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New Alberta Access to Information Law Part 2: More Obstacles to Seeking Government Records

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Matter Commented On: **Bill 34: Access to Information Act**

This is my second post on Bill 34: *Access to Information Act*, a Bill that would replace the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIP*) as Alberta's law on the public accessibility and secrecy of government records. The first post, described major proposed changes to the right of access to government records. This second post focuses on changes to process in Bill 34, both to the access request process and administrative complaints process.

For another view of Bill 33 and 34, I direct readers to the comments of the Office of the Information and Privacy Commissioner (OIPC), which published a letter with their own comments on Bill 33 and 34 on November 20, 2024. Notably, the OIPC identified concerns with the new definition of 'electronic record' that I did not raise in my first post.

Changes to Statutory Timelines and Timeline Extensions

Bill 34 changes most of the statutory timelines from being measured in days to being measured in "business days" (defined in s 1(c)) without changing the number, which extends the expected timelines for records requests by around 40% (depending on holidays). Some timelines may have been deliberately left in days rather than business days as they relate to court processes (see sections 75 and 95(3)). Others were left in days (as opposed to business days) for no clear reason, perhaps only a drafting error (see sections 9(4), 13(2), 36(2), 36(3), 69(2)), and 71(6)).

Bill 34 adds provisions for the automatic extension of timelines due to disasters (ss 16(9), 16(10), 36(2), 62(10)). This is a rational addition, as it benefits no one to have all statutory timelines violated because a disaster makes request processing temporarily impossible. These new sections were first recommended by the OIPC in relation to the 2013 floods.

Expanded Powers for Public Bodies to Stall and Reject Requests

Under *FOIP*, a request "must provide enough detail to enable the public body to identify the record." (*FOIP*, s 7(2)). The public body receiving the request makes an initial decision on whether a request meets this standard. This causes a problem, as public bodies can pretend not to understand requests or insist that requests be rephrased or modified before they can be processed. This interference strategy forces a request filer to seek OIPC review just to get a request filed, introducing lengthy delay. This is a problem in *FOIP* that could use a legislative fix.

However, Bill 34 would make the situation worse, as a request would need to "provide enough detail to enable the public body to locate the record within a reasonable time with reasonable effort" (Bill 34, s 7(2)(c)) This gives public bodies even more leeway to reject requests they do not want to process. Neither 'reasonable time' nor 'reasonable effort' have any obvious definition and what is 'reasonable' will become a constant headache for request filers and the OIPC if Bill 34 comes into force. The change is also inconsistent with the general scheme of the act, as large requests are already subject to fees. The fee mechanism already in *FOIP* provides the incentive for requesters to limit the scope of their requests. How the double mechanisms of the "reasonable effort" rule and fees would function is left completely unclear.

Under *FOIP,* public bodies needed OIPC approval to disregard a request, including for failing to have enough detail (*FOIP*, s 55). Under Bill 34, public bodies would be enabled to disregard requests and then the requester must seek OIPC review to challenge that decision. This shifts the work of getting OIPC approval from the public body to the request filer. This 'streamlines' the process for public bodies to ignore requests they do not like and makes obtaining government records even rougher.

Bill 34 weakens the public body's 'duty to assist' applicants (*FOIP*, s 10 and Bill 34, s 12). The duty to assist would now be subject to regulations, and the duty to produce electronic records is limited to the poorly defined situation where doing so "would be reasonable and practical." (Bill 34, s 12(3))

Bill 34 changes the process for public bodies to extend their timelines for responding. (see *FOIP*, s 14 and Bill 34, s 16) In a beneficial change, extensions would no longer be permitted where "a large number of records must be searched". On the extremely unhelpful side, the requirement for the OIPC to approve extensions for more than 30 days is removed, shifting the task of challenging extensions to the applicant. Multiple extensions would also be expressly permitted under Bill 34 (Bill 34, s 16(2)).

A New Procedural Mess: When a Request is Not a Request

Under *FOIP*, a public body could make categories of records available to the public without the formal access request process. (*FOIP*, s 88). This provision was typically used for categories of documents that were drafted with the expectation they would be public. An example of the use of this provision is what the AER calls 'routine disclosure' – documents relating to some regulatory applications they will send without redactions and without payment.

Bill 34 heavily modifies this section. Bill 34 would allow public bodies to redact information from records released through the 'without request' process on the same grounds they can redact information on a formal access request. Second, it would expressly remove any right to seek OIPC review (Bill 34, s 90(2) and 90(5)). Third, a record released through this 'informal' process could not be the subject of a formal access request (Bill 34, s 92 and 4(1)(cc)). These changes make the 'informal' process worse than the formal process. Information can still be redacted from the records and fees can still be charged, but the applicant cannot seek OIPC review, and the Applicant cannot choose the formal access request route. Altogether, the changes establish a pointless and bizarre system where public bodies can exclude OIPC review for categories of records even as

they redact information on the records. The provision allowing public bodies to redact information on these ‘without request-requests’ needs to be removed.

It is also worth noting that since judicial review cannot be constitutionally prevented, but only routed through administrative bodies, and the OIPC process is closed, these ‘without request-requests’ would not actually be immunized from review. Applicants could directly seek judicial review at Kings Bench – an easily foreseeable outcome the legislature likely forgot about. On that same basis, the privative clause ‘no appeal’ provision that have been retained from *FOIP* should be removed (Bill 34, ss 65, 74). It is deceptive and misleading for the legislation to include a clause that gives the impression that judicial review is not available, when judicial reviews of OIPC decisions are routine.

Changes to the Complaint Process at the Office of the Information Commissioner

Bill 34 would limit the OIPC’s power to extend the time limit for complaints to a 30 business day extension (compare *FOIP*, s 66(2)(a)(ii) and Bill 34 s 59(2)(a)(ii)). This narrowing of the OIPC’s discretion is needless and reduces the OIPC’s ability to extend the appeal period more where an applicant has extenuating circumstances for delay.

The anticipated length of the OIPC inquiry is extended from 90 days to 180 business days. (Bill 34, s 62(9). This appears to increase delay, but it really only acknowledges reality – the OIPC is underfunded and is unable to meet the 90 day expectation in *FOIP*. The OIPC currently extends all or nearly all review periods, and so I consider this extended time period unproblematic. The speed of OIPC complaint review is determined much more by staffing and funding levels than law. Legislation requiring faster work is pointless unless funding is provided to make that faster work possible.

Bill 34 also reduces the OIPC’s ability to review records during the complaint process. (Bill 34, s 50(6). Categories of records the OIPC will not be permitted to review would include: court records, cabinet records, undefined ‘political staff’ records, and records subject to any kind of legal privilege. Without the ability to review these records, the OIPC process becomes unhelpful for an applicant. I agree with the OIPC’s letter – the OIPC’s power to review records ought to have been expanded to cover records that public bodies consider to be solicitor-client privileged. A weakened OIPC means a longer, more complex, and less helpful review process for applicants.

Pointless Review of Act

Bill 34 also requires a comprehensive review of the act by special committee of the Legislative Assembly every six years. (Bill 34, s 100). Such a review would be a total waste of time. The huge problems with Bill 34 are already obvious to anyone roughly familiar with the access request process. The federal government completed such a review of their legislation last year, and then ignored it. That would be the obvious fate of such a review in Alberta.

Commentary

Bill 34 is an attack on the right of access to government records in Alberta. The UCP described the bill as a modernization needed to address "today's digital landscape and to align with other Canadian jurisdictions". The Bill's connection to changes to digital records is a cover story, as the changes relating to digital records are minimal. Most of the changes increase secrecy and procedural obstacles for requesting records to reflect what the UCP believes is the secrecy permitted to the federal government under the *Access to Information Act,* RSC 1985, c A-1. But Bill 34 'aligns' only where it increases secrecy. The federal *Access to Information Act* system is stronger than Alberta's system in notable ways: fees are limited to $5 per request, previously released record requests can be searched on-line and obtained for free, and the federal access commissioner is empowered to review solicitor-client privileged records (*Access to Information Act,* s 36(2)). Bill 34 makes no effort to strengthen the Alberta right of access to align with the federal statute, only weakening the right of access in Alberta to meet the UCPs' view of the federal statute.

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