

OPEN AND ACCESSIBLE GOVERNMENT –
MODERNIZING THE
*FREEDOM OF INFORMATION AND
PROTECTION OF PRIVACY ACT*

Open and Accessible Government -

Modernizing the *Freedom of Information and Protection of Privacy Act*

Rigorous, efficient and timely access to information is an important pillar of accountability for government.

Government has taken significant steps in improving access to information about the work of government.

Open government

Government has made a greater range of provincial government information public, including:

- making ministerial mandate letters public
- expanding the disclosure expenses of ministers
- expanding disclosure policies to include senior staff
- introducing public interest disclosure and whistleblower legislation

Government is also working on a Lobbyist Registration Act and campaign finance reform.

Open data

With the launch of the new government website in 2016, a variety of open data sets became available to the public.

Government's work on open data has continued, with more than 40 open data sets available online, from school enrollments to vehicle sales to motor vehicle collisions.

In the coming months, government will launch a powerful open data platform to enhance public access to government data. The new open data platform will enable government to easily disseminate more information to Islanders.

Progress on open data will be measured annually and expanding the list of open data sets will be a priority for government.

Freedom of Information

Through the *Freedom of Information and Protection of Privacy Act (FOIPP Act)* the public is granted rights to access certain information held by public bodies.

In 2017, Prince Edward Island received an A-rating for its access to information practices from the Canadian Newspaper Association annual "Right to Know Audit"

PEI's *Freedom of Information and Protection of Privacy Act* was proclaimed 15 years ago. The number of access requests received by government increases each year.

- Political parties submit 46% of access requests
- 65% of all requests are answered within 30 days
- Records are granted in full, or in part in 70% of requests
- Responding to requests involves responding to more than 14,000 pages of records annually
- The number of requests has increase substantially. In 2012, there was 59 requests, and in 2016, there were 317 requests

Generally, a public body must respond to access requests within 30 days. There are certain circumstances that may extend this time. There is a \$5 application fee to request access to general records. There is no charge for making a request to accessing your own personal information, or for correction to your personal information. Additional fees may be charged if the time required to process your request exceeds two hours, but the public body will provide a fee estimate.

Protection of Privacy

The *Freedom of Information and Protection of Privacy Act* also protects the personal information of individuals if that personal information is held by public bodies.

- 4% of FOIPP requests handled by government are related to privacy concerns about how a public body is using personal information

Access and Privacy Services Office

Government's Access and Privacy Services Office handles access to information requests and guides government in the protection of personal information it collects, uses and discloses.

Information and Privacy Commissioner

The Information and Privacy Commissioner is an independent officer of the Legislative Assembly who handles appeals of decisions made by government related to the access to information. The Commissioner also investigates any privacy complaints brought forward.

Public Bodies

Today, more than 125 public bodies are subject to the *FOIPP Act*. This includes government departments, provincial agencies, boards and commissions, crown corporations and school boards. This does not currently include the Legislative Assembly, municipalities, police, or post-secondary institutions.

Modernizing the *FOIPP Act*

Much has changed since the introduction of the *FOIPP Act*, including technological changes to the way information is collected and changes to the methods of communication between the public and government. In addition, a number of parties have made recommendations for modifications of the *FOIPP Act*, including:

- Standing Committees of the Legislative Assembly
- The Office of the Information and Privacy Commissioner
- Individuals and groups who use the *FOIPP Act* on a regular basis such as media and political parties

Government has announced its intention to modernize the *FOIPP Act*. Modernization will help ensure:

- public bodies continue to be transparent and accountable,
- citizens are engagement in matters of public policy,
- the quality of government decision-making is strengthened,
- the privacy of individuals and third parties is enhanced.

Seeking input

The Government of Prince Edward Island is seeking input in a number of areas of the *FOIPP Act*. Keeping in mind the progress made on open government, the changes to technology, and planned continued improvements to the proactive disclosure of information, government has several key questions about the renewal of the *FOIPP Act*.

This discussion paper outlines some of these key questions, along with some known omissions and modernizations in the *FOIPP Act* that need to be addressed in amendments. Submissions need not be confined to the highlights summarized in this paper. Every submission received will be considered. At the end of this consultation process, Government intends to table amendments to the Act in the interest of improving access to public information and strengthening the protection of personal privacy.

Key Questions

What records should be covered by the *FOIPP Act*?

What data sets should be considered for proactive release, meaning individuals don't need to go through the FOIPP process to obtain the information?

Should additional organizations be added to the *FOIPP Act*, such as municipalities, police and post-secondary institutions?

FOIPP fees are intended to partially offset the cost of administration of the *FOIPP Act*. What changes should be made to the fees for information requests?

How should unreasonable, repetitive, vexatious or frivolous requests for information be handled under the *FOIPP Act*?

Currently the *FOIPP Act* requires some information be provided by mail. Should these definitions be expanded to electronic communication?

Should the *FOIPP Act* be reviewed on a regular basis, and if so, how often?

PART I: SCOPE

Records

Section 4(1) of the *FOIPP Act* defines the "records" to which the legislation applies. It includes all records in the custody or under the control of a public body, but excludes a limited list of records. Under the legislation, government records must be disclosed under the Act regardless of whether they are within its custody, or beyond its custody, but in its control, regardless of device or account.

The review will consider whether the existing provisions best reflect most current practices in access legislation.

Over time, other jurisdictions have refined or supplemented this list of records. For example, in some jurisdictions, exception is made for quality assurance records, information collected by the Ethics and Integrity Commissioner, published works collected by a library of a public body, information part of a review of the Auditor General, and health information. You are invited to consider and suggest what records, if any, ought to be included or excluded from the *FOIPP Act*.

Solicitor-Client Privilege

A recent decision of the Supreme Court of Canada on similar legislation in Alberta concludes that the province's Information and Privacy Commissioner is not authorized under Freedom of Information legislation to obtain records from a public body that are protected by solicitor-client privilege. In order to grant that authority to the Information and Privacy Commissioner, the *FOIPP Act* would need explicit and specific amendment to displace solicitor-client privilege. Concerns around the waiver of that privilege; the willingness of a public body to obtain professional legal advice; and the effects, if any, on the quality of public decision-making may all be relevant. Your input is welcomed.

Time

The *FOIPP Act* contains a number of time limits that protect certain types of records and information from disclosure. For example, a time limit of 20 years protects:

- information that could reasonably be expected to harm intergovernmental relations, as per s. 19(4);
- Cabinet confidences, as per s. 20(2)(a);
- confidences of a public body, as per s. 21(2)(b); and
- information that could reasonably be expected to reveal advice to public officials, as per s. 22(2)(a).

The length of these time limits may no longer be appropriate in all cases. In some jurisdictions, a time limit of 10 years is used. In other jurisdictions, the time limit is 25 years. For example, the Office of the Information and Privacy Commissioner has recently recommended that these time limits be reduced to 15 years. We encourage suggestions as to the appropriate time limits for each type of information and the reasons, if any, why these limits ought to be changed.

Public Bodies

Section 1(k) of the *FOIPP Act* defines the phrase “public body” for the purpose of the legislation. In addition to the bodies listed in s. 1(k)(i)-(iv) of the *FOIPP Act*, Schedule I of the *General Regulations* designates more than 125 departments, corporations, and other entities as public bodies. All are subject to the *FOIPP Act*. However, the number of organizations subject to access to information and privacy legislation varies from jurisdiction to jurisdiction. Depending on the nature, function, and practices of the organization, it may or may not be appropriate to designate them as a public body under the *FOIPP Act*. For example, some jurisdictions include municipalities, colleges, and universities under their general access to information legislation. At present, the *FOIPP Act* does not. We welcome your submissions regarding the scope of the *FOIPP Act*.

PART II: EFFICIENCY

Fees

The collection of fees under the *FOIPP Act* was intended to offset, in part, the expenses incurred by public bodies in order to locate, retrieve, and disclose records being sought. Currently, the initial fee for an access to information request is \$5. Additional fees may be charged when the amount of time expended by a public body exceeds 2 hours. The general rate is \$10 per half hour. These fees are set forth in Schedule II of the *General Regulations*. It is not clear, however, that this recovery objective is being achieved. For example, as of the date of this paper, the fees collected in 2017 total \$2,497. The fees being charged for access requests vary from jurisdiction to jurisdiction. In Prince Edward Island, for example, various suggestions have been made in relation to fees, including a recommendation to increase the charge for locating and retrieving records from \$10 per half hour to \$15 per half hour. It has also been suggested that the free processing period be increased from two hours to three hours. We welcome your input as to what fees, if any, should be charged for responding to access to information requests.

Unreasonable, Repetitive, Vexatious or Frivolous Requests

Section 52 of the *FOIPP Act* currently authorizes a public body to disregard a request for access to information where the request would unreasonably interfere with the operations of the public body, is an abuse of the access right, is a repetitive or systemic request, or is frivolous or vexatious. These types of requests are recognized as not reflecting the intention of the *FOIPP Act*. However, in order to exercise this authority, permission is required from the Information and Privacy Commissioner. Given the obvious impact that these types of requests have on the resources of public bodies and their ability to process legitimate requests in a timely way, other jurisdictions are considering whether to give the heads of public bodies the ability to decline, on their own initiative, a request that seeks information that has already been disclosed or is available by other means, would unreasonably interfere with the operations of the public body, or constitutes a request that is vexatious, made in bad faith, or is otherwise an abuse of the right of access. Any such refusal would, however, still be subject to independent review by the Information and Privacy Commissioner. We welcome your suggestions as to what steps, if any, should be taken to address requests that do not reflect the intention of the *FOIPP Act*.

Time Constraints

The *FOIPP Act* imposes a number of time constraints on public bodies who receive requests for access to information. However, not all steps under the *FOIPP Act* are subject to these constraints. For example, s. 76(4.1) of the *FOIPP Act* does not insist on any time period for making a decision regarding a request for the waiver of fees. In other jurisdictions, this type of decision must be made within 30 days. You are invited to consider whether any new time constraints ought to be added to the *FOIPP Act* to improve efficiency.

PART III: CLARITY

Definitions

Section 1(i) of the *FOIPP Act* defines the meaning of “personal information” for the purpose of the legislation. Given that the *FOIPP Act* was introduced in 2002, that definition does not include new forms of personal information, including an email address or an individual’s biometric information or genetic information. Similarly, the term “record” is defined in s. 1(l) of the *FOIPP Act* to include audiovisual recordings; however, the definition does not expressly refer to other electronic or digital records. Consideration may be given to modernizing these definitions to include current forms of information and recordkeeping. Your suggestions on this subject are encouraged.

Errors and Omissions

Over the last 15 years, the *FOIPP Act* has been read, interpreted, and applied on thousands of occasions by individuals, public bodies, legal professionals, and the Information and Privacy Commissioner. Errors and omissions have surely been identified during this period and may now be corrected through amendments. For example, consideration may be given to the following:

- a response pursuant to s. 10(1) of the *FOIPP Act* may be clarified to confirm that the response is prepared by a public body;

- s. 34(1) the *FOIPP Act* uses the term “applicant” when the word “individual” appears to be more appropriate because the former term is defined to have a specific meaning by s. 1(a.1) of the *FOIPP Act*; and
- s. 37(1) of the *FOIPP Act* may require expansion to include certain public offices that act for, and on behalf of, other individuals, such as the Public Trustee and the Children’s Lawyer.

If you have identified any apparent errors or omissions in the *FOIPP Act*, submissions are welcomed. They may help to clarify the nature and intent of the legislation.

PART IV: RENEWAL

Mail

There are a number of provisions in the *FOIPP Act* that require information or notice to be provided by mail, including ss. 15(2)(b), 30(4), and 70. Given the prevalence, reliability and speed of electronic means of communication, consideration may be given to allowing information or notice under the *FOIPP Act* to be provided in writing. Ordinary mail could still be available as a secondary mechanism for delivering information to individuals and third parties under the *FOIPP Act*. Your suggestions to modernize the *FOIPP Act* are encouraged.

Review Process

When the *FOIPP Act* was introduced, s. 79 of the legislation stated that it would be subject to a comprehensive review by a Standing Committee of the Legislative Assembly within 3 years. In 2004, the Standing Committee on Community Affairs and Economic Development conducted a review of the *FOIPP Act* and recommended amendments. Some of those amendments were made in 2005. A similar review was conducted in 2008, and recommendations were made in 2009. However, no additional amendments were legislated. The *FOIPP Act* currently contains no statutory obligation for periodic reviews. Given the evolving nature of privacy and the development of new methods for collecting, using, and sharing information, consideration may be given to whether the *FOIPP Act* should be amended to specifically require that reviews be undertaken at certain intervals. In some other jurisdictions, a statutory review must be undertaken every 5 or 6 years. We welcome your thoughts on whether these review processes are necessary and, if so, at what intervals.

PART V: RESPONSIBILITY

Offences and Penalties

Section 75(2) of the *FOIPP Act* currently provides that any person who contravenes s. 75(1) of the *FOIPP Act* is guilty of an offence and liable to pay a fine of not more than \$10,000. A similar maximum penalty is found in s. 74.1(2) of the *FOIPP Act*. Given the passage of time, the value of personal privacy in our modern society and the important public interests protected by the *FOIPP Act*, it may be questioned whether the existing offences and maximum penalty provide sufficient deterrence. In some jurisdictions, these penalties have been increased and mandatory minimum penalties introduced. You may consider whether similar changes to the *FOIPP Act* would promote further responsibility amongst those subject to the legislation. Submissions regarding the types of offences prohibited by the *FOIPP Act*, and the scale of the penalties that are currently available to be imposed by the court, are welcomed.

SUBMISSIONS

The Government of Prince Edward Island is committed to modernizing the *FOIPP Act*. And it is hoped that this discussion paper will encourage a principled dialogue amongst stakeholders about how to strengthen this important legislation. By working together, we can continue to ensure that our public bodies are accountable, our citizens are engaged, our public decision-making is of the highest quality, and our personal privacy is protected from harm. Thank you for your input and ideas regarding amendments to the *FOIPP Act*.

Submissions may be directed by email to bwbarbour@gov.pe.ca or by mail to Blair Barbour, Manager of Policy, Planning & FPT Relations, Justice and Public Safety, 95 Rochford Street, Shaw Building (South), PO Box 2000, Charlottetown, PEI, C1A 7N8. The deadline for submissions is Friday, February 23, 2018.