



Paramountcy

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INTRODUCTION

The *Freedom of Information and Protection of Privacy Act* (the FOIP Act) is an Act of general application which normally prevails (is “paramount”) over all other Alberta legislation. However, the FOIP Act includes a provision that allows for exceptions to this rule.

Section 5 of the FOIP Act states:

5 If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

- (a) another Act, or
- (b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

Section 5 provides the means for

- resolving an inconsistency or conflict between the FOIP Act and a provision of another Act or regulation, where neither the other Act nor the FOIP Regulation says that the other provision prevails despite the FOIP Act, or
- applying a provision in
 - another Act or
 - the FOIP Regulation

that says that the other provision prevails despite the FOIP Act.

For example, **section 5** would determine whether a public body was required

- to disclose information in response to an access request under the FOIP Act, or

- not to disclose information in response to an access request, because a provision of another enactment prohibits or restricts disclosure of the information.

Background

Legislation governing access to information and privacy can significantly affect the operation of other legislation. Most access and privacy legislation makes some provision to deal with this.

Some access and privacy legislation in other jurisdictions allows enactments already in force to continue to apply despite the access and privacy legislation. Other access and privacy legislation requires an express statement (in a schedule or regulation pursuant to that legislation, or in the other legislation), that a provision of the other legislation operates despite the access and privacy legislation.

When the FOIP Act came into force in 1995, **section 5** of the Act included a provision requiring the head of a public body to refuse to disclose information to an applicant if the disclosure was prohibited or restricted by another enactment of Alberta. This transitional provision was included to allow ministries time to review their legislation and to decide whether any existing prohibitions or restrictions should be continued.

The transitional provision was repealed in 1997, and the FOIP Regulation was amended to include a list of Acts and regulations, or provisions of them, that were to prevail despite the FOIP Act. It was anticipated that the list would become shorter over time, as the Acts in question were amended to expressly provide that certain provisions prevail despite the FOIP Act. This has happened, and there are now just a few remaining Acts and regulations that prevail despite the FOIP Act by virtue of being listed in the FOIP Regulation (**sections 16 and 17**).

This Bulletin provides guidance to ministries on deciding whether it is necessary to establish a paramouncy.

Publications produced by Access and Privacy, Service Alberta, cited in this Bulletin are available on the FOIP website at 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.

WHAT PARAMOUNTCY MEANS

Section 5 is one of five sections at the beginning of the FOIP Act that apply to the entire Act. It is one of three important sections that address the operation of the FOIP Act in relation to other laws that govern access to information or the collection, use or disclosure of personal information.

Section 3 sets out the scope of the Act and makes it clear, for example, that the FOIP Act does not limit the information otherwise available by law to a party to legal proceedings. The FOIP Act and the Rules of Court can operate in parallel.

Section 4 establishes that the FOIP Act applies to *all records* in the custody or under the control of a public body, with the exception of specific categories of records and information listed in **section 4(1)(a) to (u)**. These are generally referred to as “exclusions.”

For example, the Act does not apply to a record created by or for an MLA or a record of a judge. This is consistent with the general scheme of the FOIP legislation, which is intended to apply to records and information of the executive branch of government, but not to apply to the legislative and judicial branches of government.

The Act also does not apply in other specified cases where there is a different scheme of access to information and protection of privacy. For example, the Act does not apply to a record made from information in certain Government and public registries; the Act also does not apply to health information to which the *Health Information Act* applies.

Whereas **section 4** excludes whole categories of records and information, **section 5** only comes into play when the relationship between the FOIP Act and another enactment does not allow both to operate in their entirety at the same time.

For example, the Student Evaluation Regulation under the *School Act* has a provision that comes into play when there is a conflict between a disciplinary procedure under the Regulation and the right of access under the FOIP Act.

The Student Evaluation Regulation states that, if a person commits any act that may result in a student's performance being inaccurately represented, the Executive Director may withhold the student's official transcript of achievement for a period not exceeding one year (section 8(2)(c)). The FOIP Regulation (**section 17(1)(j)**) states that this provision of the Student Evaluation Regulation prevails despite the FOIP Act.

Transcripts, as a category of records, are not excluded from the FOIP Act. Transcripts are subject to the right of access under **Part 1** of the Act and are protected under **Part 2** of the Act. However, in the narrow circumstances set out in section 8 of the Student Evaluation Regulation, the Executive Director would not be required to provide the student with a copy of his or her transcript in response to an access request under the FOIP Act. The paramouncy provision in the FOIP Regulation resolves the conflict between the right of access under the FOIP Act and the discretion of the Executive Director to withhold a transcript under section 8(2)(c) of the Student Evaluation Regulation.

This is a clear case where an inconsistency or conflict may arise under certain circumstances and is resolved by the rules set out in **section 5** of the FOIP Act.

PARAMOUNTCY AND FEDERAL LEGISLATION

Where there are conflicting or inconsistent federal and provincial laws that are both valid, the doctrine of federal paramouncy applies. Under this doctrine, the federal law prevails over the provincial law, but only to the extent of the inconsistency. This means that only that part of the provincial enactment which conflicts or is inconsistent with the federal law is made inapplicable or inoperative, not the entire enactment.

The FOIP Act is a provincial Act of general application governing access to records and information. Federal legislation that specifically deals with restrictions on disclosure would override the more general provincial access legislation.

For example, the *Youth Criminal Justice Act* (Canada) prohibits the disclosure of information regarding young offenders who are involved in proceedings under that Act. There is no paramouncy provision

within the *Youth Criminal Justice Act* because that Act specifically restricts the disclosure of such records and the doctrine of federal paramouncy would apply. The Information and Privacy Commissioner of Alberta could not order the production of those records for his examination (see *IPC Order 96-015* with reference to the *Young Offenders Act*, which was superseded by the *Youth Criminal Justice Act*). (See FOIP Bulletin No. 9: *Burden of Proof*, produced by Access and Privacy, Service Alberta, on providing affidavit evidence when records can not be produced.)

Another example of federal paramouncy can be found in federal legislation governing hazardous materials. The *Hazardous Products Act* (Canada) has disclosure requirements, which are subject to the *Hazardous Materials Information Review Act* (Canada) (HMIRA). The HMIRA establishes a Commission to rule on claims and appeals related to exceptions to disclosure of confidential business information. The Act limits the disclosure of confidential third party business information to specified purposes, such as the administration or enforcement of provincial laws relating to occupational health and safety. The federal legislation and not the FOIP Act would determine whether information subject to that Act could be disclosed by a provincial public body.

APPLYING SECTION 5

The original approach

The need to determine whether the FOIP Act applies, or a provision of another enactment prevails despite the FOIP Act, arises primarily in relation to access requests. In a number of early Orders, the Commissioner provided guidance on applying **section 5** of the Act to an access request for a record that may be subject to restrictions under another Act. The analysis that appears in those Orders is summarized in the following three steps.

1. Determine whether the information requested is subject to the FOIP Act. If so, determine whether it is also the kind of information that is referred to in the other enactment (Act or regulation).
2. Determine whether a provision of the FOIP Act is inconsistent or in conflict with a provision of the other Act or regulation.

- Determine whether the other Act or the FOIP Regulation expressly provides that the other Act or regulation prevails despite the FOIP Act.

The Commissioner revisited the approach to interpreting the paramouncy provision in the FOIP Act in *Order F2005-007* (January 4, 2007) and again in *Order F2005-029*. The new approach is described below and is the approach that public bodies should now follow.

The original approach is described in more detail in Appendix A. Public bodies that followed that approach in the past may find it helpful to review the reasoning that previously applied to see where their approach should now differ.

The new approach

In *Order 2005-007* (January 4, 2007), the Commissioner proposed an alternative approach to applying **section 5** of the FOIP Act. He said that **section 5** contains two rules.

The first rule is that, where there is an inconsistency or conflict, the FOIP Act prevails. Where there is no inconsistency or conflict, both enactments apply. The Commissioner explained that this rule supports the “presumption of coherence.” Legislation is presumed to be able to operate without coming into conflict.

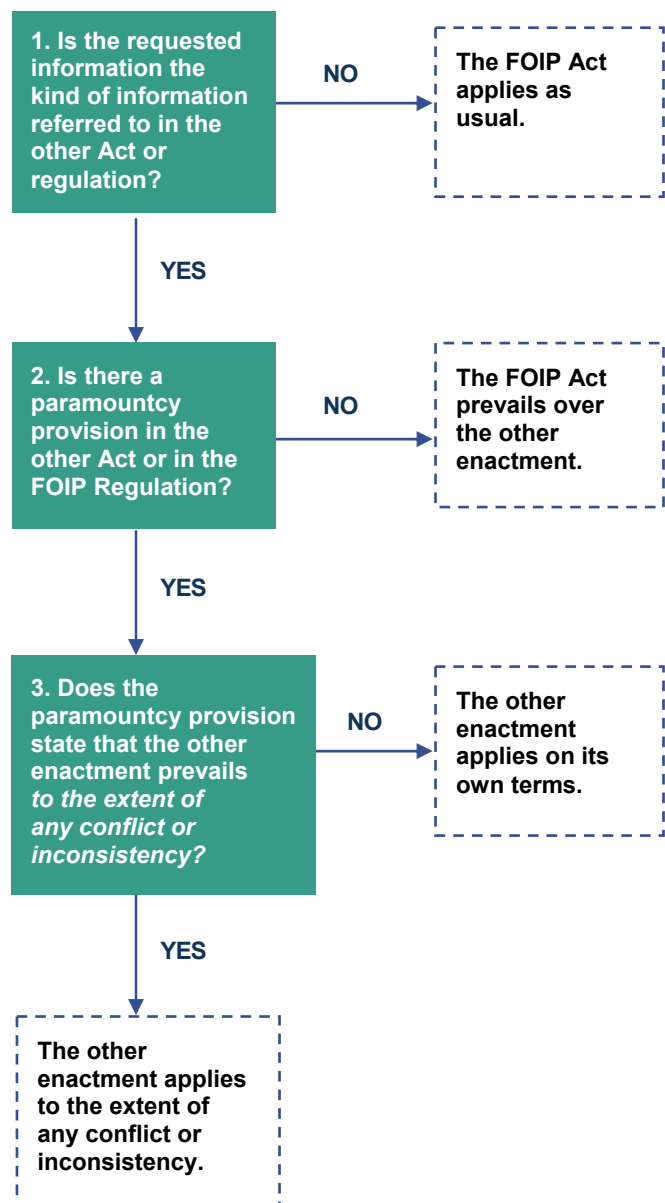
The second rule is that, where another Act or a regulation under the FOIP Act expressly provides that a provision of another enactment prevails despite the FOIP Act, the FOIP Act does not apply. The other enactment applies, on its own terms.

For example, section 15(1) of the *Maintenance Enforcement Act* (MEA) states that information received by the Director under the Act may be used only for the purpose of enforcing a maintenance order and is otherwise confidential, subject to limited exceptions in that legislation. The FOIP Regulation states that section 15(1) of the MEA prevails despite the FOIP Act. In *Order F2005-007*, the Commissioner found that the MEA creates its own scheme of disclosure and that the FOIP Act therefore does not apply to information received by the Director under that Act.

The Commissioner said that the Legislature recognized that the FOIP Act and the MEA would be

inconsistent or in conflict and provided the mechanism – the provision that expressly states that the MEA prevails – for resolving the inconsistency or conflict. It was unnecessary to determine whether there was an inconsistency or conflict.

This approach has the practical advantage of allowing a public body to eliminate one step in the analysis if the wording of the paramouncy provision does not include any conditions (e.g. “if there is an inconsistency or conflict”).



Under this approach, the steps are as follows.

- **Step one.** Determine whether the kind of information requested would normally be subject to the FOIP Act. If so, determine whether it is also the kind of information that is referred to in the other enactment (Act or regulation).
- **Step two.** Determine whether the other Act or the FOIP Regulation expressly provides that the other enactment prevails despite the FOIP Act. Note whether any conditions apply to limit the effect of the paramountcy, such as a time limit. If there is no reference to conflict or inconsistency in the paramountcy provision, apply the other enactment on its own terms. The analysis is complete.

If there is a reference to conflict or inconsistency, continue to step three.

- **Step three.** This step is necessary only if the paramountcy provision refers to a conflict or inconsistency. If that is the case, determine whether compliance with one law involves breach of the other. If so, apply the other law to the extent of the conflict or inconsistency. (For information about how the Commissioner has interpreted the terms “inconsistent” and “in conflict with,” see Appendix A.)

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.

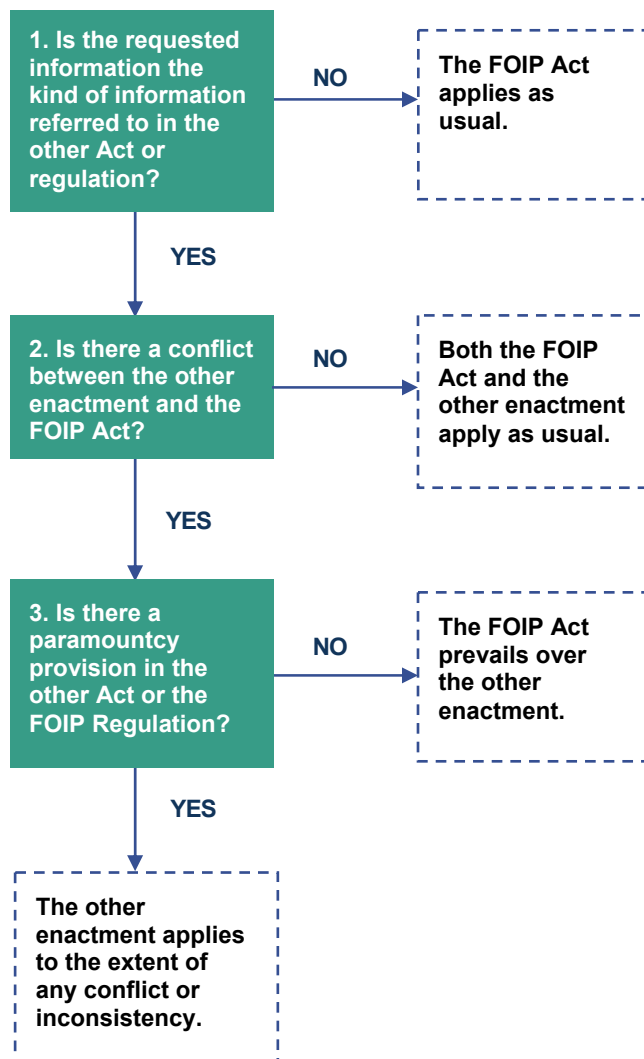
Further Information

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Appendix:

THE ORIGINAL APPROACH TO APPLYING SECTION 5

In a number of early Orders, the Commissioner provided guidance on applying **section 5** of the Act to an access request for a record that may be subject to restrictions under another Act. The analysis that appears in those Orders is summarized in the following three steps.



- **Step one.** Determine whether the information requested is subject to the FOIP Act. If so, determine whether it is also the kind of information that is referred to in the other enactment (Act or regulation). If the other enactment refers to a certain category of information, for example, a report of an investigation under the *Securities Act*, the information requested must be able to be characterized in that way.

For example, in *Order 99-027*, the Commissioner considered section 91(4) of the *Child Welfare Act* [now section 126.1(1) of the *Child, Youth, and Family Enhancement Act*]. This provision states that the name of a person who makes a report of a child in need is privileged information of the person making the report. The Act further states that, if there is a conflict or inconsistency between this provision and the FOIP Act, the provision for privilege prevails. In *Order 99-027*, the Commissioner considered whether the information requested by an applicant was a report of a child in need for the purposes of the *Child Welfare Act*. He found that it was not, because the report in question was about an incident of child abuse that had occurred in the past, involving someone who was no longer a child at the time the abuse was reported.

- **Step two.** Determine whether a provision of the FOIP Act is inconsistent or in conflict with a provision of the other Act or regulation. In *Order 99-034*, the Commissioner defined the terms “inconsistent” and “in conflict with” with reference to a decision of the Supreme Court of Canada. These terms (which are considered synonymous in this context) refer, he said, to a situation where two enactments cannot stand together, that is, “compliance with one law involves breach of the other.”

For example, in *Order 2000-034*, the Commissioner considered whether a public body must disclose records in response to a FOIP request for records relating to an application for approval of a seismic exploration program for oil and gas. The *Mines and Minerals Act* has a provision prohibiting the disclosure of information obtained under the Act that would reveal geological or geophysical work. The Commissioner concluded that there was a conflict between the access provisions of the FOIP Act and the non-disclosure provision of the *Mines and Minerals Act*.

- **Step three.** Determine whether the other Act or the FOIP Regulation expressly provides that the other Act or regulation prevails despite the FOIP Act. Note also whether any conditions apply to limit the effect of the paramountcy, such as a time limit.

In *Order 2000-034*, discussed above, the Commissioner found that it was expressly provided that the prohibition in the *Mines and Minerals Act* prevails despite the FOIP Act. At that time, there was no time limit; the *Mines and Minerals Act* now states that the paramountcy of the non-disclosure provision expires fifteen years following the end of the year in which the information was obtained.

We can see all three steps in *Order 2001-005*. The applicant asked the City of Calgary for Property Assessment Detail Reports. The Commissioner found that these records fell within section 300 of the *Municipal Government Act* (MGA). This provision permits an assessed person access to certain property assessment information provided that there is no breach of confidentiality. Section 301.1 of the MGA expressly states that sections 299 to 301 of that Act prevail despite the FOIP Act.

Since (1) the information fell within section 300 of the MGA, (2) there was a conflict between section 300 of the MGA and the access process under the FOIP Act, and (3) there was an express paramountcy, the Commissioner decided that the access provisions of the FOIP Act did not apply to the request.