



## Personal Information of Deceased Persons

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### INTRODUCTION

Privacy rights do not end upon the death of an individual. The Information and Privacy Commissioner of Alberta has said that the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) strikes a complex balance between the privacy rights of the dead and the needs of the living (*IPC Order 2000-012*).

The FOIP Act protects the privacy of deceased persons by regulating the collection, use and disclosure of personal information about a deceased individual that is in the custody or under the control of a public body. The Act also requires public bodies to protect that personal information against unauthorized access, collection, use, disclosure or destruction.

“**Personal information**” is defined in **section 1(n)** of the FOIP Act as recorded information about an identifiable individual. This definition applies to both living and deceased individuals.

This Bulletin provides an overview of the FOIP Act as it relates to the personal information of deceased individuals, reviewing the general and some specific provisions that apply to deceased individuals. The Bulletin also considers the application of the FOIP Act to the information of deceased individuals in different contexts.

Publications produced by Access and Privacy, Service Alberta, cited in this Bulletin are available on the FOIP website at [foip.alberta.ca](http://foip.alberta.ca). Decisions, practice notes and publications issued by the Office of the Information and Privacy Commissioner of Alberta may be found on the OIPC website at [www.oipc.ab.ca](http://www.oipc.ab.ca).

## INFORMATION ABOUT A DECEASED PERSON TO WHICH THE FOIP ACT DOES NOT APPLY

The FOIP Act applies to all personal information of deceased persons that is in the custody or under the control of a public body, unless the information is excluded under **section 4(1)** of the Act. A number of the provisions in **section 4(1)** may exclude information about deceased persons from the scope of the Act. However, there are several exclusions that commonly relate to deceased persons. These will be discussed below.

A public body that receives a request for excluded records (including copies) that are in its custody or under its control should consult *FOIP Guidelines and Practices*, produced by Access and Privacy, Service Alberta, for general guidelines on responding to requests for excluded records.

### Records subject to the *Health Information Act*

Alberta's *Health Information Act* governs the collection, use and disclosure of health information (as defined in that Act) that is in the custody or under the control of a "custodian." The term "custodian" refers primarily to health service providers within the publicly funded health-care system.

There are a number of public bodies that are also custodians – for example, Alberta Health and Wellness and the Alberta Health Services Board. **Section 4(1)(u)** of the FOIP Act states that the *Health Information Act*, and not the FOIP Act, applies to health information held by those public bodies.

Custodians typically have significant amounts of health information about individuals at the end of life. The *Health Information Act* would apply, for example, to

- records held by Alberta Health and Wellness relating to payment for services provided to an individual under the Alberta Health Care Insurance Plan, and

- diagnostic, treatment and care information provided to a patient in a hospital operated by the Alberta Health Services Board.

The FOIP Act applies to personal information concerning an individual's medical history only if that information is held by a public body that is not a custodian under the *Health Information Act*.

### Vital Statistics records

Under **section 4(1)(l)** of the FOIP Act, a record made from information in a registry, including information "in an office of the Director, or of a district registrar, as defined in the *Vital Statistics Act*," is not subject to the FOIP Act. This exclusion applies to any record made from information in the registry (e.g. information from a death certificate that has been recorded in a database), not only information that resides in the registry. The access-to-information rules under the *Vital Statistics Act*, rather than under the FOIP Act, apply to disclosure of information about deceased persons that may be contained in that registry.

Under section 29(2) of the *Vital Statistics Act*, a person may pay a fee and request a search for information about the death of an individual. The person must be eligible to apply for death documents or certificates under the guidelines developed by Vital Statistics. Then, if the Director is satisfied that the information is not going to be used for unlawful or improper purposes, the Director must disclose information about the registration of a death or a record of burial.

The guidelines on eligibility to apply for death documents are available on the Service Alberta website at [servicealberta.ca](http://servicealberta.ca).

### Court records

The FOIP Act does not apply to information in court records (**section 4(1)(a)**), which are generally available to the public through the court system.

Court records may include a considerable amount of information about deceased persons, particularly with respect to the administration of estates. Records relating to the administration of a deceased's estate

may include the individual's will, lists of assets in the estate, liabilities, and a description of steps taken to administer the estate.

## EFFECT OF PARAMOUNTCY

Where another Act or regulation prevails despite the FOIP Act, the provisions of the FOIP Act that permit disclosure of personal information about a deceased individual may not apply.

For example, section 9 of the *Alcohol and Drug Abuse Act*, which is paramount over the FOIP Act, prohibits the disclosure by any member or employee of the Alberta Alcohol and Drug Abuse Commission (AADAC) of any information that names or identifies a client who has been provided with treatment, care or services by AADAC. This information may not be disclosed under the FOIP Act at any time.

## WHO MAY ACT ON BEHALF OF A DECEASED PERSON

The FOIP Act provides for a number of circumstances in which a person may exercise the rights and powers conferred on an individual by the Act (**section 84**).

In the case of a deceased individual, including a minor, those rights and powers may be exercised by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate (**section 84(1)(a)**). A “**personal representative**” is someone who has the authority to administer a deceased individual's estate, such as an executor named in a will, or an Administrator who has been granted Letters of Administration by a court.

Before disclosing information about a deceased individual to a personal representative, a public body should ensure that the person requesting the information has satisfactory proof of authority to act on behalf of the deceased individual – for example, a copy of the deceased's will or the court-ordered Letters of Administration. (See *IPC Order 98-004*, where the Commissioner found that an applicant did not provide evidence of his legal authority to administer his sister's estate.)

Public bodies also need proof that disclosure of the requested information is necessary for purposes of administering the deceased's estate. An example of a case where disclosure may be necessary for this purpose would be where a widower needs information to help him decide whether to proceed with litigation related to his wife's death.

A personal representative exercises the rights and powers of a deceased individual in relation to the administration of that individual's estate. A request for an individual's personal information made by a personal representative is treated as if it were a request from the individual the information is about and not from a third party (see *IPC Order F2001-026*).

## ACCESS TO A DECEASED'S PERSONAL INFORMATION UNDER PART 1

**Section 17(1)** of the FOIP Act requires a public body to refuse to disclose personal information in response to an access request if disclosure of the information would be an unreasonable invasion of the personal privacy of a third party. Generally speaking, a public body must consider **section 17** with respect to a request for the personal information of a deceased person in the same way the public body would consider **section 17** with respect to a request for information about a living person.

When a request is made by a third party, there are certain circumstances in which disclosure of a deceased's personal information would *not* be considered an unreasonable invasion of personal privacy, including if

- the personal information is about an individual who has been dead for 25 years or more (**section 17(2)(i)**);
- the disclosure relates to the administration of the deceased's estate and the deceased's personal representative has consented to the disclosure (**section 17(2)(a)** in conjunction with **section 84(1)(a)**);
- an Act of Alberta or Canada authorizes or requires the disclosure (**section 17(2)(c)**); for example, the *Public Health Act* or the *Fatality Inquiries Act*.

There are also circumstances in which disclosure of a deceased's personal information is *presumed* to be an unreasonable invasion of personal privacy, including if:

- the personal information relates to the deceased's medical history (**section 17(4)(a)**);
- the personal information is an identifiable part of a law enforcement record (**section 17(4)(b)**);
- the personal information relates to the deceased's employment or educational history (**section 17(4)(d)**).

When making a determination under **section 17**, a public body must also consider all the relevant circumstances in determining whether disclosure of a deceased's personal information may constitute an unreasonable invasion of a third party's personal privacy.

The following factors weigh *in favour* of disclosure:

- disclosure is desirable for the purpose of subjecting the activities of a public body to public scrutiny (**section 17(5)(a)**);
- disclosure is likely to promote health and safety or the protection of the environment (**section 17(5)(b)**);
- the personal information is relevant to a fair determination of an applicant's rights (**section 17(5)(c)**);
- the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people (**section 17(5)(d)**);
- the information was originally provided by the applicant (**section 17(5)(i)**).

The factors to be considered under **section 17(5)(c)** and **section 17(5)(i)** are exceptional in that they require the public body to consider information about the applicant, which is not normally the case when a public body is responding to an access request.

The following factors weigh *against* disclosure:

- the third party will be exposed unfairly to financial or other harm (**section 17(5)(e)**);
- the personal information was supplied in confidence (**section 17(5)(f)**);
- the personal information is likely to be inaccurate or unreliable (**section 17(5)(g)**);
- the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant (**section 17(5)(h)**).

The Information and Privacy Commissioner of Alberta has applied the test of unreasonable invasion of a third party's personal privacy in several Orders respecting deceased persons. *Order 98-004* concerns a request for access to the complete records of the applicant's deceased sister, who had been receiving income support benefits. The Commissioner found that disclosure of some of the deceased's personal information was desirable for subjecting the activities of the public body to public scrutiny, but he also considered that some of the information had been supplied in confidence. He weighed other relevant circumstances such as the applicant's role as guardian and trustee and his removal as trustee due to ill health. As a result, the Commissioner ordered disclosure of some of the records but upheld the public body's decision to withhold certain records.

In another Alberta case, a member of the media requested access to an autopsy report. The Commissioner did not order disclosure of the report because he found that disclosure of intimate details of the deceased's condition at death was not desirable for subjecting the activities of a government body to public scrutiny and the disclosure was not likely to promote public health or safety (*IPC Order 2000-012*).

In a matter that has not been considered by the Alberta Commissioner, the Office of the Ontario Information and Privacy Commissioner decided that disclosure of information relating to unclaimed estates would not constitute an invasion of the personal privacy of those dying without a will. Helping unknown heirs recover

funds they would otherwise be unlikely to receive and a diminished privacy interest after death were found to be relevant factors weighing in favour of disclosure (*Ontario Orders P-71 and P-1187*). The Alberta Commissioner has not endorsed the view that there is generally a diminished privacy interest after death.

### Notice, consultation, transfer of a request

Consideration of all relevant circumstances is particularly important in processing requests relating to deceased persons, since the third party consultation process will not normally apply to the personal information of a deceased person. A deceased's personal representative would be given notice under **section 30** of the Act only if the information related to the administration of the deceased's estate (**section 84(1)(a)**).

A public body may consult informally with a third party, such as a family member, about a request. However, the public body must not disclose personal information to any third party that it is not authorized to disclose under the Act. A third party consulted in this way cannot give consent to disclosure and the consultation has no formal status under the Act.

Informal consultation with another public body that has a close knowledge of a particular case may be advisable when there is sensitivity surrounding the death of an individual.

Also, under **section 15(1)**, the head of the public body may transfer the request to another public body within 15 days after a request for access is received, if

- the record was produced by or for the other public body;
- the other public body was the first to obtain the record; or
- the record is in the custody or under the control of the other public body.

For example, as part of a fatality inquiry, the Office of the Chief Medical Examiner (Alberta Justice and Attorney General) may receive a request under the FOIP Act for access to a report created by

Workplace Health and Safety (Alberta Employment and Immigration). In that case, Justice may consider transferring the request to Employment and Immigration, since that department produced the report.

## PROTECTION OF A DECEASED'S PERSONAL INFORMATION UNDER PART 2

**Part 2** of the FOIP Act governs the collection, use, disclosure, security, and retention of personal information, including the personal information of deceased persons.

### Collection of personal information

Just as with other types of personal information, a public body may collect the personal information of a deceased individual only if

- the collection is expressly authorized by an enactment of Alberta or Canada (**section 33(a)**); for example, the Medical Examiner may collect information under the *Fatality Inquiries Act* (e.g. for completion of an autopsy report);
- the collection is for the purposes of law enforcement (**section 33(b)**); for example, a police officer may collect personal information for the purpose of investigating a possible murder; or
- the information relates directly to and is necessary for an operating program or activity of the public body (**section 33(c)**).

A personal representative can authorize indirect collection of a deceased's personal information only if the collection relates to the administration of the estate of the deceased (**section 84(1)(a)**).

In matters other than the administration of the estate, a public body needing to collect personal information about a deceased individual will be in a position of having to collect the personal information indirectly. This indirect collection must be authorized under **section 34(1)**. For example, a public body may collect personal information indirectly if

- indirect collection is authorized by another Act or regulation (**section 34(1)(a)**);
- the information is collected for the purpose of law enforcement (**section 34(1)(g)**);
- the information is collected for use in the provision of legal services to a public body (**section 34(1)(j)**);
- the information is necessary to determine the eligibility of an individual (e.g. the spouse or child of a deceased individual) to participate in a program of or receive a benefit, product or service from the Government of Alberta or a public body (**section 34(1)(k)(i)**); or
- the information is collected for the purpose of managing or administering personnel of the Government of Alberta or the public body (**section 34(1)(n)**).

### Use of personal information

A public body may use a deceased person's information

- for the purpose for which the information was collected or for a consistent purpose (**section 39(1)(a)**; and **section 41** for consistent purposes);
- if the individual's personal representative has consented to the use and the use relates to the administration of the deceased's estate (**section 39(1)(b)** in conjunction with **section 84(1)(a)**); or
- for a purpose for which that information may be disclosed to that public body under the Act's disclosure provisions (**section 39(1)(c)** in conjunction with **section 40, 42** or **43**).

### Disclosure of personal information

A public body may disclose a deceased's personal information in accordance with any of the disclosure provisions of **section 40** that apply to the situation. The following are some examples of general

provisions that may apply to the personal information of a deceased individual.

#### **Disclosure not an unreasonable invasion of privacy**

A public body may disclose personal information if disclosure would not be an unreasonable invasion of the deceased's personal privacy under **section 17 (section 40(1)(b))**. See the discussion of **Part 1** above for the application of **section 17** to the personal information of deceased individuals.

#### **Disclosure authorized by an enactment**

A public body may disclose personal information for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure (**section 40(1)(f)**).

For example, the *Public Sector Pension Plans Act* (section 9.2) authorizes the Minister, the relevant pension plan board and the employer to disclose employment information to each other, the participant to whom the information relates, and other persons prescribed in the regulations under the Act. This legislation has specific provisions for the disclosure of personal information about former participants in pension plans.

Under section 11(2) of the *Traffic Safety Act*, the Registrar of Motor Vehicles or a peace officer may release information contained in a Collision Report to a person, insurance company or lawyer that has paid or may be liable to pay damages. The Registrar may also release this information to a municipality for the purposes of improving traffic circulation or the management of roadways. The Registrar would have to be provided with appropriate supporting documentation and would then review each request on an individual basis. The names and addresses of witnesses may need to be withheld.

The *Fatality Inquiries Act* and regulation authorize the Chief Medical Examiner to release certain information and records regarding a deceased to particular individuals.

### **Disclosure to collect or repay a debt**

A public body may disclose personal information to assist in collecting a fine or debt owing to the public body or to make a payment to the deceased's estate (**section 40(1)(k)**).

For example, a university or college that had received tuition fees for a student who died before completion of a program could disclose the student's personal information as needed for the purpose of reimbursing eligible fees.

### **Disclosure to assist in law enforcement**

A public body may disclose personal information to another public body or a law enforcement agency in Canada to assist in an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result (**section 40(1)(q)**).

For example, a public body may disclose a deceased individual's personal information to a public body that is responsible for enforcing compliance with provincial legislation or to a municipal police service to assist in an investigation under the *Police Act*, if the investigation meets the requirements of **section 40(1)(q)**.

### **Disclosure of publicly available information**

A public body may disclose personal information of a deceased person that is available to the public (**section 40(1)(bb)**), such as information in a published obituary or information that is observable on a headstone in a cemetery.

In addition to these general disclosure provisions, there are also specific provisions in **section 40** that permit the disclosure of a deceased individual's personal information.

### **Disclosure 25 years after death**

A public body may disclose personal information about an individual who has been dead for 25 years or more, which would not be an unreasonable invasion of the deceased's personal privacy under **section 17** (**section 40(1)(b)** in conjunction with **section 17(2)(i)**).

For example, a university celebrating an anniversary, such as a centenary, could disclose personal information about distinguished alumni from the past and photographs recording events in the history of the university, provided that the individuals concerned had been dead for at least 25 years.

### **Disclosure for contact purposes**

A public body may disclose personal information so the spouse, adult interdependent partner, relative or friend of a deceased individual may be contacted (**section 40(1)(s)**).

For example, a housing management body may disclose personal information about a deceased resident to allow the police to inform the individual's spouse or adult interdependent partner, relative or friend of the resident's death.

“**Spouse**” refers to a husband or wife of a married person (*Interpretation Act*); the term refers here to the spouse of a recently deceased husband or wife.

“**Adult interdependent partner**” means a person who

- lived with the deceased in a relationship of interdependence
  - for a continuous period of not less than three years, or
  - of some permanence, if there is a child of the relationship by birth or adoption,
- or
- entered into an adult interdependent partner agreement with the other person under section 7 of the *Adult Interdependent Relationships Act*.

Persons who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement (section 3 of that Act).

“**Relationship of interdependence**” means a relationship outside marriage in which any two persons share one another's lives, are emotionally

committed to one another, and function as an economic and domestic unit (section 1(1)(f) of the *Adult Interdependent Relationships Act*).

In determining whether two persons function as an “economic and domestic unit,” a public body must take all the circumstances of the relationship into account. A list is included in section 1(2) of the *Adult Interdependent Relationships Act*.

“**Friend**” refers to someone other than a relative or spouse who had a close personal relationship with the deceased.

### **Disclosure to a surviving spouse, adult interdependent partner or relative**

A public body may disclose personal information to the surviving spouse, adult interdependent partner or relative of a deceased individual if, in the opinion of the head of the public body, disclosure would not be an unreasonable invasion of the deceased individual’s personal privacy (**section 40(1)(cc)**). In *IPC Order 99-035*, it was explained that the provision provides “a compassionate mechanism to overcome the obvious problem that deceased persons cannot express consent as third parties.”

This provision allows the head of a public body discretion to disclose personal information about a deceased individual, taking into consideration both the test for unreasonable invasion of personal privacy and the relationship between the deceased and the individual to whom the information may be disclosed, including, for example, the relationship of the individual to the deceased at the time of death.

Before disclosing the personal information of a deceased individual to a spouse, adult interdependent partner or relative, the head of a public body should ensure that the individual concerned provides sufficient proof of his or her relationship to the deceased. This could take the form of a marriage or birth certificate, records documenting a relationship of interdependence (e.g. evidence of having lived together in a common-law relationship for a continuous period of not less than three years, a cohabitation agreement or adult interdependent partner agreement) or records of birth or adoption of a child

of the relationship. A public body should treat a surviving adult interdependent partner in the same way as a surviving spouse would be treated.

Public bodies should consider any relevant guidelines about the interpretation of the term “relative” that may exist in applicable legislation. A public body may disclose personal information about a deceased person only to the extent necessary to enable the public body to carry out the purpose for which the information is being disclosed in a reasonable manner (**section 40(4)**).

Under **section 65(4)**, the surviving spouse or adult interdependent partner or a relative of a deceased individual may ask the Commissioner to review a decision of a head of a public body under **section 40(1)(cc)** not to disclose personal information.

## **DISCLOSURE FOR RESEARCH AND ARCHIVAL PURPOSES**

A public body may disclose personal information for research purposes under **section 42** of the FOIP Act (in conjunction with **section 9** of the FOIP Regulation). These provisions require the head of the public body to approve conditions for security and confidentiality, as well as the removal of individual identifiers at the earliest reasonable time and the prohibition of subsequent use or disclosure of individually identifying information without express authorization.

The Provincial Archives of Alberta and public bodies that maintain archives can disclose personal information in response to an access request under **Part 1** and under **Part 2** as discussed above. However, the Act also includes special provisions to allow archives to review their collections and open them to the public in cases where the records include the personal information of individuals who may not have been dead for 25 years. Under **section 43(1)(a)**, the Provincial Archives of Alberta and the archives of a public body may disclose personal information in a record

- that has been in existence for 25 years or more if the disclosure would not be an unreasonable



invasion of personal privacy under **section 17** or is in accordance with **section 42** (disclosure for research or statistical purposes); or

- that has been in existence for 75 years or more.

## DISCLOSURE IN THE PUBLIC INTEREST

The FOIP Act includes a provision (**section 32**) requiring a public body to disclose information, including personal information, without delay, to the public, an affected group of people, to any person or to an applicant, if

- the information is about a risk of significant harm to the environment or to health and safety (**section 32(1)(a)**); or
- disclosure is, for any other reason, clearly in the public interest (**section 32(1)(b)**).

**Section 32** overrides all other provisions of the FOIP Act, creating a very significant exception to the Act's provisions for privacy protection. This disclosure provision is discussed in detail in Chapter 6 of *FOIP Guidelines and Practices*, produced by Access and Privacy, Service Alberta.

Decisions on disclosure under **section 32** should be made by the head of the public body on a case-by-case basis. It is particularly important to note that **section 32** is exceptional within **Part 1** of the Act in that it applies to *information*, not *records*.

If disclosure is based on a risk of harm, the harm must be *significant*. The Commissioner has also determined that disclosure that is *clearly in the public interest* means that the information must relate to a matter of *compelling* public interest (*IPC Order 97-018*). In either case, the situation must warrant disclosure *without delay* and therefore be of some urgency.

There are many cases where members of the public, the media and elected officials assert public interest in a particular matter when requesting disclosure of information. These requests often involve accidents, crimes, natural disasters, and other situations where there have been fatalities.

Although **section 32** may not apply, public bodies that regularly receive requests of this nature should have strategies in place to provide as much information as possible in the circumstances, while observing their duty to protect personal information. When a public body simply refuses to comment on a matter for reasons of privacy, the public body can appear to the public as defensive, or even secretive, and this tends to bring privacy legislation into disrepute. This approach can also be frustrating to public bodies, which can feel that they are unfairly cast in a negative light by being unable to comment on the facts of the specific case.

The following are some strategies public bodies may use to attempt to respond to inquiries.

- Consider whether it may be appropriate to have a program of routine disclosure of information relating to fatalities within the public body's area of responsibility. For example, Alberta Employment and Immigration publishes anonymized information on serious workplace accidents on its website.
- Consider publishing investigation reports containing confidential personal information in anonymized form, ideally close to the time the report is issued to the parties.
- If a particular case has attracted public attention, track sources of publicly available information to which individuals with questions can be referred. For example, court records may provide a timely source of information about criminal matters. The Office of the Chief Medical Examiner (Alberta Justice and Attorney) issues fatality inquiry reports, which include a considerable amount of factual information on the circumstances of death.
- Provide access to information on policies and procedures relating to the public body's responsibilities in the matter. Although the media, in particular, tend to be most interested in the facts, there may be an opportunity to clarify the issues of public policy that make the story a matter of public interest.

## APPLYING THE FOIP ACT TO INFORMATION OF DECEASED INDIVIDUALS IN DIFFERENT CONTEXTS

### Death of an individual while under the supervision of a public body

Public bodies tend to be responsible for some of the most vulnerable individuals in the community, including children at risk, persons with disabilities and the elderly. When an individual dies while in the care of a public body, there can be intense interest on the part of family members and others in the circumstances surrounding the death.

Public bodies may disclose personal information of the deceased to individuals close to the deceased under **section 40(1)(cc)** (see the discussion of this provision on page 7). Some family members are very anxious to see original records such as autopsy photographs, accident or crime scene photographs, and investigation notes. If so, these records should be reviewed to ensure that information of third parties is not disclosed. However, disclosure under **section 40** need not include the actual records concerning the death or even written records. In some cases, it may be more appropriate to disclose the information, without reference to specific records, in an interview with the individual(s) concerned.

Disclosures of this kind call for sensitivity and compassion. In some cases it may be appropriate to engage the assistance of specially qualified staff within the public body (e.g. a victim's services unit). In other cases, it may be appropriate, if the individuals concerned agree, to obtain the assistance of a qualified professional outside the public body, such as a family physician.

Unless there is some legislative authority for disclosure of this kind of information to persons other than individuals close to the deceased, third parties should be required to submit a request for access under Part 1 of the Act. There may be cases where disclosure of a limited amount of personal information would be appropriate, for example, if disclosure is desirable for the purpose of subjecting the activities of the public body to public scrutiny (**section 17(5)(a)**).

### Fatality investigation by a public body

A number of public bodies are responsible for conducting investigations involving fatalities, for example, the Office of the Chief Medical Examiner (Alberta Justice and Attorney General) for investigations under the *Fatality Inquiries Act*, and Alberta Employment and Immigration for investigations under the *Occupational Health and Safety Act*. These investigations are generally conducted under legislation that sets out the investigative powers of the public body concerned as well as the persons to whom information may be disclosed.

If there is a request for information regarding an investigation, the governing legislation may provide guidance on the extent, form and timing of any disclosure. Otherwise, the person requesting investigative records should be advised to submit a request under the FOIP Act. In addition to the exception to disclosure for personal information (**section 17**), the exception for disclosure harmful to law enforcement (**section 20(1)**) may apply to certain information.

### Legal proceedings

Incidents involving fatalities tend to lead to legal proceedings before either adjudicative tribunals or courts. The FOIP Act does not limit the information available by law to a party to legal proceedings (**section 3(c)**). In fact it is quite common for parties to legal proceedings to request information under the FOIP Act and also in accordance with other processes at the same time. A request under the FOIP Act should be handled independently of any other process.

Public bodies that conduct adjudicative proceedings relating to deceased persons may produce reasons for their decisions in some form. A public body should have express legislative authority to publish personal information in a decision.

If the public body is not authorized to disclose personal information or it is contrary to the public body's policy to disclose personal information in reasons for a decision, but there is an interest in the

decisions for their precedential or other value, it may be possible to anonymize decisions for publication.

## Genealogical research

Genealogists and family historians take an interest in all kinds of information that can be pieced together to provide a record of the past. Different public bodies may receive requests for records relating to matters as diverse as adoption, educational history (school records, yearbooks, award programs), employment (responsibilities, salary, awards or other forms of recognition), residence (public housing, health-care facility records, voters lists), property ownership (rural maps, assessment rolls and tax records), accident and fatality reports, burial (cemetery records), and wills. Requests may come from individuals looking for information about a specific individual (often a relative of the requester) or from genealogical societies asking for certain categories of records to be made routinely available to the public, either for inspection in the offices of the public body or on the public body's website.

The general rule is that a public body may disclose personal information of a deceased person if the individual has been dead for 25 years or more (**section 40(1)(b)**) in conjunction with **section 17(2)(i)**. There may also be other provisions in **section 40** that apply to permit disclosure.

For example, a cemetery owner may disclose personal information in a burial register to any relative of a deceased person in the register (**section 40(1)(f)**) of the FOIP Act, in conjunction with section 37 of the Cemeteries Regulation).

A public body may also disclose personal information that is available to the public, such as personal information that appeared in a university's graduation program or was published in an obituary or is publicly observable on a headstone in a cemetery (**section 40(1)(bb)**).

In any of the cases listed above, a public body that receives a request for information may also disclose personal information of a deceased individual if the disclosure would not be an unreasonable invasion of

the deceased's personal privacy under **section 17**, taking into consideration all relevant circumstances. (Circumstances relevant to a request under **Part 1** are discussed on pages 3 to 4 above.)

When deciding whether to disclose personal information under **Part 2** of the Act, a public body should consider whether it may be possible to satisfy the request by disclosing some of the information in a record rather than the whole record. For example, a public body that operates a cemetery may be able to assist both visitors and genealogists by disclosing a map of cemetery plots, rather than the complete cemetery register, which includes other personal information, such as the name of the plot purchaser and the name and address of the personal representative or next of kin. Decisions on this form of limited disclosure should be made on a case-by-case basis.

**Section 88** of the FOIP Act allows public bodies to specify categories of records that can be made available to the public without restriction. **Section 88** can be applied to personal information only if **section 40** permits disclosure of the information. For this reason, a public body should not make whole collections of records relating to deceased persons publicly available unless a provision of **section 40** applies to *all* the personal information in the collection. This may be the case if, for example, it can be shown that all of the individuals the information is about have been dead for 25 years or more.

## Death of an employee

When an individual dies while he or she is employed by a public body, the public body can disclose that individual's personal information for several purposes, such as providing information that is necessary for the performance of the duties of other employees (**section 40(1)(h)**) and terminating the employment relationship and administering any benefit plan (**section 40(1)(x)**). Although a deceased individual is technically a *former* employee, the Commissioner has said (with respect to employee benefits under **section 17(2)(e)**), that there are circumstances when a public body can take into consideration the fact that an action on the part of a public body flows from the

employment relationship to the employee even when the relationship has formally ended (*IPC Order 2001-020*).

If the employee has died at work, either of natural causes or as a result of an accident, the public body may also disclose personal information relating to the circumstances of the death to a spouse, adult interdependent partner, relative or friend if, in the opinion of the head, the disclosure is not an unreasonable invasion of the deceased's personal privacy (**section 40(1)(cc)**).

The situation is more complex when the public body becomes involved in public announcements or memorial services. For example, public bodies frequently have newsletters that may include an announcement about the death of an employee. They may also be asked, perhaps through colleagues of the deceased, to contribute to newsletters of trade associations, professional bodies or unions. Careful consideration should be given to the type and amount of personal information that is disclosed for these purposes. Information in the individual's personnel file, such as résumés, references, test results, performance appraisals, and reviews from colleagues and clients, should not be disclosed.

In most cases, a public body will be able to disclose personal information that is already available to the public (**section 40(1)(bb)**). This may include information that was published, with the consent of the individual, in a past newsletter of the public body, information that appeared in a program for an employee recognition event or in a notice or report about a position held in a professional association, or information in an obituary published by the individual's family.

A public body may also disclose personal information about the deceased if the disclosure would not be an

unreasonable invasion of his or her personal privacy under **section 17** of the FOIP Act (**section 40(1)(b)**). This provision allows a public body to consider all relevant circumstances, including whether there are circumstances that outweigh the presumption that disclosure of personal information relating to employment history is an unreasonable invasion of personal privacy (**section 17(4)(b)**).

Some factors that may be relevant are the reliability of the information (e.g. whether it was provided by the individual or a third party), the sensitivity of the information (e.g. medical information may be considered sensitive), the effect of disclosure on the individual's reputation, whether the individual had a high public profile, the manner of disclosure (e.g. a private memorial service, a notice on a public website), views expressed by the deceased while living, any reservations expressed by public body employees, and the wishes of the deceased's family and friends.

A public body should only rely on **section 40(1)(b)** to disclose personal information in the clearest of cases. This is especially the case where a senior official of the public body is disclosing the information and there is no question that the disclosure is being made by an individual in an official rather than a private capacity.

As a general rule, a public body should not disclose negative information under this provision, especially if there has been or is likely to be any adverse relationship between the public body and the deceased or the deceased's estate, or if the information could affect the value of the deceased's estate. In any matter relating to the estate, the deceased's personal representative is entitled to exercise all the rights and powers of the individual under the Act (**section 84(1)(a)**), including the right to complain to the Commissioner.

#### Currency

This Bulletin takes into consideration decisions issued by the Office of the Information and Privacy Commissioner of Alberta up to December 31, 2008.

#### Purpose

FOIP Bulletins are intended to provide FOIP Coordinators with more detailed information for interpreting the *Freedom of Information and Protection of Privacy Act*. They supply information concerning procedures and practices to assist in the effective and consistent implementation of the FOIP Act across public bodies. FOIP Bulletins are not a substitute for legal advice.

#### Further Information

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