

November 5, 2018

## Let's Talk About Access to Information in Alberta: Part One

**By:** Shaun Fluker and Drew Yewchuk

**Legislation Commented On:** *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#)

The Faculty's Public Interest Law Clinic handles a lot of inquiries from the community that engage with Alberta's access to information legislation: the *Freedom of Information and Protection of Privacy Act*, [RSA 2000, c F-25](#) (*FOIP Act*). Simply put, there is a high demand for the disclosure of information collected, produced and otherwise held by state officials. The Information and Privacy Commissioner, who serves as an officer of the Legislature (*FOIP Act*, s 45), is responsible for overseeing the administration of the *FOIP Act* with the assistance of the Office of the Information and Privacy Commissioner (OIPC). In its [2015-2016](#) and [2016-2017](#) reports to the Legislative Assembly the OIPC indicated the access to information process in Alberta is approaching a crisis. Since commencing operations in 2015, the Public Interest Law Clinic has developed some expertise on working within the *FOIP Act*, and we would agree the system needs some critical attention. This post summarizes our current observations in this regard and, as the title to this post suggests, we see this as the beginning of a longer conversation. In order to illustrate the process and some of the problems within it, we refer to a request for information filed by the Clinic in July 2017, which is still ongoing, with respect to a creative environmental sentence imposed on CN Rail (see [here](#) for details on the offence and the creative sentence).

Access to information legislation provides an interested person with a right to the disclosure of records in the control of government departments (*FOIP Act*, s 6(1)). This is a right in the Hohfeldian sense in that the legislation imposes a correlative duty on the part of a government department to disclose records to the interested person. However, this right to the disclosure of records is qualified by many provisions in the *FOIP Act* which limit the scope of the disclosure requirement. Generally speaking, these limiting provisions are directed at preventing the disclosure of records which may be harmful to a government body or have an adverse effect on the privacy interests of others noted in the records. In cases where there is a dispute over the extent of a right to disclosure, the OIPC serves as the initial dispute resolution mechanism.

The access to information process starts with a request for disclosure by an interested person to the targeted government department along with the prescribed \$25 fee (*Freedom of Information and Protection of Privacy Regulation*, [Alta Reg 186/2008](#), s 11 (*FOIP Regulation*)). The exact wording of a request is very important: Ask for too many records over a long period of time and your request will be expensive and delayed; ask for too little and you risk not getting the records you are seeking. In the CN Rail case we are looking for records pertaining to the development of the creative sentence, and thus our request for records was as follows:

I am requesting records pertaining to guidelines, policies (formal or informal), directives, instructions, notices, or internal communication (including emails) which address the use, format, structure and decision-making framework related to orders issued under section 234

of the *Environmental Protection and Enhancement Act*, RSA 2000 c E-12 (otherwise known as the creative environmental sentences). These records would have informed the actions of the Crown Prosecutor in the matter of *R v Canadian National Railway Company* which saw the sentence order signed on June 2, 2017 (For the time period of January 1, 2017 to July 12, 2017).

In the interest of promoting transparent government, one obvious structural problem with the access to information process under the *FOIP Act* is that the subject government department plays the dominant role in a response to the information request. These departments have developed several techniques to frustrate information requests: delay, excessive fees, and redactions.

## **Delay**

The most common technique appears to be simple delay – not replying, or seeking multiple time extensions from the OIPC. Section 11 of the *FOIP Act* contemplates most requests being completed within 30 days:

- 11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless
- (a) that time limit is extended under section 14, or
  - (b) the request has been transferred under section 15 to another public body.

Extensions can be taken under section 14 if there is a large number of records (section 14(1)(b)), time is needed to consult with another public body (section 14(1)(c)), or the record contains documents with third party information which that party opposes the release of 14(1)(d)). The [OIPC 2016/2017 annual report](#) illustrates the problem: the OIPC received 253 extension requests from public bodies in 2016-2017 and had 57 cases where an applicant made an access request and received no response within the legislated timelines (what the OIPC calls a ‘deemed refusal’). Of these 57 cases, 44 were requests to Alberta Justice or Alberta Environment and Parks (see the 2016/2017 annual report at pages 6-7).

None of the access to information requests filed by the Clinic have produced records within the 30-day time frame set out in section 11 of the *FOIP Act*. The three requests where the Clinic has received records have taken 125, 89, and 84 days respectively to be completed. Five of our requests which are still outstanding have been open for more than 100 days. The Clinic filed the CN rail request for information with Alberta Justice on July 12, 2017. We received partial disclosure on November 14, 2017 but for reasons set out below, to date we have only received 35 out of the 857 pages of material we were told are responsive to our request.

## **Excessive fees**

The second technique used by government departments to frustrate the process is fees. The applicable legislative provisions governing fees are sections 11, 13, 14, and schedule 2 of the *FOIP Regulation*. A department can only charge fees where it estimates the cost of processing the request will exceed \$150. Fees are estimated by valuing employee time at up to \$6.75 per 1/4 hr (27\$ an hour) to handle the record. The amount of time needed to handle a record will vary depending on the size and complexity of the request. Once a total fee estimate is tallied, the department requires the applicant to pay 50% of the estimate before proceeding to prepare the record. An applicant must accept the fee or modify the request within 20 days of receiving the fee estimate (*FOIP Regulation*, section 13(4)). What this means in real terms is that where a request for information is estimated to take more than 5 ½ hours to process there will be a fee payment required of the requesting person before the request is processed by the department (The \$150 fee threshold divided by the \$27 per hour expense for time to prepare the record = 5.5 hours).

This fee threshold is easily passed for requests that produce a large number of documents (counted in number of pages), and thus it is typical for a person seeking access to information to be presented with a bill in the hundreds or even thousands of dollars which must be accepted within a short time frame in order for their request to be processed. Keep in mind, this monetary amount must be paid in the absence of any knowledge on what the content of the responsive records will be and what redactions will be applied by the department (more on that below).

We have noticed that a significant portion of the fee estimate will be for ‘preparing and handling’ the record. A breakdown of the required fee for requests made by the Clinic which have exceeded the \$150 threshold is set out below. Alberta Justice estimated the total fee at \$1270.25 to process the Clinic’s request for information on the creative sentence in the CN Rail case (listed as FOIP D in the table below). In a letter dated July 28, 2017 Alberta Justice requested \$635.13 to paid within 20 days in order to proceed with the request for records in the CN Rail case.

	Locating the record	Preparing and handling the record	Printing, USB sticks, or postage	Total estimated cost per FOIP
FOIP A	\$162.00	\$48.60	-	\$210.60
FOIP B	\$162.00	\$459.00	\$36.00	\$657.00
FOIP C	\$391.50	\$720.00	-	\$1,111.50
FOIP D	\$189.00	\$864.00	\$215.25	\$1,270.25
FOIP E	\$1,215.00	\$1,311.75	-	\$2,526.75
FOIP F	\$72.00	\$3,240.00	-	\$3,312.00
FOIP G	\$432.00	\$3,240.00	-	\$3,672.00
<b>Totals</b>	<b>\$2,623.5</b>	<b>\$9,883.35</b>	<b>\$251.25</b>	<b>\$12,760.10</b>

This table shows the extent to which preparing and handling the record dominates the basis for a fee requirement. At this juncture, it is important to keep in mind that so long as the request for information is in relation to a recent timeframe (i.e. not searching for archival materials) much of these records will be in an electronic format. There is a separate category for locating the records. So what sort of work is encompassed by ‘preparing and handling’ these electronic records?

Our observations from working within the *FOIP Act* suggest to us that the work involved in preparing and handling the record amounts primarily to the department redacting information from the records, in accordance with how the department reads the application of sections 16 to 29 of the *FOIP Act*. What this means for a person seeking access to information is that the legislation requires them to pay for the work it takes for department employees to remove information from the records sought. In other words, you pay the department to conceal the information you are seeking. In the CN Rail case, the Clinic was asked to pay \$864 in order for Alberta Justice to fully redact 822 pages out of a complete record of 857 pages.

One option available to someone who would like to reduce or eliminate the fee requirement is to seek a fee waiver where the person can establish (1) they cannot afford the payment or for any other reason it is fair to excuse payment; or (2) the information sought relates to a matter of public interest, including the environment or public health or safety” (*FOIP Act*, section 93(4)). The interpretation given to these criteria for a fee waiver by government departments appears to vary. Some departments focus on whether the public would be ‘interested’ in a literal sense in the information sought, and how the applicant will provide that information to the public. Alberta Energy, for example, asks whether the disclosure will add to public research on the operations of government and whether the information will be useful in clarifying public understanding of issues.

More typically, a government department offers no guidance on how it will interpret the fee waiver criteria and thus a person seeking to obtain a fee waiver should look to OIPC decisions for guidance on what to submit in their waiver application. A helpful decision to look in relation to interpreting section 93(4) of the *FOIP Act* is *Order F2014-11 (Re)*, [2014 CanLII 8570 \(AB OIPC\)](#) at paragraphs 22-23:

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

- Have others besides the applicant sought or expressed an interest in the records?
- Are there other indicators that the public has or would have an interest in the records?

2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:

- Do the records relate to a conflict between the applicant and government?
- What is the likelihood the applicant will disseminate the contents of the records?

3. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government? The following may be relevant:

- Do the records contain information that will show how the Government of Alberta or a public body reached or will reach a decision?
- Are the records desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny?
- Will the records shed light on an activity of the Government of Alberta or a public body that have been called into question?

In the CN Rail request for information, the Clinic requested a fee waiver by making submissions based on the guidance set out in this OIPC decision. Alberta Justice granted the request, and waived the stated fee of \$1270.25. However, Alberta Justice did so without reasons. The explanation we received for our successful fee waiver application was as follows: “After reviewing your request for a fee waiver and Section 93(4) of the *FOIP Act*; in this instance Alberta Justice decided to commence processing your request and the fee for processing your request has been waived.” Of course, without reasons it is not possible to know which of our submissions on the waiver request was persuasive and thus difficult to gain any institutional knowledge for future applications.

### **Redactions and More Delay**

The third, and clearly most effective, method used by government departments to frustrate the access to information process is to redact as much information from the disclosed record as is allowable under the exceptions to disclosure under sections 16 to 29 of the *FOIP Act*. As we mentioned above, in the CN Rail case Alberta Justice fully redacted 822 of the 857 pages in the pages responsive to the Clinic’s request. Of the 35 pages which were not fully redacted, 13 pages were simply copies of email correspondence that had been sent by Clinic staff to obtain information from the Crown on the creative sentence without resorting to an access to information request under the *FOIP Act*. In other words, much of the records we

received were simply copies of our own emails. In light of this result, we were glad to have been granted a fee waiver. Otherwise, we would have paid hundreds of dollars to receive copies of our own emails!

Section 65 of the *FOIP Act* provides that an applicant can request a review by the OIPC of the department's redactions from the record. A review introduces an incredible amount of delay: the OIPC [expects](#) the delay to be 6 to 8 weeks for the Office to decide if it will investigate the matter and another 9 months to investigate or mediate the complaint. If the process leads to an adjudicative inquiry by the Commissioner, you should expect the entire process to take 18 months or more. This is remarkable given that section 69(6) of the *FOIP Act* suggests an intention by the Legislature that a review will take 90 days or less. These timeframes for a review by the OIPC are in addition to whatever amount of time has elapsed before making the request for a review. In the CN Rail case, 14 months passed since the initial FOIP request before we were invited to seek a review by the OIPC. That process is ongoing.

These issues are real barriers to realizing access to information under the *FOIP Act*. What is truly disappointing is that they are widely acknowledged and known to be problematic, as set out by the Centre for Law and Democracy in its 2012 release of an [Analysis of Access to Information Legislation in Canadian Jurisdictions](#). None of what we have set out in this post will be news to anyone who regularly uses the access to information process under the *FOIP Act*. The purpose of the *FOIP Act*, to grant a right of access to government records (section 2(a)) and facilitate transparency as a means for Albertans to hold their government accountable, seems completely frustrated by delay, excessive fees, and redactions.

---

This post may be cited as: Shaun Fluker and Drew Yewchuk, "Let's Talk About Access to Information in Alberta: Part One" (November 5, 2018), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2018/11/Blog\\_SF\\_DY\\_Lets\\_talk\\_about\\_FOIP\\_Nov2018.pdf](http://ablawg.ca/wp-content/uploads/2018/11/Blog_SF_DY_Lets_talk_about_FOIP_Nov2018.pdf)

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](#)

