] Applicants who have requested the head of a public body to access 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.[76]

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 the subject of the review.[77]

Unless there is a mediation settlement, the Commissioner closes an inquiry with an order.[78] 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; to perform a duty imposed by FOIP or the regulations; reduce or extend a time limit; and/or reduce a fee or order a refund.[79]

The Commissioner must give 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 Minister.[80] An order issued by the Commissioner is final.[81] The head of the public body must comply with the order within 50 days of the receipt of a copy of the order.[82] However, the head must not take any compliance steps with the order until the period for bringing an application for judicial review ends.[83]

[74] FOIP, s 53(2).
[75] FOIP, s 54.
[76] FOIP, s 65(1).
[77] FOIP, s 68.
[78] FOIP, s 72(1).
[79] FOIP, s 72(2)-(4).
[80] FOIP, s 72(5).
[81] FOIP, s 73.
[82] FOIP, s 74(1).
[83] FOIP, s 74(2).

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.[84] Once a judicial review is submitted, the Commissioner's order is stayed until the court has dealt with the matter.[85]

ii) The Access to Information Act

At the federal level, Canada grants a right to access information under the *Access to Information Act* (ATIA).[86] Again, while the focus of the report is on Alberta's FOIP, the federal ATIA is relevant to Albertans seeking information from federal government institutions. ATIA is also subject to many of the same challenges facing the FOIP.

ATIA'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".[87] The provisions in the Act are intended to complement (not replace or limit) existing access to information procedures that are normally available to the general public.[88]

Scope of the Right to Access to Information

ATIA stipulates a right of access to "records" (as opposed to legislation that grants access to information).[89] Record means any documentary material regardless of medium or form.[90] The right to access records was initially granted to Canadian citizens and permanent residents but later extended by a Governor in Council order to all individuals who are present in Canada and to all corporations that are present in Canada.[91]

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

[84] FOIP, s 74(3).
[85] FOIP, s 74(4).
[86] *Access to Information Act*, RSC 1985, c A-1 [ATIA].
[87] ATIA, s 2(1).
[88] ATIA, s 2(3).
[89] ATIA, s 4(1).
[90] ATIA, s 3.
[91] ATIA, 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.

timely access to the record.[92] The Act does not require that the person seeking disclosure have a specific interest in the record. The Act requires a request to be made in writing to the government institution that has control of the record. The request must provide sufficient detail to enable the identification of the record.[93]

Time Frame

ATIA requires a government response within 30 days. The head of the government institution shall give written notice as to whether access to the record will be given, and if access is to be given, then access must be provided within 30 days.[94] This time limit 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 through a large number of records and meeting the original timeline 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. [95]

For an extension of more than 30 days, notice must also be given to the Information Commissioner.[96]

Costs

A person who makes a request for access to a record shall pay an application fee of $5 (as prescribed by regulation) and not more than $25.[97] The head of the respective government institution may waive the payment of a fee or may make a refund.[98]

Exemptions and Refusals

ATIA contains numerous lengthy and comprehensive exemptions to the right to access records. These exemptions include:

[92] ATIA, s 4(2.1).
[93] ATIA, s 6.
[94] ATIA, s 7. For a refusal to access the requested record see also s 10.
[95] ATIA, s 9.
[96] ATIA, s 9(2).
[97] ATIA, s 11(1); Regulations Respecting Access to Information, SOR/83-507, s 7.
[98] ATIA, s 11(2).

- information obtained in confidence from other public institutions (s. 13(1));
- disclosure of information which could reasonably be expected to be injurious to the conduct, by the Government of Canada, of federal-provincial affairs (s. 14);
- 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 (s. 15(1));
- law enforcement and investigations (s. 16(1));
- records relating to investigations, examinations and audits (s. 16.1);
- investigations, examinations and reviews under the *Canada Elections Act* (s. 16.3);
- safety of individuals (s. 17);
- economic interests of Canada and of certain government institutions (ss. 18 & 18.1);
- personal information (s. 19);
- third party information (s. 20);
- advice or recommendations developed by or for a government institution, a minister of the Crown and so forth (s. 21);
- testing procedures, tests and audits (s. 22 & 22.1); and
- information subject to solicitor-client privilege and privilege under the *Patent Act* or *Trademarks Act* (s. 23).

In addition to the exemptions listed above, the head of a government institution may refuse to disclose any record if they believe on reasonable grounds that the material in question will be published within 90 days after the request is made (or within any further period of time that may be necessary for printing or translating).[99]

Where the head of a government institution refuses to give access to a record requested, they shall give notice that the record does not exist or the specific provision on which the refusal was based; or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based.[100] The head of a government institution is not obliged to indicate whether a record exists.[101]

Where the head of a government institution fails to give access to a record requested within the time limits set out in the Act, they shall be deemed to have refused to give access.[102]

[99] ATIA, s 26.
[100] ATIA, s 10(1).
[101] ATIA, s 10(2).
[102] ATIA, s 10(3).

Remedies

Persons affected in their rights under the *Access to Information Act* can file a written complaint with the Information Commissioner.[103] The Office of the Information Commissioner is established by the *Access to Information Act* to provide oversight of the federal government's access to information practices.[104] The Commissioner receives the complaints and carries out investigations.[105] 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.[106] Another available remedy is to request a review by the Federal Court where the Information Commissioner has refused the complaint.[107]

[103] ATIA, ss 30-31.
[104] ATIA, ss 54 – 66.
[105] The Information Commissioner's powers are detailed in ATIA, s 36.
[106] ATIA, s 37.
[107] ATIA, s 41.

b) Challenges with Alberta's FOIP

In a country of weak access to information laws, Alberta is considered to have some of the weakest. Part of it is due to a culture of "reflexive secrecy".[108] Government and public bodies appear to view their obligation to disclose information through the lens of "how much am I obliged to disclose" versus "how much am I obliged to hold back". This sentiment is reflected in the *Globe*'s Secret Canada audit of how freedom of information is working across the country. As previously mentioned, only Alberta's 22 ministries refused to answer a single query (twice). This level of coordination suggests there was an orchestrated effort to test the extent to which Alberta is required to assist the public in accessing records.[109]

The other reason is that Alberta has weak access to information legislation. In a 2012 report, "Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions", Canada's Centre for Law and Democracy (CLD) ranked Alberta's legislation last (tied with New Brunswick and the federal ATIA).[110] In preparing their report the CLD relied primarily on the Right to Information (RTI) Rating. The RTI rating is a tool developed by the CLD and Access to Info Europe (AIE) to assess the strength of national legal frameworks for accessing information held by public authorities.[111] The rating was developed to assist RTI advocates, governments, legislators, lawyers, academics etc. with comparing and assessing the strengths and weaknesses of a legal framework for RTI. The rating's methodology is developed from international standards and best practices and consists of 61 "indicators" of a strong legal regime for RTI.[112] These indicators are divided into seven categories consisting of Right of Access, Scope, Requesting Procedure, Exceptions & Refusals, Appeals, Sanctions & Protections and Promotional Measures.[113] Overall, the RTI rating is a well-respected and useful metric to measure Alberta's laws against international best practices and it is referred to throughout this report.

The issues with Alberta's access to information regime are relatively well-known. They include:

i) Limited scope of FOIP

[108] Editorial Board, "Secret Canada: How Alberta is turning freedom of information into a Why Do You Need To Know Act", *Globe and Mail* (4 Oct 2023) online: <www.theglobeandmail.com/opinion/editorials/article-secret-canada-how-alberta-is-turning-freedom-of-information-into-a-why/ >.
[109] Robyn Doolittle & Tom Cardoso, "Alberta's refusal to share FOI data highlights gaps in access to information", (12 June 2023) online: *The Globe and Mail* www.theglobeandmail.com/canada/article-alberta-foi-requests-refusal/>.
[110] CLD, "Failing to Measure Up", *supra* note 14 at 1.
[111] CLD & Access Info, "Methodology", online: *Global Right to Information Rating* <www.rti-rating.org/methodology/>.
[112] CLD & Access Info, "RTI Rating Methodology", online (pdf): *Global Right to Information Rating* <www.rti-rating.org/wp-content/uploads/2021/01/Indicators.final .pdf>.
[113] *Ibid*.

ii) Overly broad exceptions
iii) Timeline delays
iv) Excessive fees
v) Weak oversight

This section identifies issues with Alberta's access to information laws and offers recommendations to improve upon our existing access regime.

i) Limited scope of FOIP

Alberta's FOIP has a limited scope. In this instance, scope refers to the types of information, records and public authorities that are subject to the Act. The Act's exceptions, that is records that are carved out of what would otherwise be subject to the Act, are discussed in the "overly broad exceptions" section below. Alberta's FOIP is limited because it only applies to records (as opposed to information) and exempts various public authorities as well as some private entities that perform public functions or are significantly funded with public funds. Finally, the Act does not include a duty to document or impose any obligations for proactive disclosure.

To begin, the Act only applies to "records" meaning a "record of information in any form" and includes notes, images, audiovisual recordings etc., generally any information that is written, photographed, recorded or stored in any matter.[114] The term "record" does not include software or any mechanism that produces records.[115] Limiting the application of the Act to records (a "legally narrowly defined term") rather than just information is unduly restrictive, diminishes the application of the Act, and lends itself to misuse.[116] For example, information that is not recorded in a particular format may be excluded.

This issue came up in the *Globe*'s Secret Canada investigation. The *Globe and Mail* made a request for "copies of data columns contained in the internal system the government uses to track FOI requests it receives, including the dates requests were received and completed, summaries of the requests, and their dispositions" to every ministry and department in Canada at the territorial, provincial and federal levels.[117] Each and every Alberta ministry refused to provide the information, not once but twice, on the basis that "no records" exist, as the information did not exist in the exact format requested. Put another way, despite this

[114] FOIP, s 1(q).
[115] FOIP, s 1(q).
[116] Astrid Kalkbrenner, "Module 4: Access to Environmental Information" in *Environmental Rights in Alberta: A Right to a Healthy Environment* (Environmental Law Centre, 2017) at 37.
[117] Doolittle & Cardoso, "Alberta rejects request for data", *supra* note 17.

information being in existence and able to be extracted, downloading only the requested data from the tracking system would mean creating a new record which the Government declined to do.[118] Meanwhile, every other jurisdiction across the country provided records in response to the same questions.[119]

FOIP does appear to anticipate instances such as this and includes a duty to assist applicants, including that a public body must create a record for an applicant if "the record can be created from a record that is in electronic form...using its normal computer hardware and software and technical expertise" and "creating the record would not unreasonably interfere with...operations". The *Globe* confirmed that the software used in Alberta was capable of creating such records.[120] Still, the requests were denied, and the Globe filed an appeal with the OIPC. As mentioned above, this appears to have been part of an orchestrated effort to test the limits of the duty to assist set out in FOIP. Granting a right to access information, rather than just records, would help remedy this issue, as public bodies would have the obligation to disclose the information itself, regardless of the formatting.

A second issue is that FOIP exempts too many major public authorities from the scope of the Act. Generally, it is accepted that access to information legislation "should be guided by the principle of maximum disclosure" and this presumption should be overcome only in very limited circumstances.[121] Accordingly, access to information should apply to the executive, legislative and judicial branches of government as well as other "organs of the State" such as de-facto entities and private entities carrying out government functions.[122] This principle recognizes that information from these bodies is essential to hold public authorities accountable for their processes and decisions.

More specifically, the RTI rating states that strong right to access legislation should include access to the following public authorities:

- the executive branch with no bodies or classes of information excluded;
- the legislature, including both administrative and other information with no bodies excluded;

[118] *Ibid*.
[119] *Ibid*.
[120] *Ibid*.
[121] UNHRC, 49th Sess, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/49/38 (2022) at 5-7; Article 19, "The Public's Right to Know: Principles on Right to Information Legislation" (2016), online (pdf): *Article 19* <https://www.article19.org/data/files/RTI_Principles_Updated_EN.pdf>.
[122] UNHRC, *Ibid* at 7.

- the judicial branch, including both administrative and other information, with no bodies excluded;
- state-owned enterprises (commercial entities that are owned or controlled by the State);
- other public authorities including constitutional, statutory and oversight bodies (such as an election commission or information commissioner); and
- private bodies that perform a public function and/or receive significant public funding.[123]

Meanwhile, Alberta's FOIP contains numerous exemptions for public authorities. Section 4 excludes various records from the application of the Act, including access to the following:

- records of the judiciary (except for judicial administrative records);[124]
- various records created by or for a person acting in a judicial or quasi-judicial capacity;[125]
- records created by or in the custody of an officer of the Legislature and that relate to the exercise of that officer's functions;[126]
- information collected by or for the Ethics Commissioner and that relates to the disclosure statements of deputy ministers, senior officers and designated senior officials as well as advice relating to conflicts of interest;[127]
- records made from information in the office of the Personal Property Registry, Registrar of Motor Vehicle Services, Registrar of Corporations, Registrar of Companies, Land Titles Office and Registrar of Vital Statistics;[128]
- records created by or for the office of the Speaker of the Legislative Assembly or office of a Member of the Legislative Assembly that is in the custody or control of the Legislative Assembly Office; and[129]
- records created by or for and intended to be circulated to a member of the Executive Council, Legislative Assembly or chair of a Provincial agency who is a Member of the Legislative Assembly.[130]

Accordingly, Alberta has broad exemptions for the office of legislators, the judiciary (save for administrative judicial records) and boards and agencies. This is a significant shortcoming that means Albertans simply do not have access to the information necessary to hold its authorities to account.

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[123] CLD & Access Info, "RTI Rating Methodology", *supra* note 112.
[124] FOIP, s 4(1)(a).
[125] FOIP, s 4(1)(b).
[126] FOIP, s 4(1)(d).
[127] FOIP, ss 4(1)(e),(e.1)&(f).
[128] FOIP, s 4(l).
[129] FOIP, s 4(1)(p).
[130] FOIP, s 4(1)(q).

In addition, FOIP does not automatically apply to private entities that perform a public function or receive significant public funding. The definition of "public body" in the Act includes: (i) a department, branch or office of the Government of Alberta and (ii) an agency, board, commission, corporation, office or other body *designated as a public body in the regulations* [emphasis added]. The FOIP Regulation provides that the Lieutenant Governor in Council *may* designate an agency, board, commission, corporation, office or other body as a public body:

> (a) where the Government of Alberta
>
> (i) appoints a majority of the members of that body or of the governing board of that body,
>
> (ii) provides the majority of that body's continuing funding, or
>
> (iii) holds a controlling interest in the share capital of that body; or
>
> (b) where that body performs an activity or duty that is required by an enactment and the Minister responsible for the enactment recommends that the Lieutenant Governor in Council make the designation.[131]

However, the use of the word "may" makes it plain that this designation is left to the discretion of the government. This is a problematic approach simply because it permits the government to create, fund and control a body while simultaneously shielding it from access laws.

This very issue came up recently in an OIPC inquiry involving the Canadian Energy Centre Ltd. (CEC). [132] The applicant in this matter sought copies of records from the CEC. Colloquially known as the "energy war room", the CEC was established by the Government of Alberta in October 2019 to improve the reputation of Alberta's oil and gas sector and challenge misinformation.[133] In response to the requests, the CEC stated that it was a private corporation and directed the applicant to Alberta Energy, who in turn advised that the CEC was not a public body subject to the Act. The applicant requested an inquiry and the OIPC considered whether the CEC was a "public body" under the Act and/or whether the requested records were available under Alberta Energy or another public body.

The OIPC looked at the legislation and found that the CEC satisfied all the criteria for designation as a public body as per s. 2(a) of the Regulation. That is, the CEC was established by the Government of Alberta as an independent corporation under the *Financial Administration Act* and its Board of Directors is made up of cabinet ministers, the CEC was funded by a grant

[131] FOIP Regulation, s 2.
[132] *Canadian Energy Centre Ltd. (Re)*, 2022 CanLII 20312 (AB OIPC).
[133] Dean Bennett, "Alberta incorporates energy war room as Canadian Energy Centre, work starts soon" (9 Oct 2019) online: *Edmonton Journal* edmontonjournal.com/news/local-news/alberta-incorporates-energy-war-room-as-canadian-energy-centre-work-starts-soon.

from the Government, the Government held 100% of the voting shares of the CEC and it fell under the purview of the Minster of Energy.[134] In jurisdictions such as Nova Scotia, Newfoundland and Manitoba this would be sufficient to qualify the CEC as a public body.[135] Nevertheless, the use of the word "may" in the Alberta Regulation means that the decision to designate a body as a public body was discretionary.[136]

Still, the Applicant argued that the failure to designate the CEC as a public body was both intentional and contrary to the principles of transparency and accountability that underpin the Act. While the OIPC acknowledged these criticisms, it concluded that the decision rests with the Legislature and therefore the CEC was not a public body within the meaning of the Act. Whether or not the Applicant could make a request for the records through Alberta Energy was not at issue in this case.[137]

Finally, Alberta's FOIP does not include either a duty to document or obligations for proactive disclosure (except in exceptional circumstances). While neither of these are included in the RTI rating, they are both natural extensions of the principle of maximum disclosure and part of international best practices.[138] For instance, the duty to document is "intimately" linked to the principle of maximum disclosure because "[a]n effective right of access to information depends on the manner in which information is handled, including for its recording, preservation and ease of retrieval".[139] Put another way, if no records are created or retained that document government decisions and activities, then there is nothing to disclose and ultimately, no accountability.

In 2013, Canada's Information and Privacy Commissioners (including Alberta)'s recognized this concern and issued a joint resolution calling for governments to, among other things, create a "legislated duty requiring all public entities to document matters related to deliberations,

[134] *Canadian Energy Centre Ltd. (Re), supra* note 132 at para 51.
[135] *Ibid* at para 55.
[136] *Ibid* at para 54.
[137] *Ibid* at para 79.
[138] UNHRC, *supra* note 121 at p 6-7. Council of Europe, CETS 205, *Council of Europe Convention on Access to Official Documents,* 18.VI.2009 (2009) at art 10 online (pdf): <rm.coe.int/1680084826 >; OAS, Department of International Law of the Secretariat for Legal Affairs, *Model Inter-American Law on Access to Public Information and its Implementation Guide,* OEA/Ser.D/XIX.12 (2012) at 12.
[139] UNHRC, *supra* note 121 at 7.

actions and decisions".[140] This joint statement on the duty to document was reiterated in 2016.[141] In its press release, Alberta's OIPC also noted that other jurisdictions have already imposed legal requirements to create records and these requirements generally include "standards to ensure that records are full and accurate, and managed in a way that makes them accessible and reliable for future use".[142] It is also generally recognized that implementing a duty to document requires an investment in digital data and records management.[143]

Also related to the principle of maximum disclosure is the obligation to proactively disclose information in the public interest. Alberta's FOIP does have a public interest override (discussed in greater detail in the section below) but it is only for exceptional circumstances (i.e. information about a risk of significant harm to the environment or to the health and safety of the public).[144] Mandatory proactive disclosure is more about recognizing that public authorities have an obligation to put information into the public domain that helps promote "the transparency and efficiency of public administration" and "encourage informed participation...in matters of general interest".[145] For example, the OAS Model Inter-American Law on Access to Public Information recommends the proactive publication of 17 key classes of information including:

- a description of its organizational structure, functions, duties, locations of its departments and agencies, operating hours and names of its officials;
- the qualifications and salaries of senior officials;
- the internal and external oversight, reporting and monitoring mechanisms relevant to the public authority including its strategic plans, corporate governance codes and key performance indicators, including any audit reports;
- its budget and expenditure plans for the current fiscal year, and past years, and any annual reports on the manner in which the budget is executed; and
- its procurement procedures, guidelines and policies, contracts granted and contract execution and performance monitoring data.[146]

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[140] OIPC, Resolution of Canada's Information and Privacy commissioners and Ombudspersons, "Modernizing Access and Privacy Laws for the 21st Century" (9 Oct 2013) <www.priv.gc.ca/en/about-the-opc/what-we-do/provincial-and-territorial-collaboration/joint-resolutions-with-provinces-and-territories/res_131009/#>.

[141] OIPC, Joint Statement, "Duty to Document" (2016) online: <oipc.ab.ca/resource/joint-statement-duty-to-document/>.

[142] *Ibid*. Other jurisdictions include, for example, the United States, New Zealand and Australia.

[143] UNHRC, *supra* note 121 at 7.

[144] FOIP, s 32(1).

[145] UNHRC, *supra* note 121 at 8; Council of Europe, *supra* note 138 at art 10.

[146] OAS, *Model Inter-American Law, supra* note 138.

Currently, Alberta has only very limited proactive disclosure obligations. The Government of Alberta has a "Public Disclosure of Travel and Expenses Policy" which mandates proactive online disclosure of travel, meal and hospitality expenses claimed by the Premier, Ministers, Associate Ministers, ministerial political staff, senior officials, deputy ministers and executive managers.[147] There is also a *Public Sector Compensation Transparency Act* that requires the annual disclosure of the salaries of Government of Alberta employees who earn above a threshold amount.[148] Additionally, s. 88(1) of Alberta's FOIP provides that the head of a public body *may* specify categories of records that are in the custody or under the control of the public body and are available to the public without a request for access under the Act. However, it is up to the discretion of the head of the public body.

Alberta's OIPC has formally recommended on several occasions that the Government of Alberta "enhance the existing provisions in the FOIP Act by incorporating mandatory proactive disclosure requirements".[149] Similarly, the Joint Resolution of Canada's Information and Privacy Commissions and Ombudspersons recommended "[e]stablishing minimum standards for proactive disclosure, including identifying classes or categories of records that public entities must proactively make available to the public and, in keeping with the goals of Open Data, make them available in a usable format".[150]

Discussion

It is tempting to believe that there must be some valid reasons or justifications for the aforementioned exemptions from the scope of FOIP. Unfortunately, this is not the case. International standards are clear that there should be a right of access to information and that the right of access to information should apply to all state agencies and officials without exception, and to all nongovernmental actors that receive public funds or benefits or carry out public functions.[151]

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[147] Government of Alberta, *Public Disclosure of Travel and Expense Policy,* (Public Disclosure Policy), (30 Apr 2020) online: <open.alberta.ca/publications/public-disclosure-of-travel-and-expenses-policy-expense-policy>.
[148] SA 2015, c P-40.5.
[149] OIPC, "Review of the Government of Alberta's Public Disclosure of Travel and Expenses Policy" (June 2015), online (pdf): *OIPC* < oipc.ab.ca/wp-content/uploads/2022/02/GoA-Expenses-Review-2015.pdf>; OIPC, "Modernizing Access and Privacy Law for the 21st Century), *supra* note 140.
[150] OIPC, "Modernizing Access and Privacy Law for the 21st Century), *supra* note 140.
[151] See for example: OAS, Committee on Juridical and Political Affairs, *Recommendations on Access to Information*, OEA/Ser.G/CP/CAJP-2599/08(2008) at 11 online (pdf): <www.oas.org/en/sla/dil/docs/CP-CAJP_2599-08_eng.pdf>; CLD & Access Info, "RTI Rating Methodology", *supra* note 112.

To put things in perspective, Alberta is an outlier when it comes to the scope of its access law. At least 17 countries score a perfect 30 out of 30 with respect to scope in the RTI rating – meaning they have a right of access for both information and records, to all public authorities and to private bodies that perform a public function or receive significant public funding.[152] For example, Mexico, which is discussed in further detail as a case study below, has a right of access to all of these. In fact, more than half the countries evaluated scored at least 24 out of 30 or above.[153] Meanwhile, Canada's ATIA scored a mere 14 out of 30 in the RTI rating with respect to scope, placing it 130 out of 140 countries.[154] Alberta's FOIP would score similarly (if not worse).[155]

With respect to the duty to disclose and proactive disclosure, these are somewhat newer practices and not part of the RTI rating.[156] Nevertheless, there is evidence that they are fast becoming part of international best practices and should be incorporated into Alberta's FOIP.[157]

Recommendations

Freedom of information legislation should always be guided by the principle of maximum disclosure, including with respect to its scope. The following recommendations would improve the scope of Alberta's access law:

- 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

[152] CLD & Access Info, "By category" online: *Global Right to Information Rating* <www.rti-rating.org/country-data/by-section/scope/>.
[153] *Ibid*.
[154] *Ibid*.
[155] CLD, "Failing to Measure Up", *supra* note 14 at 8.
[156] The RTI rating notes that it does not assess the rules on the proactive disclosure of information because they are often spread out among many different pieces of legislation and would require additional resources: https://www.rti-rating.org/wp-content/uploads/2021/01/Indicators.final_.pdf
[157] UNHRC, *supra* note 121 at 6-8.

- 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.

ii) Overly broad exceptions

Alberta's FOIP endeavours to provide "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 this Act*" [emphasis added].[158] Exceptions are important because they can make or break an access to information regime. When crafted carefully they do not take away from the culture of access and openness that should characterize access to information legislation. However, when they are overly broad and lack specificity, they ensure that there will be "plenty of places for recalcitrant bureaucrats or politicians to hide from their...obligations".[159] Unfortunately, in Alberta the Act's stated goals are significantly eroded by FOIP's exceptions as they are not very limited nor specific.

At the outset, it should be acknowledged that some exceptions to the right of access are necessary.[160] International law and the RTI rating generally accept that exceptions for the following are permissible:

- National security;
- International relations;
- Public health and safety;
- Prevention, investigation and prosecution of legal wrongs;
- Privacy;
- Legitimate commercial or economic interests;
- Management of the economy, fair administration of justice and legal advice privilege;
- Conservation of the environment; and
- Legitimate policy-making and other operations of public authorities.[161]

Alberta's FOIP exceptions mostly fall within these categories, save for its "international relations" exception (discussed in greater detail below).

[158] FOIP, s 2(a).
[159] CLD, "Failing to Measure Up", *supra* note 14 at 14.
[160] UNHRC, *supra* note 121 at 6.
[161] CLD & Access Info, "RTI Rating Methodology", *supra* note 112; see also for example Council of Europe, *Council of Europe Convention on Access to Official Documents, supra* note 138 at art 3.

Nevertheless, international standards also suggest that states should "always err on the side of full disclosure and greatly limit cases in which requests for information are refused or denied".[162] For this reason, certain checks and balances should be in place to ensure that exceptions are only available when absolutely necessary. For example, an exception should cease to apply if there is an overriding public interest in disclosure.[163] The RTI rating recommends that access to information laws should include the following:

- Access to information legislation should trump restrictions on information disclosure in other legislation in the case of any conflict;
- A harm test should apply to all exceptions so that disclosure is only refused where there is a risk of actual harm to a protected interest;
- A mandatory override that requires information that is in the public interest to be disclosed (i.e. information about human rights, corruption, crimes against humanity);
- A time limit that requires information to be released as soon as an exception ceases to apply as well as a clause excepting any information that is 20 years or older;
- Clear and appropriate procedures for consulting with third parties who provided confidential information that is subject to a request;
- A severability clause so that any portion of the record not covered by the exception must be disclosed; and
- A requirement for public authorities to state the exact legal grounds and reasons for any refusals and an obligation to notify applicants of the relevant appeal processes;[164]

As will be discussed below, Alberta's FOIP does include several checks and balances, such as a mandatory public interest override, third party consultation provisions, a severability clause and the required disclosure of appeal procedures. However, the Act lacks adequate paramountcy, harm tests and time limits for several exceptions. As a result, several exceptions in the Act are overly broad and prone to misuse.

Alberta's FOIP Exceptions

For the most part, Alberta's existing FOIP exceptions fall within the RTI list of acceptable right of access exceptions. The following chart details under which accepted category each exception falls within:

[162] OAS, *Recommendations on Access to Information*, *supra* note 151 at 13.
[163] Council of Europe, *Council of Europe Convention on Access to Official Documents, supra* note 138 at art 3.
[164] CLD & Access Info, "Scoring" at 28-35 online: *Global Right to Information Rating* <www.rti-rating.org/country-data/scoring/>.

Recognized Exceptions	FOIP Exceptions
National security	Disclosure harmful to law enforcement (s. 20) (but limited to s. 20(1)(b.1) which refers to activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act
International relations	Disclosure harmful to intergovernmental relations (s. 21) (but only to the extent that it refers to international relations)
Public health and safety	Disclosure harmful to individual or public safety (s. 18)
Prevention, investigation and prosecution of legal wrongs	Disclosure harmful to law enforcement (s. 20)
Privacy	Disclosure harmful to personal privacy (s. 17)
	Confidential evaluations (s. 19)
Legitimate commercial or economic interests	Disclosure harmful to business interests of a third party (s. 16)
	Disclosure harmful to economic and other interests of a public body (s. 25)
Management of economy, fair admin of justice and legal advice privilege	Disclosure harmful to economic and other interests of a public body (s. 25)
	Privileged information (s. 27)
Conservation of the environment	Disclosure harmful to the conservation of heritage sites, etc. (s. 28)
Legitimate policy-making and other operations	Cabinet and Treasury Board confidences (s. 22)
	Local public body confidences (s. 23)
	Testing procedures, tests and audits (s. 26)
	Information that is or will be available to the public (s. 29)

Figure 2: List of recognized exceptions

Nevertheless, at least one FOIP exception falls outside international standards. Section 21 excepts disclosure harmful to intergovernmental relations, including information that could reasonably be expected to harm relations between the Government of Alberta or its agencies and the Government of Canada; a province or territory; a local government body; an aboriginal organization that exercises government functions; the government of a foreign state or an international organization of states; as well as information that was supplied in confidence by any of these entities.[165]

Section 21 mimics a legitimate exception that is found in many national access laws and that excepts information that could harm international relations. International standards recognize that "international diplomacy is a complex and often highly adversarial process" and that great care and discretion is sometimes required to manage delicate relationships and avoid serious inter-state conflict.[166] This aspect of the exception is fine. However, section 21 also applies this same logic to the Government of Alberta's intranational and inter-provincial relationships, as well as relationships with local government bodies and aboriginal governmental organizations. These relationships are nowhere near as fragile or fraught as international relations and are not entitled to the same level of secrecy and protection.[167]

In addition, section 21 has been drafted so broadly that it even applies to relationships between different "government-like" entities. This matter was recently considered at the Alberta Court of Appeal in *Edmonton Police Service v Alberta (Information and Privacy Commissioner).*[168] At issue was whether a 3-page report shared in confidence by the RCMP to Edmonton Police Service (EPS) was exempt from disclosure under s. 21(1)(b) of FOIP. Originally, the OIPC Adjudicator relied on earlier OIPC decisions and interpreted the entirety of section 21 to be imbued with the wording and intent of s. 21(1)(a) of the Act (i.e. to protect information harmful to the *intergovernmental* relations of the Government of Alberta).[169] Accordingly, the disclosure of information from the RCMP to EPS was "intragovernmental" rather than "intergovernmental" in nature and not captured by the exception.[170] On an application for judicial review, the Court found that the Adjudicator's interpretation was reasonable.[171]

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[165] FOIP, s 21.
[166] CLD, "Failing to Measure Up", *supra* note 14 at 15.
[167] *Ibid.*
[168] 2022 ABCA 397 [*Edmonton Police Service* 2022].
[169] *Edmonton (Police Service) (Re)*, 2020 CanLII 49873 (AB OIPC) at para 24 [*Edmonton Police Service* 2020].
[170] *Ibid* at para 25.
[171] *Edmonton Police Service* 2022 at para 14.

Later, at the Court of Appeal, the court agreed that s. 21(1)(a) of the Act refers to disclosure that could "harm relations between the Government of Alberta or its agencies of any of the [listed entities] or their agencies". However, s. 21(1)(b) provides the following:

> **Disclosure harmful to intergovernmental relations**
>
> **21(1)** The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> ...
>
> (b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.

The Court of Appeal found sections 21(1)(a) and 21(1)(b) to be "expressly disjunctive" and noted that if one "ignores the heading "Disclosure harmful to intergovernmental relations" ...21(1)(b) is concerned with a different subject – whether information provided in confidence to a public body is exempt from disclosure". Based on this reading the Court of Appeal found that the RCMP was a "local government body" for the purposes of the Act and therefore an entity that could supply information for the purposes of s. 21(1)(b).[172] The matter was remitted back to the OIPC for further consideration.

Interestingly, post-appeal the Adjudicator still ordered the public body to reconsider exercising its decision to withhold the subject information.[173] The Adjudicator noted that section 21(1) was a "discretionary exception to disclosure" and therefore a public body must demonstrate that it has properly considered whether to exercise its discretion.[174] In this instance, the public body did not indicate that it considered anything other than its "belief" that the RCMP would not consent to disclosure.[175] Given that six years had passed since the request was made, the Adjudicator ordered the public body to reconsider exercising its discretion to withhold the information and, if it concludes that the information should be disclosed, seek consent from the RCMP.[176] A written explanation for its decision must also be provided to the applicant.[177]

[172] *Ibid* at para 32.
[173] *Edmonton Police Service (Re)*, 2023 CanLII 118602 (AB OIPC) at para 45.
[174] *Ibid* at para 31.
[175] *Ibid* at paras 41-42.
[176] *Ibid* at para 43.
[177] *Ibid* at para 46.

Checks and Balances for FOIP Exceptions

As previously mentioned, the RTI rating suggests that access legislation should contain certain checks and balances so that exceptions are only ever available when necessary. Alberta's FOIP does contain a number of these checks, including a mandatory public interest override, third party consultation provisions, a severability clause and the required disclosure of appeal procedures. However, the Act lacks adequate paramountcy provisions, harm tests and time limits. As a result, even though most of FOIP exceptions fall within acceptable categories, they are overly broad and open to misuse.

The following section reviews FOIP's various checks and balances, beginning with those that the Act does well and ending with those that need improvement or are not included.

Check and Balances included in FOIP

a. Mandatory override

Access to information legislation should contain a mandatory override that requires disclosure of information that is in the public interest (i.e. information about human rights, corruption, crimes against humanity). This override should permit information that falls within the scope of an exception to still be disclosed if the public interest in disclosure outweighs the harm caused to the protected interest.[178]

Alberta's FOIP does have a public interest override. Section 32 of the Act provides that the head of a public body must, without delay, disclose information about a risk of significant harm to the environment or to the health or safety of the public, an affected group or an individual, as well as information that is "clearly in the public interest". This section of the Act applies despite any other provision in the Act.[179] Overall, this is a fine override provision although it would likely benefit from some expansion of what is "clearly" in the public interest.

b. Third-party consultation

Access to information legislation should contain clear and appropriate procedures for consulting with third parties who provided confidential information that is subject to a request. In Alberta's FOIP, sections 30 and 31 of the Act deal with third party consultation when a public body is considering giving access to information that affects the interests of third parties under section

[178] CLD, "Failing to Measure Up", *supra* note 14 at 15.
[179] FOIP, s 32(1) & (2).

16 (disclosure harmful to business interest of a third party) and section 17 (disclosure harmful to personal privacy). The process involves giving notice of the request for access and advising the third party that they may consent to the disclosure or make representations as to why the information should not be disclosed within 20 days.[180] The public body must decide within 30 days after notice has been given.[181]

c. Severability clause

Another check/balance for access to information legislation is to include a severability clause that makes it clear that any portion of the record not covered by the exception must be disclosed. Alberta's FOIP does contain a general severability clause at s. 6(2) of the Act:

> **(2)** The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

Nevertheless, OIPC tribunal decisions have noted there are limits to the severability clause including:

- when the personal information of the applicant is so intertwined with that of third parties that severing is not possible;[182] and
- where disclosure of information to an applicant would be meaningless or worthless, it may be construed that a public body reasonably fulfilled its duty to sever information even though it did not provide access to the meaningless or worthless information.[183]

d. Disclosure of Appeal Procedures

Access to information legislation should also include a requirement for public authorities to state the exact legal grounds and reasons for any refusals and notification of the relevant appeal processes. In the event access to a record (or part of it) is refused, s. 12(1) of Alberta's FOIP requires the applicant be told the reasons for the refusal and the provision of the Act on which the refusal is based, the contact information for an employee of the public body who can answer questions about the refusal, as well as the fact that the applicant may request a review of the decision from the OIPC.

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[180] FOIP, s 30(4).
[181] FOIP, s 30(5).
[182] *Alberta Municipal Affairs (Re)*, 1996 CanLII 11516 (AB OIPC); *Tire Recycling Management Board (Re)*, 1996 CanLII 11523 (AB OIPC).
[183] *Tire Recycling Management Board (Re)* at para 47; *TD Insurance, (Re)* (2 July 2014), Order P2014-04 at para 23 online (pdf): OIPC <oipc.ab.ca/wp-content/uploads/2022/01/Order-P2014-04.pdf >.

Check and Balances not properly included in FOIP

a. Paramountcy of Access to Information legislation

On occasion, complying with a provision in one piece of legislation requires a contravention or breach of a provision in FOIP legislation. One way to resolve such conflict is to include a paramountcy provision that establishes a hierarchy between the two. The RTI rating suggests that, in the case of such conflict, access to information legislation should trump or be "paramount" to restrictions on information disclosure in other legislation.

Alberta's FOIP does have a paramountcy provision, however, it does not apply if another Act or regulation expressly provides that the other Act or regulation (or a provision of it) prevails over FOIP. Section 5 of FOIP reads as follows:

> **Relationship to other Acts**
>
> **5** If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless
>
> (a) another Act, or
>
> (b) a regulation under this Act
>
> expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

In other words, in cases of conflict or inconsistency, FOIP prevails unless the inconsistent Act or regulation has their own paramountcy provision.

In 2011, then Information and Privacy Commissioner Frank Work completed a study on legislation in Alberta which contains paramountcy clauses vis-a-vis FOIP. He found that 38 acts or regulations contained a paramountcy clause, often without good cause.[184] Work was concerned that "[l]eft unchecked, the practice of taking other enactments out of FOIP by making them "paramount"...has the potential to turn [the Act] into "a piece of Swiss cheese"".[185] The

[184] OIPC, "Commissioner Worries FOIP Act is Facing 'Death by a Thousand Cuts'" (30 Nov 2011), online: *OIPC* <oipc.ab.ca/foip-paramountcy-report/>.
[185] Frank Work, "Report on Use of "Paramount" Clauses in Acts and Regulations to Override the Freedom of Information and Protection of Privacy Act" (30 Nov 2011), at 2 online (pdf): <oipc.ab.ca/wp-content/uploads/2022/02/Paramount-Clauses-2011.pdf>.

numerous paramountcy clauses undermine the purpose of the Act and confuse the public as well as those tasked with implementing the Act.[186]

Instead, Work suggested that a paramountcy clause should only be included when the Legislature determines that a scheme for access to information/privacy significantly differs from, and is incompatible with, that established by FOIP and where the alternative scheme is exhaustive.[187] There is no need for a paramountcy clause in instances where an alternative scheme can co-exist with the Act, and where the alternative scheme is partially but not entirely irreconcilable with FOIP, a paramountcy provision should apply only to the extent of the inconsistency or conflict.[188]

b. Harm Test

A harm test should apply to all exceptions so that disclosure is only refused where there is a risk of actual harm to a protected interest. The exceptions listed in Alberta's FOIP are not subject to an over-arching harm test. The notion of harm (or an equivalent concept such as damage, prejudice, etc.) is mentioned and/or considered in various FOIP exceptions, including

- Disclosure harmful to business interests of a third party (s. 16)
- Disclosure harmful to personal privacy (s. 17)
- Disclosure harmful to individual or public safety (s. 18)
- Disclosure harmful to law enforcement (s. 20)
- Disclosure harmful to intergovernmental relations (s. 21)
- Disclosure harmful to economic and other interests (s. 25)
- Disclosure harmful to the conservation of heritage sites, etc. (s. 28)

However, the question of whether there is a risk of actual harm to a protected interest is not always extended to every item in the exception. For example, in s. 20(1) of the Act (disclosure harmful to law enforcement) the head of a public body may refuse to disclose information that could reasonably be expected to:

- reveal any information relating to or used in the exercise of prosecutorial discretion;
- reveal a record that has been confiscated from a person by a peace officer in accordance with the law; and
- reveal technical information relating to weapons or potential weapons;[189]

[186] *Ibid*.
[187] *Ibid* at 4.
[188] *Ibid*.
[189] FOIP, s 20(1)(g), (i) and (l).

without ever being required to consider whether any actual harm could come of this disclosure.

There are also exceptions that do not consider harm at all, most notably those for internal government deliberations, including s. 22 (Cabinet and Treasury Board confidences), s. 23 (local public body confidences), and s. 24 (advice from officials). These FOIP exceptions are drafted extremely broadly. They include:

- **Cabinet and Treasury Board confidences (s. 22)** - information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to any of these committees;
- **Local public body confidences (s. 23)** - drafts of a resolution, bylaw or other legal instrument or the substance of deliberations of a meeting of its elected officials or of its government body or a committee if an Act or a regulation under this Act authorizes the holding of that meeting in private;
- **Advice from officials (s. 24)** - information that could reasonably be expected to reveal nearly any type of advice and/or consultations involving a public body or members and staff of the Executive Council, plans developed for contractual or other types of negotiations by or for a public body and/or Government of Alberta, plans relating to management of personnel or administration of public body (not yet implemented), contents of draft legislation, agendas or minute of meetings and more.

While international standards recognize that it is a legitimate aim to protect the confidentiality of deliberations and the "integrity of the decision-making process" it is "not, however, legitimate to refuse to disclose information simply because it relates to one of these interests".[190] Exceptions should identify specific interests that they seek to protect, and disclosure must threaten to cause harm to those interests.

In the case of Alberta's FOIP, these exceptions cast a wide net and fail to identify the specific interests being protected other than the fact that the information falls within internal government and public body decision-making. Moreover, there is no consideration of whether the disclosure poses an actual risk of harm to any specific interests, such as the provision of free and frank advice within government.[191] Another issue, which is discussed in greater detail below, is that these exceptions prevent disclosure of this information for 15 years, when information

[190] CLD, "Failing to Measure Up", *supra* note 14 at 14; Article 19, "Public's Right to Know", *supra* note 2.
[191] CLD, "Failing to Measure Up", *supra* note 14 at 14.

that relates to a particular decision should really be disclosed once the decision has been made.[192]

c. Time Limit

Finally, international standards also suggest that access to information legislation should include a provision that requires information to be released as soon as an exception ceases to apply as well as a clause excepting any information that is 20 years or older.

Alberta's FOIP exceptions are not subject to a general sunset clause nor is there a general requirement to release information once an exception ceases to apply. Time limits do apply on a case-by-case basis, including:

- Disclosure harmful to business interests (s. 16) - does not apply to information in care of archives of a public body and which has been in existence for 50 years or more;
- Disclosure harmful to personal privacy (s. 17) - does not apply to personal information about an individual that has been dead for 25 years or more;
- Disclosure harmful to intergovernmental relations (s. 21) - does not apply to information that has been in existence in a record for 15 years or more;
- Cabinet and Treasury Board confidences (s. 22) - does not apply to information in a record for 15 years or more OR information for the purpose of providing background facts to assist with making a decision if the decision has been made public, implemented, or 5 years or more have passed since the decision was made or considered;
- Local public body confidences (s. 23) - does not apply to information that has been in existence for 15 years or more; and
- Advice from officials (s. 24) - does not apply to information that has been in existence for 15 years or more OR in specific cases where 3 years has elapsed.

Nevertheless, exceptions listed in sections 18, 19, 25, 26, 27, 28 and most of 20 are not subject to time limits.

Discussion

Alberta's FOIP contains numerous exceptions to the Act without also including some important checks and balances recommended by the RTI rating. As a result, several exceptions in the Act are overly broad and prone to misuse. Primarily these exceptions result in unnecessary

[192] *Ibid*.

redactions, but they can also add additional delay, whether it is through time spent doing the redactions themselves or time spent challenging them after the fact.[193]

An excellent (and unfortunate) recent example of how exceptions are misused and cause issues with delay and costs is *Alberta Energy v Alberta (Information and Privacy Commissioner)*.[194] At issue in this case was whether Alberta Energy was entitled to judicial review of the OIPC's decision to order the production of various documents withheld by the public body.

By way of background, in July 2020 a group of individuals and ranchers made a FOIP request to Alberta Energy for records discussing the rescission of the 1976 Coal Policy including all briefing materials and correspondence. Alberta Energy sought several extensions until the Commissioner declined to grant another in October 2021. On October 15, 2021 Alberta Energy released 30 pages of a reported 6539 records. Of these 30 pages, numerous parts were withheld under statutory exceptions to disclosure. The requesting parties sought and were granted an inquiry by OIPC pursuant to s. 65 of FOIP and, following the inquiry, the Adjudicator disallowed the exceptions claimed by Alberta Energy and ordered production of the documents. Alberta Energy sought judicial review of this decision.

Alberta Energy relied upon the exceptions for disclosure harmful to governmental relations (s. 21), cabinet and treasury board confidences (s. 22), advice from officials (s. 24) and disclosure harmful to economic and other interest of a public body (s. 25) to withhold portions of records under the provisions dealing with disclosure harm. Upon review, the Court found that it was reasonable for the Adjudicator to find that Alberta Energy had not met its onus to prove its exceptions to disclosure.

The Court stated that a public body carries three discrete obligations when it refuses access:

1. The Act presumes access is the norm and therefore the public body bears the onus of justifying the withholding of relevant records;
2. The public body must provide evidence to ground their denial; and
3. The public body must justify each denial on its merits (i.e. line by line) as the statutory exceptions do not afford any "blanket privilege".

In this instance, Alberta Energy argued that the Adjudicator unreasonably denied exceptions.[195] However, the Court found that the public body's argument consisted mostly of assertions and

[193] Drew Yewchuk, "Lets Talk About Access to Information in Alberta: Part One" (5 Nov 2018) online: *ABlawg* https://ablawg.ca/2018/11/05/lets-talk-about-access-to-information-in-alberta-part-one/.
[194] *Alberta Energy v Alberta (Information and Privacy Commissioner),* 2024 ABKB 198.
[195] *Ibid* at para 23.

failed to ground its arguments in the Adjudicator's decision and the evidence.[196] The more aggressively a public body redacts its records, the more onerous the obligation to defend the redactions and Alberta Energy did not meet its onus.[197]

Alberta Energy also argued that OIPC applied the exceptions too narrowly, but the Court rejected this argument on the basis that the Legislature intended the exceptions to apply narrowly, stating "[i]f exceptions were to apply broadly and permissively, the effect would be that the right of access would be illusory".[198] With respect to the exceptions based on Cabinet confidence, Alberta Energy also argued for a broad interpretation. For instance, they argued that the general title and topic of a presentation to Cabinet was sufficient to invoke cabinet confidence.[199] Again, the Court found that this position "would allow the government to shield the public access to records simply by their proximity to Cabinet".[200] Instead, the approach should be contextual and based on actual evidence that the record would disclose Cabinet discussions.[201]

In addition, Alberta Energy brought up issues of procedural fairness with respect to communications from the requesting parties and a request for an affidavit after submissions were done. However, the Court rebuffed these concerns because Alberta Energy caused the confusion which necessitated the communications and affidavit. Alberta Energy revealed a significant discrepancy in the number of records they claimed existed (from approx. 6500 to 2100) in their closing submissions which precipitated the additional communications and affidavit.

Finally, the Court discussed the issue of delay and the availability of judicial review. The requesting parties argued that the Court should decline judicial review based on the conduct of the public body in continually and deliberately delaying production. The Court acknowledged that "for the right of access to information to be meaningful, it must be timely" and "[r]eceiving records years after a request may...be a pyrrhic victory...that does little to contribute to the need for public accountability for government actions".[202] Moreover, the release of information in this instance was "so slow as to be practically non-existent".[203] and the public body's request for

[196] *Ibid* at para 25.
[197] *Ibid* at para 28.
[198] *Ibid* at para 30.
[199] *Ibid* at paras 37-38.
[200] *Ibid* at para 40.
[201] *Ibid* at para 39.
[202] *Ibid* at para 76.
[203] *Ibid* at para 78.

judicial review further delayed the process. The Court also recognized that most requesting parties would have had neither the stamina nor the resources to continue,[204] and stated the following:

> It is difficult not to look at the history of this matter and see the critical rights imbued by access to information as being largely illusory. Whether the conduct of the Public Body stems from a lack of resources or intentional conduct is largely irrelevant. The Requesting Parties have been practically denied access to the information they are entitled to at law, and this Court will not abet this conduct through the availability of judicial review.[205]

The Court dismissed Alberta Energy's application for judicial review in its entirety.

In our view, this case demonstrates how easy it is for a motivated public body to avoid its disclosure obligations using the shield of FOIP exceptions. More worrisome still is the position Alberta Energy took before the courts with respect to how broadly these exceptions should be interpreted. Interestingly, the Court also touched on whether the source of the access issues in this case rest with the legislation itself or with the conduct of the public body. The Court noted that "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".[206] This case suggests that relying on the goodwill of the public body alone is not enough. The existing legislation should be tightened up significantly to prevent errant public bodies from perverting the "attitude of access" contemplated by the Act.

Of course, it is not possible to eliminate the exercise of discretion by public bodies entirely. Take for example the international best practise that a harm test should apply to all exceptions so that disclosure is only refused where there is a risk of actual harm to a protected interest. The question of what constitutes "actual harm" is subjective and will require the exercise of discretion on behalf of public bodies. Nevertheless, public bodies must be able to justify their decisions upon review. Moreover, a comprehensive approach that puts checks and balances in place along with proper oversight by the OIPC reduces the opportunities for misuse.

[204] *Ibid* at para 80.
[205] *Ibid* at para 81.
[206] *Ibid* at para 79.

Other recent examples of excessive withholding and redactions are found in OIPC Orders F2024-16 and F2024-17.[207] In Order F2024-16 the applicant Northback Holdings Corp. made a request to the Alberta Executive Council for all communications between Cabinet and the AER for a specified period (i.e. May 2020-July 2021). The public body advised that it located nine pages of responsive records but held them back in their entirety under s. 22 (cabinet and treasury board confidences) of the Act. Following a lengthy review and discussion of prior orders and caselaw, the Adjudicator reiterated that for s. 22 to apply the information at issue must reveal the substance of deliberations of Cabinet or one of its committees, either on its own or in conjunction with other information.[208] The public body asserted that the records at issue were a cabinet presentation on an AER matter.[209] However, the Adjudicator found no evidence that the records at issue revealed the substance of deliberations of Cabinet and the public body failed to establish evidence to suppose such a finding.[210] Disclosure of the records would only appear to reveal that the committee was made aware of a matter before the AER. Given that the matter was public, and the decision made by the AER in relation to the matter was available on the AER website, the records themselves did not reveal any deliberations. The Adjudicator ordered the records to be disclosed to the applicant.[211]

In Order F2024-17, Northback Holdings Corp. also made a request to the Alberta Executive Council for records related to Benga Mining or the Grassy Mountain Coal Project from May 2020 to July 2021.[212] The public body located 613 pages of records, disclosed 17 of these with some redactions and withheld the remaining in their entirety citing various exclusions and exceptions. The Adjudicator considered each in turn:

- **Right of access does not extend to records for briefing Executive Council (s. 6(4))** - the Adjudicator ordered the public body to re-process its response to a briefing binder and determine whether any document in the binder was actually responsive to the Applicant's request and if so, whether another copy of that document is likely to exist elsewhere. If it exists elsewhere the public body should conduct a search and provide a new response to the Applicant with respect to that document;[213]

[207] *Office of the Premier/Alberta Executive Council (Re)* (29 May 2024), Order F2024-16, online (pdf): <oipc.ab.ca/wp-content/uploads/2024/10/Order-F2024-16.pdf >; *Office of the Premier/Alberta Executive Council (Re)* (31 May 2024), Order F2024-17, online (pdf): < https://oipc.ab.ca/wp-content/uploads/2024/06/Order-F2024-17.pdf>.
[208] *Ibid,* Order F2024-16 at para 39.
[209] *Ibid* at para 13.
[210] *Ibid* at para 39.
[211] *Ibid* at para 46.
[212] Order F2024-17, *supra* note 207 at paras 1-2.
[213] *Ibid* at para 20.

- **Disclosure harmful to intergovernmental relations (s. 21(1)(a))** - the public body withheld one sentence in a record that revealed a meeting took place between the Premier and the Chief of a First Nation organization. Caselaw suggests there must be "a reasonable expectation of probable harm" and the public body must show the likelihood of any of the identified harms is "considerably above" a mere possibility.[214] In this instance, the public body did not meet this burden, and they were ordered to disclose the information;[215]

- **Cabinet and Treasury Board confidences (s. 22)** - the public body withheld a number of pages on the basis of cabinet confidences (i.e. cabinet presentations and speaking notes on Coal Policy, meeting minutes and a record of decision).[216] Some records were ordered disclosed on the basis that they were not covered by the exception (i.e. email dates, document headers, subject lines, etc. or summary documents that do not reveal deliberations) or should be disclosed on the basis of s. 22(2)(c) which excludes background facts when the decision has been made public.[217] Others were found to be subject to the exclusion;[218]

- **Advice from officials (s. 24)** - sections 24(1)(a) and (b) applies only to records that reveal substantive information about which advice was sought or consultations or deliberations were being held. It does not apply to names, dates or information that reveals only the fact that advice was being sought or a bare recitation of facts.[219] The Adjudicator found the public body withheld the names of documents, entire documents and a cabinet presentation without doing a line-by-line review, status updates, information prepared for Executive Council, etc. that did not consist of advice or deliberations.[220] The Adjudicator ordered the public body to disclose numerous pages to the applicant and to re-exercise its discretion in applying s. 24(1).[221]

[214] *Ibid* at para 26.
[215] *Ibid* at paras 29-32.
[216] *Ibid* at paras 56-69.
[217] *Ibid*.
[218] *Ibid* at paras 70-72.
[219] Order F2024-17, *supra* note 207 at paras 90-91.
[220] *Ibid* at paras 95-113.
[221] *Ibid* at paras 95-113 & 120.

- **Disclosure harmful to economic and other interests (s. 25)** - the public body applied this section to phone numbers of Government of Alberta employees appearing in signature lines of emails.[222] The public body failed to support its application of the exclusion (i.e. show there is a reasonable expectation of probable harm) and the Adjudicator ordered the public body to disclose this information to the applicant;[223]

- **Information that is or will be available to the public (s. 29)** - the documents in question were withheld on the basis that they were copies of Hansard transcripts. However, the Adjudicator found that this section was not properly applied because the public body did not provide the applicant with any means by which to identify or obtain the record via another avenue. Nevertheless, the Adjudicator did not order them to be disclosed as they were outside the timeframe of the request.[224]

Again, both above orders demonstrate cases where, upon review, many of the exceptions upon which the public body relied turned out to be inapplicable. The public bodies used an expansive reading of the exceptions or misapplied them entirely to withhold large swaths of information. The applicants were obliged to seeks reviews from the OIPC to obtain the records to which they were entitled.

Notably, all three cases discussed above considered the recent Supreme Court of Canada case, *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*.[225] At issue in *AG Ontario* was whether Cabinet was required to disclose 23 mandate letters that the Premier of Ontario had delivered to each of his Ministers shortly after forming government in 2018. The Government argued they were exempt from disclosure under the Cabinet records exemption in s. 12(1) of Ontario's *Freedom of Information and Protection of Privacy Act* (FIPPA).[226] Upon appeal, the SCC agreed and found the mandate letters reflected the Premier's view on the importance of certain policy priorities and marked the beginning of policy formulation by Cabinet, thereby revealing the substance of Cabinet deliberations.

The SCC reflected on the purpose of protecting Cabinet confidentiality. In short, they found that it promotes candour, solidarity and efficiency, all in aid of effective government.[227] Ministers must be able to speak freely when deliberating and yet stand together in public once a decision

[222] *Ibid* at para 121.
[223] *Ibid* at para 135.
[224] *Ibid* at paras 143-146.
[225] *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner),* 2024 SCC 4 [*AG Ontario*].
[226] RSO 1990, c. F. 31.
[227] *AG Ontario, supra* 225 at para 30.

has been made. In addition, efficiency demands that Cabinet must be able to choose when and how to communicate policy priorities to the public and to opposition parties, as early exposure of policy priorities could "destroy governmental credibility and effectiveness".[228]

Nevertheless, all three cases noted there was a distinction between information that is provided to Cabinet and that which would disclose the deliberations of Cabinet. In general, it is only the latter which is entitled to protection.[229]

Recommendations

Alberta should make the following changes to narrow the exceptions in FOIP:

- 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 intragovernmental relations are not in line with international standards;
- Introduce policy that flags and requires the OIPC to review any new legislation that includes a paramountcy clause with respect to FOIP to determine whether it is necessary and justifiable;
- Add an overarching 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.

iii) Timeline delays

Delay is arguably the most common issue that applicants face using Alberta's FOIP. Delay can take many different forms. Sometimes public bodies disregard requests entirely. Other times they acknowledge a request but ignore the legislated timelines. Still other times, public bodies cause or increase delays by seeking unnecessary clarifications or wrongfully withholding relevant information based on unjustified exceptions or redactions. They may also seek extension after extension or even bring unwarranted appeals or seek judicial review. In most instances, the applicant's only recourse is to complain or appeal to the OIPC or the courts, all of which takes

[228] *Ibid* at paras 29-30 & 37.
[229] *Alberta Energy v Alberta, supra* note 194 at paras 36-37; Order F2024-16, *supra* note 207 at paras 37-39; Order F2024-17, *supra* note 207 at paras 52-54.

additional time and causes further delay (not to mention increases costs as discussed in greater detail below).

Delay is especially insidious because FOIP exists in part to help citizens and journalists hold government to account. But information requested under the Act loses its relevance, importance and "newsworthiness" when it is not disclosed in a timely manner.[230] In turn, this defeats the purpose of the Act.

The RTI rating sets out a baseline for responding to requests. Public authorities should be required to respond to requests "as soon as possible" with clear and reasonable maximum timelines of 20 working days or less.[231] There should also be clear limits on timeline extensions (20 working days or less) and a requirement that applicants be notified and provided with reasons for any extension.[232] 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).[233]

Alberta's FOIP Timelines

In Alberta, FOIP does include legislated timelines for responding to requests. However, there is no requirement to respond "as soon as possible" and at least two timelines can run concurrently without requiring a formal extension. Moreover, there are no real consequences or remedies for failure to meet these timelines.

FOIP provides that the head of a public body "must make every reasonable effort to respond to a request not later than 30 days after receiving it" unless a) the time limit is extended under section 14 or b) the request has been transferred to another public body.[234] Section 14 of the Act permits the head of a public body to extend the time for responding for up to 30 days or, with the Commissioner's permission, for a longer period. The Commissioner may extend the time limit if:

- The applicant did not give enough detail to enable the public body to identify a requested record;

[230] Drew Yewchuk, "An Example of How Government Delays Access to Information Requests: Pretending to not Understand Them" (June 24, 2022), online (blog): *ABlawg* <ablawg.ca/2022/06/24/an-example-of-how-government-delays-access-to-information-requests-pretending-to-not-understand-them/>.
[231] CLD & Access Info, "RTI Rating Methodology" *supra* note 112 at indicators 21-23.
[232] *Ibid* at indicator 23.
[233] *Ibid* at indicator 36.
[234] FOIP, s 11(1).

- A large number of records are requested or must be searched and doing so within the original timeframe would unreasonably interfere with the operations of the public body;
- More time is needed to consult with a third party or another public body about whether to grant access to record; or
- A third party asks for a review under sections 65(2) or 77(3).[235]

The Commissioner may also grant permission to extend the time limit if multiple concurrent requests have been made by the same applicant or organization.[236] There is no limit to the number of extensions or their timeframe in the Act.

Accordingly, public bodies get up to 60 days to respond to a request without repercussions. After 60 days, they need to make a request to the OIPC for an additional extension. A failure by the public body to respond to a request within the time limit is treated as a decision to refuse access.[237] More importantly, there are no meaningful consequences for failing to meet the legislated timeline(s). Instead, it is up to the applicant to seek redress with the OIPC (discussed in further detail below).

Discussion

In general, it is difficult to get statistics on how long it takes for a public body to reply to a FOIP request. The OIPC does keep track of how many requests for time extensions it receives each year. Records show that in the past decade or so there has been an increase in the number of requests to OIPC for time extensions. While requests peaked in 2021-2022, they are still higher than a decade ago. In the OIPC's most recent annual report, they include the following graph demonstrating the number of requests from 2009-10 to 2023-24:

[235] FOIP, s 14(1).
[236] FOIP, s 14(2).
[237] FOIP, s 11(2); OIPC, "Annual Report 2022-2023" (November 2023), online (pdf):<oipc.ab.ca/wp-content/uploads/2023/12/Annual-Report-22-23.pdf> at 41.

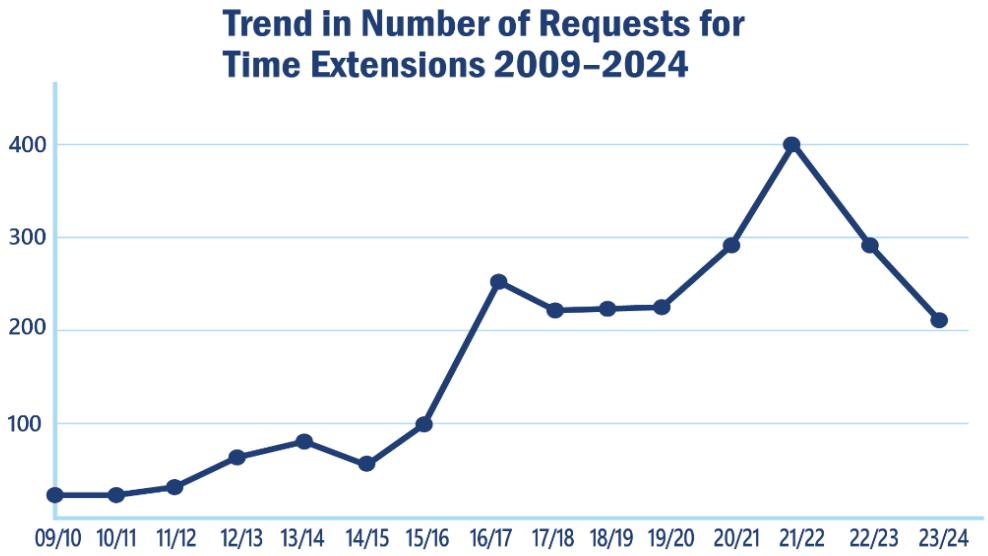

Figure 3: Trend in number of requests for time extensions from 2009 – 2024
Source: https://oipc.ab.ca/wp-content/uploads/2024/11/Annual_Report_2023-24-Online-version.pdf

A review of the last six years of annual reports also show that hundreds of time extension requests have been fully or partially granted:

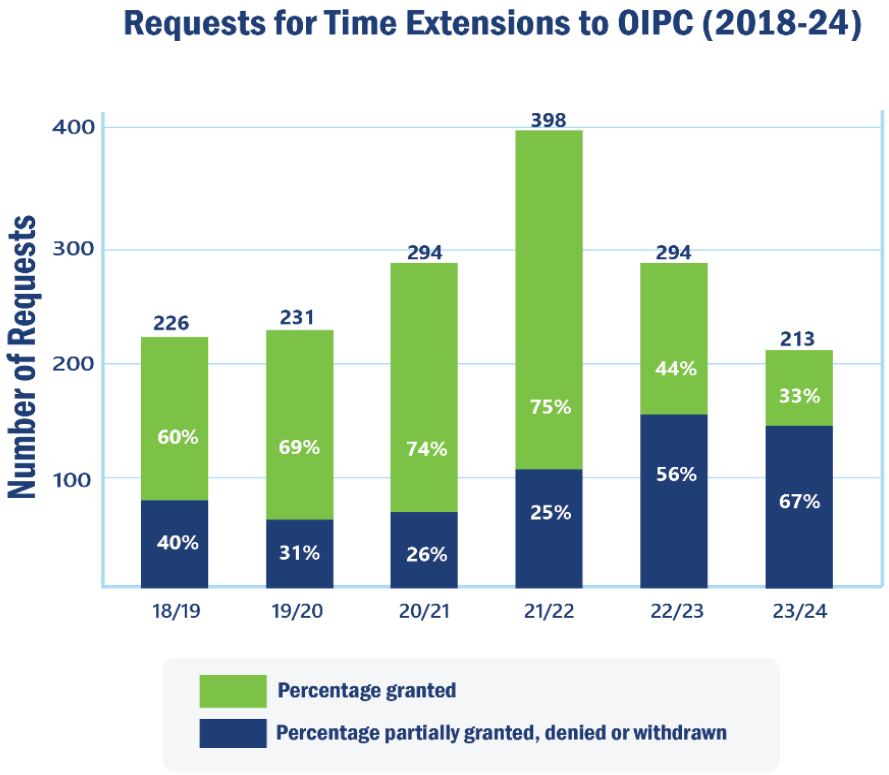

Figure 4: Requests for Time Extensions to OIPC (2018-2024)
Source: OIPC Annual Reports 2018-19 to 2023-24

To help clarify and standardize the process, the OIPC recently released a practice note with respect to requests for time extensions (the "Practice Note").[238] The Practice Note aims to "help public bodies understand when to consider a time extension request to the Commissioner...and what information is required".[239] At least in part, the Practice Note appears to be a response by the OIPC to some of the issues raised by the *Alberta Energy v Alberta (Information and Privacy Commissioner)* case (discussed above in exemptions section and more below).[240]

The Practice Note requires the completion and submission of a Request for Time Extension (RFTE) form at least 5 days prior to the expiry of the time limit for responding. It also outlines the factors OIPC may consider when determining whether to grant an extension. These include:

- **Identifying records (s. 14(1)(a))** - information with respect to any attempts and difficulties obtaining more information from the applicant;
- **Large volume of records requested (s. 14(1)(b))** - information with respect to both volume/search of records and how processing these will cause unreasonable interference with the operations of the public body;
    - Volume/search: factors include the number of pages of records that need to be searched, search details, types/formats of records that require different handling methods, etc. OIPC also now includes a table with general ranges for reasonable extension times (see below) based on the number of pages (500 or more pages is the threshold);

Number of Pages	Range for extension
<500	0 unless exceptional circumstances/rationale is acceptable
500 to 1000	0-30 days
1000 to 2000	30-45 days
2000 to 3000	45-60 days
3000 to 4000	60-75 days
4000 to 5000	75-90 days
5000 to I0000	90-180 days

Source: OIPC, "Practice Note: Request for Time Extension Under FOIP Section 14" at 3 online (pdf): <oipc.ab.ca/wp-content/uploads/2024/06/RFTE-Practice-Note-2024.pdf>.

[238] OIPC, "Practice Note: Request for Time Extension Under FOIP Section 14" (2024), online (pdf): <oipc.ab.ca/wp-content/uploads/2024/06/RFTE-Practice-Note-2024.pdf> at 1.
[239] *Ibid*.
[240] Drew Yewchuk, "The New Office of the Information and Privacy Commissioner Approach to Time Extensions for FOIP Requests" (25 June 2024) online (blog): *ABlawg* <ablawg.ca/2024/06/25/the-new-office-of-the-information-and-privacy-commissioner-approach-to-time-extensions-for-foip-requests/ >.

  - Unreasonable interference: factors include impacts to the public body's operations, level of complexity of request, ability to reallocate staff, number of requests to process, etc.
- **More time needed to consult with third party or other public body (s. 14(1)(c))** - nature of records and number of third parties or public bodies involved; and
- **Multiple concurrent requests (s. 14(2))** - number of concurrent requests, evidence that applicants work for the same organization, approximate volume involved.

Generally speaking, the OIPC will not consider factors related to lack of resources, preparation, poor records management or use of programs and technology, of an "anticipation" of a large volume without more information, internal deliberations and other issues or delays caused by the public body itself. With respect to subsequent requests for extension, the OIPC states that the public body must demonstrate that it "encountered a significant change in circumstances that resulted in additional or unexpected work such that additional time is required than what was previously granted".[241]

Overall, the Practice Note is an improvement that provides some much-needed additional structure and direction for granting time extensions under FOIP. Nevertheless, there are some missed opportunities. In a post for the University of Calgary's Faculty of Law blog, Drew Yewchuk notes that the table of general ranges for extension (posted above) lacks a crucial detail.[242] That is, whether the numbers refer to the actual number of pages that must be searched or the number of pages that are *anticipated* to be released. A discrepancy with respect to these two numbers was at issue in *Alberta Energy v Alberta (Information and Privacy Commissioner)* discussed above. Yewchuk notes that OIPC ought to specify that the number of pages expected to be released that is relevant, as this should be known by the time a public body seeks an extension.[243]

Yewchuk also flags that the Practice Note lacks any "attention to the requirement for a public body to tell an applicant the reason" for any extensions as per section 14(4)(a) of the Act. Instead, it would have been helpful to require a public body to provide a copy of an RFTE form (with any personal information of third parties withheld) so that the applicant could make an informed decision on whether to appeal the extension as per section 14(4)(c) of the Act.

[241] OIPC, "Practice Note", *supra* note 244 at 8.
[242] Yewchuk "The New Office of the Information and Privacy Commissioner Approach to Time Extensions", *supra* note 240.
[243] *Ibid*.

As previously noted, it is up to the applicant to seek redress with the OIPC when a public body fails to respond within the legislated timelines or at all. Section 65(1) of the Act permits an applicant to ask the Commissioner to review any decision, act or failure to act of the head (of a public body) that relates to the request.[244] The Commissioner may conduct an inquiry which must be completed within 90 days (although this timeline can also be extended!) and may issue an Order requiring the public body to respond.[245] The public body is then required to comply with the Order within 50 days.[246] In short, if a public body fails to respond to a request or meet the legislated timelines for disclosure, it is up to the applicant to enforce the Act and this process can take up to 140 days (if not more).

The *Alberta Energy v Alberta (Information and Privacy Commissioner)* case is an excellent example of this type of delay. The applicants made a request for records on July 3, 2020. The public body sought and received extensions until October 13, 2021, due to the large volume (6000+) of documents. Eventually, the public body provided 30 records, and the applicant requested a review with respect to the public body's severing of records and its failure to provide the remaining records. Nevertheless, it was not until April 6, 2022, that the OIPC ordered the public body to respond within 50 days.[247] This matter then went to court for an application for judicial review and was not decided until April 2024.[248] Altogether, it took almost four years for the applicants to receive a response to their request.

Even in a more typical case, it can easily take more than one year between making a request to receiving an order requiring the public body to respond. For instance, in OIPC Order F2022-63 the applicant made a request on October 4, 2021, from Environment and Protected Areas for records related to a proposed shooting range at the Saddle Hills Target Sports Association.[249] The public body calculated the fees and received a 50% deposit. The public body originally advised that it would respond to the access request by November 2021 but subsequently extended the time to respond until December 2021. The public body then requested and was granted permission from the Commissioner to extend the timeline further until June 8, 2022. The public body did not respond to the access request by the deadline and on June 21, 2022, the

[244] FOIP, s 65(1).
[245] FOIP, ss 69 & 72.
[246] FOIP, s 74.
[247] *Energy (Re)*, (6 Apr 2022), Order F2022-20, online: OIPC <oipc.ab.ca/wp-content/uploads/2022/05/Order-F2022-20.pdf>.
[248] *Alberta Energy v Alberta, supra* note 194.
[249] *Alberta Environment and Protected Areas (Re)*(19 Dec 2022), Order F2022-63, online (pdf): <oipc.ab.ca/wp-content/uploads/2023/01/Order-F2022-63.pdf>.

applicant requested a review. On December 19, 2022, the Commissioner ordered Environment and Protected Areas to respond to the applicant within 50 days of receipt of the order.[250]

Similarly, in Order F2023-09 the applicant made a request from Alberta Energy that was clarified and finalized on January 19, 2022.[251] The public body extended its time to respond until March 21, 2022. On March 22, 2022, the public body informed the applicant that it needed additional time to consult with third parties. The public body did not respond and on August 11, 2022 the applicant requested a review. On February 15, 2023, the OIPC ordered Alberta Energy to respond to the applicant within 50 days of receipt of the order.[252]

It is also not uncommon for the public body to blame staff and resources for the delay in processing a request. However, the OIPC has firmly shut down this excuse. In Order F2018-10 the adjudicator considered whether the high volume of requests and "inadequate staff and experience" of the FOIP office of Alberta Health had any bearing on its obligations under s. 11 of the Act.[253] The adjudicator had this to say about the public body's duties under the Act:

> I am unable to accept the Public Body's arguments regarding the delay in responding to the access request or to accept its suggestion that it respond by August 2018 to ensure that it responds to prior access requests in a timely manner. Section 11 imposes a duty on the head of a public body to make reasonable efforts to respond to an access request. As the head is the Minister of Health, it would be impractical for her to process access requests personally. For this reason, section 85 of the FOIP Act permits the head to delegate her duties, powers or functions under the FOIP Act to any person. However, if the head does not delegate her duty, the duty remains with her. Moreover, if the duty is not met by the delegate, the Minister will not have complied with the duty imposed by the FOIP Act.
>
> The Public Body's arguments and proposed response time appear to rely on the notion that it is the FOIP branch of the Public Body that has the duty to respond to the Applicant, rather than the head. If that were the case, then the arguments regarding staffing levels and the complexity of records...that requires the FOIP Advisor to "work with the appropriate program areas" in making access decisions would be more

[250] *Ibid* at paras 57-61.

[251] *Energy (Re)* (15 Feb 2023), Order F2023-09, online (pdf): <oipc.ab.ca/wp-content/uploads/2023/03/Order-F2023-09.pdf>.

[252] *Ibid* at paras 26-27.

[253] *Alberta Health Services (Re)* (9 Feb 2018), Order F2018-10, online (pdf): <oipc.ab.ca/wp-content/uploads/2022/01/Order-F2018-09.pdf>.

> persuasive. However, as noted above, it is the head of the Public Body who has the duty to make reasonable efforts to respond to the Applicant. She may meet this duty by delegating her duties to "any person" and is not limited to delegating the duty to an employee of a FOIP office. If the FOIP office is unable to meet the head's duties under section 11, then the head will fail in her duty under section 11 if she delegates the duty to an employee of the FOIP Office without ensuring the duty can be met. In contrast, if the FOIP office is sufficiently staffed with persons having adequate authority and knowledge to make timely access decisions, then the head will be more likely to meet her duty under section 11 by delegating the duty to an employee of the office.
>
> ...
>
> The FOIP Act, which is a paramount statute, does not create exceptions to the duty under section 11 to accommodate low staff levels or insufficient experience. Instead, section 85 of the FOIP Act enables the head of the Public Body to achieve compliance through delegation of the head's duties, powers, and functions. However, if the head delegates her duty and authority to employees who lack sufficient authority, time, and experience to fulfil those duties, the result may be a failure to comply with mandatory duties under the FOIP Act.[254]

The adjudicator ordered Alberta Health to comply with its duty to make all reasonable efforts to respond to the applicant's request.[255] This analysis and reasoning have since been followed in several reviews including Order F2023-24, Order F2024-10, and Order F2024-19.[256]

Recommendations

Time delays are an altogether too common and pernicious part of Alberta's current access to information regime. The Government of Alberta should make the following changes to address some of the unreasonable timeline delays that applicants experience trying to access records under FOIP:

- 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;

[254] *Ibid* at paras 18, 19 & 22.
[255] *Ibid* at para 31.
[256] *Environment and Protected Areas (Re)* (23 June 2023), Order F2023-24, online (pdf): < https://oipc.ab.ca/wp-content/uploads/2023/06/Order-F2023-24.pdf >; *City of Edmonton (Re)* (14 Mar 2024), Order F2024-10, online (pdf): <oipc.ab.ca/wp-content/uploads/2024/03/Order-F2024-10.pdf>; *City of Edmonton (Re)* (2 July 2024), Order F2024-19, online (pdf): <oipc.ab.ca/wp-content/uploads/2024/07/Order-F2024-19.pdf>.

- 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;
- 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; and
- Most importantly, FOIP departments within public bodies must be sufficiently organized and funded so that they can meet the legislated timelines.

iv) Excessive fees

Fees are yet another part of Alberta's FOIP regime that frustrate and hinder access to information. Requesting fees, costs for "preparing and handling" the records, as well as the amounts charged for paper or records production themselves can all add up to amounts that effectively bar or deter applicants from accessing the information to which they are entitled.

International standards provide that it should be free to file access to information requests.[257] Any fees should be limited to the actual cost of reproducing and sending information and even then, there should be a free minimum order (i.e. first 20 pages or more). Fees should be set by a central authority and there should also be fee waivers available for those that cannot afford to pay.[258]

In Alberta, the fees are set by a central authority and legislation provides for fee waivers in select circumstances. However, the Act also permits fees for simply filing an access request and the regulations include fees for much more than the actual cost of reproduction, including employee time for responding to requests. OIPC orders suggest that the fee structure, whether on purpose or inadvertently, is often miscalculated resulting in applicants being grossly overcharged for information to which they are legally entitled.

Alberta's FOIP fees

FOIP permits the head of a public body to require an applicant to pay fees for services as provided for in the regulations.[259] Requests for an applicant's own personal information are

[257] CLD & Access Info, "RTI Rating Methodology" *supra* note 112 at indicator 24.
[258] *Ibid* at indicators 25-26.
[259] FOIP, s 93(1).

excepted (but for the actual costs of producing a copy).[260] In the event an applicant is required to pay fees, the public body must give them an estimate of the total fee beforehand and, if the estimate exceeds $150, the applicant must pay at least a 50% deposit to continue processing the request.[261] Finally, the fees must not exceed the actual costs of the services.[262]

The actual fees for accessing information under Alberta's FOIP are set out in the *Freedom of Information and Protection of Privacy Regulation*.[263] Section 11 of the FOIP Regulation provides that an applicant is required to pay an initial fee of $25 for non-continuing requests or $50 for a continuing request.[264] Additional fees are set out in Schedule 2 of the *Regulation,* however, a public authority can only charge fees where it estimates costs in excess of $150. These additional fees include:

Item	Fees
Producing a record from an electronic record – computer processing	Actual cost to a public body
Producing a record from an electronic record – computer programming	Actual cost to public body up to $20 per ¼ hr
Producing a paper copy of a record – B&W photocopy on 8 ½ x 14" paper	$0.25 per page
Shipping a record	Actual cost to a public body

In addition to the costs for making a request and for producing records, Schedule 2 of the Regulation also includes fees for time spent by public body employees searching for records, preparing records, and supervising the examination of records:

Item	Fees
Searching for, locating and retrieving a record	$6.75 per ¼ hr
Preparing and handling a record for disclosure	$6.75 per ¼ hr
Supervising the examination of a record	$6.75 per ¼ hr

[260] FOIP, s 93(2).
[261] FOIP, s 93(3); FOIP Regulation, s 14 (1).
[262] FOIP, s 93(6).
[263] Alta Reg 186/2008 [FOIP Regulation].
[264] FOIP Regulation, s 11(2).

However, s. 11(6) of the *Regulation* provides that "a fee may not be charged for the time spent in reviewing a record". Naturally, this has caused some confusion. Public bodies may charge fees for searching for, locating and retrieving records as well as preparing and handling records for disclosure but not actually *reviewing* the records themselves.

The question of what constitutes "reviewing" records was discussed in Order F2016-40.[265] Reviewing was interpreted to mean "making decisions about what to sever from a record, by reading the record to locate and/or assess the information it contains".[266] In terms of preparing a record, the public body may only charge for the time spent removing or deleting information from a record.[267] If using software, this process should only take seconds per redaction.[268] Everything else, such as locating and identifying information to be removed and making responsible decisions with respect to severing third party information for consistency/public confidence, consists of "reviewing".[269]

Other observations include that a public body may not charge fees for its internal processes and therefore scanning records or preparing records to be scanned in order to sever them cannot be included in the costs of preparing and handing records for disclosure.[270] Time spent organizing records in chronological order (absent the applicant's request) is not a service and the public body cannot charge a fee for this activity.[271] However, time spent formatting records (i.e. adding headers, footers and page numbers) is reasonable to include.[272] A FOIP bulletin with respect to fee estimates includes additional information here.

Discussion

A review of orders with respect to fees for Alberta's FOIP suggests that the fee structure is often applied in a haphazard way and that the calculated fees do not always stand up to scrutiny. For instance, in Order F2012-06 the applicant requested access to records relating to methane contamination in water wells at specific locations.[273] The public body withheld information under

[265] *Alberta Energy (Re)* (11 Oct 2016), Order F2016-40, online (pdf): <oipc.ab.ca/wp-content/uploads/2022/01/Order-F2016-40.pdf>.
[266] *Ibid* at para 32.
[267] *Ibid* at para 36.
[268] *Ibid* at para 36.
[269] *Ibid* at para 35.
[270] *Ibid* at para 24.
[271] *Ibid* at para 27.
[272] *Ibid* at para 39.
[273] *Alberta Innovates - Technology Futures (Re)* (30 Mar 2012), Order F2012-06, online (pdf): <oipc.ab.ca/wp-content/uploads/2022/01/Order-F2012-06.pdf>.

various exclusions and charged a fee of $4125 for processing the request. The applicant sought a review by the Commissioner for, among other things, the fees charged and whether they should be waived because the request was in the public interest.

At the outset, the public body admitted that its photocopying costs had been "much less" than the $0.25 per page rate that it had charged the applicant and therefore waived these costs and refunded the applicant $750.[274] Additional fees were based, in part, on a "two minute rule" established by a decision of Ontario's Information and Privacy Commissioner that found two minutes per page was a reasonable guideline for severing records where only a few severances per page are being made.[275] The Adjudicator found that the "two minute rule" was an inaccurate method for estimating costs under Alberta's legislation.[276] Unlike Ontario, s. 11(6) of the FOIP Regulation prohibits public bodies from charging applicants for the time spent reviewing records. In this instance, the public body was only entitled to charge for "the amount of time required to redact text from the records, and to number and record section numbers" and therefore between "five and ten seconds per record where information was removed...would be a more reasonable estimate".[277]

The public body was also unable to establish the full time spent searching, locating and retrieving records so this time was reduced. Moreover, the adjudicator found that the public body's decision to include duplicates (that the applicant initially tried to exclude) was "disorganized, difficult to navigate and repetitive". [278] Altogether, the Adjudicator found that the total amount that should have been charged for searching for and preparing the records was approximately $297 (versus $4125). The Adjudicator did not consider whether the fees should be waived on the basis that the records relate to the environment and are a matter of public interest. Instead, she opted to rely on s. 72(3)(c) and order a full refund because the way the public body responded and the fees it charged "served to defeat the Applicant's right under the FOIP Act to timely access to the information she requested".[279]

Similarly, in Order F2016-39 the Adjudicator reduced the applicant's fees from $1218.50 to $81 and then waived them altogether in the public interest.[280] The applicant, a journalist, requested

[274] *Ibid* at para 7.
[275] *Ibid* at para 185.
[276] *Ibid* at para 197.
[277] *Ibid* at para 197.
[278] *Ibid* at para 211.
[279] *Ibid* at para 223.
[280] *Alberta Energy Regulator (Re)* (11 Oct 2016), Order F2016-39, online (pdf): <oipc.ab.ca/wp-content/uploads/2022/01/Order-F2016-39.pdf>.

access to all records relating to "broad industry initiatives" with the Alberta Energy Regulator (AER).[281] Broad industry initiatives referred to a discontinued practice of the AER levying fees on behalf of industry umbrella organizations (i.e. Canadian Association of Petroleum Producers (CAPP) and the Small Explorers and Producers Association of Canada (SEPAC)). The AER estimated approximately $45 for photocopying expenses and $1161 for "searching, retrieving, reproducing, and preparing records for disclosure".[282]

Upon review, the Adjudicator found that the public body had not properly calculated the fees for providing services as it charged 43 hours for manually entering data to create records for the applicant and only 3 hours were actually eligible.[283] The public body had also not established that its actual costs for photocopies were reflected by the statutory maximum (i.e. $0.25 per page).[284] The fees were reduced to $81 and then waived altogether as the Adjudicator found a fee waiver should be granted in the public interest.[285] This Order was upheld upon judicial review.[286]

These Orders highlight several issues with FOIP's fee structure. First, it appears that the majority of costs associated with access to information requests are for time spent by public body employees responding to the request. This same observation was echoed by the University of Calgary's Public Interest Law Clinic in a blog post where they detailed some of their experience working with FOIP. In particular, they noted that "preparing and handling the record dominates the basis for a fee requirement".[287] This is unfortunate because it rewards poor records management - there is no real incentive to improve records management when the public body can charge for much of the time it takes to search for, locate and redact the requested documents.[288] More importantly, however, charging applicants for employee time is contrary to international standards. The Centre for Law and Democracy notes that "[r]esponding to access requests should be included within every public authority's general operating budget, since accountability to the public should be considered a basic part of their job".[289] It is wholly

[281] *Ibid* at para 1.
[282] *Ibid* at paras 2-3.
[283] *Ibid* at para 30.
[284] *Ibid* at para 32.
[285] *Ibid* at paras 33 & 58.
[286] *Alberta Energy Regulator v Information and Privacy Commissioner and Jennie Russell*, (21 Feb 2018), Court of QB, online: <oipc.ab.ca/decision/f2016-39-2/>.
[287] Yewchuk, "Lets Talk About Access to Information in Alberta: Part One", *supra* note 193.
[288] CLD, "Failing to measure up" *supra* note 14 at 12.
[289] *Ibid*.

inappropriate to make applicants pay these sums to exercise their democratic rights and access information to which they are legally entitled.

Second, these Orders showcase how easy it is for public bodies to overcharge (intentionally or not) for access requests. In both cases discussed above, the public bodies were found to have overcharged the applicant by hundreds or even thousands of dollars. Moreover, the only recourse the applicant had was to request a review with OIPC, which as discussed in the section on time delay above is a lengthy process that can add significant delay to an access request.

Fee waivers

Section 93(4) of the Act permits the head of a public body to excuse the applicant from all of part of a fee if, in their opinion: a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment or b) the record relates to a matter of public interest, including the environment or public health or safety.

A FOIP bulletin issued in March 2009 provided some guidance with respect to establishing both financial hardship and the public interest.[290] Fee waivers are decided on a case-by-case basis.[291] With respect to financial hardship, the onus is on the applicant to substantiate their claims, which may include income and expense documentation.[292] In general, a finding of impecuniosity means that an applicant should be entitled to a fee waiver so long as they have not previously made a request for and received the same documents.[293]

In Order F2006-032 the Adjudicator set out which factors and questions should be considered when determining whether to excuse fees because a matter relates to the public interest (these were also reproduced in the FOIP bulletin).[294] The criteria include:

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it?

[290] Government of Alberta, "FOIP Bulletin" No 2 (Mar 2009) online (pdf): <open.alberta.ca/dataset/d3695329-ed1c-4976-a8d2-9beca39e94ce/resource/0e732b8f-e776-44e2-b46c-51d6c5b82894/download/bulletin2.pdf>.
[291] *Ibid* at 4.
[292] *Ibid*.
[293] *Ibid*.
[294] Order F2006-032, 2007 CanLII 81644 (AB OIPC). These are a shortened and revised version of 13 criteria for determining public interest previously established in Order 96-002. See FOIP Bulletin, *supra* note 296 at 7.

2. Is the applicant motivated by commercial or other private interest or purposes, or by a concern on behalf of the public or a sector of the public?

3. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government?[295]

The question of a public interest fee waiver for environmental information was addressed in Order F2016-40.[296] The applicant, an investigative journalist with CBC, made a request to Alberta Energy for records relating to audits performed by independent accounting firms assessing bioenergy emission. She requested the audits to explore issues raised by Alberta's Auditor General with whether the public body lacked means for measuring whether a multi-million-dollar program aimed at biofuel incentives was meeting its objectives.[297] She also requested a fee waiver. The public body assessed fees of $519 and denied the fee waiver.

At the outset, the Adjudicator found that the public body had improperly assessed the applicant's fees and was only authorized to require payment of $21.50 in fees. Fees for scanning records, preparing records for scanning, organizing records in chronological order, and severing records were excluded.[298]

The Adjudicator also found that the applicant was entitled to a fee waiver in the public interest. The request met part one of the test insofar as "the contents of the records will contribute to the public understanding as to whether the Public Body has corrected the deficiencies noted by Auditor General in two different reports, and whether the program is serving to reduce emissions, and therefore, whether it is spending public money on this program appropriately".[299] Part two was met because the applicant was an investigative journalist and therefore not merely motivated by private interests.[300] The records also contained information that contributes to an understanding of the process or functioning of government and satisfied part three.

While fee waivers are arguably a good thing, one wonders whether the costs associated with having the OIPC adjudicate whether applicants are entitled to one negates any potential savings when fee waivers are withheld (either by the public body or the OIPC). In fact, this logic applies to the entire exercise of collecting fees for access requests. Does the process of collecting fees

[295] FOIP Bulletin, *supra* note 296 at 7-8.
[296] Order F2016-40, *supra* note 271.
[297] *Ibid* at para 2.
[298] *Ibid* at paras 21-40.
[299] *Ibid* at para 62.
[300] *Ibid* at para 64.

result in a net positive financial gain when the costs of adjudicating fee complaints are considered? Or is it simply another unofficial method of deterring access requests? If it is the latter, then fees should be done away with altogether.

Recommendations

FOIP should be amended to abolish fees for filing an access to information request. In addition, fees set out in the *Regulation* should be limited to those recouping the actual cost of reproducing and sending information. There should be a free minimum order of at least 20 pages. If not already done, the Government of Alberta should do a cost benefit analysis of whether it is financially advantageous to administer fees at all. If not, then fees should be done away with altogether.

v) Weak oversight

The OIPC is the regulator of Alberta's access to information and privacy laws. Strong oversight is a crucial component of an effective access to information regime. In part, this is because a right without a remedy is no right at all. Strong oversight is also important because proper sanctions and penalties are key to deterring non-compliance and holding public bodies accountable.[301] Alberta's OIPC does many things well, but it is not sufficiently empowered to hold hostile or under-performing public bodies to account.

Lack of OIPC Powers and Sanctions

The OIPC provides oversight for FOIP, the *Health Information Act* and the *Personal Information Protection Act*. The OIPC's general duties with respect to FOIP include:[302]

- Providing independent reviews of decisions made by public bodies, custodians and organizations under FOIP as well as the resolution of complaints under the Act;
- Investigating matters relating to the application of the Act including any organization's compliance with the Act;
- Educating the public about the Act, their rights and access and privacy issues generally;
- Commenting on the access and privacy implications of existing and/or proposed legislative schemes, policies or programs; and
- Promoting openness and accountability for public bodies.

[301] CLD, "Failing to Measure Up", *supra* note 14 at 18; UNHRC, *supra* note 121 at 10.
[302] OIPC, "What We Do" online: *OIPC* <oipc.ab.ca/what-we-do/ >; OIPC, "Annual Report 2023-2024" at 14 online (pdf): <oipc.ab.ca/wp-content/uploads/2024/11/Annual_Report_2023-24-Online-version.pdf>.

Section 72 of the Act sets out the types of orders the Commissioner can make following a review/inquiry. If the inquiry relates to a decision to give or refuse access to all or part of a record the Commissioner may, by Order, do any of the following:

a) require the head to give the applicant access to all or part of the record;
b) confirm the decision of the head to refuse access or require them to reconsider; or
c) require the head to refuse access to all or part of the record.[303]

If the inquiry relates to any other matter, the Commissioner may, by Order, do any of the following:

a) require that a duty imposed by the Act or regulations be performed;
b) confirm or reduce the extension of a time limit; or
c) confirm or reduce a fee or order a refund in the appropriate circumstances.[304]

In terms of sanctions, s. 92(1) of the Act makes it an offence to make false statements, mislead or obstruct the Commissioner's work as well as to alter, conceal or destroy records with the intent of evading access or fail to comply with orders made by the Commissioner or adjudicators. A person who contravenes s. 92(1) is guilty of an offence and liable to a fine of up to $10,000.[305]

In short, the Commissioner has the 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). Notably absent, however, are any powers that would enable the Commissioner to actually address the problem of public authorities that "systematically fail to disclose information or underperform".[306] As evidenced by many of the cases discussed throughout this report, there are also many subtle ways public bodies can undermine the right to information, such as poor recordkeeping, insufficiently funded FOIP offices, repeated and unnecessary use of exceptions and redactions, chronic use of time extensions and overcharging for production fees. The OIPC's powers do not permit them to remedy any of these.

OIPC Powers to Review Privileged Documents

Another issue is that Alberta's OIPC is no longer able to review records over which public bodies are claiming solicitor-client privilege. From the Act's inception until 2016, it was understood that

[303] FOIP, s 72(2).
[304] FOIP, s 72(3).
[305] FOIP, s 92(2).
[306] CLD & Access Info, RTI Rating Methodology, *supra* note 112 at indicator 51.

the powers of the Commissioner in conducting investigations or inquiries included the ability to require any record to be produced and to examine any information in a record, "despite...any privilege of the law of evidence".[307] In other words, the Commissioner could review records over which solicitor-client privilege was being claimed to confirm or deny whether such privilege existed.

Nevertheless, in 2016 the Supreme Court of Canada decided *Alberta (Information and Privacy Commissioner) v. University of Calgary* and found the expression "any privilege of the law of evidence" does not in fact require a public body to produce documents over which solicitor-client privilege has been claimed.[308] The Court found solicitor-client privilege had evolved from a privilege of the law of evidence into a substantive protection and therefore could not be set aside by inference. Instead, the legislative language must be "clear, explicit and unequivocal".[309]

Following this decision, the OIPC issued a special report and request for a legislative amendment; asking the legislature to amend the FOIP Act to permit the Commissioner to require the production and to review records of which solicitor-client privilege is claimed.[310] To date, the Act has not been amended to reflect these changes. The result is that there is "no effective oversight over documents withheld under these exceptions, and no mechanism for ensuring that the exceptions are being appropriately applied".[311]

OIPC Funding and Resources

Still another issue is that of the funding and resourcing of the OIPC itself. In recent years the OIPC has complained of being overwhelmed by its workload. In the 2021-2022 annual report, the Commissioner noted that their office closed a record number of cases (3,989 total).[312] In 2022-2023 the OIPC noted it was facing a significant backlog of cases that was affecting the access and privacy rights of Albertans.[313] In its 2023-2024 annual report the Commissioner noted the following:

[307] FOIP, s 56(1)-(3).
[308] *Alberta (Information and Privacy Commissioner) v University of Calgary,* 2016 SCC 53.
[309] *Ibid* at para 2.
[310] OIPC, "Producing Records to the Commissioner: Restoring Independent and Effective Oversight under the FOIP Act" (Apr 2017) online (pdf): <oipc.ab.ca/wp-content/uploads/2022/02/Producing-Records-2016.pdf>.
[311] CLD, "Failing to Measure Up", *supra* note 14 at 17.
[312] OIPC, "Annual Report 2021-2022" at 4 online (pdf): <https://oipc.ab.ca/wp-content/uploads/2022/12/Annual-Report-21-22.pdf>.
[313] OIPC, "Annual Report 2022-2023" at 8 online (pdf): *OIPC* <oipc.ab.ca/wp-content/uploads/2023/12/Annual-Report-22-23.pdf>.

> In the face of resource challenges both in my office, the Crown Prosecutors' office and Alberta courts, it is concerning to see that we must be increasingly selective and only pursue the most egregious cases. As a consequence, I regularly must decline pursuing offence investigations for cases that are arguably more concerning than some of the past cases this office has investigated under HIA and that resulted in individuals being fined under the offence provisions of that Act. Given this, I have recommended that the Commissioner be empowered in both the FOIP Act and PIPA (and I will do the same regarding HIA, once it has been reviewed for amendment) to issue administrative monetary penalties (AMPs) for serious and significant violation of those Acts. In my view, the ability to issue AMPs in these circumstances will serve as a stronger deterrence to violating these Acts than is the case with the offence provisions, which, for the reasons indicated, are largely failing on that front. I will note here that as of January 1, 2024, Ontario's Information and Privacy Commissioner has the power to issue AMPs under Ontario's Personal Health Information Protection Act.[314]

Clearly, adequate funding, resources and powers are necessary for the OIPC to do its job well. Without them, the OIPC may do more harm than good. In another post for the University of Calgary's law blog about the OIPC, Yewchuk noted that underfunded administrative review bodies can sometimes become a roadblock for parties seeking to enforce their rights via judicial review.[315] There is a general principle of administrative law that a person should not be allowed to bring concerns to court where they still have access to an administrative review body that could address their issues. So long as the OIPC exists, applicants must first request a review through their office, and "wait through the lengthy and often unhelpful OIPC process before getting to court".[316] As a result, OIPC can act as an "obstacle to effective oversight".[317]

Recommendations

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

[314] OIPC Annual Report 2023-2024, *supra* note 302 at 10.
[315] Drew Yewchuk, "Freedom of Information in Alberta: The Troubles with the OIPC" (19 Mar 2020), online (blog): *ABLawg* <ablawg.ca/2020/03/19/freedom-of-information-in-alberta-the-troubles-with-the-oipc/>.
[316] *Ibid*.
[317] *Ibid*.

- 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.

c) Case Studies

Section b) of this report detailed the many ways Alberta's access to information regime falls short of its own and international standards. It also begs the question - are there jurisdictions out there that are doing it well? Fortunately, the answer is "yes". Section c) of this report looks at four jurisdictions that have better access to information laws and what Alberta can learn from their successes. The case studies include:

i) Newfoundland and Labrador's *Information and Protection of Privacy Act, 2015;*
ii) Mexico's *General Act of Transparency and Access to Public Information*;
iii) The *Aarhus Convention*; and
iv) Norway's *Access to Environmental Information Act*.

A brief discussion and review of what Alberta could learn from these case studies follows at the end.

i) Newfoundland and Labrador

Canada's best access to information laws can be found in Newfoundland and Labrador. A political scandal in 2012 was the impetus for the government-of-the-day to make innovative changes and enact the *Access to Information and Protection of Privacy Act, 2015* (ATIPP).[318] The ATIPP Act introduced changes to timelines, costs and complaint resolution procedures which helped to transform the existing access regime and re-shape the political culture around information laws in Newfoundland and Labrador.[319]

In terms of improvements, the ATIPP Act tightened up the existing 30-day timelines so that the head of a public body must respond to a request "without delay and in any event not more than 20 business days after receiving it".[320] With respect to extensions, the head of a public body may, not later than 15 business days after receiving a request, apply to the commissioner to extend the time for responding to the request and the commissioner has 3 business days to either grant or refuse the application.[321] There is also an option for the head of a public body to apply to the commissioner to vary a procedure (incl. time limit) in extraordinary circumstances.[322]

[318] SNL 2015 c A-1.2 [ATIPP].
[319] Tom Cardoso & Robyn Doolittle, "A political scandal in Newfoundland gave rise to the country's most transparent FOI system" (3 Jul 2023) online: *The Globe and Mail* <www.theglobeandmail.com/canada/article-newfoundland-foi-system/>.
[320] ATIPP, s 16.
[321] ATIPP, s 23.
[322] ATIPP, s 24.

The ATIPP Office annual reports show that from 2018 to 2023, the majority of departments and public bodies responded to requests within the legislated timelines:[323]

Response Time to Access Requests

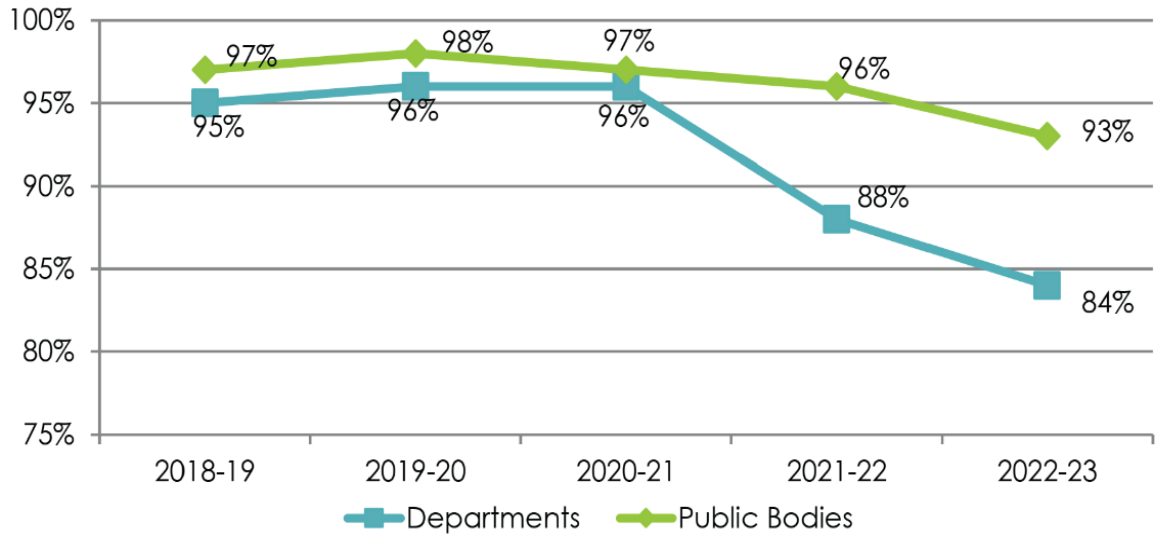

Figure 5: On-time response timelines for all requests (general and personal information requests) (2018-19 to 2022-23)

Source: Administration of the Access to Information and Protection of the Privacy Act, 2015 - ATIPP Office, Newfoundland and Labrador 2022-23 Annual Report

The new Act also greatly reduced applicant costs. The ATIPP Act provides that the head of a public body shall not charge an applicant for making an application or for the services of identifying, retrieving, reviewing, severing or redacting a record.[324] The Act permits "modest costs" for locating a record after 10 hours (if request is made to a local government body) or 15 hours (if request is made to a public body) as well as for copying or printing a record that is to be provided in hard copy form.[325] Actual costs may be charged for reproducing or providing a record that cannot be reproduced or printed on conventional equipment and for shipping a record using a method chose by the applicant.[326] In short, typical requests should not incur any costs.

[323] Administration of the Access to Information and Protection of the Privacy Act, 2015 - ATIPP Office, "2022-2023 Annual Report", online (pdf): <www.gov.nl.ca/atipp/files/publications-atippaannualreport2022-23.pdf >. See Figure 1 at 9.
[324] ATIPP, s 25.
[325] ATIPP, ss 25(2) & (3)(a).
[326] ATIPP, ss 25(3)(b) & (c).

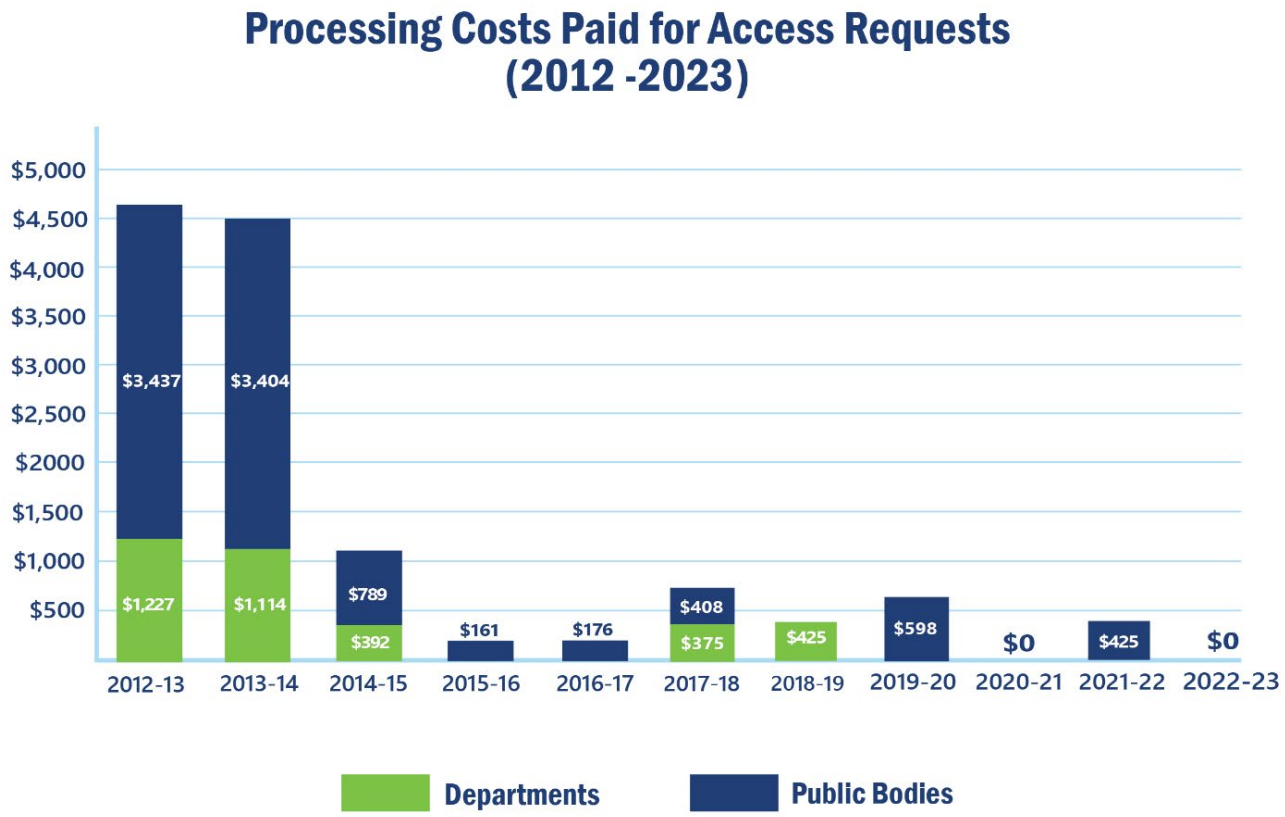

Figure 6: Processing costs paid for access requests (2012 to 2023).

Source: https://www.gov.nl.ca/atipp/files/publications-atippaannualreport2022-23.pdf p. 10
https://www.gov.nl.ca/atipp/files/publications-atippa-annual-report-2017-18.pdf p. 14
https://www.gov.nl.ca/atipp/files/publications-atippa-annual-report-2016-17.pdf p. 15

Another transformative change was to take a "quick-and-dirty approach" to resolving complaints.[327] Previously, the commissioner had 60 days to resolve a complaint or request for review informally or 120 days to conduct a review and complete a report with reasons and recommendations.[328] After receiving the report of the commissioner, the head of the public body had the option to decide whether to follow the commissioner's recommendations or make a decision they considered appropriate.[329] In other words, the public body was not bound by the

[327] Cardoso & Doolittle, "A political scandal in Newfoundland", *supra* note 325.
[328] *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1 [ATIPP 2005], ss 46(2) & 48.
[329] ATIPP 2005, s 50(1)(a).

commissioner's recommendations. If the applicant wished to appeal the public body's decision, they had 30 days to appeal to the Trial Division.[330]

The new ATIPP Act gives the commissioner 65 business days to complete an investigation and make a report.[331] The Act also explicitly puts the burden on the public body or the third party to prove that the applicant has no right of access to the record.[332] The commissioner can still only make recommendations to the head of a public body.[333] However, the new Act requires that if the head of a public body decides not to comply with a recommendation of the commissioner, they have 10 business days to apply to the Trial Division for a declaration that the public body is not required to comply with the recommendation.[334] In other words, while the commissioner's recommendations are not binding, if the head of a public body wishes to disregard them they must get court approval. Court approval is contingent on the public body being able to show that they are either required or authorized to refuse access.[335]

In practise, these changes have meant that the commissioner's recommendations act more like binding orders, as public bodies must a) be confident that they would be successful at trial and/or b) feel strongly that the results would be worth the resources (time, money, etc.) required to take the matter to court.[336] Meanwhile, the commissioner's office benefits from not having to write the "ironclad, inscrutable legalistic decisions" required when issuing actual orders.[337] In the past five years, records show that the commissioner's recommendations are overwhelmingly accepted by public bodies:

[330] ATIPP 2005, s 60(1).
[331] ATIPP, s 46.
[332] ATIPP, s 43.
[333] ATIPP, ss 48-49.
[334] ATIPP, s 50.
[335] ATIPP, s 50(2).
[336] Cardoso & Doolittle, "A political scandal in Newfoundland", *supra* note 325.
[337] *Ibid*.

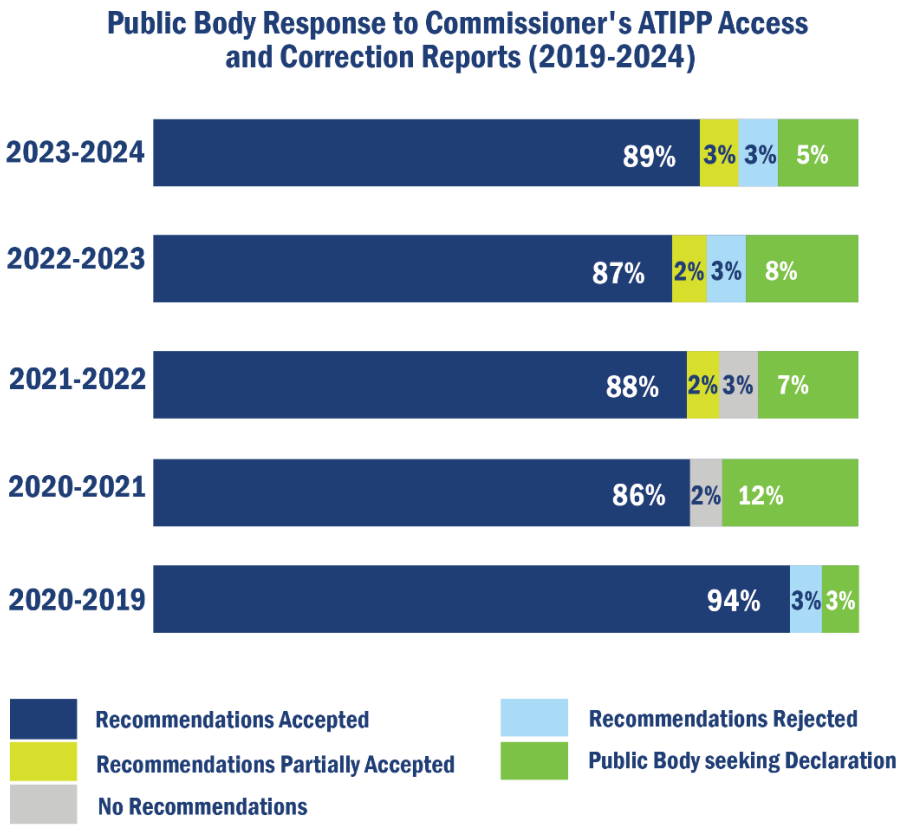

Figure 7: Public Body Response to Commissioner's ATIPP Access and Correction Reports (2019-2024)

Source: Public Body Response to Commissioner's ATIPPA, 2015 Access and Correction Reports from: 2023-24, 2022-23, 2021-22, 2020-21 & 2019-20.

Taken together, these changes have helped to propel Newfoundland and Labrador's access laws to the top of the RTI rating in Canada. Toby Mendel, executive director of the CLD, estimates that Newfoundland and Labrador's new law would sit at 23rd place if assessed according to the global RTI Rating, well above any other Canadian jurisdiction (Canada currently ranks 51st overall).[338]

One final component that cannot be overlooked is how change in the political culture around access to information also likely contributed to the success of the ATIPP Act. As mentioned above, the Act rose out of the ashes of a political scandal with the government of the day. In 2012, the governing Progressive Conservatives introduced Bill 29, legislation aimed at restricting public access to information. The new Act attempted to limit the kinds of documents available, increase costs and reject requests as frivolous or vexatious. This, in conjunction with cost

[338] *Ibid*.

overruns and delays associated with a major hydroelectric project and the suspicion that the government was trying to bury these facts, led to widespread sentiment that Bill 29 was "synonymous with secrecy, paternalism and mismanagement".[339]

The backlash to Bill 29 led to a review by an independent civilian committee. The committee reviewed written submissions and held 10 days of public hearings. In the end, it produced 90 recommendations and drafted an entirely new access law, the ATIPP Act. The Progressive Conservative government, then deeply unpopular and just six months away from an election, passed the new law, likely spurred by the fact they would benefit from these changes in opposition. The result was that the Act was ushered in at a time when the public was deeply invested in change and political uptake was at an all-time high. Michael Harvey, Newfoundland and Labrador's first commissioner under the new Act, credited leadership from politicians and senior bureaucrats for improving legislative compliance post-2015.[340]

ii) Mexico

The RTI rating ranks Mexico's access to information laws 2nd in the world.[341] Mexico achieved this remarkable result over an 8-year period with both constitutional amendments and the passing of the *General Act of Transparency and Access to Public Information* ("*General Transparency Act*").[342] Prior to this, Mexico's 33 jurisdictions all had their own access laws.[343] Pressure from Mexican civil society brought about the standardization of these access laws as well as improvements to transparency and accountability.[344]

Mexico's access to information regime has several impressive features. For one, the right to information is enshrined in the Political Constitution of the United Mexican States. Article 6 of the Constitution establishes the following:

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[339] *Ibid.*
[340] *Ibid.*
[341] CLD & Access Info, By Country, *supra* note 4.
[342] Adriana Garcia Garcia, "Transparency in Mexico: An Overview of Access to Information Regulations and their Effectiveness at the Federal and State Level" Wilson Centre (December 2016) at 7-11 online (pdf): <www.wilsoncenter.org/sites/default/files/media/documents/publication/transparency_in_mexico_an_overview_of_access_to_information_regulations_and_their_effectiveness_at_the_federal_and_state_level.pdf>; Instituto Nacional de Transparencia, Acceso a la Informacion y Proteccion de Datos Personales (INAI), "General Act of Transparency and Access to Public Information" (May 2015), online (pdf): <inicio.inai.org.mx/Publicaciones/LGTAIPinglescompressed.pdf>.
[343] Garcia Garcia, "Transparency in Mexico", *Ibid* at 7.
[344] *Ibid* at 3 & 20.

1) All information held by public authorities (i.e. any federal, state and municipality authority, entity, body, office and agency) is public and subject only to limited and temporary exceptions;
2) The government is obliged to protect personal information in their possession;
3) Everyone is entitled to free access to public information and personal data without having to prove any interest or justify its use;
4) The government is required to establish expeditious mechanisms to access information and these are overseen by independent and specialized agencies;
5) Public entities are required to document their actions and publish complete and updated information regarding the use of public resources and their management indicators;
6) Public entities shall make public the information related to public resources delivered to companies or individuals; and
7) Non-compliance with the access provisions will be penalized under the terms set by the law.[345]

Second, Mexico's *General Transparency Law* is a comprehensive piece of legislation that includes an expansive scope, an overarching harm test and proactive disclosure obligations. The *General Transparency Act* was enacted in 2015 to standardize the access to information legal framework across the state and federal levels. Specific highlights include:[346]

- The law applies to all public authorities including the executive, legislative and judicial branches at all levels of government as well as private entities which operate with substantial public funds of which performs public functions;
- There is a requirement for proof of harm in every case of classification of information;
- Corruption is added to the list of public interest issues where information cannot be withheld;
- There is an obligation to disseminate a wide range of information publicly and on government websites including organizational structure, qualifications and salaries of senior officials, budget and expenditure plans, procurement procedures along with contracts granted and performance monitoring data; and
- Federal and state bodies are obliged to create specialized and independant oversight bodies with the power to enforce the law, monitor compliance and sanction non-compliance. The Instituto Nacional de Transparencia (INAI) supervises decisions from each of these bodies and its decisions are subject to judicial review.

[345] *Ibid* at 11; Constitución Política de los Estados Unidos Mexicanos/Political Constitution of the United Mexican States, (1917), Article 6, online (pdf): <www.oas.org/ext/Portals/33/Files/Member-States/Mex_intro_txtfun_eng.pdf >.
[346] Garcia Garcia *supra* note 342 at 18-19.

Taken together, these laws make Mexico's legislative regime one of the best in the world and there is much that Canada and Alberta would benefit from emulating. Measures such as expanding the scope of our access laws to include all executive, legislative and judicial branches as well as private entities that operate with public funding, including a requirement for proof of harm before withholding disclosure, more proactive public disclosure, and penalties for non-compliance should be priorities.

In practice, much of Mexico's success seems to stem from the oversight provisions baked into the *General Transparency Act*. Prior to 2015, better laws in Mexico did not necessarily translate to improved transparency. In *Transparency in Mexico: An Overview of Access to Information Regulations and their Effectiveness at the Federal and State Level,* author Adriana Garcia Garcia distinguished between enactment (transparency *de jure*) and implementation (transparency *de facto*) with respect to Mexico's freedom of information laws. She noted that while there was an average improvement in Mexico's freedom of information laws from 2010 to 2014, effectiveness decreased.[347] Accordingly, strengthening the laws had no significant effect on *de facto* transparency.[348] In her view, the missing ingredient was oversight.[349]

Notably, in 2015 the *General Transparency Act* introduced several mechanisms to supervise government compliance including local oversight bodies in each jurisdiction and the INAI, a national oversight body. These features were part of a "commitment to addressing the deep-seated public distrust of government stemming from a long history of opacity and information concealment".[350] The oversight mechanisms appeared to work. As of 2024, over 95% of information requests were resolved within legal time limits with exemptions being claimed in only 2% of cases. Applicants could also request a free appeal and were favoured in more than 75% of cases.[351] Moreover, it was commonplace for the INAI to issue fines for institutions that did not fulfill their transparency obligations.[352]

Unfortunately, the INAI may have been too successful – the improved transparency was credited with assisting investigative journalists to uncover numerous scandals involving the political

[347] *Ibid* at 17.
[348] *Ibid* at 20.
[349] *Ibid*.
[350] Fernando Nieto-Morales, "The Elimination of INAI: A Blow to Transparency and Accountability in Mexico" (21 Nov 2024) online: https://www.wilsoncenter.org/article/elimination-inai-blow-transparency-and-accountability-mexico.
[351] *Ibid*.
[352] Robyn Doolittle, Tom Cardoso & Mahima Singh, "How can Canada fix its FOI systems? Norway, Mexico and others may offer solutions" (15 Jan 2024) online: *The Globe and Mail* <www.theglobeandmail.com/canada/article-freedom-of-information-solutions/>.

class.[353] In late 2024 the INAI was dismantled as part of a suite of constitutional changes and folded into the newly created Anti-Corruption and Good Government Secretariat.[354] While the current President of Mexico, Claudia Sheinbaum, claims these changes will result in even "stricter" transparency,[355] critics note that shifting an autonomous body like INAI into a government agency usually "undermines their independence and compromises their capacity to address irregularities without bias".[356] It remains to be seen whether Mexico's access to information regime will suffer because of these changes.

iii) The Aarhus Convention

Yet another strong access to information law is the United Nation's Economic Commission for Europe's (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the "*Aarhus Convention*").[357] Adopted in June of 1988 in the Danish city of Aarhus, the *Aarhus Convention* is an international multilateral environmental agreement that aims to guarantee procedural rights under three pillars: access to information, public participation in decision-making and access to justice in environmental matters.[358]

The *Aarhus Convention* is not a law *per se*, rather it establishes a legal framework which is then transposed into national law by the contracting parties. That means the *Aarhus Convention* does not confer direct rights to individuals, instead they must refer to their domestic law. It does, however, set minimum standards. Contracting parties are free to guarantee broader and more comprehensive access to information rights.[359] As of 2023, there were 47 parties to the Convention (all in Europe or Central Asia).[360] In the European Union, the *Aarhus Convention* is adopted through Directive 2003/4/EC on public access to environmental information.[361]

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[353] David Agren, "Dismantling of Mexico's transparency institute prompts concerns over freedom of information" (4 Jan 2025) online: *The Globe and Mail* <www.theglobeandmail.com/world/article-dismantling-of-mexicos-transparency-institute-prompts-concerns-over/>.
[354] *Ibid*.
[355] *Ibid*.
[356] Nieto-Morales, The Elimination of INAI, *supra* note 350.
[357] *Aarhus Convention*, *supra* note 9.
[358] *Ibid,* Art 1.
[359] *Ibid*, Art 3(5).
[360] UNECE, "Status of Ratification" online: *UNECE* <unece.org/environment-policy/public-participation/aarhus-convention/status-ratification>.
[361] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, online: <eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003L0004>.

The *Aarhus Convention* is significant because it recognizes a right of access to environmental information specifically. Article 4(1) provides that environmental information is available upon request and without an obligation to demonstrate a specific interest in that information.[362] 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 programs likely to affect the environment; and
- the state of human health, safety and conditions of life.[363]

The request to access information must be directed to a public authority. While the general assumption is that access to information be provided, there are exemptions and reasons for refusal. Exemptions include:

- the public authority does not hold the 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.[364]

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

[362] *Aarhus Convention*, *supra* note 9, Art 4(1)(a).
[363] *Ibid*, Art 2(3).
[364] *Ibid*, Art 4 (3).

- the environment to which the information relates, such as the breeding sites of rare species.

Article 4(4) specifically provides that the grounds for refusals and exemptions must be interpreted in a restrictive way, taking into account the public interest served by the disclosure and whether the information requested relates to emissions into the environment.[365]

Access to information must be given as soon as possible, not exceeding one month after submission of the request.[366] However, in special circumstances the requested volume and the complexity of information may justify an extension of up to two months.[367] Under the *Aarhus Convention* public authorities are allowed to make reasonable charges for supplying information.[368]

Overall, the *Aarhus Convention* has been lauded as an ambitious and transformative international treaty that has helped to strengthen the influence of individuals, NGOs and the public on government decision-making with respect to the environment.[369] It has also "accelerated the process of reform and notably extended the right to access to information".[370]

iv) Norway

Finally, Norway is another country with some enviable access to information laws. While their freedom of information law is only ranked 86th in the world by the RTI rating, they are one of the only jurisdictions to introduce additional legislation that gives a right to environmental information from both public authorities AND private enterprises.[371] Norway's *Environmental Information Act* recognizes that making private enterprises responsible for recording and giving access to information on their environmental impacts helps improve environmental

[365] *Ibid*, Art 4(4).
[366] *Ibid*, Art 4 (2).
[367] *Ibid*, Art 4 (2).
[368] *Ibid*, Art 4(8).
[369] Karl-Peter Sommermann, "Transformative Effects of the Aarhus Convention in Europe" (2017) Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht at 323-324 online (pdf): <www.zaoerv.de/77_2017/77_2017_2_a_321_338.pdf>.
[370] *Ibid* at 334.
[371] South Africa also reportedly provides a constitutional right to access to information from private bodies. See Jean-Claude Ashukem, "A comparative analysis of the right to access to environmental information in South Africa and Uganda" (Nov 2017) 33:3 South African J on Human Rights online: <www.researchgate.net/publication/321387837_A_comparative_analysis_of_the_right_to_access_to_environmental_information_in_South_Africa_and_Uganda>.

sustainability and "forms part of the corporate social responsibility of enterprises established in Norway". [372]

By way of background, the right to a healthy environment and a right to environmental information is enshrined in Norway's Constitution. Article 112 of The Constitution of the Kingdom of Norway provides the following:

> Every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations which will safeguard this right for future generations as well.eIn order to safeguard their right in accordance with the foregoing paragraph, citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out.
>
> The authorities of the state shall take measures for the implementation of these principles.

While this article was originally perceived only as a directive to the legislative authority, changes made in 2014 have laid grounds to claim the provision is justiciable (i.e. provides a sufficient legal basis for individual claims).[373]

In 2003, the Norwegian government introduced the *Environmental Information Act.* The Act was passed to help realize the constitutional right to environmental information as well as to implement Norway's obligations under the *Aarhus Convention* and the EU Directive. The Act's stated purpose is to make it easier for individuals to contribute to the protection of the environment, to protect themselves against injury to health and environmental damage, and to influence public and private decision-makers in environmental matters.[374] It is also intended to promote public participation in decision-making processes related to the environment.[375] The Act is separate from and applies in conjunction with Norway's *Freedom of Information Act*.[376]

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[372] Hans Petter Graver, "Public Participation in Environmental Protection: Business Enterprise and the Environmental Information Act in Norway" (26 Sep 2016) pre-print of article published in Frontiers of Law in China at 2 & 4 online: <www.duo.uio.no/bitstream/handle/10852/60919/FLC+201701+Hans+Petter+Graver.pdf?sequence=5 >.
[373] *Ibid* at 4.
[374] *Environmental Information Act*, Act of 9 May 2003 No. 32, s 1, english translation online: <www.regjeringen.no/en/dokumenter/environmental-information-act/id173247/>.
[375] *Ibid*.
[376] *Environmental Information Act*, s 3.

The *Environmental Information Act* defines environmental information as factual information and assessments of the environment, factors that affect or may affect the environment (i.e. projects and activities being planned/implemented, properties and contents of products, etc.), and human health, safety and living conditions to the extent they are or may be affected by the environment.[377] This definition is very broad and goes beyond that in the *Aarhus Convention*. The environment means the external environment, including archaeological and architectural monuments and sites and cultural environments.[378]

The *Environmental Information Act* applies to Norwegian public authorities, meaning any administrative agency (as defined by s. 1 of the *Freedom of Information Act*), legal persons that perform public functions or offer services to the public and are subject to the control of an administrative agency and legal persons that are responsible by law for performing public functions or offering services to the public relating to the environment.[379] The Act also imposes a duty on administrative agencies to hold environmental information relevant to their areas of responsibility and function and to make it accessible to the public.[380] Any person is entitled to receive environmental information from a public authority.[381]

As set out above, the *Environmental Information Act* is unique in that it also applies to private enterprise. In addition to public authorities, the Act applies to all other public and private undertakings, including commercial enterprises and other organized activities.[382] This means all commercial entities, natural and legal persons as well as non-commercial enterprises (i.e. schools, rest homes, NGOs, etc.).[383]

According to Hans Petter Graver, the reasoning behind this decision is threefold. First, business enterprises hold important environmental information. For example, forestry, agriculture and resource extraction companies all hold information on operations, current conditions and future plans that are crucial for assessing the environment. Goods and services companies hold information on product composition, waste and energy use. While public authorities often collect this information in their role as regulators, it is almost always more efficient and accurate

[377] *Environmental Information Act,* s 2.
[378] *Environmental Information Act,* s 2.
[379] *Environmental Information Act,* s 5. Note this is a more expansive definition than Norway's *Freedom of Information Act* which only applies to administrative agencies.
[380] *Environmental Information Act,* s 8.
[381] *Environmental Information Act,* s 10.
[382] *Environmental Information Act,* ss 4 & 5.
[383] Graver, *supra* note 372 at 14.

to collect this information from individual enterprises directly.[384] Second, the Norwegian government found that there was an "increasing demand from the public for information about the activities and products of undertakings".[385] Consumers recognize that business enterprises are a leading cause of environmental problems and need information to make informed choices in the marketplace and protect themselves from harm.[386] Third, this type of information is also necessary for the public to be able to ensure environmental regulations are enforced and hold commercial entities accountable for their environmental impacts.[387] Note that any person is entitled to receive environmental information from undertakings so long as the information "may have an appreciable effect on the environment".[388]

Not only are public authorities and enterprises required to disclose environmental information, but they are also obliged to hold the relevant information. Section 8 of the Act imposes a duty on administrative agencies to hold environmental information and make it accessible to the public, while s. 9 imposes a duty on private enterprises to hold information about environmental factors related to their operations, including factor inputs and products, which may have an appreciable effect on the environment. Graver notes that, while this appears to be a novel duty in Norwegian law, private enterprises are already obliged to hold information on the environmental impacts of their operations under many other rules (i.e. accounting and reporting rules, product control legislation).[389] Accordingly, all the Act does is express these obligations in a comprehensive manner so that it is not necessary to refer to the other rules.[390]

The *Environmental Information Act* is also subject to exemptions, including where a request is formulated too generally and it is not possible to identify what is meant by the request, or it is so wide-ranging that it is clearly unreasonable.[391] Information may also be withheld where there is a genuine and objective need to do so or the document may be exempted pursuant to the *Freedom of Information Act*. When considering whether there is a genuine and objective need to withhold a document, the environmental and public interests served by disclosure shall be weighed against the interest served by the refusal.[392] Nevertheless, the public shall always have access to information on: a) pollution that is harmful to health or that may cause serious

[384] *Ibid* at 2.
[385] *Ibid* at 2.
[386] *Ibid* at 2.
[387] *Ibid* at 3.
[388] *Environmental Information Act*, s 16.
[389] Graver, *supra* note 372 at 7 & 13.
[390] *Ibid* at 13.
[391] *Environmental Information Act*, ss 16 & 17(b).
[392] *Environmental Information Act*, s 11.

environmental damage, b) measures to prevent or reduce the aforementioned damage and c) unlawful intervention or damage to the environment.[393]

Section 17(c) of the Act also states that a request for environmental information may be refused if:

> [T]he information requested concerns technical devices and procedures or operational or business matters which for competition reasons it is important to keep secret in the interests of the person whom the information concerns.

In general, business enterprises regard information on production methods, strategies and plans as well as factors determining pricing of goods and services, customers and other business strategies, as "commercial secrets." Naturally, there is a lot of potential overlap between these and environmental matters. The onus is therefore on the enterprise to prove that a piece of information is a commercial secret.[394]

Finally, the Act also includes a right to public participation in decision-making processes. Administrative agencies are obliged to make provisions for public participation in connection with the preparation of legislation, plans and programmes relating to the environment.[395] Where a "significant impact" on the environment is anticipated, a public hearing must be held.[396]

The overall impact of the *Environmental Information Act* is difficult to measure as Norway does not keep records on the number or type of requests made to either public authorities or private enterprises. The Environmental Appeals Board, which hears complaints from the public when requests are refused, averages approximately 15 complaints annually.[397] Nevertheless, Graver reported that in the first ten years after its adoption the Act had been relatively well received: "[t]here are few conflicts about its provisions and the duty to give information on environmental information seems to have gained a wide acceptance, also among business enterprises".

In part, this is likely because the Act does not introduce wholly new obligations. Many public and private enterprises are already required to report financial and non-financial information to public authorities under various rules. The *Environmental Information Act* simply consolidates much of this information. Yet for those who seek out environmental information, the Act represents a huge advancement, as it gives "anyone the right to receive the information they

[393] *Environmental Information Act,* s 12.
[394] Graver, *supra* note 372 at 18.
[395] *Environmental Information Act*, s 20.
[396] *Environmental Information Act,* s 20.
[397] Graver, *supra* note 372 at 3.

request on demand, and the information is...not limited to the scope and form that is determined by the reporting rules".[398]

Discussion

If nothing else, the four case studies discussed above demonstrate that it is possible to implement much stronger access to information laws than we currently have in Alberta. It also need not be complicated, for each of these jurisdictions provides a road map for a way forward.

For instance, Newfoundland and Labrador's ATIPP Act demonstrates that small changes can add up to significantly improve a province's access to information regime. In particular, Alberta could learn from their experience with respect to tightening up timelines for both access requests and complaint resolution, as well as eliminating applicant costs for straightforward requests.

Mexico's *General Transparency Law* is a leading example of strong access to information laws. It includes various measures already recommended in Part 2 including expanding the scope of access laws to include all executive, legislative and judicial branches as well as private entities that operate with public funding, including a requirement for proof of harm before withholding disclosure, Mexico's laws were also buttressed with strong oversight bodies and penalties for non-compliance. All of these, if incorporated into Alberta's legislation, would dramatically improve the access regime. Mexico's laws also underscore the importance of proactive public disclosure.

Meanwhile, the *Aarhus Convention* highlights the importance of *environmental* information, specifically. Including a right of access to environmental information in Alberta would help strengthen the influence of individuals, NGOs and the public on government decision-making with respect to the environment.

Finally, Norway's *Environmental Information Act* goes beyond the standards set by the *Aarhus Convention*. The Act makes a strong case for not only requiring government agencies to hold environmental information and to make it publicly available, but also for imposing a similar duty on private enterprise. Given the size and scale of resource extraction operations that take place in Alberta and are controlled by private companies, there is no question the province should consider requiring these companies to hold environmental information related to their operations which may have an appreciable effect on the environment, and to require them to distribute this information to the public upon request.

[398] *Ibid* at 21.

Recommendations

The case studies discussed above strengthen the case for many of the recommendations already made throughout the report (i.e. shorten timelines, expand the scope of bodies included in the Act, add an obligation for proactive disclosure, etc.). In addition, the *Aarhus Convention* also makes a case for including the specific mention of access to "environmental information" in Alberta's FOIP. The term should be defined broadly to include 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.

d) Bill 34: the Access to Information Act

"*In general, my view is that there are many grounds for concern regarding Bill 34's impact on Albertans' access to information rights and more generally the functioning of the access to information system in Alberta.*"

Diane McLeod, Information and Privacy Commissioner of Alberta

On November 6, 2024, the Government of Alberta introduced legislation aimed at updating FOIP. The existing Act would be divided into two parts: an access to information act (Bill 34) and a protection of privacy act (Bill 33). Bill 34, the *Access to Information Act, 2024* (AIA) purports to "recognize electronic records, allow public bodies to extend timelines during times of emergencies, clarify definitions and processes and further empower public bodies to proactively disclose information".[399] While this language suggests AIA makes changes to improve and modernize the Act, it unfortunately does neither and when it comes into force it will only weaken and degrade Alberta's access to information regime further. AIA received royal assent on December 5, 2024, and will come into force Spring 2025.[400]

An in-depth review of AIA is outside the scope of this report. Fortunately, both Diane McLeod, Alberta's current Information and Privacy Commissioner, and Drew Yewchuk, Lawyer and Phd Student at the Allard School of Law and frequent writer for the University of Calgary's Faculty of Law *ABlawg* on the topic of access to information laws, have written about the issues with the new AIA.[401] A brief summary of some of the proposed changes from the point of view of McLeod and Yewchuk follows below.

AIA Improvements

The AIA as currently drafted does contain some modest improvements. These include fixing some organizational problems with FOIP as well as adding provisions for the automatic

[399] Government of Alberta, "Modernizing access to information for Alberta's digital age" online: <www.alberta.ca/modernizing-access-to-information-for-albertas-digital-age>.
[400] *Ibid*.
[401] Letter from Diane McLeod, Information and Privacy Commissioner to Honourable Dale Nally, Minister of Service Alberta and Red Tape Reduction (20 Nov 2024), online (pdf): *OIPC website* <oipc.ab.ca/wp-content/uploads/2024/11/20241120-Letter-to-Minister-Nally-regarding-Bill-34-the-Access-to-Information-Act-OIPC-comments-and-recommendations_Final-Unsigned.pdf>; Drew Yewchuk, "New Alberta Access to Information Law Part 1: More Secrecy" (20 Nov 2024) online: *ABlawg* <ablawg.ca/2024/11/20/new-alberta-access-to-information-law-part-1-more-secrecy/>; Drew Yewchuk, "New Alberta Access to Information Law Part 2: More Obstacles to Seeking Government Records" (9 December 2024), online: *ABlawg*, <ablawg.ca/wp-content/uploads/2024/12/Blog_DY_New_AIA2.pdf>.

extension of timelines due to emergencies and/or disasters.[402] The rest of the proposed changes are considered detrimental rather than beneficial to access to information.

Expanded exemptions to scope

Various sections of the AIA unjustly narrow rather than expand the scope of documents to which the Act applies. These include:

- Changes to the definition of "electronic record" (s. 1(f)) and the "duty to assist applicants" (s. 12(2)) which will now "exclude from the right of access any information that may reside in databases or any other electronic formats where there is a need to create a record that is not routinely generated from the dates to respond to the access request";[403]
- Changes to the definition of "information" (s. 1(k)) and "record" (s. 1(u)) that limit access to that information which is already in existence at the time of an access request (and exclude that which could be created from stored electronic information);[404]
- Section 4(1) of the AIA which lists the records to which the Act applies (i.e. scope) also now exempts:
    - Information in a "court database of any other record system used by a court" (s. 4(1)(a);
    - Records relating to a prosecution or "potential prosecution" (which is new and undefined) no matter their age or whether a prosecution was completed (s. 4(1)(m);[405]
    - Records in the custody or control of a prosecutor (s. 4(1)(n)); and
    - Records of communication between "political staff" (which is new and undefined) or a member of Executive Council and "political staff" that does not involve an employee of a public body (s. 4(1)(w).

[402] Yewchuk, "New Alberta Access to Information Law Part 1", *supra* note 401 and AIA, s. 16(9).
[403] Letter from McLeod at 6, *supra* note 401.
[404] *Ibid* at 7.
[405] Letter from McLeod, *supra* note 401 at 5; Yewchuk, "New Alberta Access to Information Law Part 1", *supra* note 401.

Expanded Exceptions to Disclosure

The AIA also introduces changes that further expand the list of exceptions to disclosure. Most worrisome among these are the changes to executive level government transparency.[406] These include:

- Cabinet and Treasury Board confidences
    - Broadened significantly to exempt any record "submitted to or prepared for" and "created by or on behalf of" rather than categories of defined records as currently found in FOIP (s. 27(1));
    - No more carve-outs for background and factual information (s. 27(2));
    - Reduces the exceptions to this section from three to one (i.e. kept the 15-year sunset clause only) (s. 27(3));[407]
- Advice from Officials
    - No more carve-outs for background and factual information (s. 29(1));[408]
- Introduction of an exception for "workplace investigations", which is an undefined term that could be interpreted broadly to include information beyond just the personal information that is generally entitled to privacy (s. 24); and[409]
- Disclosure harmful to economic and other interests of a public body
    - Broadened to include information about the "labour relations" of a public body, including information used by a public body during collective bargaining, again this is an undefined term that could be interpreted broadly (s. 30(1)(e)).[410]

Timeline Extensions

The AIA introduces longer timelines for responding to requests and authorizes public bodies to extend their timelines multiple times. In part, this is because most of the AIA uses "business days" rather than "days" like in FOIP. For instance, section 13(1) of the AIA provides that public bodies "must make every reasonable effort to respond to a request not later than 30 business days". According to Yewchuk, this extends the expected timelines for records requests by around 40% (depending on holidays).[411]

[406] Letter from McLeod, *supra* note 401 at 4.
[407] *Ibid*.
[408] *Ibid* at 5.
[409] *Ibid* at 6.
[410] *Ibid*.
[411] Yewchuk, "New Alberta Access to Information Law Part 2", *supra* note 401.

In addition, section 16 of the AIA gives public bodies the sole authority to extend the timeline for responding to a request. The head of a public body may extend the time for responding to a request for up to 30 business days and for "additional reasonable periods".[412] There is no limit on the number of extensions and it is up to the applicant to request a review by the Commissioner.[413] Conversely, FOIP only permits public bodies to extend the timeline once for 30 days, and then any further extensions must be requested from the OIPC. McLeod warns that:

> In my view, the shift of this decision to public body heads, together with the expanded circumstances under which a time extension may be taken under section 16, means that there will likely be an increase in the number of time extensions taken and an increase in complaints about them to the Commissioner.[414]

The AIA also extends the length of the OIPC inquiry from 90 to 180 business days.[415] While this extension acknowledges that the OIPC is regularly unable to meet the 90-day timeline, it also tells us that the Government has no intention of addressing the root causes of this delay (i.e. chronic underfunding and staffing of the OIPC).[416]

Expanded Powers for Public Bodies to Disregard Requests

The AIA also makes it easier for public bodies to stall and disregard requests. Currently, FOIP requires an applicant to "provide enough detail to enable the public body to identify the record".[417] Section 7(2)(c) of the AIA goes a step further and states the applicant's request must "provide enough detail to enable the public body to locate and identify the record within a reasonable time with reasonable effort". Both McLeod and Yewchuk note the language is ambiguous and likely to lead to further delays.[418] It also improperly puts the onus on the applicant to ensure the public body can do its job.[419]

Furthermore, the AIA removes the requirement that public bodies need the Commissioner's authorization to disregard a request. Instead, s. 9(1) of the AIA permits the head of a public body to disregard access requests and in more circumstances than was permitted by FOIP.

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[412] AIA, s. 16.
[413] AIA, s 16.
[414] Letter from McLeod, *supra* note 401 at 11.
[415] AIA, s 62(9).
[416] Yewchuk, "New Alberta Access to Information Law Part 2", *supra* note 401.
[417] FOIP, s 7(2).
[418] Letter from McLeod, *supra* note 401 at 9; Yewchuk, "New Alberta Access to Information Law Part 2", *supra* note 401.
[419] Letter from McLeod, *supra* note 401 at 9.

These decisions are reviewable by the Commissioner.[420] As noted by Yewchuk, this shifts the onus for getting OIPC approval from the public body to the applicant, making it easier than ever for public bodies to ignore inconvenient requests.[421]

Increased Limits on the Authority of the OIPC

As discussed above, the AIA removes the requirement for OIPC authorization to grant timeline extensions and to disregard requests. In addition, the AIA limits the OIPC's power to extend the time limit for complaints to one 30-day extension (rather than "any longer period allowed by the Commissioner" under FOIP).[422]

More importantly, the AIA removes the Commissioner's ability to review and compel specific records including court records, cabinet records, "political staff" records and records subject to any kind of legal privilege.[423] As discussed above in the section on OIPC oversight, the issue of the OIPC being unable to review solicitor-client privileged documents was already a known and significant weakness of the existing FOIP. These changes to the AIA only worsen the problem – leaving the OIPC unable to provide a timely and efficient independent review of public body refusals and clogging up the court with challenges.[424]

[420] AIA, s 58(1).
[421] Yewchuk, "New Alberta Access to Information Law Part 2", *supra* note 401.
[422] AIA, s 59(2)(a)(ii).
[423] AIA, s 50(6).
[424] Letter from McLeod, *supra* note 401 at 11-12.

Part Two: Regulatory Disclosure of Environmental Information in Alberta

In addition to FOIP, legislation exists at both levels of government that mandates the disclosure of environmental information in Alberta. An example at the federal level is the *Canadian Environmental Protection Act,* whereas at the provincial level there is the *Environmental Protection and Enhancement Act* and the *Water Act*. These pieces of legislation have complex aims ranging from economic growth to integrated environmental planning. Through their operation, governments collect significant amounts of environmental information and, to some extent, make that information available to the public through regulatory disclosure.

Part Two of the report discusses the kinds of information collected in these acts and the regulatory disclosure provisions that allow for access to environmental information outside the realm of access to information legislation detailed in Part One. Part Two also looks at the challenges facing effective public access of this information as well as recommendations to improve disclosure.

e) Laws Providing for Regulatory Disclosure

i) Canadian Environmental Protection Act

The *Canadian Environmental Protection Ac*t (CEPA) provides opportunities to access certain types of environmental information and assists the public in understanding government decision-making with respect to areas such as pollution prevention, toxic substances, and waste management.[425] Additionally, access to information through CEPA helps Canadians manage their risk regarding toxic substances. These two goals are outlined in the preamble of the Act:

> Whereas the Government of Canada is committed to openness, transparency and accountability in respect of the protection of the environment and human health;
>
> Whereas the Government of Canada recognizes the importance of Canadians having information, including by means of the packaging and labelling of products, regarding the risks posed by toxic substances to the environment or to human health[426]

On June 13, 2021, the Government of Canada amended CEPA in part to recognize the right to a healthy environment within the Act. The proposed implementation framework for the newly legislated right espouses the importance of access to information and public participation as procedural rights.[427] It states that access to information supports individuals to "make informed decisions about their and their communities' health and environment, to understand how government decisions are made, and to hold governments accountable for those decisions".[428]

The Act has various provisions regarding the disclosure of environmental information. Two important, public sources of such information are the Environmental Registry and the National Pollutant Release Inventory.

CEPA also contains a general confidentiality provision, allowing those submitting information under the Act to request that the information remain confidential.[429] The request is required to be accompanied by reasons "taking into account the criteria set out in paragraphs 20(1)(a) to (d)

[425] *Canadian Environmental Protection Act*, 1999, SC 1999, c 33.
[426] CEPA, Preamble.
[427] Environment and Climate Change Canada, "Draft Implementation Framework for the Right to a Healthy Environment under the Canadian Environmental Protection Act, 1999" (2024), at 12 online (pdf): <www.canada.ca/content/dam/eccc/documents/pdf/cepa/20241018-IF-eng.pdf> [Draft Framework].
[428] Draft Framework at 12.
[429] CEPA, s 313.

of the *Access to Information Act*".[430] The Minister must review a sample of confidentiality requests and determine whether the requests concern:

- trade secrets of any person;
- financial, commercial, scientific or technical information that is confidential information and that is treated consistently in a confidential manner by any person;
- information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, any person; or
- information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of any person.[431]

Environmental Registry

Section 12 establishes the Environmental Registry to facilitate "access to documents relating to matters under [CEPA]".[432] The Environmental Registry must be publicly accessible, searchable, and in electronic form.[433]

Section 13(1) specifies the contents of the Environmental Registry. It "shall contain notices and other documents published or made publicly available" including notices of objection and of approval, every policy and proposed regulation or order, and court documents submitted by the Minister in any environmental protection action.[434]

In addition, the Environmental Registry contains:

- notices related to private actions under CEPA;[435]
- notices of granted extensions to the time limit for third parties to submit a pollution prevention plan required under s. 56;[436]
- the proposed plan prioritizing substances for assessment;[437]
- the list of substances capable of becoming toxic;[438]

[430] CEPA, s 313(2).
[431] CEPA, s 313(3).
[432] CEPA, s 12.
[433] CEPA, s 13(2).
[434] CEPA, s 13(1).
[435] CEPA, ss 26, 27(2).
[436] CEPA, s 56(4).
[437] CEPA, s 73(3).
[438] CEPA, s 75.1(4).

- an explanation in any delay in publishing a statement about the measure the Minister's proposed to take as required by s. 77(6)(b);[439]
- a statement about and a time frame for a subsequent regulation or instrument related to a substance after the first regulation or instrument has been published;[440]
- a notice of the export of a substance specified in the Export Control List;[441]
- permit information for disposal of waste permits issued under s. 127; and[442]
- information about any alternative measures agreement or report.[443]

The Act also requires the Minister to publish data on environmental quality and the state of the Canadian environment collected as part of its monitoring and research duties on a periodic basis.[444]

National Pollutant Release Inventory

The National Pollutant Release Inventory (NPRI) is established by s. 48 of CEPA, which states that:

> The Minister shall establish a national inventory of releases of pollutants using the information collected under section 46 and any other information to which the Minister has access and may use any information to which the Minister has access to establish any other inventory of information.[445]

CEPA requires the NPRI to be published but grants discretion as to its manner of publication.[446] A person who provides information can request the information remains confidential based on the following reasons:

- 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

[439] CEPA, s 77(8).
[440] CEPA, s 77(8).
[441] CEPA, s 103.
[442] CEPA, s 133(1).
[443] CEPA, s 301.
[444] CEPA, s 44.
[445] CEPA, s 48.
[446] CEPA, s 50.

- 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.[447]

In deciding whether to accept or reject the request, 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
- whether 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.[448]

In the event the Minister rejects the request for confidentiality, the person requesting to keep the information confidential may file for a review with the Federal Court.[449]

Every few years, the Minister publishes a notice in the Canada Gazette with reporting requirements to the NPRI.[450] The current order covers over 300 substances and applies to a wide range of pollutant releasing industries.[451] Facilities to which the notice applies must submit reports yearly.[452]

According to the government's guidance document on proposing changes to the NPRI, "[a]ny party in Canada ... may submit proposals to [Environment and Climate Change Canada (ECCC)] for modifications to the NPRI program, such as adding or deleting substances, changing reporting thresholds, or other types of changes to the reporting criteria or to the information requirements."[453] The proposal must meet a comprehensive set of criteria including for example justification for the type of threshold, the threshold itself, and a value versus cost justification.[454]

[447] CEPA, ss 51-52.
[448] CEPA, s 53(3).
[449] CEPA, s 53(6).
[450] See Notice with respect to the Substance in the National Pollutant Release Inventory for 2025, 2026 and 2027 (Department of the Environment), (2025) C Gaz 1 Volume 159, Number 10 [NPRI Notice 2025].
[451] NPRI Notice 2025.
[452] NPRI Notice 2025.
[453] Government of Canada, "Process for Proposing and Considering Changes to the National Pollutant Release Inventory", online: <www.canada.ca/en/environment-climate-change/services/national-pollutant-release-inventory/publications/process-proposing-considering-changes.html> at 4 [NPRI Changes Guide].
[454] NPRI Changes Guide.

Proposals for change may be rejected if they clearly do not meet decision criteria or accepted if they are minor changes.[455] Otherwise, they are referred to the stakeholder consultation process discussed below.[456] Proposals may be deferred if there is a high volume of proposals, the proposal is incomplete, or additional information or resources are needed.[457]

Decisions on substances to be reported are made with the input and recommendations of the NPRI Multi-Stakeholder Work Group, including changes to the substance list and reporting criteria.[458] The group is made up of approximately half industry representatives, 40% civic organizations, and 10% indigenous governments or organizations.[459] There is an opportunity for public comments during this review.[460] These comments are provided to the Work Group for their consideration.[461]

The NPRI is searchable by year, facility, location, type of industry, as well as by pollutant, release medium, watershed, and disposal category.

ii) Environmental Protection and Enhancement Act

The *Environmental Protection and Enhancement Act* (EPEA) creates access to certain environmental information for those activities it governs in Alberta.[462] EPEA is a broad act that encompasses environmental impact assessment, the release of harmful substances, pesticide regulation, and waste management among other things. It acknowledges the importance of public participation in its purposes section.[463] Access to information is provided for under s. 35 of the Act and the *Disclosure of Information Regulation*.[464]

Subject to any exceptions, information that must be disclosed under s. 35 of EPEA includes:

1. Information provided to the Department under EPEA.
    - information in respect of a proposed activity that is provided to the Department for the purposes of Environmental Assessment by a project proponent;

[455] NPRI Changes Guide at 12.
[456] NPRI Changes Guide at 12.
[457] NPRI Changes Guide at 12.
[458] Government of Canada, "Stakeholder Working Group Terms of Reference: National Pollutant Release Inventory", online: <www.canada.ca/en/environment-climate-change/services/national-pollutant-release-inventory/public-consultations/stakeholder-working-group-terms-reference.html> [NPRI Stakeholder WG].
[459] NPRI Stakeholder WG.
[460] NPRI Changes Guide at 13.
[461] NPRI Changes Guide at 13.
[462] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [EPEA].
[463] EPEA, s 2.
[464] *Disclosure of Information Regulation*, Alta Reg 273/2004 [*EPEA Disclosure Reg*].

- documents and information in the Environmental Assessment Registry;
- information that is provided to the Department as part of the application by
    - an applicant for an approval, a registration or a certificate of variance;
    - the holder of an approval or registration, in respect of an application to change an activity; or
    - the holder of an approval, in respect of an application to amend a term or condition of, add a term or condition to, or delete a term or condition from the approval;
- environmental and emission monitoring data, and the processing information that is necessary to interpret that data, that is provided by an approval holder or a registration holder or provided pursuant to a code of practice;
- any reports or studies that are provided to the Department in accordance with a term or condition of an approval or a code of practice;
- any reports or studies that are provided to the Department and are required by the regulations to be disclosed to the public under this section;
- statements of concern; and
- notices of appeal;[465]

2. Information created by the Department under EPEA.
    - approvals and registrations;
    - certificates of qualification;
    - certificates of variance;
    - environmental and emission monitoring data and the processing information that is necessary to interpret that data;
    - reclamation certificates;
    - remediation certificates;
    - enforcement orders; and
    - environmental protection orders.[466]
3. Information in the possession of the Department that the Minister considers to be public information under s. 35(3).
    - written warnings;
    - a Notice of an Administrative Penalty;
    - specified penalty violation Tickets issued under the Provincial Procedures and Offences Act, for an offence of the Environmental Protection and Enhancement Act;

[465] EPEA, s 35(1)(a).
[466] EPEA, s 35(1)(b).

- Inquiry Reports prepared under the Conservation and Reclamation Regulation [AR 115/93];
- records intended as Statements of Concern;
- directions of an Inspector or a Director;
- Notice of Decision of a Director;
- decisions of a Director provided to an applicant, approval holder, registration holder, licensee, preliminary certificate holder or Statement of Concerns filers;
- any information or records submitted to the Department pursuant to Part 5 of the Environmental Protection and Enhancement Act;
- reports and records required under a Code of Practice that are to be prepared or maintained and that are to be submitted to the Department or to be made available to the Department for inspection upon the request of the Department;
- scientific and/or technical information, studies, reports, records submitted to the Department pursuant to Part 5 of the Environmental Protection and Enhancement Act relating to the environmental condition of a site, including tests and assessments, relating to the delineation or remediation of such sites, or any correspondence between the submitter and the Department pertaining to such information or records;
- names and addresses of persons consigning, transporting or accepting hazardous waste, the total quantity, or quantity per class, of hazardous waste consigned, transported or received by the facility or person, but not including information linking generators to carriers or receivers of hazardous waste, or information on individual waste stream names, composition and quantity;
- information or records submitted to the Department that relate to an application under the Environmental Protection and Enhancement Act, or its regulations;
- any correspondence from the Department to the applicant relating to the submitted information or records; and
- information or records submitted to the Department in accordance with a regulation under the Environmental Protection and Enhancement Act, an approval, authorization, notice or direction, and any correspondence from the Department to the submitter relating to the submitted information or records.[467]

Section 35(4) creates an opportunity for providers of information that would otherwise be public to request that it be kept confidential if it "relates to a trade secret, process or technique that the person submitting the information keeps confidential". The only consideration for whether

[467] Rob Renner, Alberta Environment, "Ministerial Order 02/2010" (Designation of Public Information Under the Environmental Protection and Enhancement Act).

to grant the request for confidentiality is the Director's opinion on whether it is "well founded".[468] No person involved in the administration of the Act may disclose any of the information to which the request relates while the Director is considering the request.[469]

Additionally, s. 35(9) specifies that information relating to a matter that is the subject of an investigation or proceeding may not be released.

Other provisions of EPEA and its regulations require the following information to be made public:

- The *Remediation Regulation* provides that once an application for a remediation certificate has been submitted, information in or referred to in an application, the certificate or amended certificate, and any notices or refusal or cancellation are public information.[470]
- Section 237.1 mandates that particulars of enforcement actions, such as administrative penalties and prosecutions, be published.[471]
- Section 4(2) specifies that reports and recommendations of committees established under that section shall be made public.[472]
- Section 14 mandates the creation and public disclosure of environmental quality guidelines and objectives.[473]
- Sections 44(5) and 48(2) require that notices of an environmental assessment and its proposed terms of reference must be published in a newspaper in the project area.[474] Similarly, sections 72(3) and 74 provide for specific notice requirements for applications for approval, registration, a change in activity, or amendment of an approval, and notice requirements for the Director's decision on these matters.[475]
- The Environmental Appeals Board must make its written decisions available in accordance with regulations.[476]

[468] EPEA, s 35(5).
[469] EPEA, s 35(7).
[470] *Remediation Regulation*, Alta Reg 154/2009, s 9.
[471] EPEA, s 237.1.
[472] EPEA, s 4(2).
[473] EPEA, s 14.
[474] *Environmental Assessment Regulation*, Alta Reg 112/1993, ss 3, 6.
[475] EPEA, ss 72, 74; *Environmental Protection and Enhancement (Miscellaneous) Regulation*, Alta Reg 118/1993, ss 2 & 3; See also EPEA, s 78(3) (re notice requirements for a Certificate of Variance).
[476] EPEA, s 98(3)(b).

The *Disclosure of Information Regulation* states that to access s. 35 information a requester must make a request for information in writing.[477] A request for information must be responded to within 30 days, with information about the time and manner in which access to the document will be granted.[478] The Department may charge fees for the release of documents and information in amounts not to exceed those set out in FOIP.[479]

This information may be provided by making the document or information available for inspection, by providing a copy, summary, or excerpt, or by publishing the document in some way.[480] Information must be made available within a "reasonable time".[481]

For information referred to in certain subsections of s. 35 (broadly information provided to the Department unrelated to an environmental assessment) requesters must first ask the person who provided the information and show that the requester was unable to contact them, they refused to provide the information, or did not respond within 30 days before making a request to the Department.[482]

Finally, the Director or person in charge of the information may refuse a request if in their opinion the requestor is a member of a group, organization, association or other body that was already provided with the document or information, or it is available for purchase by the public.[483]

iii) Water Act

The *Water Act* is another piece of legislation that obliges the government to disclose select environmental information.[484] In the event an emergency related to water is declared, the Minister is obliged to publish the details of select orders.[485] The Act also requires the Director to publish particulars of enforcement action taken under this Act.[486] Finally, when a person is

[477] *EPEA Disclosure Reg*, s 2(2).
[478] *EPEA Disclosure Reg*, s 2(2).
[479] *EPEA Disclosure Reg*, s 4.
[480] *EPEA Disclosure Reg*, s 2(3).
[481] *EPEA Disclosure Reg*, s 2(3).
[482] *EPEA Disclosure Reg*, s 2(4).
[483] *EPEA Disclosure Reg*, ss 2(5), 2(6).
[484] *Water Act*.
[485] *Water Act*, s 107(2.6).
[486] *Water Act*, s 152.1.

convicted of an offence under the Act, they are required to publish the facts relating to the conviction.[487]

The *Water (Ministerial) Regulation*, Alta Reg 205/1998 provides additional requirements for notice and access to information. Part 3 of the *Regulation* details the specific notice requirements for the publication of, or notice provisions for select applications, decisions, and/or orders pursuant to the *Water Act*.[488] Part 4 of the *Regulation* also provides that the following documents and information in the possession of the Department that are provided in the administration of the Act must be disclosed to the public in the form and manner provided for in the *Regulation*:

- documents and information in a registry established by the Department for that purpose;
- information, applications, plans, and specification that are provided to the Department as part of an application;
- verified monitoring data and the processing information that is necessary to interpret that data that is provided by an approval holder or licensee in accordance with a term or condition of the approval or licence;
- reports or studies that are provided to the Department in accordance with a term or condition of an approval, preliminary certificate or licence;
- statements of concern;
- certificates of completion; and
- flood action plans.[489]

Part 4 of the *Regulation* also provides for the disclosure of certain documents that are created in the administration of the Act, including:

- approved water management plans;
- approvals;
- preliminary certificates;
- licences;
- registrations;
- verified monitoring data and the processing information necessary to interpret that data;
- reports with respect to water conservation objectives and water guidelines;
- emergency plans;
- plans relating to floods;
- water management orders; and

[487] *Water Act*, s 148(1)(c) & (2).
[488] *Water (Ministerial) Regulation*, Alta Reg 205/1998, s 13 [Water Reg].
[489] Water Reg, s 15(1)(a).

- enforcement orders.[490]

Moreover, the Minister may disclose to the public in the form and manner specified by the Minister any other information in the possession of the Department that they consider should be public information.[491] The *Regulation* provides that upon receipt of a request in writing for a document or information referred to above, the Director or other person in charge must, within a reasonable time and in receipt of any fee specified in an order of the Minister, make the document or information available for inspection during normal business hours at the location where it is kept or another agreed upon location and provide one copy of the document or information to the person making the request.[492]

The *Regulation* provides an exemption, upon request, for information that is provided to the Department and relates to a trade secret, process or technique that the person submitting keeps confidential. The person submitting the information may make a request in writing to the Director at the time of submission that the information be kept confidential and not be disclosed. The Director may approve the request if they consider it to be well founded.[493]

[490] Water Reg, s 15(1)(b).
[491] Water Reg, s 15(3).
[492] Water Reg, s 16(1).
[493] Water Reg, s 15(4)-(6).

f) Challenges with Laws Providing for Regulatory Disclosure

i) Canadian Environmental Protection Act

CEPA is not an access to information regime. However, it collects, stores, and works with massive amounts of environmental information that is of interest to the public. As the primary piece of legislation dealing with toxic pollution at the Federal level, the public interest in both the administration of the Act as well as the information provided by industries pursuant to the Act is high.

CEPA information is subject to ATIA, however CEPA's access to information provisions provide certain information proactively, reducing the barriers to public access. As outlined above, CEPA creates an Environmental Registry that discloses documents related to its operation as well as the National Pollutant Release Inventory through which the Canadian government proactively discloses pollution release data.

One of the most important ways that CEPA contributes to access to environmental information in Canada is through proactive disclosure provisions. Proactive disclosure of environmental information helps to overcome one of the greatest barriers to access to information: the inability of a requester to know what information exists and how it can be accessed. Additionally, proactive disclosure of pollution data through the NPRI also supports its goal of reducing pollution by influencing polluter behavior with socioeconomic pressure created through transparency of pollution data.[494]

However, these access provisions can be improved in the areas of data quality and reliability in the NPRI, the CEPA confidentiality section, and compliance and enforcement information disclosure.

NPRI Data Quality and Reliability

In order to be a useful source of environmental information, NPRI data must be reliable and high quality. Data reliability is about the completeness of a dataset, whereas data quality is about its accuracy.[495] The NPRI suffers from challenges with both. Stuart Edwards and Tony

[494] See Stuart C Johnston Edwards & Tony Robert Walker, "An overview of Canada's National Pollutant Release Inventory program as a pollution control policy tool" (June 2019) J Environmental Planning & Management at 4 (See discussion about the pollution control public disclosure theory).
[495] *Ibid* at 9.

Walker in their article "An overview of Canada's National Pollutant Release Inventory program as a pollution control policy tool" noted that the NPRI lacks a stated policy goal for the quality of information that the NPRI collects.[496]

Firstly, the NPRI includes exceptions to reporting requirements that create gaps in the completeness of information. With some exceptions, facilities (as defined in the Act) that release substances that would otherwise have to be reported under the NPRI but do not meet the employee count do not need to report.[497] With exceptions, the total number of annual labour hours needs to add up to 20,000 or more before a facility is required to report.[498]

Additionally, the following activities are exempt from reporting if they are the only activity that takes place at a facility:

- exploration for oil and gas or the drilling of oil and gas wells;
- discharge of treated or untreated wastewater from a wastewater collection system with an average discharge of < 10 000 m3 per day into surface waters; or
- production of < 500 000 Tonnes at pits or quarries.[499]

Activities that produce substances required to be reported under Parts 1 to 3 of the NPRI do not have to report them if are produced during one of the following activities:

- education or training of students;
- research or development;
- maintenance and repair of vehicles;
- distribution, storage or retail sale of fuels, except as part of terminal operations;
- wholesale or retail sale of the substance or articles or products that contain the substance;
- growing, harvesting or management of renewable natural resources; or
- dentistry[500]

[496] *Ibid* at 6.
[497] See Canada, Environment and Climate Change Canada, *Guide for Reporting to the National Pollutant Release Inventory 2022-2024* (ISSN: 1480-6622) at 7-10 [Reporting Guide 2022]; See also NPRI Notice 2025.
[498] Reporting Guide 2022 at 7; NPRI Notice 2025, Schedule 3 s 1(b).
[499] Reporting Guide 2022 at 12-13; NPRI Notice 2025, Schedule 3 s 1(2).
[500] Reporting Guide 2022 at 14; NPRI Notice 2025, Schedule 3 s 2(1).

Further, substances contained in certain items and vehicle emissions do not need to be reported.[501] Unconsolidated overburden, inert waste rock and inorganic, inert and unaltered components of tailings are exempt from calculation and reporting for substances contained in waste rock or tailings.[502]

Finally, most substances have a reporting threshold amount or other reporting criteria (mass, concentration or activity threshold), and if the production does not meet these criteria, the substance does not need to be reported.[503]

These exceptions reduce the burden on smaller facilities or facilities operating for specific purposes at the price of completeness of information. As a result, the public is left with an inaccurate picture of actual emissions versus reported emissions. With each exception, the gap grows. Edwards and Walker in their analysis of the NPRI recommend including small and medium sized enterprises (under 20,000 employee hours) to improve the completeness of the data.[504] They noted that offsetting the burdens of reporting and easing the transition for smaller facilities could be achieved through providing incentives and/or training materials.[505]

Secondly, concerns over data accuracy arise because estimation methods for release data are not standardized in Canada.[506] Reporting facilities must use the best available method which may include monitoring data, mass balance calculations, emission factor estimates and engineering estimates, among others.[507] Edwards and Walker, in discussing this issue, note that it limits how facilities can be compared over time and to each other.[508]

In addition to inaccuracies from outdated or inconsistent estimation methods, facilities may be inaccurately reporting their emissions and there is little validation or verification in place to catch and amend these inaccuracies. For example, one study found that that Alberta oilsands facilities carbon emissions levels were between 20 and 64 times higher than reported depending

[501] Reporting Guide 2022 at 13; NPRI Notice 2025, Schedule 3 s 3.
[502] Reporting Guide 2022 at 14-15; NPRI Notice 2025, Schedule 3 s 3.
[503] See e.g. NPRI Notice 2025, Schedule 3 Table 1.
[504] Edwards & Walker, *supra* note 494 at 10.
[505] *Ibid* at 10.
[506] *Ibid* at 10-11.
[507] *Ibid* at 10-11; NPRI Notice 2025, Schedule 4 s 2.
[508] Edwards & Walker, *supra* note 494 at 11.

on the facility.[509] These pollutants (including black carbon and polycyclic aromatic hydrocarbons, which are dangerous to human health) are being deposited in a concentrated amount in a 100km radius within hours of their release and drop off after 200km.[510] The deposition is not accounted for in current models.[511]

Further, Edwards and Walker note that there is very little data validation and almost no verification of NPRI data: only about 3% of facilities' reports to the NPRI are certified every year.[512] As facilities submitting NPRI reports may be underreporting the amount of pollution, Edwards and Walker concluded that increased verification for NPRI is needed to address these inaccuracies.[513]

Thirdly, failure to report when required may be a major barrier to public access to pollution information in Canada. A 2024 request by the Alberta Wilderness Association to investigate alleged violations of the NPRI reporting requirements identified 427 facilities that meet the reporting threshold for total VOC and benzene reporting requirements but did not report them, and 104 facilities that meet the PM2.5 threshold for reporting but did not report Part 4 and benzene emissions data.[514] These allegations raise the concern that failure to report "is an endemic problem which risks undercutting the purpose of the NPRI".[515]

Finally, as discussed further in Case Studies above, Canada is notably not a party to the *Aarhus Convention* or the *Kiev Protocol on Pollutant Release and Transfer Registries* (Kiev Protocol). Canada participated in these negotiations in part to "encourage international consistency with Canada's National Pollutant Release Inventory" and maintains that it "meets most of the

[509] Benjamin Shingler, "Alberta's oilsands pump out more pollutants than industry reports, scientists find", *CBC News* (25 January 2024), online <www.cbc.ca/news/science/alberta-oilsands-research-emissions-1.7093626>; He et al, "Total organic carbon measurements reveal major gaps in petrochemical emissions reporting" (2024) 383:6681 Science 426.
[510] Wallis Snowdon, "Oilsands pollution study reveals new 'blind spot' in industry reporting", *CBC News* (19 January 2025), online <www.cbc.ca/news/canada/edmonton/oilsands-carbon-study-plumes-1.7433050>; Liggio et al, "Organic carbon dry deposition outpaces atmospheric processing with unaccounted implications for air quality and freshwater ecosystems" (2025) 11:1 Science Advances (eadr0259).
[511] *Ibid*.
[512] Edwards & Walker, *supra* note 494 at 11.
[513] *Ibid* at 12.
[514] Debborah Donnelly, "RE: CNRL's Failure to Report Emissions to the NPRI" (11 December 2024), online (pdf): <https://ecojustice.ca/wp-content/uploads/2024/12/Application-for-Investigation-NPRI-Non-Reporting-by-CNRL.pdf> at 8-9.
[515] *Ibid* at 10.

elements of the final protocol".[516] However, Canada fails to meet the protocol's requirements regarding reporting of greenhouse gases, pesticides, and intensive agricultural operations, stating that it "has other methods to manage and collect information" in these areas.[517]

Including information about greenhouse gases, pesticides and intensive agricultural operations would contribute to the NPRI's completeness and to international consistency. International consistency would allow for better cross-country comparison of emissions data.

Confidentiality Exception

CEPA allows regulated entities to request confidentiality when submitting information to the Minister.[518] These requests for confidentiality limit public access to information by prohibiting its disclosure except in certain circumstances. For example, the Act allows for disclosure in the public interest.[519]

The previous version of this section did not require that reasons be provided alongside requests for confidentiality.[520] In response to concerns raised regarding this previous version, in its review of CEPA the House of Commons Standing Committee on Environment and Sustainable Development (ENVI Committee) recommended that:

> [S]ection 313 of CEPA be amended to specify that information provided to the Minister under the Act is presumed to be public and to require persons who submit a request for confidentiality under section 313 to provide the Minister with justification to support the request.[521]

The Government of Canada amended the confidentiality section in 2023 in response to the ENVI Committee's recommendations, including adding a section allowing for the invalidation of

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[516] Environment and Climate Change Canada, "Convention on Access to Information: Public participation in the Aarhus Convention and the Kiev Protocol" (2 September 2022), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/corporate/international-affairs/partnerships-organizations/convention-access-information-public-participation-aarhus-convention-kiev-protocol.html>.

[517] *Ibid*.

[518] CEPA, s 313.

[519] CEPA, s 315.

[520] CEPA, s 313 (Version in force between 2021-05-01 and 2023-06-12).

[521] House of Commons, *Healthy Environment, Healthy Canadians, Healthy Economy: Strengthening the Canadian Environmental Protection Act, 1999: Report of the Standing Committee on Environment and Sustainable Development* (June 2017) (Chair: Deborah Schulte) at 24.

requests that do not fall into certain categories of information. However, the amendments do not reflect the recommended presumption that information provided to the Minister is public.

The current version of the confidentiality section states that requestors must provide reasons which consider the criteria set out under sections 20(1)(a) to (d) of ATIA in their requests for confidentiality.[522] A representative sample of requests must be reviewed by the Minister and deemed not to have been made if they do not concern one of the following categories:

- trade secrets of any person;
- financial, commercial, scientific or technical information that is confidential information and that is treated consistently in a confidential manner by any person;
- information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, any person; or
- information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of any person.[523]

However, unless invalidated, requests are treated as confidential once they are made.[524] This creates a presumption of confidentiality which does not reflect the recommendations of the ENVI Committee.

In comparison, the confidentiality provision that applies to NPRI information provides for a mandatory review of the request for confidentiality by the Minister and the prohibition of disclosure only applies when the Minister accepts the request.[525] Unlike s. 313 requests for confidentiality, s. 54 of CEPA creates a presumption that the information will be made public.

Section 52 provides that those submitting information for the NPRI may request in writing that the information be kept confidential.[526] Reasons must be provided and must be based on one of the following:

- the information constitutes a trade secret;

[522] CEPA, s 313.
[523] CEPA, s 313(3).
[524] CEPA, s 314.
[525] CEPA, s 54.
[526] CEPA, s 52.

- 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.[527]

This section applies despite s. 313, meaning that "financial, commercial, scientific or technical information that is confidential information and that is treated consistently in a confidential manner by any person" is not an acceptable reason to keep information intended to be published under the NPRI confidential.

The Minister must then consider whether the reasons are well founded, and despite a finding that they are, may still reject the request if:

- the disclosure is in the interest of the protection of the environment, public health or public safety; and
- 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.[528]

The difference in the treatment of information may be because information subject to the NPRI confidentiality request provision is relatively narrow and explicitly intended to be public whereas the information provided under the remainder of the Act is broader and not necessarily requested with the intention of being made public. However, treating this information as presumptively public in the manner of NPRI information, subject to legitimate exceptions, would provide consistency and improve access to information.

Compliance and Enforcement Information

Access to environmental information includes information on compliance and enforcement actions taken in accordance with CEPA and its regulations. This type of information is beneficial

[527] CEPA, s 52.
[528] CEPA, s 53.

to members of the public seeking to understand the environmental compliance records of facilities in their area, for example.

Some environmental enforcement information must be published according to CEPA provisions, including:

- court documents submitted by the Minister in any environmental protection action;[529]
- notices related to private actions under CEPA;[530]
- information about any Environmental Protection Alternative Measures agreement or report;[531]
- information about all convictions of corporations for offences under CEPA for the past five years at minimum.[532] Notices of successful prosecutions are available online.[533]

Additionally, in an annual report to parliament, the Minister must outline enforcement actions taken in the past year.[534] The information is provided as raw statistics and lacks detail. For example, while the report discloses the number of warnings issued it does not disclose who those warnings were issued to, for what kind of violation, or where the facility is geographically.

CEPA and its regulations do not mandate proactive disclosure of enforcement actions such as warnings, tickets, inspections, or investigations. To be clear, the results of a completed investigation are not confidential in themselves.[535]

Further, CEPA provides for the release of some of this enforcement information in specific circumstances. Where a request to investigate a violation of CEPA under s. 17 is made, the Minister must provide updates on the progress of the investigation to the requesting party every 90 days.[536] However, these progress updates do not apply to investigations instigated by

[529] CEPA, s 13(1).
[530] CEPA, ss 26, 27(2).
[531] CEPA, s 301.
[532] CEPA, s 294.2.
[533] Environment and Climate Change Canada, "Enforcement Notifications" (12 March 2025), online: *Government of Canada* <www.canada.ca/en/environment-climate-change/services/environmental-enforcement/notifications.html>.
[534] CEPA, s 342; See e.g. Canada, *Environment and Climate Change Canada, Canadian Environmental Protection Act, 1999: Annual Report to Parliament for April 2022 to March 2023*, online: <www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/publications/cepa-annual-report-april-2022-march-2023.html#a1>.
[535] Environmental enforcement information may include information subject to the Law Enforcement and Investigations exception of the ATIA, s 16.
[536] CEPA, s 19.

the Minister and therefore cannot be used to stay informed of such investigations. In *Gray v Canada (Attorney General)*, members of the public brought a judicial review of the Minister's decision to refuse to open investigations into three alleged contraventions of CEPA related to the importation and sale of Volkswagen vehicles equipped with devices intended to produce false results during emissions testing.[537] The court confirmed the Minister's ability to refuse to investigate for the reason that an investigation is already underway.[538] However, a consequence of the refusal to investigate is that the requesters, and the public in general, would not receive updates on the investigation every 90 days as they would have had the request to investigate been accepted.[539]

Although it is possible to gain details of enforcement action through access to information requests, this approach can be difficult to navigate and may be subject to delays.[540]

Recommendations

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

CEPA's effectiveness in informing the public can be strengthened through these NPRI reforms. Additionally, the Act can be improved by strengthening the confidentiality section by amending s. 313 such 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, as well as providing for the proactive disclosure of detailed enforcement and compliance information, including warnings, tickets, inspections, and investigations.

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[537] *Gray v Canada (Attorney General)*, 2019 FC 1553 at paras 1-5.

[538] *Ibid* at paras 38-40 (appeal dismissed for mootness in *Gray v Canada (Attorney General)*, 2021 FCA 11).

[539] CEPA, s 19.

[540] See for example *Envirotec Services Incorporated v University of Saskatchewan*, 2016 SKQB 201 where EC investigation records were ordered produced in addition to the redacted records provided per the access to information request.

ii) Environmental Protection and Enhancement Act

Similar to CEPA, EPEA is aimed at a series of environmental goals and includes provisions that require public bodies to collect large amounts of environmental information. Accordingly, EPEA's access to information provisions, most significantly s. 35 and the *Disclosure of Information Regulation* provide a first point of access for the public to information that would otherwise only be available through the FOIP. However, this public information is not proactively disclosed and may be withheld without an opportunity to appeal that decision.

Proactive Disclosure and Organization

A challenge with access to information that arises under EPEA is that there is no single database available to search for comprehensive information. Outside of the Environmental Assessment Registry, which is organized by project, information may be found on various webpages. While certain information is considered "available to the public", much of it must still be requested in order to be accessed.

The absence of a single database decreases transparency because unless a requester knows exactly what they are looking for, it is difficult to make a specific request. Requestors may not know what types of information are available to request and relevant to their needs. A database of proactively disclosed information with good search parameters reduces the time it would otherwise take to review legislation, regulations, and codes of practice to determine what information may be available regarding an activity or project.

The authority to proactively disclose information under s. 35 of EPEA is provided for in the *Disclosure of Information Regulation:*

> The Director or other person in charge of keeping or distribution of a document or information referred to in section 35(1) of the Act or considered by the Minister to be public information under the authority of section 35(3) of the Act may publish the document or information in any form and manner the Director or other person considers appropriate, regardless of whether there is a request for the document or information.[541]

Some information is posted online, but it is not readily apparent which information collected under EPEA is available and how often it is updated. Additionally, this information is not all in one place. Information published proactively online is on separate webpages based on whether

[541] *EPEA Disclosure Reg*, s 2(1).

it relates to energy resources because the Alberta Energy Regulator (AER) rather than Alberta Environment and Protected Areas administers EPEA for energy resource activities. In both cases, the information available is not comprehensive.

For non-energy resource related activities, information available online includes a summary of enforcement actions published quarterly, however this is not updated regularly.[542] Orders made under EPEA are searchable on the Open Government Program webpage.[543] Finally, past and current environmental prosecutions can be found online.[544]

For energy resource related activities, the AER posts online enforcement information including incidents that fall into the following categories:

- a reportable release that involves hydrogen sulphide (H2S);
- a reportable release that affects a water body, whether on or off lease;
- a reportable release of hydrocarbon or produced water that migrates off lease or on pipeline right-of-ways; or
- a seismic event of local magnitude (ML) 4.0 or greater in the Duvernay Zone (subject to Subsurface Order No. 2) or 2.5 ML or greater in the Brazeau area (subject to Subsurface Order No. 6) or 3.0 ML or greater in the Red Deer area (subject to Subsurface Order No. 7).[545]

The AER also posts online some information regarding investigations, although the details are limited.[546] Finally, the AER posts noncompliance and enforcement information including:

- enforcement decisions, such as warning letters, administrative penalties, and prosecution;
- administrative sanctions (e.g., imposition of terms and conditions);

[542] Alberta Government, "Enforcement actions [quarterly reports]" (31 January 2023), online: Open Alberta <open.alberta.ca/publications/1766023> (As of April 2025, the most recent quarterly report was published in January 2023).
[543] Alberta Government, "Publications", online: Open Alberta <open.alberta.ca/publications>.
[544] Alberta Environment and Protected Areas, "Environmental prosecutions – Current files", online: Alberta Government <https://www.alberta.ca/environmental-prosecutions-current-files>; Alberta Environment and Protected Areas, "Environmental prosecutions - Concluded files", online: Alberta Government <www.alberta.ca/environmental-prosecutions-concluded-files>.
[545] Alberta Energy Regulator, "Compliance Dashboard", online: AER <www1.aer.ca/compliancedashboard/incidents.html>.
[546] *Ibid*.

- directions of an inspector in relation to s. 137(2)(c) of EPEA
- orders issued to compel compliance or remediate;
- any notice of noncompliance that is related to a full or partial suspension of operations;
- suspension or cancellation of an approval; and
- cancellation of a reclamation certificate.[547]

Access to information regarding releases of harmful substances would be greatly enhanced through proactive disclosure. Information regarding release of substances and contaminated sites is difficult to access. A person who has released a substance that causes or may cause a significant adverse effect is required to report the release to the Director under EPEA and to any person who may be directly affected by the release.[548] However, there is no requirement to report the release to the general public.

While records related to the release of substances under Part 5 of the Act are available upon request, the extra barrier of having to request that information, when an interested requester may not know that any particular release happened, necessarily leads to a fishing expedition for all releases of a certain substance or a certain area. The public may only come to know of a release if an environmental protection order or other enforcement action is issued and eventually disclosed online.[549]

Additionally, proactive disclosure of certain data would enable the public and researchers to use it more effectively. For example, information that can be accessed or requested under EPEA is often not organized in a way that can be tied directly to land. Proactively disclosing information related to releases and contamination and organizing it to be searchable by location would likely improve public utilisation.

Process for Requesting Information

Another barrier to access to information under EPEA is the requirement to first contact a proponent and be unsuccessful in a request for information before requesting that information from the government.[550]

[547] *Ibid*.
[548] EPEA, s 110.
[549] Such as under ss 113, 114, or 116 of EPEA.
[550] See *EPEA Disclosure Reg*, s 2(4).

First, there may be practical difficulties with this requirement. There may be animosity between a proponent and an information requestor, and a refusal to disclose information may cause further animosity.

Second and relatedly, there is no requirement for the proponent to respond to these requests, which can cause significant delay for requestors.

While uncommon, it is not unheard of to require proponents or businesses to provide environmental information directly to private parties. In Norway, a requestor has the right to request information directly from all public authorities and undertakings (including private enterprises), under the *Environmental Information Act*.[551] The undertaking has a corresponding duty to hold and provide that information.[552] The information subject to these disclosure requirements is very broad, including both factual information and assessments of the environment, factors that affect or may affect the environment, and human health, safety, and living conditions.[553]

Discretion in Access Provisions of EPEA

The discretionary nature of several elements of the disclosure process under EPEA present challenges.

First, a practical challenge is that the Regulations allow the Minister to limit copies of the materials, potentially making it difficult for requesters to meaningfully review the information.

Second, EPEA does not mandate a time limit for the release of information that is public under s. 35 and the *Disclosure of Information Regulation*. The regulation requires the director or other person in charge of the information, within 30 days, to provide a time by which the information will be disclosed.[554] However, there is no legislated limit on how long this timeline can be. The only requirement is that the information be released within a "reasonable time".[555]

Third, the confidentiality exception to disclosure of information under EPEA is broad, with no requirement to show that harm would be caused by the disclosure of the information. Further

[551] *Environmental Information Act*, s 1; Graver, *supra* note 372 at 2.
[552] *Environmental Information Act*, ss 8, 9.
[553] *Environmental Information Act*, s 2.
[554] *EPEA Disclosure Reg*, s 2(3).
[555] *EPEA Disclosure Reg*, s 2(3).

there is no statutory review mechanism for the three main exceptions to disclosure under EPEA: the confidentiality exception, the investigative process exception under s. 35(9), and the exception for membership in a body that was already provided with the information.

If any of these exceptions are relied on to refuse disclosure, the next step for a requester (barring judicial review of the decision) is to request the information under FOIP. Unfortunately, this can increase both the time and costs for accessing the information.

In contrast, if a request for confidentiality under s. 35(4) is refused, the Director must notify the request maker and the person to whom the notice is directed may appeal the decision to the Environmental Appeals Board.[556]

Recommendations

Although EPEA possesses routine disclosure provisions, proactive disclosure of this environmental information would enhance public access. EPEA should 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 who wish to challenge the format the information was provided in, the timeline for receiving the information, or the validity of the use of an exception to disclosure.

iii) Water Act

Finally, there are also a variety of challenges with transparency and disclosure around the *Water Act*. These challenges range from overall water conservation policy and decision-making to individual authorization decisions. Specifically, disclosure and transparency concerns arise under the *Water Act* in relation to:

- public reviews of water allocation transfer applications and decisions;
- tracking and reporting around water conservation objectives under the Act; and
- statutory timing of participation for *Water Act* approvals.

[556] EPEA, ss 35(6), 91(1)(o).

Public reviews of water allocation transfer applications and decisions

For water licence allocation transfers, the Act states that the "Director must conduct a public review of a proposed transfer of an allocation of water under a licence, in a form and manner that the Director considers appropriate."[557] While public notice has been given in relation to these water allocation transfer applications the authors are not aware of any "public reviews" having been conducted for licence transfers. The legislation is drafted in such a way as to clearly intend a "review" in "public" and not merely notice. This could have been, but was not, limited under the statute.

While there remains discretion around the scope of review, the reasonable baseline of a public review would ensure the public has access to sufficient information to understand the implications of a transfer both on the environment and on other water users. This includes, as a starting point, all relevant information regarding how required statutory considerations under the Act will be taken into account. These statutory conditions are set out in section 82(3) of the Act and include a requirement that a transfer of a water allocation can only occur if, "in the opinion of the Director, [the transfer] does not impair the exercise of rights of any household user, traditional agriculture user or other licensee other than the household user, traditional agriculture user or other licensee who has agreed in writing that the transfer of the allocation may take place, and …the transfer, in the opinion of the Director, will not cause a significant adverse effect on the aquatic environment."

Further, where approved water management plans are in place for a basin (as they are for the South Saskatchewan River Basin (SSRB) and the Battle River Basin) any matters and factors articulated in the plan must be considered.[558] For example, the approved plan for the SSRB sets out various factors of interest including:

- Existing, potential and cumulative effects on the aquatic environment;
- Existing, potential and cumulative effect on any applicable instream objective and/or Water Conservation Objective (WCO);
- Efficiency of use;
- Net diversion;
- Water quality; and

[557] *Water Act*, s 81(6).
[558] *Water Act*, s 82(5).

- First Nation Rights and Traditional uses.[559]

These matters and factors are accompanied by guidelines aimed at guiding decision making. Of interest, these guidelines include whether a licence transfer results in "[n]o significant adverse effects on existing instream objectives and/or Water Conservation Objectives", that efficiency of water use meets "industry standards and best practices", and that the quality and timing of return flow are benign or beneficial for the environment.[560] As such a "public review" of transfers in the SSRB should disclose relevant information around the transfer's impact on the enumerated considerations to determine whether the guidelines of the plan are being met.

Transparency in WCO tracking and reporting and policy direction

As articulated above, WCOs are relevant to licence transfers but are also relevant to licence renewals, water conservation holdbacks during transfers, decisions about whether to issue licences under the Act, and decisions about whether to accept licence applications for a prescribed time.

Where WCOs and other instream objectives are in place there should be regular reporting around whether flows are reaching WCOs as they are relevant to a suite of decisions under the Act (as highlighted above). They are also relevant to promoting public understanding of efforts for water conservation for instream purposes.

Statutory timing of participation for Water Act approvals

Current timelines around participatory rights under the Act can pose significant challenges. Specifically, under the Act a statement of concern must be filed in relation to an approval seven days (and 30 days for a licence) from the date of publication of the notice (unless there is an alternate date specified by the Director).[561] While supporting documentation for these applications are part of the information available in the regulatory process, the time required to understand the potential impacts of a proposed activity and to pursue additional investigations that may be needed to understand potential impacts may exceed seven days (or 30 days). As a result, these tight timelines may curtail the rights of affected parties to assess the extent and probability of impacts related to *Water Act* approvals and licences.

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[559] See page 14 of the Alberta Environment, Approved Water Management Plan for the South Saskatchewan River Basin (Alberta), 2006, online: <Approved water management plan for the South Saskatchewan River Basin (Alberta) - Open Government >.

[560] *Ibid.*

[561] *Water Act*, s 109.

Recommendations

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 including information disclosure to the public to understand the impacts of a transfer on the aquatic environment, instream objectives, water conservation objectives, efficiency of water use, net water use, and water quality;
- The Government of Alberta should ensure that WCOs and instream objectives are publicly reported including instances where WCOs and instream objectives are not being met; and
- The *Water Act* should be amended to extend the timeline for the submission of a statement of concern for *Water Act* approvals or to enable an extension of time for the response to approval notices as of right for directly affected parties.

Conclusion and Recommendations

Today, Alberta is at a crossroads with respect to access to environmental information. It can adopt Bill 34 and continue down its current path of reduced transparency and underperforming FOIP legislation. Or, like Newfoundland and Labrador, Mexico and Norway, it can look to international standards and best practices and work on improving access to environmental information legislation in Alberta.

Throughout this report the ELC has compiled recommendations to facilitate the latter. These recommendations are reproduced again below. The implementation of these recommendations, along with strong leadership from the heads of public bodies, would help to create the legislative and cultural change necessary for true government transparency and accountability in Alberta.

The recommendations in this report also address current issues with CEPA and EPEA challenges, and how these Acts can improve the access to information regime in Alberta by better enabling proactive disclosure of important environmental information and expanding the avenues of access available to Albertans.

Recommendation No. 1 *– Access to Environmental Information*

The right to access information should specifically include environmental information. FOIP should include access to environmental information and the term should be defined broadly to include 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.

Recommendation No. 2 *– Expand the Scope of the Act*

Freedom of information legislation should always be guided by the principle of maximum disclosure, including with respect to its scope. The following recommendations would improve the scope of Alberta's access law:

- 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.

Recommendation No. 3 *- Narrow the Exceptions in the Act*

Alberta should make the following changes to strengthen FOIP and narrow its exceptions:

- 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 intragovernmental 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.

Recommendation No. 4 *– Improve Timelines Delays*

Alberta should make the following changes in order to address some of the unreasonable timeline delay that applicants experience trying to access records under FOIP:

- 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;
- 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; and
- Most importantly, FOIP departments within public bodies must be sufficiently organized and funded so that they can meet the legislated timelines.

Recommendation No. 5 *– Reduce Fees for Requests*

FOIP should be amended to abolish fees for filing an access to information request. In addition, fees set out in the Regulation should be limited to those recouping the actual cost of reproducing and sending information. There should be a free minimum order of at least 20 pages. If not already done, the Government of Alberta should do a cost-benefit analysis of whether it is financially advantageous to administer fees at all. If not, then fees should be done away with altogether.

Recommendation No. 6 *– 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 violation of the Act.

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

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

To ensure reliable and accurate data, 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.

Implementing these recommendations will require amendments to CEPA, exercises in discretion under CEPA, or both. Additionally, CEPA can be improved by strengthening the confidentiality section 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.

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

Although EPEA possesses routine disclosure provisions, proactive disclosure of this environmental information would enhance public access. Accordingly, 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 who wish to challenge the format the information was provided in, the timeline for receiving the information, or the validity of the use of an exception to disclosure.

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 including information disclosure to the public to understand the impacts of a transfer on the aquatic environment, instream objectives, water conservation objectives, efficiency of water use, net water use and water quality;
- The Government of Alberta should ensure that WCOs and instream objectives are publicly reported including instances where WCOs and instream objectives are not being met; and
- The *Water Act* should be amended to extend the timeline for the submission of a statement of concern for *Water Act* approvals or to enable an extension of time for the response to approval notices as of right for directly affected parties.