

2.

ADMINISTRATION OF THE FOIP ACT

Overview

This chapter covers

- the roles and responsibilities of various public body officials;
- the delegation of FOIP responsibilities;
- the roles of the Information and Privacy Commissioner, the Minister responsible for the *FOIP Act*, and Access and Privacy, Service Alberta;
- practices of routine disclosure and active dissemination;
- the exercise of individual rights by authorized representatives;
- notices and the manner of giving notice;
- the directory of public bodies and personal information banks;
- accessing manuals and guidelines;
- the protection from liability for public bodies and their officials;
- offences and penalties; and
- disclosure to the Commissioner.

2.1

Public Body – Roles and Responsibilities

Head of a public body

The head of each public body is responsible for all decisions made under the *FOIP Act* that relate to that public body. If the public body is a department, branch or office of the Government of Alberta, the head is the member of the Executive Council (the Minister) who presides over the public body (**section 1(f)(i)**).

For other public bodies that are not local public bodies (i.e. agencies, boards, commissions, etc. designated in the FOIP Regulation), the head is the person designated by the member of the Executive Council responsible for that public body. If a head is not so designated, the person who acts as the chief officer and is charged with the administration of the body is the head (**section 1(f)(ii)**).

The provision for designation of a head by a Minister recognizes that small government agencies may receive support services from a government department. In these cases, the member of Executive Council responsible for the agency can assist them by designating a head for the purposes of the *FOIP Act*, for example, a person from within the department.

For local public bodies, the head is the person or group of persons designated by bylaw or other legal instrument to perform the duties of the head for purposes of the Act (**sections 1(f)(iii) and 95(a)**).

In any other case, the head is the chief officer of the public body (**section 1(f)(iv)**).

The governing authority of a local public body will normally designate its chief administrative officer, or equivalent, as head. Examples include a president of a

post-secondary educational institution, a city or town manager, a head librarian, and a school superintendent. However, the governing authority may decide to appoint a committee to fulfil this role.



Governing authorities of local public bodies must designate a head by bylaw or by another legal instrument by which they act.

FOIP Coordinator

The Minister responsible for the *FOIP Act* and Regulation requires that each public body establish an office or function that is responsible for FOIP matters and have a key contact person who can carry out this function.

The function is usually performed by a FOIP Coordinator. The FOIP Coordinator is responsible for the overall management of access to information and protection of personal information within a public body. Depending on the size and resources of the public body, the FOIP Coordinator may carry out his or her responsibilities on a full-time or part-time basis, or may be someone appointed from outside the public body to carry out FOIP responsibilities on its behalf. Some FOIP Coordinators provide shared services for several public bodies.

The FOIP Coordinator's office should provide the focal point for access to information and protection of privacy expertise within the public body. Details of the responsibilities of this office throughout this publication represent a typical distribution of responsibilities for a FOIP Coordinator. Public bodies may find that a different distribution of responsibilities is appropriate for them.

The responsibilities include

- implementing policies, guidelines and procedures to manage the public body's compliance with the Act;
- ensuring that the public body has a delegation instrument in place and that public body staff understand their roles under the Act;
- providing advisory services to the staff of the public body;
- providing training programs on access to information and privacy protection within the public body and coordinating participation in FOIP courses offered by the Government of Alberta;
- informing the public body's clients, and all those with which it does business or provides services, about the Act;
- advising senior management on information that can be disclosed without a FOIP request;
- managing the FOIP request process for the public body, which may include
 - assisting applicants;
 - assigning requests to program areas;
 - monitoring and tracking the processing of requests;
 - meeting time limits and notification requirements;

- considering representations from third parties;
- calculating fee estimates and collecting fees;
- reviewing preliminary recommendations from program areas and offices of the public body about the disclosure of records and proposals for severing information;
- making final recommendations on responses to requests; and
- responding to applicants;
- coordinating any negotiations, mediations, inquiries, investigations, and audits with the Office of the Information and Privacy Commissioner;
- setting up practices and procedures to ensure compliance with the privacy protection measures in **Part 2** of the Act regarding the collection, use, disclosure, accuracy, retention and security of personal information;
- ensuring that the public body staff are aware of other Acts and regulations that restrict the disclosure of information (**section 5**) so that the provisions of such Acts and regulations are applied consistently;
- reporting as required to the Ministry responsible for the *FOIP Act* on the operation of the Act; and
- maintaining and publishing a Directory of Personal Information Banks and coordinating the public body's submission to the Directory of Public Bodies published by the Minister responsible for the *FOIP Act*.

In the case of public bodies that have affiliated agencies, boards and commissions, responsibilities also include

- maintaining a list of the public body's affiliated agencies, boards and commissions for the purposes of **Schedule 1** of the FOIP Regulation; and
- consulting with Access and Privacy, Service Alberta, regarding any legislative developments or amendments in other legislation that might relate to the *FOIP Act*.

Program administrators

In larger or decentralized public bodies, program administrators or department heads have special responsibilities for ensuring effective administration of the *FOIP Act*.

Normally, they are accountable for

- setting up practices and procedures to ensure that the management and security of records in the custody or under the control of their program area meet the requirements of the legislation, especially the provisions relating to the protection of privacy;
- identifying and providing access to information that can be disclosed without a FOIP request;
- locating and retrieving records in response to FOIP requests; and
- ensuring that the program perspective is considered in any recommendation on a response to a FOIP request.

Where the administration of the *FOIP Act* is decentralized, each program should have an appointed program contact to ensure that requests are processed effectively, that information that can be routinely disclosed is identified, and that privacy protection measures are implemented.

Public relations or communications

In public bodies with a public relations or communications area, staff in that area may have a direct role in the access to information and protection of privacy function. Disclosure of information in response to access requests under the *FOIP Act* should be coordinated with the overall flow of information to the public where possible. Where a public body is providing information on sensitive issues, either on its own initiative or in response to a FOIP request, the public body may find it helpful to have a communications strategy for disclosure of the information. At the same time, communications staff must bear in mind that the *FOIP Act* determines what may or must be disclosed in response to a request under the Act and establishes time limits for disclosing records in response to a request.

Routine disclosure of information in response to a routine inquiry or request, active dissemination of information, and publication of information in print and electronic formats should continue to be the normal ways of serving those interested in obtaining information.

Records and information management

Effective records and information management within a public body plays a major part in the effective administration of the *FOIP Act*. The same is true of the information technology function relating to the management of electronic information systems, databases and other electronic records.



Each public body should coordinate its efforts for managing, administering, controlling, providing security for, and preserving all its records. Records include electronic data and information, publications and other reports in the custody or under the control of the public body. These efforts will ensure that the public body can meet its requirements under the Act.

Records and information management and information technology professionals can provide support to the FOIP Coordinator by

- establishing and maintaining an adequate level of information control to ensure that all records can be located and retrieved within the required time limits;
- establishing and maintaining information management systems for the public body that comply with the Act's privacy protection provisions;
- creating a listing of all personal information banks;
- ensuring that records retention and disposition schedules are established, authorized as required, and applied to all information in the custody or under the control of a public body; and

- providing a basis for implementing information security measures for sensitive records and for the reasonable protection of personal information.

Additional guidance on records and information management practices is provided in Chapter 8.

2.2 Delegation of FOIP Responsibilities

Under **85** of the Act, the head of a public body has the power to delegate to any other person any of the head's duties, powers and functions under the Act, except the power to delegate.

In a very small public body, where the designated head may also be the FOIP Coordinator, there will generally be no need to delegate. In larger public bodies, a delegation instrument will be needed. The FOIP Coordinator normally prepares the delegation instrument and submits it to the head of the public body for approval.



All public bodies that decide to delegate some or all of the head's powers and duties should have an up-to-date delegation instrument in place. This means that the delegation instrument should be reviewed regularly for any necessary changes related to restructuring of the public body. It should also be reviewed with a new head to confirm that the head agrees with the scheme of delegated responsibilities.

The delegation instrument should identify the position, not the individual, to which the powers are delegated. When delegation is to the position rather than the person, a new delegation is not required when a new appointee assumes the position or when someone is acting in the position. A delegation instrument may also recognize another position to which delegation passes if the occupant of the original position is absent or incapacitated. A delegation instrument may cover a wide variety of duties, powers and functions, including those under the *FOIP Act* as well as others.

A delegation instrument remains in effect until replaced. It is important to review the instrument periodically for any changes that may be needed, especially if the public body is restructured or part of the public body is transferred to another public body.

There is a substantial difference between delegations relating to access to information and those relating to protection of privacy. In the case of access to information, the delegations relate mostly to the processing of an access request and the decision whether or not to disclose all or part of a record. Delegated authority empowers certain officials and employees to make decisions or take action. In the case of privacy protection, responsibilities centre on the collection, handling and protection of personal information. This is a much more general area of responsibility and is centred on the program areas or local offices that handle the information on a day-to-day basis. Even in small public bodies, most privacy protection responsibilities should be delegated to staff in the program areas responsible for the information.

Not every section of the Act dealing with privacy matters calls for delegation of responsibility in a formal sense. The head of a public body should, however, clearly

advise program administrators and managers of their responsibilities, especially with regard to compliance in the collection and disclosure of personal information.

In general, delegation should be considered for all provisions of the Act that state that the head of a public body may or must do something. A **Delegation Table** that lists all the provisions of the *FOIP Act* for which delegation should be considered is provided in Appendix 2.1. A table listing all the administrative responsibilities that may be assigned (particularly those under **Part 2** of the Act) is provided in Appendix 2.2. Public bodies need to customize these listings to their actual operations. This includes using the organization's own position titles and providing for delegation to positions in multiple departments, branches or offices where appropriate (e.g. delegation of powers and duties relating to different regions to the director of each regional office of the public body).

The **Delegation Table** provides for the identification of specific officials by title and office (e.g. the Executive Manager, Personnel) and for generic titles such as "all program managers (for their respective program areas)."



It is essential when a delegation instrument is put in place that all identified officers or employees know and understand their delegated responsibilities. It is also important for other officers and employees to understand that only those with delegated responsibilities under the *FOIP Act* should be carrying out those duties or functions.

For example, a public body's lawyer is not authorized to respond to an access request unless the head has delegated that authority to the lawyer under **section 85** (see *IPC Investigation Report 99-IR-009*).

At the same time, a public body official may sign a document advising an applicant of a decision under the *FOIP Act* on behalf of the person who has been delegated to make the decision, provided it is clear that the delegate has directed his or her mind to the making of the decision. This may be the case if the head of the public body has retained the power to make a particular decision, but the FOIP Coordinator is generally responsible for corresponding with the applicant.

For example, in *IPC Investigation Report 98-IR-011*, it was reported that the Minister of Justice and Attorney General had delegated to the Chief of Police of a police service the authority to disclose information about an individual believed to present a risk of significant harm to the health or safety of persons in that community, in accordance with an approved disclosure protocol. Although the Chief of Police (the delegate) made the decision regarding the disclosure, the information was disclosed through a news release issued by the police service. The Information and Privacy Commissioner determined that the disclosure was in accordance with the *FOIP Act*.

Job orientation materials for employees should include a statement about FOIP responsibilities for each official or employee taking up a position that includes delegated responsibilities under the Act. The employee should also be advised that additional information can be obtained from the FOIP Coordinator.

The way in which powers and duties are delegated in practice is very much determined by the structure of the public body and the approach that it wishes to take toward administration of the *FOIP Act*. Delegation is decided in consultation with elected officials or governing board members and senior management in the public body. In smaller public bodies, for instance, the head may choose to delegate to a single official. In larger public bodies or in decentralized organizations, the head may wish to spread decision-making responsibilities more widely, to department heads or other staff.

If the individual with delegated authority does not actually make the decision that he or she has been authorized to make, the delegation has not been properly exercised. Once a delegate makes a valid determination or decision in the proper exercise of the delegated power, the head of the public body cannot redetermine the matter or substitute his or her decision for that of the delegate.

It is also important not to fetter or restrict the discretion of a delegate. In *IPC Investigation Report 98-IR-011*, the Commissioner considered it important that the Disclosure Protocol for Chiefs of Police that he reviewed as part of the investigation did not fetter the discretion of the Chief to decide whether to disclose personal information about an individual and how much or what personal information to disclose about the individual.

2.3

Province-wide Administration of the Act

Minister responsible for the *FOIP Act*

The Lieutenant Governor in Council designates the Minister responsible for the Act by Order in Council. In March 2008, the Minister of Service Alberta was given this responsibility. The Minister has overall responsibility for the general administration of the Act across the province, including preparation and submission of amendments to the *FOIP Act* and FOIP Regulation and providing guidance about access to information and protection of the privacy of personal information generally.

The Minister is required to report annually to the Legislative Assembly on the administration of the Act (**section 86**). The Minister is also responsible for publishing a Directory of Public Bodies, including the names of all public bodies, and business contact information for their FOIP Coordinators or heads (**section 87**).

Access and Privacy, Service Alberta

Access and Privacy supports the Minister responsible for the *FOIP Act* and Regulation in all aspects of the administration of the legislation across all public bodies. Access and Privacy provides public bodies with the following services and products related to the FOIP program:

- the development of proposals for amendments to the *FOIP Act* and the FOIP Regulation, as well as the development of Ministerial Regulations for the designation of public bodies in between updates to the Schedule of public bodies in the FOIP Regulation;
- the development of guidelines and best practices, where appropriate or needed, to assist public bodies in administering the legislation;

- the production of resources to enable FOIP Coordinators and others in public bodies to remain up-to-date on issues and trends in the fields of access to information and the protection of privacy;
- guidance on the interpretation of the Act and Regulation, including a “help desk” to assist public bodies;
- regular distribution of updated FOIP legislation and policies, as well as access to Orders and Investigation Reports issued by the Information and Privacy Commissioner and other related information;
- delivery of regular FOIP training sessions and seminars;
- an electronic tracking system for FOIP requests and statistical reporting which may be used by public bodies; and
- collection of statistical information for the Annual Report and contact information for the Directory of Public Bodies.

Key departments

There are a number of departments that have statutory responsibilities relating to particular local public bodies. These include the provincial ministries of Municipal Affairs, Education, Advanced Education, Health and Wellness, Solicitor General and Public Security, Aboriginal Relations, Culture and Community Spirit, Environment, and Agriculture and Rural Development.

Key departments assist local public bodies in resolving administration and compliance issues relating to the Act. Key departments are also partners with Access and Privacy in answering questions, resolving issues, sponsoring meetings and other training forums, and providing speakers in the area of access to information and protection of privacy.

Information and Privacy Commissioner

The Information and Privacy Commissioner is an officer of the Legislature who is independent of government. The Commissioner is responsible for monitoring how the legislation is administered to ensure that its purposes are achieved. He or she may carry out investigations to ensure compliance with any provision of the Act or compliance with rules relating to the destruction of records. The Commissioner may be asked to provide an independent review of decisions made under the Act. He or she may make an order regarding duties imposed by the Act (e.g. ordering the disclosure of certain records), administrative matters (e.g. reducing a fee assessment) and the collection, use or disclosure of personal information.

The Commissioner reports annually to the Speaker of the Legislative Assembly on the operation of the legislation (**section 63**). The powers of the Commissioner and the role of the Office of the Commissioner are discussed in Chapter 10.

2.4 Routine Disclosure and Active Dissemination of Information

In addition to providing access to records and information in response to FOIP requests under **Part 1** of the Act (see Chapter 3), public bodies may provide access to information and records through two other processes:

- routine disclosure in response to inquiries and requests for information; and
- active dissemination of information.

Routine disclosure and active dissemination will likely satisfy many of the information needs of members of the public. Public bodies should bear in mind that the FOIP process is in addition to and does not replace existing procedures for access to information (**section 3(a)**), where that disclosure would not otherwise be prohibited by the *FOIP Act*.

There are numerous advantages to using routine disclosure and active dissemination processes. The public will be better served and better informed through the planned and targeted release of information in support of overall program objectives. As well, making information available outside the FOIP process, through disclosure in response to routine inquiries and requests or active dissemination of information, can promote cost-effective management of public information resources.

Routine disclosure

The *FOIP Act* is intended to strengthen informal access rights by encouraging routine disclosure and requiring public bodies to provide access to decision-making manuals (**section 89(1)**). (See section 2.8 of this chapter for further discussion of what is meant by decision-making manuals.)

Routine disclosure, in response to an inquiry or request, occurs when access to a record can be granted without a request under the *FOIP Act*.

For example, a public body may have a routine disclosure policy regarding information related to an appeal process, such that an appellant does not need to make a FOIP request to obtain that information. In a case involving this kind of information, the Information and Privacy Commissioner found that the public body had properly responded to a request from an appellant for information related to an appeal when it disclosed information in accordance with the public body's routine disclosure policy and not under the *FOIP Act* (*IPC Order 2001-013*).

If a request cannot be satisfied entirely through routine disclosure, then the request may be dealt with in part through routine disclosure and in part through the FOIP request process. For example, a public body might provide the final report of an administrative review through a process of routine disclosure, but would not routinely disclose research for the report and preliminary drafts of the report.

If there are two processes for obtaining access to information, such that a public body will provide routine disclosure to an individual of information in his or her own file in addition to providing access in response to a FOIP request, then the public body should advise individuals of the two processes. Public bodies should ensure that individuals are aware of both their statutory rights under the Act and the availability of any other method of access.

Where two processes exist, a public body meets its duty to assist an applicant under **section 10(1)** only if it informs the applicant that the two processes are in place (see *IPC Order 98-002*).

Section 88(2) enables a public body to set fees for the provision of information through routine disclosure, unless records can otherwise be accessed without a fee.

Public bodies may consider the appropriateness of routine disclosure in the following situations:

- disclosure is required or permitted by another federal or provincial statute or regulation or by a municipal bylaw;
- **section 40** of the *FOIP Act* permits disclosure and any conditions specified in **section 40** apply in the circumstances;
- no exceptions to access would apply if the records were requested under the *FOIP Act*;
- any exceptions that apply to a class of records are not mandatory exceptions, and the public body, if it received a request for the particular class of records, would not invoke any discretionary exceptions to refuse access; or
- an exception does apply to a class of records, but the information subject to the exception can easily be severed from the other information and that other information may be routinely disclosed.

There are several ways in which public bodies may make information accessible through routine disclosure.

Answers to particular questions

Public bodies handle a large number of inquiries from members of the public seeking the answer to a question rather than asking for access to records. Occasionally, a person will combine a question with a request for records. To the greatest extent possible, public bodies should deal with these questions without a FOIP request through information offices or the appropriate program area and approval process.

If it becomes clear that the request involves records that cannot be routinely disclosed, such as personal information about a third party, the person making the request should be referred to the FOIP Coordinator's office. That office could either advise the applicant to make a FOIP request under the Act or give advice to the program area on how the records should be severed before being disclosed.

Specifying categories of records for routine disclosure

Section 88(1) of the Act provides that public bodies may specify categories of records in their custody or under their control that will be made available to the public without a request for access under the Act. In this way, public bodies can take a proactive approach by setting up channels for the release of information and identifying records that are available without a FOIP request. This approach promotes openness and accountability in a public body.

Active dissemination

Active dissemination occurs when information or records are periodically released, without any request, under a program or communications plan.

Active dissemination is best used where there is an anticipated demand for information by the public. Active dissemination projects generally involve some investment by public bodies, and these costs have to be balanced against improved services to the public.

Active dissemination can take many forms. A public body may have an information centre where information can rapidly be gathered and sent to clients, by mail, fax or through electronic networks. Information may also be made available in a library or public reading area.

Public bodies can establish Internet sites or online databases where interested citizens can obtain information either through an intermediary or by direct online access. Reference databases may be used to answer queries from clients or made directly accessible online. Databases may also be distributed to libraries and other public facilities; private sector information services may be also used to make popular government or local public body databases available.

Much information is available in reports and publications through public body websites and through various program information offices. These may be made available either free of charge or for a price. To assist their staff and members of the public to access published materials, public bodies may wish to maintain listings of these materials through their communications office, library, information resource centre or the office of the FOIP Coordinator.

In deciding upon the method of active dissemination, public bodies should consider the accessibility of the information to the intended target audience. For example, a document that is intended to provide information to persons who may be visually impaired may not reach that audience if it is only made available in a small-print format.

Practices for routine disclosure and active dissemination

The following practices will support routine disclosure and active dissemination of information.

Review information holdings

In establishing a system of routine disclosure and active dissemination, public bodies should review their record holdings to determine where the practices may best apply.

Every jurisdiction that has implemented freedom of information legislation has found that there has been considerable ongoing demand for contracts, travel claims, major reports and plans, internal audits, tax and regulatory rulings, decisions of adjudicative tribunals, and inspection records, among other types of information.

In some instances, records may have to be written and prepared in a different way to facilitate access. For example, reports might be written in a more structured way, such that recommendations or personal information can easily be severed and the

remainder of the record made public. Where this is necessary, the public body should establish standards for the creation of these types of documents and ensure that its staff are familiar with them.

Establish a coordinating committee

Where a public body is large or decentralized, it may be advantageous to develop a network of contacts in program and administrative areas or in the public body's various locations or facilities. This may be built into a coordinating group that could, in consultation with the FOIP Coordinator, develop and help implement routine disclosure and active dissemination practices. The practices must be guided by and not contravene the *FOIP Act*. Members of such a group might include

- interested individuals from program areas with records that may qualify for routine disclosure and active dissemination;
- a communications officer who understands the information needs of clients and the general public;
- a representative of the records and information management practice area in the public body who has a good grasp of the types of records held by the public body;
- a representative from the information technology area who understands how the public body can use information networks to disseminate information;
- a FOIP Coordinator who understands how routine disclosure and active dissemination can assist the public body in dealing with the requirements of the *FOIP Act*; and
- a representative from the legal or legislative services area who understands the obligations of the public body under other legislation that may affect the kind of information that can be disclosed.

Review requests for information

The FOIP Coordinator or the committee should review the types of requests for information currently made to the public body to determine whether these can be met through either routine disclosure or active dissemination. The objective should be to respond to as many requests as possible outside the *FOIP Act*. This should involve an ongoing monitoring and review of FOIP requests to determine whether there are certain categories of requests that can be handled through routine disclosure.

Delegate authority

The public body may delegate authority for routine disclosure, under an appropriate delegation instrument, to the program area where the information is collected, compiled or created. The program area should, in accordance with the practices of the public body on routine disclosure, establish mechanisms for the rapid and effective release of the information. For further information on delegation, see section 2.2 of this chapter and Appendix 2.

In the case of active dissemination, an official in the program area may be delegated the responsibility for establishing a dissemination mechanism. The FOIP Coordinator should play an advisory role in establishing such mechanisms, monitoring what action has been taken, and obtaining information on how these mechanisms are working. A listing of records subject to routine disclosure and active dissemination

should be available to employees of the public body. Employees should receive training on assisting the public when a request is made for a record that falls within these categories and about referring members of the public to the appropriate office when it is not clear whether the information may be disclosed.

Create new records

The FOIP Coordinator should be consulted when there are plans to create new types of records within the public body. This consultation will determine whether any of these new records could be made available through routine disclosure or active dissemination.

Consideration should be given, where possible, to modifying standard records by removing segments that would be subject to mandatory exceptions. For example, if a record contains both general information and personal information, but the main purpose of the record is to provide general information, then practices can be put in place to move personal information on to a separate page or suppress the fields for personal information in an electronic record. This may make the record available for either routine disclosure or active dissemination.

Special conditions for personal information

Personal information requires special consideration when making decisions about routine disclosure.

Public bodies may be able to identify categories of records containing personal information that may be made available without an access request

- to the individual the information is about, or to the individual's personal representative (**section 84(1)**); or
- under the public body's governing legislation.

The public body must, when routinely disclosing personal information to the individual the information is about or under an enactment that authorizes disclosure to specific persons,

- verify the identity of the person to whom the information is disclosed; and
- ensure that any person exercising the rights of an individual under **section 84** of the Act provides appropriate written evidence of his or her right to exercise that individual's rights under the Act.

Designation of categories of personal information for routine disclosure to the individual the information is about is appropriate where a considerable demand occurs for a particular type of record. Making the process more routine, with fewer processes and approval requirements, can save a public body considerable time, effort and resources. An example of this process is providing a client with routine access to his or her file or an employee with routine access to his or her personnel records.



When providing routine disclosure of information in an individual's own file, public bodies must ensure that disclosure of personal information of other individuals does not occur. Advice from the FOIP Coordinator should be sought on procedures for providing routine disclosure of these records.

**2.5
Exercise of
Individual Rights
by Authorized
Representatives**

Section 84 of the Act provides that another person, under specific circumstances, may exercise any right or power under the Act that is conferred on an individual. The specific circumstances in which a person may act for another individual, and the limitations that apply in each case, are discussed in this section.

Deceased individual

Section 84(1)(a) If an individual is deceased, the individual's personal representative (an executor under a will or an administrator under Letters of Administration) can exercise rights and powers under the Act. This exercise of rights and powers is limited to information relating to the administration of the individual's estate.

Proof of the right to act is normally a copy of the signed and attested document naming the representative to act in matters related to the estate. Evidence consisting of an applicant's stated belief in his or her authority, whether by affidavit or otherwise, or evidence that an applicant administered an estate is not sufficient (see *IPC Order 98-004*). For information related to disclosure to relatives of deceased persons, see section 4.3 in Chapter 4, and section 7.7 in Chapter 7. For a detailed discussion of information rights relative to deceased individuals, see also FOIP Bulletin No. 16: *Personal Information of Deceased Persons*.

Guardian or trustee

Section 84(1)(b) If a guardian or trustee has been appointed for the individual under the *Dependent Adults Act*, the exercise of rights can be undertaken only by the guardian or trustee. The rights or powers must relate to the powers and duties of the guardian or trustee. When the *Adult Guardianship and Trusteeship Act* is proclaimed in force, and repeals the *Dependent Adults Act*, there will be a broader range of roles to support adults with impaired capacity to make decisions. These new roles include co-decision-makers, specific and emergency decision-makers, as well as both temporary and permanent guardians and trustees. There will also be a registry to track court orders respecting guardianship and trusteeship.

The document governing the nature of the guardianship or trusteeship provides the authority for the representative to act. Public bodies should examine that document to ensure that the right being exercised under the *FOIP Act* is within the scope of the powers and duties set out in the guardianship or trusteeship document.

Personal directive

Section 84(1)(c) If an agent has been designated under the *Personal Directives Act*, the agent can exercise the individual's rights. The exercise of rights is limited to the powers and duties given to the agent under the personal directive. Personal directives cannot provide authority over financial matters.

Before allowing an agent to exercise the rights of the maker of a personal directive, a public body should satisfy itself as to the identity of a person who wishes to exercise the rights of an agent, and the authority of the person to exercise the rights of the maker of the personal directive. This may require examination of the personal directive and any necessary supporting documentation (such as a record of the determination of lack of capacity). Since this information is sensitive personal information of the maker of the directive, a public body should record only what is necessary to document the agent's authority to exercise the rights of the maker under the *FOIP Act*.

The *Personal Directives Act* provides for a registry of personal directives and permits the Minister responsible for that Act to disclose information in the Registry if, in the opinion of the Minister, the disclosure is in the best interest of the maker. The Act, as amended in 2008, also makes directives made outside Alberta valid when they consistent with Alberta's *Personal Directives Act*.

Further information about personal directives is available from the Office of the Public Guardian and online at www.seniors.gov.ab.ca/opg/PersonalDirectives/.

Power of attorney

Section 84(1)(d) A *power of attorney* is an authority given to one person (called the attorney) to do certain acts in the name of, and personally representing, the person granting the power (called the donor).

A power of attorney can be to perform specific acts on behalf of the donor or can be a general power of attorney to do everything that the donor can do. Some powers of attorney can be revoked by the donor; some are irrevocable. Powers of attorney come into effect in the event of mental incapacity or remain in effect notwithstanding the mental incapacity of the donor, provided they comply with the provisions of the *Powers of Attorney Act*. The death of a donor normally revokes the power of attorney.

A public body should satisfy itself that the scope of a power of attorney is sufficient to authorize the attorney to exercise the donor's rights under the *FOIP Act*. The public body should also verify the identity of a person exercising the power of attorney. It may also be necessary, depending on the nature of the power of attorney, to verify that the donor is alive.

Minors

Section 84(1)(e) A guardian of a minor may exercise any right or power under the Act if the exercise of that right would not be an unreasonable invasion of the minor's privacy. For a public body to make that decision, the first step is to determine whether the person asserting guardianship is a legal guardian. The Information and Privacy Commissioner has said that it is the responsibility of the person asserting the right to exercise the rights of a minor to prove that he or she is the child's guardian (*IPC Order F2006-003*). The second step is to determine whether the exercise of the right or power by the guardian would be an unreasonable invasion of the personal privacy of the minor.

Guardianship is determined under two Acts. The federal *Divorce Act* applies to custody, access and child support matters in divorce proceedings. Alberta's *Family Law Act* defines legal parentage and provides for guardianship and parenting orders.

The *Divorce Act* does not use the term "guardian." The language of the *Divorce Act* focuses on "custody" and "access." If a spouse is granted custody of a child, he or she is entitled to make decisions regarding the care and control of the child.

The *Family Law Act* does not explicitly define "guardian," but indicates that, in most cases, parents are automatically the guardians of their children. Guardians are responsible for raising the child, providing day-to-day care, and supporting and nurturing the child's development.

The *Family Law Act* provides for the courts to make a "parenting order" if guardians are unable to agree on how to distribute the powers, responsibilities and entitlements of guardianship. Parenting orders may allocate powers among parents and limit the involvement of a parent.

Every child under the age of 18, except if married or in an adult interdependent relationship, is subject to guardianship. Parents are normally the guardians. Each guardian may exercise all the powers independently of the other, unless there is an agreement or court order to the contrary.

A public body that receives a request to exercise the rights of a minor under the *FOIP Act* will need evidence that an individual is authorized to exercise those rights. An individual could provide

- a custody order under the *Divorce Act*,
- a parenting order under the *Family Law Act*, or
- other evidence that would be considered reliable and appropriate in the circumstances (e.g. a statutory declaration may suffice in some cases).

A non-custodial parent with rights of access to the minor may have some limited rights to access information about his or her child (e.g. under the Student Record Regulation pursuant to the *School Act*) even if he or she is not the child's guardian.

Regardless of what evidence is provided in support of guardianship, the public body should verify the individual's identity (e.g. ask to see some form of valid photo identification, such as a driver's licence).

A public body that has determined that an individual is entitled to exercise the rights of a guardian must then consider whether it is appropriate in the circumstances.

Section 84(1)(e) is discretionary, and disclosure of the minor's personal information may be limited to circumstances where, in the opinion of the head of the public body concerned, the exercise of the right or power by the guardian would not constitute an unreasonable invasion of the personal privacy of the minor. Special care is required when the exercise of the rights of a minor relates to sensitive personal information of the minor.

When determining whether a minor can give a direction or make a decision that the public body may act upon, a public body should take into consideration its own

policies and procedures for assessing when a minor has the ability to understand the matter being decided and to appreciate the consequences of such a decision. The opinions and views of the minor must be taken into account in making this determination, except in cases where the minor is clearly too young or immature.

Written authorization

Section 84(1)(f) A *written authorization* is a document in writing signed by an individual who authorizes another individual to do certain acts in the name of and on behalf of the individual signing the document.

A written authorization should be to perform specific acts (e.g. provide consent, make a FOIP request on behalf of the authorizing individual) or, more generally, to exercise the rights or powers of the individual under the *FOIP Act*. Before disclosing personal information on the basis of **section 84(1)(f)**, public bodies may, in some circumstances, wish to contact the individual who has granted the authority to confirm that he or she is aware of the amount and type of personal information that will be disclosed. However, a public body cannot refuse to allow a person with a valid authorization to exercise the rights of an individual.

An example of an **Authorization of Representative Form** is included in Appendix 5.

**2.6
Notice and
Manner of Giving
Notice**

The Act contains requirements for giving various types of notices to persons. **Section 17(2)(b)** provides for a notice to be given to a third party when the third party's personal information is being disclosed for compelling health or safety reasons. **Sections 30** and **31** deal with notices to be given to third parties and to applicants during the access request process. **Section 32(4)** provides for notices to be given to a third party and to the Information and Privacy Commissioner when personal or confidential business information of a third party is being disclosed in the public interest. In addition, **section 80** provides for the Commissioner to notify parties respecting a review. The **Model Letters** in Appendix 3 provide examples and options for the notices that a public body may be required to give under the Act.

Section 83 **Section 83** requires that any notice or document to be given to a person under the Act be given

- by sending it to that person by prepaid mail to the last known address of that person;
- by personal service;
- by substitutional service if so authorized by the Commissioner;
- by facsimile telecommunication; or
- in electronic form other than facsimile telecommunication if the person to whom the notice or document is to be given has consented to accept the notice or document in that form.

Personal service means a method of delivery whereby it can be shown that the person to be served actually received the document.

Substitutional service means the placing of public notices in a trade journal or in other specialized or general media. This method of service may be appropriate in situations where a very large number of persons need to be given notice or where a third party or other notice recipient cannot be located and the nature of the information would lend itself to this type of public notice.



Substitutional service can be used only with the permission of the Commissioner.

Service in electronic form means delivery in digital form or in any other intangible form by electronic, magnetic or optical means or by any other means with similar capabilities for creation, recording, transmission or storage. Whether a person has consented to accepting a notice in electronic form (e.g. by e-mail) is determined in accordance with section 8(2) of the *Electronic Transactions Act*. Under that provision, consent may be inferred from a person's conduct if there are reasonable grounds to believe that the consent is genuine and relevant to the information.

The provision allowing electronic transmission does not limit a public body's obligations under the Act with respect to personal privacy, rights of access to information and the protection of confidential information (section 3 of the *Electronic Transactions Act*). A public body must comply with the *FOIP Act's* requirements for protection of personal information (**section 38**), making reasonable security arrangements to prevent unauthorized access. A public body must not disclose confidential business information in the course of the third party notice process by transmitting the information in an insecure manner. Also, a public body must not impair rights of access by limiting the manner in which a person can obtain access to information.

Third party notices

When the head of a public body is considering giving access to a record that may contain information that affects the interests of a third party under **section 16** or the disclosure of which may be an unreasonable invasion of a third party's personal privacy under **section 17**, the head must give written notice to the third party and to the applicant in accordance with **sections 30 and 31** of the Act.

Public bodies should choose a delivery method that ensures that the notice arrives quickly and conveniently for a third party or other person receiving notice but also one that is efficient and cost-effective. Prompt delivery will allow the third party as much time as possible to respond. See Chapter 5 and FOIP Bulletin No. 10: *Third Party Notice*, published by Access and Privacy, Service Alberta.

Section 84(2) Any notice required to be given to an individual under the Act may be given to the person entitled to exercise the individual's rights and powers as provided for in **section 84(1)**.

2.7

Directories

Directory of public bodies

Section 87(1) sets out the requirements for the Directory of Public Bodies that must be published by the Minister responsible for the Act. The directory must include the name of the public body and business contact information for the FOIP Coordinator or, if the public body has no FOIP Coordinator, business contact information for the head of the public body. The Minister may publish the directory in either print or electronic form.

Access and Privacy, Service Alberta is responsible for coordinating revisions to the Directory of Public Bodies.

Directory of personal information banks

Section 87.1 A *personal information bank* is defined in **section 87.1(5)** as a collection of personal information that is organized or retrievable by the name of an individual or by an identifying number, symbol or other particular assigned to an individual.

Personal information banks have the following characteristics:

- they contain one or more types of personal information;
- they contain information about a group or groups of individuals; and
- the information is organized by a personal identifier or capable of being retrieved by a personal identifier.

Collections of information that are neither organized nor accessible by a personal identifier do not qualify as personal information banks, even if the collection contains personal information. Information that is retrievable only by corporate name does not constitute a personal information bank. Nor does a list of organizations where there is no index or capability of retrieving the names of the contact officers. Collections of personal information that do not qualify as personal information banks must still be managed in accordance with the requirements of the *FOIP Act*.

The directory of personal information banks provides a public listing of all personal information banks in the custody or under the control of a public body. It also provides a public record of the purposes for which this information may be used or disclosed.

The Information and Privacy Commissioner may consider or review a public body's directory of personal information banks if there is a complaint or general investigation relating to the collection, use or disclosure of personal information by a public body.

Further information about personal information banks is available in the *Guide to Identifying Personal Information Banks*, published by Access and Privacy, Service Alberta.

The head of each public body is responsible for maintaining and publishing a directory of its personal information banks, which may be in either printed or electronic form. The required content for this directory is the same for all public

bodies, including local public bodies. The directory of personal information banks must include

- the title and location of the personal information bank;
- 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 personal information bank; and
- the purposes for which the personal information is collected or compiled and the purposes for which it is used or disclosed.

Section 87.1(3) requires a public body to record any use or disclosure of personal information that is different from those listed in the directory. This notation must be either attached to or linked to the personal information in question, and the new purpose(s) must be included in the next update to the directory.

Section 87.1(4) requires the head of a public body to ensure that the directory is kept as current as is practicable.

2.8
Accessing
Manuals and
Guidelines

Section 89(1) of the Act requires that public bodies make available for inspection by the public any manual, handbook or other guideline used in decision-making processes that affect the public. This provision applies to manuals used by employees when administering or carrying out programs or activities. Rules for program administration, formulae or eligibility criteria for grants or other benefits, guidelines for reviewing applications, and procedures for administering a public program are included. The availability of material that guides decision-making allows members of the public to understand how decisions that affect them are made and opens up the decision-making process to public scrutiny (see *IPC Order F2002-023*).

Section 89(1) does not apply to manuals or handbooks that deal only with internal decision-making, such as internal personnel practices or records management guidelines.

There is no requirement under this provision for a public body to provide access to information in a manual that is already available to the public for purchase, as in the case of the Supports for Independence Policy Manual produced by Alberta Employment and Immigration (*IPC Order F2002-023*). There would also be no requirement to provide access to information that is readily available on a public website.

Each public body should provide facilities where the public may inspect manuals, handbooks and guidelines used in decision-making, both at its headquarters and, if reasonably practicable, at other offices of the public body. There are a number of ways to accomplish this. One approach may be to designate space in the office areas of the FOIP Coordinator and appropriate regional contacts. Another is to provide access in an existing library or resource centre.

The term “facility” may include a location such as a reception area, a work station, an office or any other area used for the purpose of providing access to manuals and guidelines. In addition to providing a facility where the public may inspect manuals,

handbooks and guidelines used in decision-making processes, some public bodies are providing access to these records through a website.

Section 89(2) provides that manuals, handbooks and guidelines may be reviewed by the public body before being made available for public examination. Any information that would not be disclosed in accordance with the exceptions set out in the Act may be severed.



If information in a manual, handbook or guideline is severed, the record must include a statement that information has been severed and the reason for the severing (i.e. the section number).

Access to manuals and guidelines, facilities for the public to consult these documents, and different ways of providing access are discussed in FOIP Bulletin No. 3: *Access to Manuals and Guidelines*, published by the Access and Privacy, Service Alberta.

2.9 Disclosure to the Commissioner by a Public Body Employee

Section 82(1) of the Act provides that an employee of a public body may disclose to the Information and Privacy Commissioner any information which that employee is required, whether under oath or by agreement, to keep confidential, if the employee, acting in good faith, believes that the information

- ought to be disclosed by the head of the public body under the public interest provisions of **section 32**; or
- is being collected, used or disclosed in violation of the privacy provisions contained in **Part 2** of the Act.

The intent of **section 82** is to protect employees. The provision encourages employees to come forward when they honestly believe that the public body for which they work is either ignoring an important public interest by failing to disclose particular information, or failing to meet the obligations to protect personal privacy imposed by the provisions of **Part 2** of the *FOIP Act*.

The Commissioner will seek proof that the employee is *acting in good faith*. This means that the employee has an honesty of intention or honestly believes that he or she is following a lawful path. If the Commissioner is satisfied that the complaint is in good faith, there must be an investigation of the alleged failure to comply with the Act or the need to disclose certain information. The investigator may use all the powers vested in the Office of the Information and Privacy Commissioner to investigate the matter (**section 82(2)** and **(7)**).

The Commissioner must not divulge the identity of the employee except with the individual employee's consent (**section 82(3)**).

Disclosure can occur through written communication with the Commissioner or through a meeting between the employee and the Commissioner or one of the Commissioner's staff who is delegated to undertake the case.

If an employee has acted in good faith, he or she is protected from prosecution under any Act for

- copying a record or disclosing it to the Commissioner; or
- disclosing information to the Commissioner (**section 82(4)**).

An employee acting in bad faith would not be protected from prosecution. *Acting in bad faith* means acting with mischievous, harmful or false intent.

A public body or any person acting on behalf of a public body is prevented from taking any adverse employment action against an employee acting in good faith who

- has disclosed information to the Commissioner under **section 82**; or
- has exercised or may exercise a right under this section (**section 82(5)**).

Any person who contravenes **section 82(5)** is guilty of an offence and liable to a fine of not more than \$10,000 (**section 82(6)**).

2.10
Liability

Protection from liability

Under **section 90** of the Act, a public body and all the officials involved in the administration of the Act are protected from liability for damages for

- disclosing or withholding information, or for the consequences of disclosing or withholding information, where a public official has acted in good faith; or
- failing to give a required notice where the public official took reasonable care in giving notice.

2.11
Offences and Penalties

Offences and penalties

Section 91 protects an employee of a public body from adverse employment action as a result of properly disclosing information in accordance with the Act. Anyone who contravenes **section 91** is guilty of an offence and liable to a fine of not more than \$10,000.

Section 92(3) is a special provision that was added in 2006 to prevent the disclosure of personal information of Albertans to foreign courts, especially under outsourcing arrangements. This provision makes it an offence to wilfully disclose personal information to which the Act applies

- in response to a subpoena, warrant or order issued by a court, person or body that has no jurisdiction in Alberta to compel the production of information, or
- in response to a rule of court that is not binding in Alberta.

The penalty for this offence is a fine of between \$2,000 and \$10,000 for an individual, and between \$200,000 and \$500,000 for an offender that is not an individual (e.g. a corporation).

Section 92 of the Act sets out other offences and penalties and requires public bodies to cooperate with the Information and Privacy Commissioner or another person performing duties of the Commissioner.

It is an offence under the Act to

- collect, use or disclose personal information in contravention of **Part 2** of the Act;
- attempt to gain or gain access to personal information in contravention of the Act;
- make a false statement to, or mislead or attempt to mislead, the Commissioner or another person in the performance of the duties, powers or functions of the Commissioner or another person under the Act;
- obstruct the Commissioner or another person in the performance of the duties, powers or functions of the Commissioner or other person under the Act;
- alter, falsify or conceal any record, or direct any person to do so, with the intent of evading a request for access under the Act;
- fail to comply with an order made by the Commissioner under **section 72** or by the adjudicator under **section 81(2)**; or
- destroy any records subject to the Act, or direct any person to do so, with the intent to evade a request for access to the records.

Public bodies should note that it is an offence to wilfully reveal or wilfully attempt to gain access to the identity of an applicant in contravention of the Act, whether or not the attempt is successful (see *IPC Order 2000-023*).

Although it is an offence to destroy any records subject to the Act with the intent to evade a FOIP request, there is no duty or requirement as to how a public body should structure or maintain its record retention system (see *IPC Order 2000-030*).

In *IPC Order F2002-006*, the Commissioner commented that giving up the custody of a record to an external reviewer for the purpose of avoiding the requirements of the Act was contrary to the spirit of the Act. It appeared that the public body came “dangerously close” to breaching **section 92(1)(e)**.

Failure to comply with a duty imposed by the FOIP legislation or otherwise acting in contravention of the legislation is not an offence unless it is covered under **section 92(1)**.

The Commissioner may find grounds for believing that an offence under **section 92(1)** has occurred in the course of

- a review requested by an applicant or other individual under the Act;
- an investigation under **section 53**; or
- a disclosure to the Commissioner under **section 82** regarding possible failure to disclose in the public interest or regarding a possible violation of **Part 2** of the Act.

Any other failure to comply with the legislation that is not an offence under **section 92(1)** is dealt with by the Commissioner under the normal review and complaints process set out in **Part 5** of the Act or in an investigation under **section 53**.

Any person who commits an offence under **section 92(1)** or **section 91(1)** is liable, upon conviction, to a fine of up to \$10,000 under **sections 92(2)** and **91(2)** respectively. The Commissioner does not impose the fine. The court, under the

Provincial Offences Procedures Act, will determine whether or not an offence has been committed and impose any fine (see *IPC Order 99-012*).

In order to support charges under the offence provisions in the Act, the Commissioner would have to be satisfied, on reasonable and probable grounds, that an offence had been committed. The Commissioner would then swear an Information in Provincial Court to that effect and the charge would be heard in that Court (see *IPC Investigation Report 2001-IR-010*).