

# ***Overview of BC's Access & Privacy Law***

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## ***Today's Goals***

- Overview of the privacy and FOI context for local governments in BC
- Brief history of purposes and policies of the law
- Survey of the mechanics of the law
- Key points to remember

## ***Origins of Access & Privacy Laws***

- Freedom of information laws have now spread worldwide
- US Great Society reforms of the 1960s and the US federal *Freedom of Information Act*
- Canadian legislation starting in the 1970s, driven by MPs
- Privacy laws starting late 1960s in EU and US (Church Commission and state abuses)
- Laws in all territories and provinces now

## ***Legislative Goals***

- *Freedom of Information and Protection of Privacy Act* aims to make public bodies more open, and accountable, to the public (s. 2(1))
- Gives “the public” a right of access to records
- FOI is a quasi-constitutional right (SCC)
- Limits public bodies’ collection, use and disclosure of personal information
- Constrains state power in doing so

## ***Coverage of the Act***

- Applies to more than 2,200 public bodies in BC
- All ministries, Crown corporations and agencies
- Local governments, school boards, universities, colleges, police services, health authorities and hospitals
- Professional governing bodies for lawyers, doctors, nurses, engineers, dentists, etc.

## ***How FOI Works in BC***

- Right of access to any “record” in the “custody or under the control” of a public body
- A record is any thing on or in which information is recorded (paper or electronic)
- Exceptions to application of Act to certain records in the in the custody or under the control of a public body (e.g., academic records, judicial records)
- Custody and control can be slippery concepts

## ***Custody***

- Physical possession not enough to have custody
- Example: personal papers of employees
- Public body must have some right to deal with the record
- To what extent has the record been relied on or used by the public body?
- Was the record created by a public body employee acting in the course of her or his duties?

## ***Custody***

- Does its content relate to the public body's mandate and functions?
- Is the record integrated with public body records?
- What is the nature and purpose of the record?
- ON case of minister's constituency records in ministerial office
- Kept in separate files, not integrated: bare possession thus not sufficient



## ***Control***

- Control issue arises where another person possesses the record (including an employee, elected official or contractor)
- Who created the record in the first place? An employee or contractor?
- Does the record relate to your business or functions?
- Can you control use or further disclosure of the record?

# ***Control***

- Several factors to be considered
  - Content of the record
  - Circumstances in which it was created
  - Legal relationship between the government institution and the record holder
- Control issue arises in many relationships: employment, service provider, commissions or boards, corporate subsidiaries
- Deal with the issue up front, don't leave it to chance

## ***Control***

- Use of personal email addresses does *not* get around FOI
- If the email is business email, doing the public's business, it is not somehow exempt from the law's reach
- Public bodies should have policy on use of personal email for public business
- Again, deal with the issues up front, provide certainty

## ***How the Access Process Works***

- Written request
- Duty to assist requesters and respond in a timely, open and accurate way (IR F15-03)
- Requester's duty to provide sufficient detail
- Timelines for response (30 business days), extensions
- Fees and fee exemptions (public interest test)
- Transfers of requests to other public bodies

## ***All Rights Have Limits***

- Right of access is not absolute
- The law recognizes the public interest in protecting certain information
- Like all FOI laws, BC's law protects a range of information from disclosure to the public
- To ensure only information that should remain secret is withheld, the law provides for independent review by the Information and Privacy Commissioner

## ***What Are the Limits?***

- Cabinet confidences (s. 12(1))
- Local public body confidences (*in camera* council meetings, properly constituted) (s. 12(3))
- Advice or recommendations (including factual matrix) (s. 13)
- Legal privilege (s. 14)
- Harm to law enforcement (s. 15)
- Inter-governmental relations and confidences (s. 16)

## ***What Are the Limits?***

- Harm to the public body's financial interests (s. 17)
- Harm to cultural or anthropological sites or objects (s. 18)
- Threats to individual or public safety (s. 19)
- Information that will be published (soon) (s. 20)
- Third-party commercial interests (s. 21)
- Third-party personal privacy (s. 22)

## ***Where Does the Burden Lie?***

- Strong default that entire records must be disclosed
- Only information that is protected may be withheld
- Must be severed from the record if it can reasonably be done
- Public body pretty well always has the burden of proving it has properly withheld information
- Exceptions for third-party information



## ***Appeals & Enforcement***

- Free right of appeal to the OIPC
- Mediation will be attempted
- Inquiry (appeal) held if mediation fails
- Adjudicator issues decision
- Decisions (orders) are binding and enforceable in the superior court
- Judicial review of orders is available (generally on a deferential standard)

## ***Privacy & Public Bodies***

- Privacy is constitutionally protected (*Charter*, UN human rights covenant, EU law)
- Urbanization and technological advances have fuelled its increased prominence
- BC law, as other such laws, imposes limitations on public bodies' collection, use and disclosure of "personal information"
- No 'right to privacy' *per se* in BC's law

# ***What is Personal Information?***

- Information “about an identifiable individual”
- Biographical core, substantive relation to the individual?
- What about identifiability?

## ***Limits on Collection***

- A local government may only collect personal information necessary and directly related to a program or activity (fairly generous)
- Statutory authority
- Law enforcement

## ***Limits on Use & Disclosure***

- Can only use personal information for the purpose for which it was collected
- Or a consistent purpose
- Or where statutorily authorized

## ***Protecting Personal Information***

- Must take reasonable measures to protect personal information from loss, improper use or disclosure, etc.
- Technology neutral, always evolving with threats
- Right of access to one's own personal information is strong
- Right to request correction (not to require)

## ***Privacy Impact Assessments***

- Assessing the compliance and risks in new programs or activities involving personal information
- Must be done according to ministerial directions
- Some must be given to the OIPC for comment
- A practical tool for compliance with the privacy rules

## ***Conclusion***

- The law has been here for over 20 years
- It continues to grow more complex all the time, both in FOI and privacy
- But the contours of the rules are well-established and discernible