Office of the Information and Privacy Commissioner of Alberta

DELIVERED BY EMAIL

November 20, 2024

Honourable Dale Nally
Minister of Service Alberta and Red Tape Reduction
ministersa@gov.ab.ca

Dear Minister Nally,

RE: Commissioner's comments and recommendations regarding Bill 34 – *Access to Information Act*

I am responding to the November 6, 2024 introduction of Bill 34 *Access to Information Act* (Bill 34, AIA or the Act). The *Freedom of Information and Protection of Privacy Act* (FOIP Act) provides me with the ability to comment on the access and privacy implications of proposed legislative schemes.

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.

As I stated in my September 23, 2024 letter about potential amendments to the FOIP Act, functional access to information legislation is the cornerstone of ensuring 'good governance' of public institutions as recognized by the OECD[1], and helps create transparency and accountability, build public trust, enable Albertans to meaningfully engage and participate in our democracy, and can also play an important role in addressing disinformation.

Having reviewed Bill 34 and taking into account the importance of a well-functioning access to information system in Alberta as indicated, I believe there is a need to consider the implications of what is being proposed in this Bill and how it will impact the access rights of Albertans. It with this goal in mind that I made my comments and recommendations, which are attached to this letter.

I look forward to continuing to work with you and your team on improvements to this fundamentally important legislation and on the development of the regulations.

Sincerely,

Original signed by

Diane McLeod
Information and Privacy Commissioner

[1] See the Executive Summary on pages 17-18 and also page 58 of the referenced report.

Office of the Information and
Privacy Commissioner of Alberta

Bill 34 Access to Information Act

Comments and Recommendations from the Commissioner

November 20, 2024

Contents

Explanatory Note

All section references in the following text are to Bill 34 *Access to Information Act* (AIA or the Act), unless stated otherwise. "Previous letter" refers to the letter provided by the OIPC to the Ministry of Technology and Innovation on September 23, 2024 with comments on proposed changes to the *Freedom of Information and Protection of Privacy Act* (FOIP Act). "Previous Report" refers to the March 4, 2024 entitled report *Freedom of Information and Protection of Privacy Act Comments and Recommendations from the Commissioner*, provided by the OIPC to the same Ministry on that date.

Comments and Recommendations about the Act

Expanded exceptions and carve-outs to the right of access

Sections 4(1)(t), (u), (v), and (w) combined with sections 27 and 29 creates some of the broadest exceptions to executive level government transparency, as compared to similar Canadian or international legislation.

Section 27 Cabinet and Treasury Board confidences

1. The use of blanket Cabinet privilege exemptions in section 27(1) [*"any record submitted to or prepared for"* (a) *"or created by or on behalf of"* (b)], as opposed to select categories of defined records, is a new exception that is very broad.

2. Section 27(1) not only broadens the exception for Cabinet confidences, but it also broadens the exception for Treasury Board documents in the same manner as Cabinet privilege.

3. Section 27(2) now exempts background and factual information as part of the substance of deliberations exception. This kind of information was expressly carved out of the substance of deliberations exception in section 22(2)(c) of the FOIP Act in certain circumstances. There are no exceptions to the carve-out for this information in section 27(2).

4. Section 27(3) sets out the only exception to the sections 27(2) and (3) exceptions and that is to "information that has been in a record for 15 years or more". Section 22(2) of the FOIP Act has three exceptions to the substance of deliberations exception, which are:

> (a) information in a record that has been in existence for 15 years or more,
>
> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
>
> (c) information in a record the purpose of which is to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision if
>
> (i) the decision has been made public,
>
> (ii) the decision has been implemented, or

(iii) 5 years or more have passed since the decision was made or considered.

Section 29 Advice from officials

5. Section 29(1)(a) also carves out background factual information from the right of access, which is not carved out in section 24(1)(a) of the FOIP Act.

New categories of exempt records can include virtually all communication between political staff and Executive Council members, (section 4(1)(t)), and can be especially far-reaching given that political staff can be freely defined in the regulations. Correspondence amongst Ministers and amongst MLAs are fundamental to governance and accountability and should be, with a view to the democratic principles of access to information legislation and barring some reasonable exceptions[2], subject to Albertans' right to access. Furthermore, the use of '*record … that is to be sent'* is highly subjective as it is based on intent, which is not a tangible criterion.

Regarding section 4(1)(w), where the Ministers act as the head of a department, political staff serve a public purpose, and perform public interest functions. This section exempts a broad class of government documents (not just policy deliberation, as is commonly the case under Canadian access laws) that relate to decisions that involve them. It has the potential to improperly extend access requirement exemptions to the public service. For this reason, most access to information legislation primarily focuses on the type of records, or specific and narrowly defined processes that should be exempt, not on persons.

These provisions are broad, vague and may significantly degrade the openness of Government of Alberta departments.

Other provisions under 4(1) that narrow the reach and potency of access to information include the following.

Section 4 Records to which this Act applies

In addition to those section 4(1) exceptions mentioned previously:

6. Section 4(1)(a) now includes the words "court database or any other record system used by a court". It is unclear whether this will exclude records of public bodies where a court and a public body share an information system or database.

7. Section 4(1)(m) carves out the application of the Act to records relating to a "potential prosecution", which is not a defined term and may be interpreted broadly.

8. Section 4(1)(n) refers to a record in the custody or control of a prosecutor. It is unclear when a prosecutor would have custody or control of a record as an employee of the Department of Justice, which is a public body.

[2] See e.g., Yukon *Access to Information and Protection of Privacy Act,* section 67.

9. Sections 4(1)(m) and (n) both use the term "potential prosecution". Potential is a term of probability without any defined beginning or end to the scope of this exemption, i.e. anyone may potentially be prosecuted. This may be interpreted overly broadly.

10. Section 4(dd) carves out the application of AIA to a record that is in the custody or control of (i) the Government of Canada or its agencies, or (ii) the government of a province or territory of Canada or its agencies, other than the Government of Alberta or its agencies. This is a new carve-out and it is unclear how it will be applied.

Section 24 Workplace investigations

11. Section 24 is a new exception, which excludes any information related to workplace investigations, not just personal information related to workplace investigations. "Workplace investigation" is not defined. As such, its meaning could be interpreted overly broadly to deny individuals access to records.

Section 30 Disclosure harmful to economic and other interests of a public body

12. The Section 30(1)(e) exemption for labour relations information is also a new exception. The meaning of "labour relations information" is non-exhaustive in this section and may be interpreted overly broadly.

New definitions that may impact access rights

"Electronic record"

Section 1(f) includes a definition of "electronic record".

> electronic record" means a record that exists at the time a request for access is made or that is routinely generated by a public body that can be any combination of texts, graphics, data, audio, pictorial or other information represented in a digital form that is created, maintained, archived, retrieved or distributed by a computer system [underlining added]

This definition limits any access request for electronic records to that which exist at the time the access request is made or to that which is routinely generated by a public body. This together with section 12(2) will 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 data to respond to the access request. The requirement in the FOIP Act for a public body to create a record from a record that is in electronic form under section 10(2)(a) does not appear in AIA. This carve-out is very concerning given that most information held by public bodies is now in electronic form and the narrowing of access rights in this way may have significant effects on the rights of Albertans to access electronic information in the custody or control of public bodies. Furthermore, as government advances its digital services delivery model, which may include the use of artificial intelligence and other forms of digital innovation, this carve-out could have significant implications for holding government to account in the use of data for those initiatives. In my view, this amendment takes access rights a step back, not forward.

"Information" and "record"

Section 1(k) defines "information" as "content contained in a record". This definition does not appear in the FOIP Act and will impact the right of access by limiting access to information to what is already in existence at the time of an access request. Additionally, in section 1(u) of AIA the definition of a record is as follows:

> (u) "record" means any electronic record or other record in any form in which information is contained or stored, including information in any written, graphic, electronic, digital, photographic, audio or other medium, but does not include any software or other mechanism used **to store or** produce the record [emphasis added to show addition to the definition of a "record" under the FOIP Act].

Together, these changes would mean that individuals would be able to access far less electronic information that they would be able to access today under the FOIP Act, which is an unfortunate outcome for Albertans.

Use of regulation

Deference to regulation on the following subjects shifts the balance of power from the Legislature to Executive Council and may be used to curtail effective access rights by any current or subsequent administrations, as any future changes to these regulations will be solely at a Minister's discretion.

1. Deference to regulation of the definition "political staff" in section 4(7) is problematic, as that definition is related to other new provisions such as section 4(1)(w), which will determine how much the scope of records that will be exempt is broadened.

2. The meaning of the duty to assist under section 12(1) can be determined by regulation. This duty as contained in the FOIP Act has been interpreted by the Office of the Information and Privacy Commissioner (OIPC) in numerous decisions and is an integral component of a well-functioning access to information system. This is because it is the public body, not an individual, who is in the best position to assist an applicant to determine what records they are seeking and to locate them if they are within its custody or control. Given the importance of this foundational duty, its interpretation should not be subject to regulation unless regulation is used solely for the purpose of creating operational standards and procedures, for the reasons indicated herein.

3. The attestation process for section 27 records applied by the Commissioner under section 50(7) is to be done in accordance with the regulations. This is problematic as attestation is already a weakening of the Commissioner's powers, vis-à-vis review, and the process for how this will be done will be determined by a member of the Executive Council rather than the Legislature.

Power of the head to disregard access requests

Section 9(1) of AIA permits the head of a public body to disregard access requests. This represents a shift of decision-making from the Commissioner under section 55(1) of the FOIP Act to the head of a public body. Under the FOIP Act, the Commissioner could authorize a public body to disregard a request in two circumstances:

- where the request is repetitious or systematic and processing the request would unreasonably interfere with the operations of a public body or amount to an abuse of the right to make those requests; or
- the request is frivolous or vexatious.

In section 9(1) of AIA, there are five circumstances under which a head can disregard an access request. They are as follows.

> **Power to disregard requests**
>
> **9(1)** The head of a public body may disregard a request made under section 7(1) if
>
> (a) responding to the request would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make a request because the request has been made repeatedly or in a systematic nature,
>
> (b) the request is abusive, threatening, frivolous or vexatious or is made in an abusive or threatening manner,
>
> (c) the information the request relates to has already been provided to the applicant, or has been made available to the public under section 90 or 91,
>
> (d) despite receiving further information from an applicant under section 7(3), the request does not meet the requirements of section 7(2)(c) because the public body does not have information that is sufficiently clear to enable the public body to locate and identify the record within a reasonable time with reasonable effort, or
>
> (e) the request is otherwise overly broad or incomprehensible.

The fact that this authority would shift to heads of public bodies, together with the expanded set of circumstances under which a head may disregard a request, means that it is likely that this authority will be exercised more frequently than was the case with requests to disregard made to the Commissioner.

A disregard decision made by a head is reviewable by the Commissioner under section 58(1) and can lead to an inquiry. In my view, this new authority, and the process of inquiries related to requests for review of these decisions, has the potential to cause significant delays to the right of access and to significantly increase the review work of the OIPC.

In terms of the grounds specified under this section to disregard an access request:

- Section 9(1)(b) includes the power to disregard an access request if "the request is abusive…or is made in an abusive or threatening manner". To avoid subjective and overly broad interpretations, the Act would benefit from the addition of criteria.

- Section 9(1)(c) relies on section 90 to allow public bodies to disregard access requests. Section 90(1) allows the head of a public body to "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 this Act". While this may appear as a positive development at first, sections 90(2) to 90(5) go on to outline how public bodies would be able to exempt additional categories of records from the application of AIA, including the lack of **any** oversight by the Commissioner over the information withheld in the records provided under this section, or over the fees assessed to provide these records. At best, this section will pose practical issues for individuals who would not know whether records they seek to access require an access request or not. At worst, this section could all but eviscerate individuals' access rights under access to information legislation.

- Section 9(1)(d) authorizes a head to disregard a request when an applicant does not meet the section 7(2)(c) requirements for making an access request. This provision uses ambiguous terms such as "sufficiently clear" and "reasonable" without any criteria for making these determinations. These criteria should be added to the Act to avoid overly broad interpretations. In addition, it should be clarified in this section that the public body has a duty to assist under section 12 that must be met before a request can be disregarded under this section.

- Section 9(1)(e) authorizes a head to disregard a request if "the request is otherwise overly broad or incomprehensible". Here again these terms are ambiguous. Criteria for making these determinations should be included in the Act for the same reasons previously identified. The same qualification about the obligation to meet the public body's duty to assist should be added to this section as a pre-condition for exercising this authority.

Processes associated with making an access request

Section 7(2)(c) states that an applicant must *"provide enough detail to enable the public body to locate and identify the record with reasonable time and effort"*. This wording is ambiguous and improperly places onus on the applicant. This requirement could lead to serious delays in the processing of the access request. As indicated, failure of the applicant to provide "enough detail" can result in the access request being disregarded under section 9(1)(e).

We note here that the duty in section 57 of Bill 33 *Protection of Privacy Act* for the heads of public bodies to publish a directory of personal information banks works in conjunction with section 7(2)(c) of AIA such that an applicant who is wanting to access personal information would need information about the personal information banks that exist to meet the duty to "provide enough detail". Given this, these directories must come into existence prior to passage of these changes and be specific enough to enable an applicant to meet the conditions of making an access request. To do otherwise would be unfair to the applicant.

Section 12(2)(c) lowers the standard that a public body needs to expend on providing a record, to that which is "reasonable and practical". These terms could be interpreted overly broadly and significantly narrow when a public body must provide an applicant access to a record.

Section 59(1) requires an applicant to deliver a request for review to the Commissioner and the head of the public body that received the request for access that the review relates to. It is unclear whether the Commissioner's authority to review a request will be impacted if the applicant fails to deliver the request to the head of the public body (or it is otherwise not received by the head). This is a new requirement that is not in the FOIP Act.

Section 59(2) establishes the timelines for when an applicant may request a review. Section 59(2)(ii) limits the length of time that the Commissioner can extend the time to request a review beyond the initial 60 days to another 30 days. In section 66(2)(a)(ii) of the FOIP Act, the Commissioner could extend the period to "any longer period allowed by the Commissioner". It is unclear why the Commissioner's discretion to extend has been narrowed to 30 days. There are often good reasons for taking longer than the timeframes set out in section 59(2) for requesting a review and, in my view, the Commissioner has been, and continues to be, in the best position to make these decisions.

Time extensions

Section 16 of AIA authorizes public bodies to extend timelines beyond that which is currently permitted under the FOIP Act.

Section 12 of the FOIP Act permits a public body to extend its time to respond up to 30 days beyond the initial 30-day period. An applicant must then be informed about the time extension decision and that they can complain to the Commissioner about the same. The Commissioner is authorized under section 53(2)(b) of the FOIP Act to investigate and attempt to resolve complaints that an extension of time for responding to a request is not in accordance with section 14. Under the FOIP Act, a public body can only extend beyond the 30-day extension with the permission of the Commissioner for the reasons listed in sections 14 (1)(a) to (d) and (2) of that Act. The Commissioner's decision is only reviewable by a court.

Under AIA, the authority for extending the time to respond rests solely with the head of a public body and there is no limit on the length of extensions (section 16(2)) after taking the initial 30-day extension (16(1)). There is also no limit on extensions taken under sections 16(2) to (4).

> **Extending time limit for responding**
>
> **16(1)** The head of a public body may extend the time for responding to a request for up to 30 business days if
>
> (a) the applicant agrees,
>
> (b) a large number of records are requested and more time is required to process the request, or
>
> (c) more time is needed to consult with a third party, another public body or another entity before deciding whether to grant access to a record.
>
> **(2)** The head of a public body may extend the time for

> responding to a request for additional reasonable periods in a circumstance described in subsection (1)(a) to (c).
>
> **(3)** The head of a public body may extend the time for responding to a request if multiple concurrent requests have been made by the same applicant or by 2 or more applicants who work for the same organization or who work in association with each other.
>
> **(4)** Where the head of a public body is considering giving access to a record that may contain information
>
> (a) described in section 19(1) or (2), or
>
> (b) the disclosure of which may be an unreasonable invasion of a third party's personal privacy under section 20,
>
> the head of a public body may extend the time for responding to a request or part of a request for the period of time necessary to enable the head to comply with the requirements of section 36.

A public body is required under section 16(5) of AIA to inform an applicant that they may request a review of the extension by the Commissioner. The Commissioner may conduct a review under section 58(1) and follow that process to inquiry.

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. In addition, the process for reviewing a time extension could cause delays for Albertans to access information.

I will be monitoring the use of the power of public bodies to disregard requests and to take time extensions and we will report on the same to keep the public informed about the exercise of these new authorities under AIA and any impact they may have on Albertans' access rights.

Commissioner's powers

Section 50(6) of AIA removes the Commissioner's ability to compel records over which specified exceptions and exemptions are claimed [exceptions to access for privileged and Cabinet records; exemptions from the Act for court records, Executive Council/MLA records, political staff communications]. From an oversight perspective, the Commissioner's inability to compel production of these records during a review is highly problematic for the following reasons.

- Albertans seeking access to information about government and its processes need an independent review of public bodies' responses to their access requests.
- The OIPC was created in large part to provide such independent reviews in an accessible, timely and affordable manner.

- The 2016 Supreme Court of Canada decision that the Commissioner is unable to compel records for her review over which *privilege* has been claimed has already significantly weakened the Commissioner's processes for this (often claimed) category of records. Alternative evidence as to whether the claimed exception applies can be unsatisfactory and often takes extra time; the Commissioner must make orders without access to the best evidence when it is needed (the records themselves); public bodies have the resources to challenge such orders and do so routinely, but applicants most often do not.

- Court challenges to access orders by public bodies create lengthy delays and increased use of court resources, expenses which are paid for by Albertans several times over (at the public body level, within the court system and at the OIPC), for a task that is readily performed by a dedicated OIPC expert in information access. Several jurisdictions in Canada have access laws that permit the Commissioner to have authority over this kind of information so that the Commissioner can perform their oversight role. See, for example, the Federal *Privacy Act*[3], the Federal *Access to Information Act*[4], Saskatchewan's *Local Authority Freedom of Information and Protection of Privacy Act*[5], British Columbia's *Freedom of Information and Protection of Privacy Act*[6], and Yukon's *Access to Information and Protection of Privacy Act*[7].

- Providing the Commissioner with records over which exceptions/exemptions are claimed does not unduly compromise the confidentiality of records; the Commissioner compels/reviews the records only when necessary and then returns them; an Order to disclose such records is subject to judicial review.

- For the reasons above, the OIPC has recommended on numerous occasions that the power to compel privileged records be restored. The amendments in this section overlook this recommendation, and instead expand the inability to compel to cover many additional categories of records.

- The justification for further undermining the Commissioner's decision-making ability under AIA and the Commissioner's ability to provide a timely and affordable review for a significant additional number of record categories is unclear.

In terms of sections 62(3) and (4), my view is that these provisions encroach on the Commissioner's authority and ability to determine the Commissioner's own process. Confirmation on proceeding with issues not resolved at mediation is built into the current process. Furthermore, the significance of this

[3] Section 34(2.1).
[4] Section 36.
[5] Section 43(1). The Saskatchewan Court of Appeal (SKCA) held at para 7 that section 43(1) of the LAFOIPA empowers the SK Commissioner "to require the production of records claimed to be subject to solicitor-client privilege". However, in the circumstances of this case, the Commissioner should not have requested the records. At para 37 (and throughout the SCP discussion starting at para 29) the SKCA distinguished the *LA FOIPA* from the SCC's U of C case, 2018 SKCA 34.
[6] Section 44(3).
[7] Section 95(1)(c)(ii).

power is to ensure that the Commissioner is able to move a matter to inquiry without the participation of an applicant when there is a need to clarify the interpretation of a provision.

I am of the view that there should be a provision under section 64(3) to allow the Commissioner to order that no further action is required.

Inquiry procedural matters

In sections 63(2) and (3)(a) the burden of proof is procedurally unfair, as it would require the applicant to prove facts about information they do not have insight into.

While section 50(5) clarifies the duty for the OIPC to return records following review, this section should further clarify that this duty is only triggered when the Commissioner requires the public body to produce records under sections 50(2) to (4).

Impact on the resources of the OIPC

As indicated herein, it is my view that the workload of the OIPC, particularly as it relates to reviews, will be significantly increased by AIA. To adequately fulfill its regulatory function under this Act as set out therein, the OIPC must be adequately resourced for this work or its role in the legislative scheme will not be effective in upholding the access rights of Albertans.

Recommendation

My recommendation as it relates to my comments herein is that the potential changes to the access to information system in Alberta, as they currently appear in Bill 34 and are highlighted above, be reconsidered, such that the access rights of Albertans under AIA are restored, if not improved, through amendments to this Bill.