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New Alberta Access to Information Law Part 1: More Secrecy

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Matter Commented On: Bill 34: Access to Information Act

On 6 November 2024, the United Conservative Party introduced two bills that would repeal the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIP*) and replace it with separate statutes for personal information held by provincial government agencies (Bill 33: *Protection of Privacy Act*) and the public accessibility and secrecy of government records (Bill 34: *Access to Information Act*).

This post describes the notable proposed changes to the right of access to government records found in Bill 34. In short, Bill 34 weakens the public's right of access to the factual information connected to government policy decisions, removes the public's right of access to almost all prosecutor's records, and creates a bizarre new zone of secrecy around "political staff" without defining who "political staff" are.

A follow up post will describe the changes Bill 34 would make to the processes for records requests and related complaints to the information commissioner.

Name Changes: From Freedom to Access and the *PIPA*-*POPA* Problem

Bill 34 would change the name of the statute from 'freedom of information' to 'access to information'. There is no consistent approach to naming this type of statute across Canadian jurisdictions. For instance, B.C., Saskatchewan, and Ontario use 'freedom of information', while the federal government, Yukon, and Newfoundland and Labrador, use 'access to information'. In my view, the name 'access to government records act' would be a good replacement for both, as it more specifically describes the function and scope of these laws. All such laws only provide access to 'information' that is recorded in government records.

My only comment on the privacy statutes is that the names of *Personal Information Protection Act*, SA 2003, c P-6.5 (*PIPA*), which governs personal information in the possession of non-provincial government organizations, and the proposed *Protection of Privacy Act* (*POPA*) in Bill 33 are too similar and invite confusion. Both laws protect the privacy of personal information: one is for personal information held by provincial government agencies and the other is for personal information held by provincial non-government bodies (organizations – see *PIPA*, s 1(1)(i)), but the names give no hint of which is which. The two personal privacy statutes should be combined into a complete code for privacy or given new descriptive names along the lines of the *Personal Privacy in Government Records Act* and the *Personal Privacy in Non-Government Organization Records Act*.

Drafting Improvements

Because the content of the current *FOIP* is being divided into two statutes, the numbering of nearly all sections in the law are changed. Bill 34 also fixes some organizational problems and errors in wording from *FOIP*. I will not describe each of the organizational and wording edits, but provide two significant examples. *FOIP* divided limits on access rights into three categories in different places in *FOIP*: (*FOIP*, section 4, section 6, and part 1, division 2). Bill 34 reorganizes those limits on access rights into two categories and places (Bill 34, section 4 and part 1, division 2). Bill 34 also edits and rewords the division about reviews of the commissioner's decisions as head of a public body to avoid confusion about the role and function of 'independent adjudicators' (see Bill 34, part 3, division 3). Those changes are beneficial improvements to the organization of the statute.

Less Records Subject to the Right of Access

Bill 34 changes the secrecy for prosecutor's records from temporary to permanent. Under *FOIP*, records "relating to a prosecution if all proceedings in respect of the prosecution have not been completed" were not subject to records requests (*FOIP*, s 4(1)(k)) and a public body could refuse to disclose "records that would reveal any information relating to or used in the exercise of prosecutorial discretion" for 10 years after those records were created (*FOIP*, s 20(1)(g) and 20(2)). Under Bill 34, records held by prosecutors relating to a prosecution or potential prosecution would no longer be subject to records requests, no matter their age or whether a prosecution was completed (Bill 34, s 4(1)(n)).

The shift to permanent secrecy and total exclusion from records requests is lacking any justification. Exercises of prosecutorial discretion ought to be subject to public scrutiny and historical review. For an example of why someone would want old prosecutor's records, see OIPC Order F2023-27, a decision on my request for records relating to sentencing for bird landings in a tailing pond in April 2008.

The largest and most absurd problem with Bill 34 is the new category of "political staff" communications not subject to records requests:

> (w) a record of communication between
> (i) political staff
> (ii) A member of Executive Council and political staff that does not involve any other employee of a public body
> (Bill 34, section 4(1)(w))

"Political staff" is the critical term for this exclusion, but the term is being left to be defined by regulations made by cabinet (ss 4(7) and 97(1)(a)). This new zone of secrecy will be a gigantic obstacle to meaningful access. This is an outrageous and bizarre addition, and I am not aware of any government records act law that has a comparable zone of secrecy for the executive branch.

The ”political staff” exception is not limited or specific because possible dictionary definitions of “political” are “of or relating to government, a government, or the conduct of government” (Merriam-Webster) or “of or relating to politics or government” (Britannica Dictionary). The cabinet is therefore being granted an almost unlimited power to immunize government staff from the records requests.

The “political staff” exception in Bill 34 reflects a bizarre understanding of the purpose of access to government records laws by establishing an inverse relationship between transparency and executive branch authority. The Premier and cabinet ministers, who exercise real discretionary authority, are granted a broad scope of secrecy while lower ranking public body employees with little discretionary power are subject to public scrutiny. To enable democratic oversight, the public needs to supervise cabinet ministers, not the janitorial staff at government buildings. Instead of enabling democracy, this approach to access to government records law mostly makes it unpleasant to be a government employee. (For a full discussion of this problem in the American context, see David E. Pozen, “Transparency’s Ideological Drift” (2018) 128 Yale L J 100).

More Redactions

The exceptions to disclosure allow a public body to redact parts of government records that meet the statutory requirements.

Section 24 is a new exception to disclosure for workplace investigations. The massive problem is that no definition of “workplace investigation” is provided in Bill 34. These exceptions need to be drafted so they can be consistently interpreted by non-lawyers working in access to government record offices and by the public. Leaving the key phrase “workplace investigation” undefined invites confusion and needs to be fixed. What is being investigated, by whom, or for what purpose for something to be a ‘workplace investigation’ needs to be set out in the bill. The heading “Workplace Investigations” is not correct either, as it should be “Disclosure Harmful to Workplace Investigations” to be consistent with the other exception to disclosure headings in the Bill.

Section 25 protects the identity of people involved in making disclosures under the *Public Interest Disclosure (Whistleblower Protection) Act,* SA 2012, c P-39.5. That protection is not new, but it has been helpfully reorganized. *FOIP* pointlessly classified the rule as a limit on access rights instead of an exception to disclosure (see *FOIP*, s 6(9) and (10)). There is a problem with the heading of the new section 25 though. The heading is “Disclosure and Complaints”. That is not descriptive enough, because almost all of Bill 34 describes other kinds of ‘disclosures and complaints’. The heading ought to be “Disclosure Harmful to Whistleblower Protection”.

One of the worst changes in Bill 34 is the greatly expanded secrecy for factual information relating to cabinet secrecy and internal advice. The exceptions to disclosure for cabinet and treasury board confidences are being extended to cover ‘records’ instead of ‘information’ and “any background or factual information” (s 27(2)), replacing the old rule, which read:

> (2) Subsection (1) [Cabinet and Treasury Board confidences] does not apply to
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> (a) information in a record that has been in existence for 15 years or more,

> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
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> (c) information in a record the purpose of which is to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision if
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> (i) the decision has been made public,
> (ii) the decision has been implemented, or
> (iii) 5 years or more have passed since the decision was made or considered.
> (*FOIP*, s 22(2))

Bill 34 would also extend the exception to disclosure for "advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council" to cover "background factual information and information provided for informational purposes only" (s 29(1)(a)). This reverses the findings of many past decisions from the office of the information and privacy commissioner (see for instance Re *Alberta Environment and Protected Areas*, Order F2022-62, 2022 CanLII 122541, at paras 25-26).

Secrecy for the background information to government decisions has no connection to the traditional justifications for cabinet or administrative secrecy. The exceptions for both cabinet secrecy and executive branch advice are meant to keep the policy deliberation process secret. Even the scholars who defend the importance of cabinet secrecy have been clear that cabinet secrecy should not be extended to cover factual information.

> Preventing the disclosure of facts does not conform to the purpose of the cabinet secrecy convention. Moreover, the breadth of these statutory provisions is undermining the legitimacy of the convention.
> (Nicholas D'Ombrain "Cabinet Secrecy" (2004) 47:3 Can Pub Admin 332 at 352)
>
> Cabinet immunity should not be invoked to protect factual and background information related to a decision that has been made public. (Yan Campagnolo, "Rethinking Cabinet Secrecy" (2020) 13:3 J Parliamentary & Political L 497 at 510)

Extending secrecy to cover background factual information is a move in entirely the wrong direction. Further, the phrase "information provided for informational purposes only" is absurdly bad drafting. All information is informational, putting a suffix on the word "information" does not help clarify anything.

Bill 34 adds an explicit exception for "information about the labour relations of a public body" to the list of exceptions to disclosure harmful to the economic interests of public bodies (Bill 34, s 30(1)(e)). The change will prevent public sector unions from gaining any advantage in negotiations using the act, but such information would likely already have been at least partially covered by existing protections for public body negotiations (see *FOIP*, s 30(1)(c)(iii)).

Bill 34 also expands the scope of secrecy for legal privilege from covering 'information' to covering 'records'. *FOIP* allows a public body to refuse to disclose "information that is subject to any type of legal privilege" (*FOIP*, s 27(1)(a)). Bill 34 would allow a public body to refuse to disclosure "information **or a record** that is subject to any type of legal privilege" (emphasis added) (Bill 34, s 32(1)(a)). This change and the similar change for cabinet records are misguided because they interfere with the structure of the act. Categories of records not subject to requests are described in section 4, specific types of information that can be withheld are described in part 2, division 3. The purpose for the change and its relationship with the obligation to sever and release releasable information (Bill 34, s 6(2)) therefore creates an ambiguous puzzle.

Conclusion

Bill 34 has some drafting errors that need attention. Far more importantly, Bill 34 expands the scope of government secrecy over historical prosecutor's records, factual information connected to ministerial and cabinet decision making, and over the records of "political staff". The public's right of access to government records is already particularly weak in Alberta, but Bill 34 would make Alberta the definite leader in Canadian government secrecy. Many records requests that would obtain heavily redacted pages under *FOIP* would obtain nothing at all under Bill 34.

I conclude with a quote from Joe Clark in 1978, when the federal government was being pressured to enact legislation on access to government records.

> This is not at all a narrow legal question we are dealing with here. What we are talking about is power – political power. We are talking about the reality that real power is limited to those who have facts. In a democracy that power and that information should be shared broadly. In Canada today they are not, and to that degree we are no longer a democracy in any sensible sense of that word. There is excessive power concentrated in the hands of those who hide public information from the people and Parliament of Canada.

This post may be cited as: Drew Yewchuk, "New Alberta Access to Information Law Part 1: More Secrecy" (20 November 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/11/Blog_DY_New_AIA1.pdf