

Internal Review Committee
report in consideration of the
Freedom of Information and Protection of Privacy (FOIPP) Act

May 24, 2013

Acknowledgements

The Department of Environment, Labour and Justice led an internal review of the Freedom of Information and Protection of Privacy (FOIPP) at the direction of Policy Board. The process included employees of the department as well as employees of Finance, Energy and Municipal Affairs, Communications Prince Edward Island and Innovation and Advanced Learning. Every participant generously contributed to the process by sharing their experience and energy. The committee met on six occasions between November 2012 and January 2013. The Deputy Minister recognizes and appreciates the contribution of each participant.

Internal Review Committee Membership:

- **Gordon Garrison**, Acting Director, Community Safety and Justice Policy Division, Environment, Labour and Justice
- **Kathryn Dickson**, Access and Privacy Services Manager, Environment, Labour and Justice
- **Jessie Frost-Wicks**, Legal Counsel, Environment, Labour and Justice
- **Joanne MacKinnon**, Policy and Planning Coordinator, Environment, Labour and Justice
- **Ron Ryder**, Senior Communications Officer, Communications Prince Edward Island
- **Camilla MacAleer**, FOIPP Coordinator, Innovation and Advanced Learning
- **Jennifer MacDonald-Donovan**, FOIPP Coordinator, Finance, Energy and Municipal Affairs
- **Debbie Cullen**, Administrative Support, Environment, Labour and Justice
- **Kristopher Butler**, Resource, Environment, Labour and Justice

Also, contributing to the internal process was Information and Privacy Commissioner Maria MacDonald. The Commissioner plays an independent, but an integral, role in access and privacy oversight to benefit public bodies and the public at large. The Commissioner's feedback has been included in the recommendations and her contribution is appreciated.

Executive Summary

The *FOIPP Act* was proclaimed in 2002 with the promise of accountability, openness and transparency. The Act provided a right of access to information while ensuring the protection of personal privacy. *The Act* is based upon Alberta's Act of the same name.

In September 2012, Policy Board directed the Department of Environment, Labour and Justice to lead an internal review of the *FOIPP Act*. The Board directed the inclusion of proactive disclosure in the internal review process and the review mandate was later expanded to include a review of staffing models used by other jurisdictions to perform access and privacy-related responsibilities.

As part of the mandate, departments were invited to submit their challenges applying the *FOIPP Act* for consideration by the Internal Review Committee. Transportation and Infrastructure Renewal, Innovation and Advanced Learning, Agriculture and Forestry, the Public Service Commission, the Crown Attorney/Legal Aid Office and Community Services and Seniors each provided submissions.

Since 2002, the Alberta Act has undergone several review processes resulting in substantive changes. The Internal Review Committee considered the Alberta amendments to determine which should be adopted.

As the Prince Edward Island Act was adapted from Alberta's many of Alberta's interpretations, resource materials and decisions are used by Prince Edward Island. It is therefore important to ensure the Prince Edward Island *FOIPP Act* remains as similar to Alberta's FOIP Act as reasonably possible.

The Internal Review Committee also considered a report of the Standing Committee on Community Affairs and Economic Development that was presented to the Legislative Assembly on April 16, 2009. . The Acting Commissioner of that time, Judy Haldemann had submitted recommendations for amendments to the Act and appeared before the Committee in January 2009 and the Standing Committee endorsed 16 of these recommendations.

Finally the committee considered access and privacy trends occurring in other Canadian jurisdictions, as well as several items that were suggested by public bodies.

The resulting 36 recommendations are presented in this report. Items that were considered by the Committee, but did not result in action recommendations are listed in Appendix A.

Recommendations have been presented in the following themes:

- Proactive Disclosure
- Fees
- Public Bodies
- Proposed amendments to the *FOIPP Act* that would be relatively simple to invoke.
- Proposed amendments to the *FOIPP Act* that would require consultation with stakeholders prior to implementation.

Introduction and Background

Requests to Access Information Received per Province/Territory*

Jurisdiction	Pop**	Requests 2010-2011	Requests 2011-2012
Nunavut	33.7	119	149
Yukon	36.1	420	422
NWT	43.3	70 (2008-2009)	not available
Prince Edward Island	146.1	110	87
Newfoundland and Labrador	512.7	576	555
New Brunswick	756.0	370	426
Nova Scotia	948.7	1,636	1,870
Saskatchewan	1,080.0	1,470	1,591
Manitoba	1,267.0	2,292	2,120
Alberta	3,873.7	4,264	not available
British Columbia	4,622.6	7,939	8,423
Quebec	8,054.8	1,958	2,062
Ontario	13,505.9	15,161	17,158

* most recent statistics available as reported by jurisdictions

** per thousands 2012, source: Stats Canada

Prince Edward Island receives relatively few FOIPP requests when compared with other jurisdictions. However, when compared on a per capita basis, PEI processes a comparable number of requests. On average, about 100 requests per year are received.

Many FOIPP requests are reasonably straightforward and most are processed within the 30-day time frame legislated by the *Act*. However, in recent years there have been a growing number of requests that seek larger quantities of records which require public bodies to devote more time to searching and processing requests.

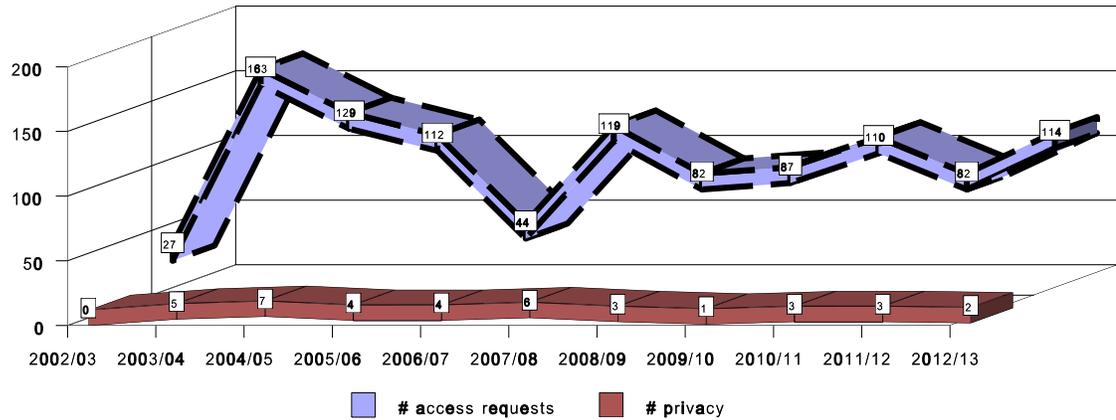
When an applicant disagrees with a decision made by a public body, he or she can request the decision be reviewed by the Office of the Information and Privacy Commissioner (OIPC). OIPC is reporting an increase in the number of review requests recently: from seven in 2010 to 17 in 2011.

FOIPP Coordinators must prepare submissions and complete documentation necessary to respond to a review. These tasks are often more time-consuming than the time required to process the original request to access information. A significant number of requests for review involve disputes over processing fees being charged by the public body.

While the number of requests received year-to-year by the Prince Edward Island government fluctuates, overall most requests have been received by a core group of government organizations including:

- Environment, Labour and Justice;
- Health PEI;
- Innovation and Advanced Learning;
- Transportation and Infrastructure Renewal;
- Finance, Energy and Municipal Affairs;
- Community Services and Seniors;
- English Language School Board: and
- Education and Early Childhood Development

Total Access to Information Requests and Privacy Complaints per Year



Total Requests to Access Information Received per Public Body or Designated Public Body = 1095

236	Environment, Labour & Justice	20	Health and Wellness
193	Health PEI	14	PEI Liquor Control Commission
85	Innovation & Advanced Learning	13	Island Waste Management Corporation
83	Transportation & Infrastructure Renewal	6	Legal Aid
77	Finance Energy & Municipal Affairs	5	Fisheries, Aquaculture & Rural Development
65	English Language School Board	4	Island Regulatory & Appeals Commissions
58	Community Services & Seniors	1	Elections PEI
48	Education & Early Childhood Development	2	French Language School Board
40	Agriculture & Forestry	1	Fathers of Confederation Trust
35	Workers Compensation Board	0	Police Commissioner
31	Tourism & Culture	0	Auditor General
29	Executive Council	0	Workers Compensation Appeal Tribunal
21	Public Service Commission	0	Human Rights Commission
22	Premieres Office	4	Community & Cultural Affairs (no longer exists)

Proactive Disclosure

There are three methods for the public to access information from public bodies

- *Proactive disclosure* occurs when information or records are periodically released, without any request, under a program or release strategy. Active dissemination is best used where there is a strong and constant demand for information by the public.
- *Routine disclosure* occurs when access to a record can be granted in response to a routine inquiry or request, without a request under the *FOIPP Act*.
- *FOIPP* process to request information from government is formal and legislated. When it becomes clear that the request involves records that cannot be released outside a formal process (such as personal information about a third party) the FOIPP process is appropriate.

Every jurisdiction that has implemented freedom of information legislation has found that there has been considerable and ongoing demand for contracts, travel claims, major reports and plans, internal audits, tax and regulatory rulings, and inspection records. An open government philosophy recognizes these demands and proactively provides the information to the public.

The internal review committee studied the types of information being disclosed proactively by other jurisdictions and considered the types of records which are commonly requested and released through routine disclosure.

The federal government and its departments are currently leaders in proactive disclosure. Federal policy requires proactive disclosure of information related to expenses, contracts, grants and contributions, and position classifications. To this end, the federal government publishes the expenses of Ministers and their staff, MPs, Deputy Ministers and Senior Officials regularly. Expenses of politicians and senior employees are also disclosed by Alberta, Nova Scotia, New Brunswick, Ontario and British Columbia.

The federal government also discloses contracts (of \$10,000 or more), as do Newfoundland and Labrador, Nunavut, the Yukon and Quebec.

The federal government, Newfoundland and Labrador, Quebec, Manitoba and British Columbia all disclose information around FOIPP requests (a summary of the request and the outcome including details about the number of pages disclosed), by publishing details in annual reports, or posting statistics to websites.

British Columbia and Newfoundland and Labrador go a step further and publish copies of the records released through general FOIPP requests on a website, thus making the records available to everyone.

Many jurisdictions have indicated they are currently considering their options to expand proactive and/or routine disclosure of information.

As the committee was tasked to consider proactive disclosure specifically, it did not consider routine disclosure. Routine disclosure is an option that could result in the appropriate disclosure of more information outside of the FOIPP process and is also worthy of consideration. For example, Nova Scotia has a routine disclosure policy and reports annually on the number and outcome of routine information requests received. According to their 2009 annual report, more than 3,000 requests to access routine information were received.

An expanded disclosure program will require the assignment of additional responsibilities and the development of processes to facilitate this higher level of information sharing. However, it should also reduce the number of FOIPP requests and ensure that Prince Edward Island keeps pace with disclosure practices of other jurisdictions.

Recommendations:

- 1. Proactive disclosure of the expenses of members of Deputy's Council, Executive Assistants and all MLAs.**
- 2. Proactive disclosure of contracts/grants.**
- 3. Proactive disclosure of FOIPP requests including number, applicant type and outcome of request.**
- 4. Public bodies should make records such as manuals, handbooks or other guidelines used in making decisions that affect the public available to the public by request (routine disclosure) or by publishing to website (proactive disclosure).**

Fees

"Part of the balancing act involves the burden of the cost of disclosure to the taxpayer on one side and open and transparent government on the other side."

– Alberta Information and Privacy Commissioner in Order 96-002

"I wish to point out that the access to information process set out in the Act is not a user pay system. The fee structure set out in the Regulation to the Act, in most cases, does not reflect the actual cost to the Public Bodies of complying with requests under the Act, just a portion of it. Certainly, the time estimates set out in the Regulation do not accurately reflect the actual time expended to fulfill an Applicant's request. In addition, as I pointed out earlier, fees are not mandatory and are only charged if the Public Body decides after careful consideration that they should be charged."

– Prince Edward Island Information and Privacy Commissioner in Order No. 03-001

An important principle underlying the *FOIPP Act* is the use of fees to help offset the cost of providing applicants with access to records.

The *Act* provides for a reasonable and fair fee structure that is intended to support effective provision of FOIPP services. Fees are listed under Schedule 2 of the regulations and have remained unchanged over the past ten years.

A scan of fees charged across the country show public bodies charge a variety of fees. Six jurisdictions charge no initial fee to submit a FOIPP request, two charge \$25, and four (including Prince Edward Island) charge \$5.

Fees of various amounts are charged to applicants to locate and retrieve records as well as handle and prepare records. The fees are determined by each jurisdiction and range from zero to \$30 per hour. Alberta and NWT offer 5.5 hours of free processing time, Yukon and British Columbia offer three hours. Two free hours is the standard for Prince Edward Island and four other jurisdictions.

According to those who process requests, many files are processed in three hours or less. Fees are most useful when managing vague or overly-general requests, which tend to increase workloads and lead to release of large amounts of information that is of little interest to the applicant. In these cases, fees are a useful tool to persuade applicants to narrow the focus their request, benefiting both parties.

Fees Assessed by Canadian Jurisdictions

Jurisdiction	Initial Fee* (General)	Processing Fees*	"Free"
North West Territories	\$25	\$27/hour	up to \$150 or approximately 5.5 hours
Prince Edward Island	\$5	\$20/hour	first 2 hours
Nunavut			
New Brunswick	0	0	NA
Yukon	0	\$25/hour	first 3 hours
Newfoundland and Labrador	\$5	\$15/hour	first 2 hours
Saskatchewan	0	\$30/hour	first 2 hours
Nova Scotia	\$5	\$30/hour	first 2 hours
Quebec			
Manitoba	0	\$30/hour	first 2 hours
Alberta	\$25	\$27/hour	up to \$150 or approximately 5.5 hours
British Columbia	0	\$30/hour	first 3 hours
Ontario	\$5	\$30/hour	none

* Applicants who request their personal information are subject to photocopying fees only. The above table reflects fees for general information requests.

Recommendations:

5. **Fee rates for locating and retrieving/ preparing and handling/ supervising the examination of records to be increased from \$10 per half hour to \$15 per half hour.**
6. **The free processing period to be increased from two hours to three hours.**
7. **The elimination of the initial application fee to request general records.**

Public Bodies Obligated to Comply with the Act

Prince Edward Island is the only province that does not require municipalities, universities or colleges to comply with a *FOIPP Act*. There are a few other jurisdictions where compliance by these types of organizations is not legislated. They include the North West Territories and the Yukon. Nunavut includes the Arctic College of Nunavut as a public body, but does not include municipalities.

The most recent jurisdiction to include universities, community colleges and municipalities is New Brunswick. They came under the *Right to Information and Protection of Privacy Act* on September 1, 2012. The inclusion of these bodies in New Brunswick was in response to a recommendation by a 2007 task force and followed discussions with universities, municipalities and other affected parties. There have also been local media reports questioning why Prince Edward Island is the only province that does not require municipalities, universities or colleges to comply with the *FOIPP Act*.

The committee believes there would be a benefit to including these organizations, so as to ensure citizens can request access to such records. However, the committee also acknowledged these organizations would be subjected to additional costs, if they were included. The committee also considered that the potential for increased requests for decisions to be reviewed would place an additional burden to the Office of the Information and Privacy Commissioner. Ultimately, any increased costs associated with expanding the Act would be shouldered by taxpayers.

In addition to expanding the Act to include municipalities, universities and colleges, the committee reviewed the process for designating public bodies under the Act. Currently all departments, agencies, boards and commissions that are designated public bodies are listed in Schedule 1 of the *FOIPP* General Regulations. However, there is no mechanism to ensure that when new public bodies are created or current public bodies are renamed or dissolved the Schedule is updated.

Recommendations:

- 8. That further research be done on the possible inclusion of municipalities, colleges and universities under FOIPP and that the affected bodies be consulted as part of this work.**
- 9. An internal protocol be established and evaluated for the purpose of ongoing identification and promotion of designated public bodies of government.**

Amendments to Freedom of Information and Protection of Privacy Legislation

The following recommendations to the *FOIPP Act* should be relatively simple to invoke without need for further consultation. All are based on either amendments to Alberta's Act or the recommendations of the 2009 Standing Committee on Community Affairs and Economic Development. Generally the purpose of all recommended amendments is to improve clarity or to modernize the Act.

Recommendations:

10. ***The FOIPP Act*, section 1(i)(v) - titled "Personal information" be amended to read "the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics."** (Source: *Alberta amendment*)
11. ***The FOIPP Act*, section 1(l) - titled "Record" be amended by the deletion of the phrase "audiovisual recordings" and the substitution of the words "audio, visual, or audio-visual recordings."** (Source: *Standing Committee on Community Affairs and Economic Development*)
12. ***The FOIPP Act*, section 4(1)(h)(v) - titled "Records to which this Act applies" be amended to refer to records made from information "in a registry operated by a public body if that registry is authorized or recognized by an enactment and public access to the registry is normally permitted."** (Source: *Alberta amendment*)
13. ***The FOIPP Act*, section 4 (1) - titled "Records to which this Act applies" be amended to add an exclusion of published works collected by a library of a public body in accordance with the library's acquisition of materials policy.** (Source: *Alberta amendment*)
14. ***The FOIPP Act*, section 9(2) - titled "Failure to respond" be amended by the deletion of the words "is to be treated as" and the substitution of the words "is deemed to be."** (Source: *Standing Committee on Community Affairs and Economic Development*)
15. ***The FOIPP Act*, section 10(1) - titled "Contents of response" be amended by the deletion of the words "In a response under section 9" and the substitution of word "In a response by a public body under subsection 9(1)".** (Source: *Standing Committee on Community Affairs and Economic Development*)
16. ***The FOIPP Act*, section 15(2)(b) - titled "Where disclosure not an**

- unreasonable invasion of a third party's privacy" be amended to eliminate the requirement to provide notice by mail. Instead it is required simply that "written notice of the disclosure is given to the third party." (Source: Alberta amendment)
17. *The FOIPP Act*, section 15(2) - titled "Where disclosure not unreasonable invasion of a third party's privacy" be amended to clarify that third party notice is not required if section 27 is applicable to the information, if for example, the information is readily available to the public, is available for purchase, or is to be published within 60 days of the request. (Source: Alberta amendment)
 18. *The FOIPP Act*, section 30 (4) - titled "Notice" be amended to require the public body to "give written notice of the disclosure" rather than "mail a notice of disclosure." (Source: Alberta amendment)
 19. *The FOIPP Act*, section 34 (1) - titled "Right to request correction of personal information" be amended to replace the term "applicant" with wording that refers to an "individual." This amendment was made because section 1(a.1) of the Act defines "applicant" to mean a person who makes a request for access to a record under section 7(1) and not a person who makes a request for correction of personal information under section 34. (Source: Alberta amendment)
 20. *The FOIPP Act*, section 36(1) (c) - titled "Use of personal information" be amended by the deletion of the word "to" and the substitution of the word "by". (Source: Standing Committee on Community Affairs and Economic Development)
 21. *The FOIPP Act*, section 37 (1) (c.1) - titled "Disclosure of personal information" be amended by the addition of the following: to the Public Trustee. (Source: Standing Committee on Community Affairs and Economic Development)
 22. *The FOIPP Act*, section 37(1)(f) - titled "Disclosure of personal information" be amended to state that a public body may disclose personal information for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body having jurisdiction in Prince Edward Island. (Source: Alberta amendment)
 23. *The FOIPP Act*, section 40 - titled "Disclosure for research purposes" be amended to delete the former reference to disclosure for research purposes. (Source: Alberta amendment)

24. ***The FOIPP Act, section 52 - titled “Power to authorize a public body to disregard questions” be amended to add that the processing of a request under section 7(1) ceases when the head of a public body has made a request under section 52 and (a) if the Commissioner authorizes the head of the public body to disregard the request, does not resume; (b) if the Commissioner does not authorize the head of the public body to disregard the request, does not resume until the Commissioner advises the head of the public body of the Commissioner’s decision. (Source: Alberta amendment)***

25. ***The FOIPP Act, section 56 - titled “Restrictions on the disclosure of information by the Commissioner and staff” be amended by the addition of wording to afford enhanced protections for the confidential information provided to the Commissioner and her/his staff. Wording originally included in the 2009 report of the Standing Committee on Community Affairs and Economic Development stated that the Commissioner is not a competent witness. However, it is more appropriate to indicate that neither the Commissioner nor their staff can be compelled as a witness. This significant distinction is suggested by the current Commissioner who supports the amendment with revised language.***

Rationale: This would afford enhanced protections for the confidential information that is provided to the Commissioner and her/his staff.(Source: Standing Committee on Community Affairs and Economic Development and M. MacDonald, Office of the Information and Privacy Commissioner)

26. ***The FOIPP Act, section 61(3) - titled “Failure to respond constitutes refusal” be amended by the deletion of the words “is to be treated as” and the substitution of the words “is deemed to be”. (Source: Standing Committee on Community Affairs and Economic Development)***

27. ***The FOIPP Act, section 75 - titled “Offences” be amended with the following addition: Where an application for judicial review has been made in respect of an order of the Commissioner made under this Act, the court may, on application, seal the records filed by the Commissioner with the court. (Source: Alberta amendment)***

28. ***The FOIPP Act, section 76 (4.1) - titled “Notice on refusal to excuse fee” be amended to read that the decision of the head of a public body related to waiver of a fee be communicated in writing to the applicant within 30 days of receiving the request for a fee waiver. (Source: Alberta amendment)***

29. ***The FOIPP Act, section 79 - titled “Comprehensive review” be amended to read that a review be undertaken no later than April 1, 2020 and to be***

followed not less than every 10 years thereafter. (Source: Alberta amendment)

The Committee recommends the following amendments to the *FOIPP Act* also be implemented. These are expected to have moderate to significant consequences and will require consultation with stakeholders prior to implementation.

Recommendations:

30. ***The FOIPP Act, section 43 - titled "Term of office" be amended to state that "the Commissioner holds office for a term not exceeding five years" instead of the previously fixed term of five years.*** (Source: Alberta amendment)
31. ***The FOIPP Act, section 75 (2) - titled "Penalty" be amended to establish a new offence and penalty for unauthorized disclosure of personal information to a court or tribunal. The penalty that is recommended is that in the case of an individual, there be a fine no less than \$2,000 and not more than \$10,000. In the case of a corporate entity, a fine not less than \$200,000 and not more than \$500,000 is recommended.*** (Source: Alberta amendment)
32. ***The FOIPP Act Regulations, section 6 - titled "Consent to the disclosure of personal information" be amended to provide for consent in writing, consent in electronic form and oral consent requires further study and this be undertaken in partnership with Legal Services.*** (Source: Alberta amendment)

Miscellaneous Items

STAFFING MODELS

In Prince Edward Island, FOIPP requests are received and processed by delegated FOIPP coordinators employed within each public body. They receive support and guidance from an Access and Privacy Services Office.

The fluctuating number and complexity of requests make management of workload and concurrent deadlines a significant challenge for these public body employees who divide their time and attention between their “regular job” and “FOIPP role.” There are also frustrations from department employees required to search for records relevant to a FOIPP request. Good records management is an asset when performing a comprehensive and timely search. However in spite of good records management practises considerable time may be necessary to conduct a search. Ultimately this time detracts from employees primary functions.

It was noted some Prince Edward Island public bodies receive so few requests, they face the unique challenge of having either little or no opportunity to obtain the skills necessary for timely, consistent and accurate processing of FOIPP requests. This is especially problematic when a department receives multiple requests in a short span.

British Columbia is currently the only jurisdiction with a centralized staffing model employing more than 100 full-time FOIPP Coordinators. In 2010-2012 British Columbia processed about 8,400 requests to access information under FOIPP. Since establishing a centralized model, British Columbia has made significant improvements in compliance with legislated time frames and estimate about 95 per cent of FOIPP files processed meet the 30-day processing period.

In 2011-2012 Yukon processed approximately 425 FOIPP requests. The Yukon has a hybrid model where Yukon's Access and Privacy Services Office receives and documents all requests before forwarding to the appropriate public body where processing is completed. The office also provides training, advice to public bodies and policy development.

Most jurisdictions report challenges keeping pace with the constant demands of FOIPP. An audit released in 2012 by the Canadian Newspaper Association reported the federal government's performance was among the worst with half of requests submitted by CNA completed within the statutory 30-day deadline. Nova Scotia, Prince Edward Island and Yukon were the fastest responders, while British Columbia was the slowest.

In the same report, the Canadian Newspaper Association took Newfoundland and

Labrador to task for controversial amendments to their Act last year which they claimed made records harder to obtain.

The Committee had lengthy discussions on the pros and cons of various staffing models but in the end, the group recommended the discussion needed to include Public Service Commission representatives.

EXCLUSIONS AND EXEMPTIONS

Several public bodies requested that new exclusions or exemptions for particular types of records be considered by the committee:

- The Crown Attorney's Office and the Legal Aid Office asked that their records be excluded citing their records were previously disclosed through the criminal justice process, and therefore the requirement to respond to FOIPP requests was an unnecessary duplication of work;
- The Public Service Commission asked that employee references provided in confidence by previous employers be protected absolutely, as employers might be reluctant to be frank in their evaluations if confidentiality was not guaranteed;
- Lastly the Department of Innovation and Advanced learning wished to ensure reasonable protection of some third party information like business plans which if disclosed could impact a business's ability to be competitive or their willingness to submit similar information in future.

The Internal Review Committee considered current exceptions and exemptions which exist in the Act: Specifically, sections 4 (records to which the *FOIPP Act* applies); 14 (disclosure harmful to business information); and 15 (disclosure harmful to personal information).

In the case of excluding records of the Crown Attorney/ Legal Aid, the committee could find no other jurisdiction that excluded these records. There are a number of exceptions that could apply to these records and would adequately protect records or portions of records from disclosure. When considering these various exceptions currently available and the lack of precedence in other jurisdictions, the committee found no compelling reason to create an additional exemption.

While the Committee did find one jurisdiction where employment references are explicitly protected under the Act, most other jurisdictions process requests for these records by applying general exemptions or exclusions as appropriate. As a result, the Committee again found no compelling reason to create additional exceptions to protect these documents.

The Committee did recommend the following actions in response to the various submissions it received from public bodies.

Recommendations:

- 33. The Access and Privacy Services Office work with the Department of Innovation and Advanced Learning to develop policy and procedures to ensure adequate protection and reasonable disclosure of information supplied by business clients.**
- 34. The Access and Privacy Services Office work with the Public Service Commission to develop policy and procedures to ensure adequate protection and reasonable disclosure of references.**
- 35. The Access and Privacy Office to offer appropriate support to the Crown Attorney Office and the Legal Aid Office if/when a request to access records is received.**
- 36. A review of staffing models related to the performance of access and privacy be lead by the Department of Environment, Labour and Justice.**

Appendix A

The following amendments, which were made to the Alberta Act or included as recommendations of the Standing Committee on Community Affairs and Economic Development, were discussed but deemed inappropriate, unnecessary, or generally without any perceived value towards increased transparency, openness or accountability. The following did not result in a recommendation for action from the Committee.

1. **Section 4(1) - titled Records to which the Act applies** should not be amended by the addition of the following: a record or a part of a record that is prohibited from disclosure by a judge or under any enactment of the Province or of Canada.

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Rationale: These documents are already adequately protected under current provisions in the Act.

2. **Section 4(1)(n) - titled Records of members of the governing body of a local public body** should not be amended to exclude from the scope of the Act “a personal record of an appointed or elected member of the governing body of a local public body.

Rationale: These records are excluded except for “local public bodies” which are not defined by the *FOIPP Act*. Should municipalities be included in FOIPP at some future date, this should be revisited.

3. **A new exclusion for records in the custody of the Chief Internal Auditor (CIA)**, a new position in Alberta. This is a more limited version of the exclusion than applies to the Auditor General and applies only to records relating to an audit by the CIA. And records in the custody/control of CIA or a person under his/her administration, does not apply to records relating to an audit in the custody of another public body.

Rationale: Discussion took place regarding the position and a representative from Treasury Board was consulted. As there is no equivalent position to the CIA currently existing in Prince Edward Island there is no reason to adopt this amendment.

4. **A new exclusion for Ministerial Briefings.** The right of access does not extend to a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry, or to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly. These exclusions are limited to five years. For a record created to brief a Minister for

a sitting of the Legislative Assembly, section 6(4)(b) does not apply to a record described in that clause if five years or more has elapsed since the beginning of the sitting in respect of which the record was created (section 6(6)).

Rationale: It does not add clarity nor does the current process of developing ministerial briefing notes suit this type of amendment, as notes are created and continuously recreated to ensure accuracy of briefing information. Determining which notes would be covered by this exclusion, or determining when the five year time frame was ended would be impossible. The current exemptions for content under *the Act* are adequate to protect any sensitive information and overall, the amendment does not support increased openness, transparency of accountability

5. **Section 7 - titled How to make a request** should not be amended by the addition of the following: A written request for access to information made to a public body shall be deemed to be a request made under subsection 7(2).

Rationale: This is covered under current policy and practice, any issues arising are better addressed through education around best practice.

6. **Section 15 - titled Disclosure harmful to personal privacy** should not be amended by the addition of the following: notwithstanding clause (2)(1) the Commissioner may order the disclosure of personal information about an individual(s) who has been dead for at least 20 years, where the Commissioner believes that such disclosure is not contrary to the public interest.

Rationale: This proposed amendment gives the Commissioner discretion to disclose information during the period when a person has been dead for at least 20 years but less 25 years. The proposed discretion puts public bodies in an awkward position by creating a grey area between 20 to 25 years.

7. **Section 18(2)(b) - titled Refusal, exposure to civil liability and prisoner custody interests** should not be amended by the deletion of the word “harm” and the substitution of the words “interfere with”.

Rationale: The intent is to refuse based on harm. “Interfere with” is more subjective than “harm” and might be considered too broad a criteria. “Harm” is a recognized legal concept.

8. **Section 18(4) - titled Non application of subsections (1) and (2)** should not be amended by the deletion of the words “interfere with or harm any of the matters referred to in section (1) or (2)” and the substitution of the words “fall within the matters described in subsection (1)”.

Rationale: Not clear on what the advantage would be.

9. **Section 19(2) - titled Disclosure harmful to intergovernmental relations** should not be amended by the addition of the words “responsible for that public body” after the word “Minister” as follows: the head of the public body may disclose information referred to in clause (1)(a) only with the consent of the Minister responsible for that public body in consultation with Executive Council.

Rationale: Recommendation would change the original intent of the clause, which is the Attorney General (as the Minister of the public body responsible for the *FOIPP Act*). This does not provide clarification.

10. **Section 27 - titled Information available to the public** allows the head of a public body to refuse to disclose to an applicant information “that is readily available to the public.”

Rationale: This is already in place in Prince Edward Island.

11. **Section 37 (1) - titled Disclosure of personal information** should not be amended by the addition of the following: to a lawyer or articled clerk acting for an inmate under the control of supervision or a correctional authority, or acting for a person who is confined to a psychiatric ward, hospital or institution under the criminal code of Canada.

Rationale: Changes to (bb) are not necessary. The inclusion would be redundant because a person who is confined under the Criminal Code of Canada is under the control or supervision of a correctional authority.

12. **Section 54 (1)(c) - titled Statements made to the Commissioner not admissible in evidence** should not be amended by the addition of the word “made” after the word “decision” as follows: 54(1) “a statement made or answer given by a person during an investigation or inquiry by the Commissioner is inadmissible in evidence in court or in any other proceeding, except (c) in an application for judicial review or an appeal from a decision made with respect to that application.”

Rationale: Not a grammatical error as indicated in report.

13. **Section 70 - titled Manner of giving notice** should not be amended by the addition of the following : where any notice or other document is sent by mail under this Act, the notice shall be deemed to be received by the addressee 5 business days after the date on which the notice is mailed.

Rationale: The issue is adequately addressed in current practice.

14. Designation of Public Bodies by the Minister, an amendment is needed because, as of 2004, a body that is not subject to the FOIP Act was automatically subject to Alberta's *Personal Information Protection Act* (PIPA).

Rationale: This is not applicable to Prince Edward Island at this time as we do not have a *Personal Information Protection Act*.

15. **Exception for Records Relating to an Audit by CIA 24 (2.1).** *The Amendment Act* establishes a mandatory exception to disclosure in section 24(2.1) for a record relating to an audit by the Chief Internal Auditor of Alberta that is created by or for the Chief Internal Auditor of Alberta (section 24(2.1)(a)), or information that would reveal information about an audit by the Chief Internal Auditor of Alberta section 24(2.1)(b)).

Rationale: No equivalent position to the CIA currently exists in Prince Edward Island.

16. Alberta section 24 (2.2) addresses a situation if 15 years or more has elapsed since the audit to which the record or information relates was completed, or if the audit to which the record or information relates was discontinued or if no progress has been made on the audit for 15 years or more.

Rationale: No equivalent position currently exists in Prince Edward Island.

17. **Section 4(1) and section 4(1)(I)(vi):** Vital Statistics registry — has been amended to refer to records made from information “in an office of the Director, or of a district registrar, as defined in the Vital Statistics Act.”

Rationale: Prince Edward Island has this in place already.

18. **Disclosure harmful to business interests of a third party** amended to apply if “the information relates to a non-arm's length transaction between a public body and another party.

Rationale: This practice currently exists in Prince Edward Island's Act.

19. **Disclosure harmful to personal privacy** disclosure for research purposes was repealed. This provision allowed for disclosure in response to a FOIP request if the disclosure was for research purposes and in accordance with the Act's provisions for disclosure for research or statistical purposes. All disclosures of personal information in accordance with section 42 or section 43 should be dealt with under Part 2 of the Act, not within the FOIP request process under Part 1.

Rationale: This gives defence to a claim for privacy breach in the event of a complaint. This is already incorporated into PEI Act.

20. **Disclosure harmful to personal privacy:** health facility admission has been repealed. This provision allowed a public body to disclose, under certain circumstances, the information that an individual had been admitted to a health care facility. The proclamation of the *Health Information Act (HIA)* in 2001 made this provision unnecessary.

Rationale: We do not have a *Health Information Act* in Prince Edward Island - however, there is work underway to create a *HIA* and will need to revisit.

21. **Disclosure harmful to personal privacy: bank account and credit card information:** a new provision stating a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if "the personal information consists of an individual's bank account information or credit card information."

Rationale: This is already in place in Prince Edward Island.

22. **Disclosure of personal information: business contact information:** a new provision permits, but does not require, public bodies to disclose the names and business contact information (including e-mail address) if doing so would not reveal other personal information.

Rationale: This practice is already in place in Prince Edward Island.

23. **Disclosure of personal information:** technical amendments were amended to add the phrase "Notwithstanding subsection (1)." This technical amendment resolves a possible conflict with section 40(1).

Rationale: This is not applicable to Prince Edward Island where the *FOIPP Act* does not currently apply to municipalities and universities.

24. **Disclosure of information in the archives of a post-secondary educational body** allowed the archives of a post-secondary educational body to disclose information under a confidentiality agreement. This provision has been deleted.

Rationale: This is not applicable to Prince Edward Island where the *FOIPP Act* does not currently apply to post-secondary institutions. It may need to be revisited if the scope of the Act is broadened to include post-secondary institutions.

25. **Powers of Commissioner in conducting investigations or inquiries** amendment provides the Commissioner with the same powers under the *Public Inquiries Act* in conducting a review of a decision of the Registrar of Motor Vehicles Recommendation.

Rationale: This is not applicable in Prince Edward Island where there is not a *Motor Vehicles Information Act*.

26. **Refusal to conduct an inquiry** allows for exceptions to the Act's provision that, if a matter that is subject to a request for review is not resolved through mediation, the Commissioner must conduct an inquiry. A new provision, section 70(b), allows the Commissioner to refuse to conduct an inquiry if the circumstances warrant. Consideration might be given to refusing to conduct an inquiry if the Commissioner were satisfied that the matter could more appropriately be dealt with by means of a procedure under another law, or an inquiry would not result in any useful remedy (e.g. because a public body has already disclosed all available records in response to a FOIP request), or a request for review is frivolous, vexatious or made in bad faith.

Rationale: Unnecessary, already have this in the Act.

27. **Power to make regulations** amended to allow the Lieutenant Governor in Council to make regulations respecting the manner of giving consent for the purposes of section 36 (1)(b) and 37 (1) (c).

Rationale: Unnecessary, already have this in the Act.

28. **Review of Decisions of the Registrar of Motor Vehicle Services.** Addition to allow the Commissioner to review a decision of the Registrar to determine whether the decision is in accordance with criteria established in Traffic Safety legislation. The Alberta Access to Motor Vehicle Information Regulation under section 8 of the *Traffic Safety Act* was approved on May 20, 2003 (O.C. 248/2003). Section 2 of the Regulation, sets out the criteria for release of personal driving and motor vehicle information.

Rationale: Not applicable to Prince Edward Island because there is not a *Motor Vehicles Information Act*.

29. **New section: Directory of personal information banks (PIB)** significantly changes the requirements for all public bodies. The head of each public body is responsible for maintaining and publishing a PIB directory, which may be in either printed or electronic form. The directory must include the title and location of the PIB, a description of the kind of personal information and the categories of individuals whose personal information is included, the authority

for collecting the personal information in the PIB, and the purposes for which the personal information is collected or compiled and the purposes for which it is used or disclosed.

Rationale: Not applicable to Prince Edward Island. There is no requirement for Personal Information Banks.

30. **Include a new section to require each public body to provide facilities where the public may inspect** any manual, handbook or other guideline used in making decisions that affect the public.

Rationale: Some information in manuals and policies contain information that would be exempt from FOIPP (ie compromise public safety). Access to most manuals/policies can be provided under proactive disclosure. (See recommendation #4.)

31. Consider revising the definition of a “vexatious” and/or “repetitive” request.

Rationale: Asking for authorization to disregard requests should be rare. Public bodies should ensure that they have fully discharged their duty to assist applicants in a full and forthright manner and have a strong case before seeking permission from the Commissioner to disregard requests from one or more applicants. There is no compelling reason to revise the definition at this time.

32. Consider changing the time to process a FOIPP request from current 30 calendar days to 30 working days.

Rationale: British Columbia is the only jurisdiction that uses 30 working days. Every other jurisdiction uses 30 calendar days as the measure of time to reasonably process a request. The *FOIPP Act* permits an extension of up to 30 days if necessary. Under specific circumstances, and if approved by the OIPC it is possible to further extend. For these reasons, there is no compelling reason to change from calendar, to working days.

33. **Proactive disclosure of position reclassifications.** These records are pro-actively disclosed by federal government and disclosure of these records would support openness and accountability by Public Service Commission.

Rationale: The committee questioned the level of public interest in these records as no request has been received for these records.

34. **Consider changes to cost of re-producing records,** including photocopying in schedule 1.

Rationale: 25 cents per page compares reasonably to other jurisdictions and the schedule permits actual costs for non standard records. There is no pressing need to revise these costs.

Appendix B

Definitions

Disclosure: To provide access (examine or copy) of a record in part, or in whole.

Exceptions: Set out in the *FOIPP Act* (section 14 to 27). They are limited and specific and provide the only basis for refusing access to records. They should always be interpreted with a view to giving as much access as possible to the records requested.

Personal

information: Recorded information about an identifiable individual, including the individual's name, home or business address or home or business telephone number, race, national or ethnic origin, colour or religious or political beliefs or associations, age, sex, marital status or family status, an identifying number, symbol or other particular assigned to the individual. The individual's fingerprints, blood type or inheritable characteristics, information about the individual's health and health care history, including information about a physical or mental disability, information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given, anyone else's opinions about the individual, and the individual's personal views or opinions, except if they are about someone else (see FOIPP Act section 1)

Public body: A department, branch or office of the Government of Prince Edward Island, an agency, board, commission, corporation, office or other body designated as a public body in the regulations, the Executive Council Office, and the office of an officer of the Legislative Assembly. (See FOIPP Act section 4)

Record: A record of information in any form. The term "record" 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. The definition of "record" does not include software or any mechanism that produces records.

Sever: The act of separating by blacking out or removing protected information from a record.

Third party: A person, a group of persons or an organization other than an applicant

or a public body.

Vexatious: Without reasonable or probable cause or excuse (Black's Law Dictionary, 5th ed.). "Usually taken to mean with intent to annoy, harass, embarrass, or cause discomfort. Government officials may often find individual requests for information bothersome or vexing in some fashion or another. This is not surprising given that freedom of information legislation is often used as a vehicle for subjecting institutions to public scrutiny. To deny a request because there is an element of vexation attendant upon it would mean that freedom of information could be frustrated by an institution's subjective view of the annoyance quotient of a particular request. This, I believe, was not the Legislature's intent." (Source: Alberta Information and Privacy Commissioner, November 4, 2005, Request for Authorization to Disregard Access Requests)