Prince Edward Island
Legislative Assembly

Information and
Privacy Commissioner
PO Box 2000, Charlottetown PE
Canada C1A 7N8

Île-du-Prince-Édouard
Assemblée législative

Commissaire à l'information et
à la protection de la vie privée
C.P. 2000, Charlottetown PE
Canada C1A 7N8

October 2, 2017

Hand Delivered

Kathleen Casey, MLA
Chair, Standing Committee on Communities, Land and Environment
Legislative Assembly of Prince Edward Island
175 Richmond St.
Charlottetown, PE

Dear Ms. Casey:

Please find enclosed a copy of the recommendations of the Office of the Information and Privacy Commissioner, relating to the 2017 review of the *Freedom of Information and Protection of Privacy* Act. I look forward to discussing these recommendations with your committee members on Thursday, October 5, 2017.

Yours sincerely,

Karen A. Rose
Information and Privacy Commissioner

enclosure

c: Members of the Standing Committee on Communities, Land and Environment (7)

FOIPP ACT REVIEW

RECOMMENDATIONS of the OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

TO THE STANDING COMMITTEE ON COMMUNITIES, LAND AND ENVIRONMENT

PROVINCE OF PRINCE EDWARD ISLAND

October 2, 2017

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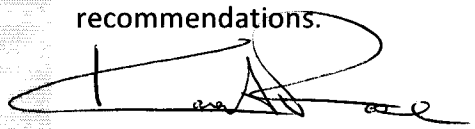
The *Freedom of Information and Protection of Privacy Act* ("the *FOIPP Act*") is an often-used law. Last year, the Access and Privacy Services Office processed almost 200 access to information requests, and may exceed this number in 2017. The number of requests for access has increased considerably since the original proclamation of the *FOIPP Act*. In addition, people are more aware of, and concerned about, protection of their personal information, which is a core obligation of public bodies set out at Part II of the *FOIPP Act*.

The *FOIPP Act* is well-written, and has proven to be an effective law. Over the years, some issues have arisen, which Commissioners and courts have clarified through statutory interpretation. There are still amendments which the OIPC encourages this Committee to consider to improve access to information and protection of privacy, and to bring the *FOIPP Act* in line with similar statutes in other jurisdictions.

The recommendations herein arise from the OIPC's review of the *FOIPP Act*, and Alberta's FOIP statute, upon which the *FOIPP Act* was originally modelled. In addition, as discussed in the following pages, the OIPC has gathered information from other jurisdictions, for comparison purposes. If the Committee considers other amendments to the *FOIPP Act*, not described herein, the OIPC requests the opportunity to provide comment.

I thank the Committee for the invitation to make recommendations.



Karen A. Rose
Information and Privacy Commissioner

Brief History of Amendments to the *FOIPP Act:*

PEI's *FOIPP Act* was proclaimed in November, 2002. The Standing Committee on Community Affairs and Economic Development began a review of the *FOIPP Act* in May, 2004, and made recommendations for amendment in December, 2004. The Office of the Information and Privacy Commissioner ("the OIPC") was among the presenters to the Committee. Amendments were incorporated into Bill 10, which received Royal Assent on December 15, 2005.

Pursuant to section 79 of the *FOIPP Act*, beginning on December 12, 2008, a formal review of the *FOIPP Act* was undertaken by the Standing Committee. The Committee received remarks from the Acting Commissioner, and made recommendations for amendment in April, 2009. No additional amendments to the *FOIPP Act* resulted from this review.

Addition of public bodies - Municipalities

What is the issue? Islanders do not have a legislated right to access information in the custody or control of municipalities, and municipalities are not subject to the same obligations as public bodies to protect the privacy of the personal information that they hold.

Some municipalities provide access to some information, but they are not required to do so, and, importantly, there is no independent oversight of their decisions. For example, if a municipality declines to provide access to information, there is no designated Commissioner to independently review that decision.

In March 2015, the Saskatchewan OIPC made a recommendation to the Saskatchewan Legislative Assembly regarding its *Local Authority Freedom of Information and Protection of Privacy Act*, to include municipal police forces as local authorities covered under this law.

This recommendation was incorporated into Bill No. 30, and received Royal Assent on May 17, 2017. It is awaiting proclamation.

The Legislature passed the *Municipal Government Act*, Bill No. 58, on December 15, 2016 (not yet proclaimed), which includes a requirement for councils to create bylaws to address access to information and protection of privacy. The statutory standard is far less detailed than the statutory standards of the *FOIPP Act,* with no independent oversight.

In order to provide better services to individuals or families who may be at risk, there has been a move within governments to develop models which may involve collaboration among service providers, and sharing of personal information of those who are identified as being at risk of harm. The PEI Bridge is one such model, which has been operational for the past year. Collaboration within the PEI Bridge may involve local police services. The OIPC is particularly concerned that local police services are not public bodies under the *FOIPP Act*. While the RCMP fall under federal legislation, the *Privacy Act* and the *Access to Information Act*, there is no access or privacy legislation which applies to local police in Prince Edward Island. This creates a gap in oversight. Until recently, this was also the case in Saskatchewan, but has been remedied by an amendment to their legislation (see text box above). Inclusion of municipalities, and municipal police services, as public bodies under the *FOIPP Act*, would eliminate this gap in Prince Edward Island.

In the 2015-2016 Annual Report of the Information and Privacy Commissioner for the Northwest Territories, Commissioner Keenan-Bengts stated:

"It will come as no surprise that the need to ensure that municipal governments become subject to some form of access and privacy regulation remains on my wish list. Municipalities have had nearly twenty years to get their heads around how to achieve this. While I understand the limitations that municipalities face in terms of resources, expertise and infrastructure, it is no longer acceptable, in 2016, that a public government has no legal obligation to provide access to public records and, perhaps more importantly, to protect the personal information it collects."

Commissioner Keenan-Bengts is also the commissioner for Nunavut and made a similar recommendation for Nunavut.

How do we compare to other Canadian jurisdictions? Prince Edward Island is the only province whose municipalities do not have a statute governing access to information or protection of privacy. Saskatchewan will soon include local police services. The Territories have not yet included local public bodies in their freedom of information and protection of privacy legislation, but the OIPCs overseeing their legislation have recommended a similar amendment (see text box at left).

Recommendation: It is the recommendation of the OIPC that municipalities be added as public bodies under the *FOIPP Act*.

Timing: The PEI Legislature may wish to consider adding municipalities as a public body, with a delayed statutory effective date. The approach of other jurisdictions to add municipal governments to the different access to information and protection of privacy laws has varied, with most provinces adding municipalities years after the original proclamation of their freedom of information and protection of privacy legislation. This is also how the PEI Legislature brought Regional Health Authorities and School Boards, into the *FOIPP Act*, one year following the original proclamation.

Other consequential considerations: Based on the OIPC's review of the *FOIPP Act*, adding municipalities as public bodies should be a straightforward exercise. Aside from including municipalities in the definition of "public body" under section 1 of the *FOIPP Act*, and listing them in Schedule 1, there is one other provision which may require amendment: Section 19 is a discretionary exception to disclosure if disclosure would be harmful to intergovernmental relations. This section should be amended to include intergovernmental relations with municipal governments.

University of Alberta website:

The Freedom of Information and Protection of Privacy Act (the Act) has applied to the University of Alberta since September 1, 1999. This Act applies to all public bodies including ministries, Crown agencies and corporations, municipalities, hospitals, schools, universities and colleges.

University of Saskatchewan website:

The purpose of this policy is to ensure that the University of Saskatchewan complies with its obligations under The Local Authority Freedom of Information and Protection of Privacy Act (the "Act") to provide appropriate public access to information and to protect the privacy of Personal Information that is in the possession or under the control of the University of Saskatchewan ....

1. *Freedom of Information*:

As a publicly funded institution, the University will act in an accountable and open manner when receiving and responding to Requests for information.

Addition of public bodies - Post-secondary educational institutions

What is the issue? Islanders do not have a right to access information in the custody or control of post-secondary educational institutions in this province. In addition, these institutions are not required to protect individuals' personal information in their custody or control.

While the two Island post-secondary educational institutions have recently adopted policies about access to information and protection of personal information, these policies are at the discretion of the institutions and, further, there is no independent oversight of their processes or decisions.

Post-secondary educational institutions hold significant personal information, but have no legislated obligation to protect the privacy of the personal information that they hold.

How does PEI compare with other Canadian jurisdictions? Prince Edward Island is the only province whose freedom of information legislation does not apply to post-secondary educational institutions. All other Canadian provinces include such institutions as public bodies under their freedom of information legislation. The Territories also include post-secondary educational institutions as public bodies under their legislation.

Recommendation: It is the recommendation of the OIPC that post-secondary educational institutions be added as public bodies under the *FOIPP Act*.

Timing: The PEI Legislature may wish to consider adding post-secondary educational institutions as public bodies, with a delayed statutory effective date, to permit these institutions to properly prepare to comply with the *FOIPP Act*.

Other consequential considerations: Alberta's FOIP, upon which the PEI *FOIPP Act* is based, includes the following provisions, relating to post-secondary educational institutions, which are worthy of consideration for amendment to the PEI *FOIPP Act*:

Alberta *FOIP* Section	**Equivalent PEI *FOIPP Act* Section**	**Effect of specific Alberta *FOIP* provision**
1	1	1: Defines local public body to include universities and colleges
4	4	4(1)(h) and (i): FOIP does not apply to teaching materials and employee research information. 4(1)(n): FOIP does not apply to personal records of an appointed or elected member of a board of governors.
17	15	The PEI *FOIPP Act* already states that disclosure is not an unreasonable invasion of personal privacy if it only reveals enrolment in a school [s. 15(2)(j)(i)]. S. 17(2)(j)(i) of the AB FOIP adds "school or post-secondary institution".
39	36	39(2) and (3): Post-secondary educational institutions may use personal information in alumni records for fund-raising, unless the individual requests the post-secondary educational institution to discontinue this use.
40	37	40(2): Post secondary educational institutions may disclose personal information in alumni records for fund-raising, if there is a written agreement with the person to whom the personal information is disclosed, to provide access and to discontinue if requested by the individual. 40(3): Post secondary educational institutions may disclose teaching and course evaluations to assist students in selecting courses.

Section 25 of the PEI *FOIPP Act* states, in part:

Privileged Information

25. (1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege;

...

(2) The head of a public body shall refuse to disclose information described in clause (1)(a) that relates to a person other than a public body.

Solicitor-client privilege

What is solicitor-client privilege? The courts have given broad protections to records created when someone (including a public body) seeks legal advice. These protections are based on the public policy objective of encouraging people to be forthright with their lawyers when they are seeking legal advice; legal advice is optimal if the lawyer has all of the relevant information.

How the *FOIPP Act* protects solicitor-client privilege: Section 25 (in text box at left) permits a public body to refuse to disclose to an applicant information that is the subject of legal privilege. Solicitor-client privilege is specified as one type of legal privilege.

What is the Issue? As with any claimed exception to disclosure, if a public body relies on section 25 to refuse to disclose information to an applicant, and a review is requested by the applicant, the Commissioner must decide whether the public body has properly applied section 25 to the information. The Commissioner requires adequate evidence to make this determination, which may require ordering production of the record containing the information over which the section 25 exception is claimed. A problem sometimes arises when the public body refuses to provide a copy of the record to the Commissioner.

The Supreme Court of Canada has recently stated that the current wording of the *FOIPP Act* does not give the Commissioner authority to require the public body to produce records containing solicitor-client privileged information, to the Commissioner. The Supreme Court interpreted provisions in Alberta's FOIP statute, which are, in effect, the same as PEI's sections 25 and 53 of the *FOIPP Act*. The Supreme Court decided that the

Section 53 of the PEI *FOIPP Act* states, in part:

Powers of the Commissioner in conducting inquiries

53. (1) In conducting an investigation under clause 50(1)(a) or an inquiry under section 64 or in giving advice and recommendations under section 51, the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act* R.S.P.E.I. 1988, Cap. P-31 and the powers given by subsection (2).

(2) The Commissioner may require any record to be produced to the Commissioner and may examine any information in a record, including personal information whether or not the record is subject to the provisions of this Act.

(3) Despite any other enactment or any privilege of the law of evidence, a public body shall produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

....

(5) After completing a review or investigating a complaint, the Commissioner shall return any record or any copy of any record produced.

provisions, relating to the power of the Commissioner to compel records, are not clear enough to encompass information over which a public body has claimed solicitor client-privilege. It stated that solicitor-client privilege is a substantive rule rather than merely an evidentiary rule, so the expression "privilege of the law of evidence" in Alberta's equivalent to section 53(3) of the *FOIPP Act* (in text box at left) does not apply to solicitor-client privileged records.[1]

The lack of statutory authority to order production of records, containing information over which a public body has claimed solicitor-client privilege, makes it difficult for the Commissioner to properly perform her oversight function.

Recommendation: It is the recommendation of the OIPC that the *FOIPP Act* be amended to explicitly state:

- The Commissioner may require public bodies to produce records containing information over which solicitor-client privilege is claimed; and
- Solicitor-client privilege is not waived when the solicitor-client privileged records are provided to the Commissioner.

[1] *Alberta (Information and Privacy Commissioner)* v. *University of Calgary*, [2016] 2 SCR 555, 2016 SCC 53 (CanLII), <http://canlii.ca/t/gvskr>, retrieved on 2017-07-25 at paragraph 44

Sections 19, 20, 21, and 22 of the *FOIPP Act* state, in part:

Disclosure harmful to intergovernmental relations

19. (4) This section does not apply to information that has been in existence in a record for 20 years or more.

...

Cabinet Confidences

20. (2) Subsection (1) does not apply to

(a) information in a record that has been in existence for 20 years or more; or

...

Public Body confidences

21. (2) Subsection (1) does not apply if

...

(a) the information referred to in that subsection is in a record that has been in existence for 20 years or more.

Advice from Officials

22. (2) Subsection (1) does not apply to information that

(a) has been in existence for 20 years or more;

Time Period Amendment

Sections 19, 20, 21, and 22 of the *FOIPP Act* are discretionary exceptions to disclosure. If the circumstances outlined in these sections apply to information requested by an applicant, a public body may exercise its discretion to withhold the information. All four sections contain a provision that the exception does not apply to information in records that have been in existence for 20 years or more.

What is the issue? The underlying rationale for these four time limits is that the harm which could be caused from disclosure, decreases with the passage of time. When balanced with the goal of transparency, twenty years seems a long period to wait.

How do we compare to other Canadian Jurisdictions? The time limits vary for similar provisions, in access to information legislation in other Canadian jurisdictions, from 10 to 25 years.

In four provincial/territorial jurisdictions, similar sections cite a 15-year term. In three jurisdictions, the time limit is 20 years, and in one jurisdiction, 25 years. Remaining jurisdictions cite time limits which vary from provision to provision. For example, in British Columbia, while cabinet confidences maintain a 15-year time limit, advice from officials requires 10 years.

The federal Office of the Information Commissioner has stated:

"...in light of the public interest in citizen engagement and the government's Open Government commitments, the 20-year time frame included in section 21 is unnecessarily long. This time limit should be reduced to provide certainty as to when the exemption can no longer be applied."

Suzanne Legault,

Federal Information Commissioner

Striking the Right Balance for Transparency – Recommendations to Modernize the Access to Information Act, page 56, March 2015

[referring to section 21, Advice and Recommendations]

Both the Alberta and British Columbia Commissioners have recommended that the 15-year term in their legislation be reduced to 10 years. The federal Information Commissioner has recommended reducing the time limit of the exemption for advice and recommendations to five years or once a decision has been made, whichever comes first (see text box at left). A 15-year time limit for disclosure of information in these sections of the *FOIPP Act* is in keeping with the trend toward decreasing these time limits.

Recommendation: It is the recommendation of the OIPC that sections 19(4), 20(2)(a), 21(2)(a), and 22(2)(a) of the *FOIPP Act* be amended to replace the time limit of 20 years, with a time limit of 15 years.

Section 79 of the PEI *FOIPP Act* states:

79. A Standing Committee of the Legislative Assembly shall begin a comprehensive review of this Act within 3 years after the coming into force of this section and shall submit to the Legislative Assembly a report that includes any amendments recommended by the Committee.

Periodic Review

Currently, the only provision for review of the *FOIPP Act* is section 79, a provision added in 2005 that a comprehensive review of the *FOIPP Act* would be undertaken three years after the section came into force. Limited reviews of the *FOIPP Act* have been undertaken, but there is nothing in the legislation to require them.

What is the issue? There is no statutory requirement for periodic reviews of the *FOIPP Act.* Access and privacy issues have proven to be dynamic. Reviews should be performed to respond to evolving needs, and to provide clarification.

How does PEI compare with other Canadian jurisdictions? Most jurisdictions have a similar provision to section 79 of the *FOIPP Act*, to conduct a review of the legislation within several years of the statute first coming into force. There is a statutory requirement at section 80 of British Columbia's access to information and protection of privacy legislation (FIPPA), and at section 69 of Yukon's ATIPPA, that a review should take place at least once every six years. Similarly, Quebec's ATI requires a statutory review every five years.

In a November, 2010 report reviewing Alberta's FOIP Act, the legislative committee recommended that a review of the Act occur every six years.

Recommendation: It is the recommendation of the OIPC that section 79 of the *FOIPP Act* be replaced by the following:

Review of Act

79 (1) At least once every 6 years, a standing committee of the Legislative Assembly shall begin a comprehensive review of this Act and shall submit a report respecting this Act to the Legislative Assembly within one year after the date of the commencement of the review.

(2) A report submitted under subsection (1) may include any recommended amendments to this Act.

(3) For the purposes of subsection (1), the first 6 year period begins on _____, 2017.