



Records of Elected and Appointed Officials of Local Public Bodies

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INTRODUCTION

Access to information legislation is generally intended to apply to records and information of the executive branch of government, not the legislative and judicial branches of government. Other processes of accountability apply to legislators and judges. This is the case with Alberta’s *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

Municipal councillors, school trustees, Metis settlement councillors, as well as some other officials of local public bodies, are elected to their positions and have a role in creating regulations; they also generally have a role in the administration of their respective local public bodies.

When the FOIP Act came into force, the Act expressly excluded the records of elected members of local public bodies that were *not in the custody or under the control of the local public body*.

In 1999, the FOIP Act was amended to clarify the exclusion for records of elected officials, and to extend the exclusion, as applicable, to *appointed* members of the governing bodies of local public bodies. The intent of the amendments was

- to provide parity for elected officials at the provincial and the local levels, and
- to provide a consistent approach to the records of members of the governing bodies of all local public bodies, whether elected (as in local government and school boards) or appointed (as in the case of the boards of governors of post-secondary educational institutions and boards of regional health authorities).

The purpose of this Bulletin is to explain how the FOIP Act applies to records of elected officials of local public bodies and to appointed officials serving on their governing bodies. The Bulletin will provide

guidance on determining when a local public body has custody or control of an official's records, deciding whether a record is a personal or constituency record, and how to process an access request for records of local public body officials.

Decisions, practice notes or publications issued by the Office of the Information and Privacy Commissioner of Alberta cited in this Bulletin may be found on the OIPC website at www.oipc.ab.ca.

APPLICATION OF THE ACT

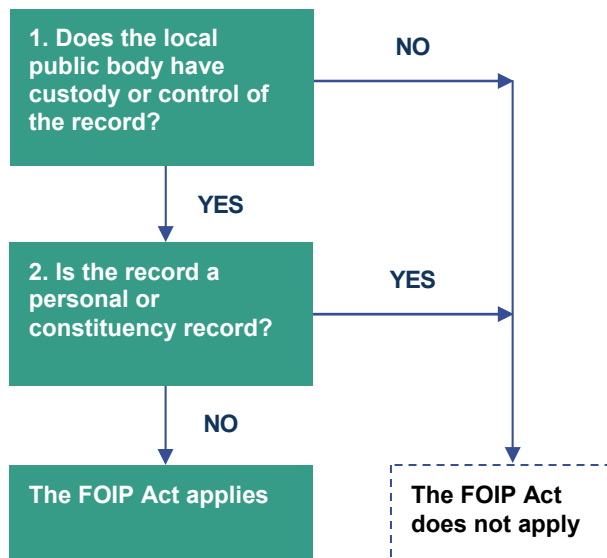
The FOIP Act now reads:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

- (m) a personal record or constituency record of an elected member of a local public body
- (n) a personal record of an appointed or elected member of the governing body of a local public body

Section 4(2) of the FOIP Act defines a “governing body” for universities, colleges and technical institutes. The governing body is the board of governors or the general faculties council for universities, and the board of governors or academic council for colleges or technical institutes.

To determine whether a record of an elected or appointed official is subject to the FOIP Act, it is necessary to determine whether the local public body has custody or control of the record. If the answer is no, the Act does not apply to the records. If the answer is yes, it is then necessary to determine whether the record is a personal or constituency record. If the answer is yes on either point, the Act does not apply to the records. In that case, an applicant has no right of access to the records and the privacy provisions of the Act do not apply to personal information in the records.



CUSTODY OR CONTROL

The FOIP Act applies to all records in the custody or under the control of a public body, except for the records described in **section 4**. A public body has custody of a record when it is in the physical possession of the public body (*IPC Orders 2000-003 and 2000-005*). Custody implies that the public body has some right to deal with the record and some responsibility for its care.

A record is under the *control* of a public body when the public body has the authority to manage the record, including restricting, regulating and administering its use, disclosure and disposition.

In *Order 99-032*, the Adjudicator outlined a number of criteria to consider when determining control of personal records. Some of the indicators that a record may be in the custody or under the control of a public body are as follows:

- the record was created by an officer, employee or member of the public body,
- the record was created by a contractor for the public body,
- the record is specified in a contract as being under the control of a public body,

- the record is in the possession of the public body,
- the record is closely integrated with other records of the public body,
- the content of the record relates to the public body's mandate and functions,
- the public body has the authority to regulate the record's use and disposition,
- the public body has relied upon the record to a substantial extent,
- a contract permits the public body to inspect, review or copy records produced, received or acquired by a contractor as a result of a contract.

An Order from Ontario approaches the issue of custody and control of records of elected officials from a different perspective. This Order, which uses some of the same criteria as the Alberta Order, considers what records are *not* in the custody or under the control of a public body.

Ontario Order M-813 deals with letters received by a city councillor from a constituent. On the basis of records management authorities and policies in the City of Toronto, the Inquiry Officer suggested the following as characteristics of a record that was not in the custody or control of the municipality:

- the record was not deposited with council or the city,
- the city had no power to compel the elected official to produce the record, even when referred to in a council meeting,
- the city had no authority to regulate or dispose of the record,
- the record existed and was referred to as a part of the elected official's mandate to represent the constituent, not as a basis for action by the city,
- the record was not integrated with city records in the office of the elected official.

Although this Order is not binding in Alberta, it provides helpful guidance on determining whether a record is, or is not, in the custody or under the control of the public body.

Uncertainty regarding custody and control of records of officials of local public bodies tends to arise as a result of office and working arrangements.

In some cases, elected and appointed officials in a local public body have an office or work space within the local public body where they keep records relating to the functions of the local public body. Typical examples of such records would be agendas and minutes of meetings, reports submitted to the governing body, and manuals relating to the operations of the local public body. These records would clearly be under the *control* of the local public body.

Other records may be clearly within the *custody* of a public body, but *not* under the public body's *control*. An official may send and receive correspondence or conduct business from his or her office within the local public body, and keep the records in the office, even though the correspondence or business is not directly related to the operations of the local public body. For example, a school board trustee may also be a volunteer for a non-profit organization, and may send e-mail relating to that position through the school board's computer system. The e-mail would be in the *custody* of the school board for the purposes of the FOIP Act.

The reverse situation is also often the case. Some elected officials and board members do not have an office at the local public body, so they keep their records at home or at their place of business. Although these records may not be housed on the premises of the local public body, the records may, nevertheless, be under the control of the local public body.

If a record of an elected or appointed official is in the custody or under the control of a local public body, the record is subject to the FOIP Act unless the record is a "personal or constituency record."

"PERSONAL RECORDS"

The FOIP Act expressly excludes *personal records* of an elected or appointed member of a local public body from the scope of the Act (**section 4(1)(m)** and **section 4(1)(n)**).

The Information and Privacy Commissioner defined "personal" in the context of **section 4(1)(n)** to mean "one's own; individual; private"; "intended for a

particular person rather than a group” (*IPC Order 99-025*). The Commissioner defined a “personal note” as including notes taken by an individual that were intended only for that individual’s use (*IPC Order F2006-024*).

For the purposes of **section 4(1)(m)** and **(n)** of the FOIP Act, a “personal record” would be a record related to an official as a private individual rather than as a member of the governing body of the local public body. A personal record would be a record that was unrelated to the mandate and functions of the local public body.

Some examples of the types of records that are likely to be considered personal records are:

- records of personal or family appointments or events, such as medical appointments, birthdays, vacations or financial transactions;
- records related to a community organization or non-profit group to which the individual belongs on a personal basis not as a representative of the public body;
- records related to a professional or similar organization to which the individual belongs or in which he or she holds office;
- records related to a commercial or private business enterprise in which the individual is employed, holds office or of which he or she is an owner, shareholder or partner;
- records of meetings that do not involve the business of the local public body;
- e-mail between the individual and others which does not deal with the business of the local public body;
- biographical and historical material about the individual which has not been made public;
- records related to previous jobs or appointments;
- research, speeches, lecture notes and the like which are not related to the local public body.

Some examples of records that would *not* be considered “personal records” are

- municipal correspondence that a councillor has taken home;
- a record of an *in camera* meeting prepared by a council member because staff were excluded from the meeting;
- notes taken by a school board trustee during a meeting, in his or her official capacity, with a citizen.

If an applicant requests access to records of an elected or appointed official of a local public body, the local public body must determine whether records of the official are related in any way to the business of the municipality, school board, Metis settlement, housing management body, or other local public body, as the case may be. If the records are related to the business of the local public body, it is unlikely that they would be considered “personal records.”

“CONSTITUENCY RECORDS”

Section 4(1)(m) of the FOIP Act excludes constituency records of an elected member of a local public body from the scope of the Act.

A “constituency” is “the body of voters in a specified area who elect a representative member to a legislative body” (*Oxford Canadian Dictionary*).

The term “constituency record” may be understood to mean a record that deals with the political activities of an elected official of a local public body, including election contributions, campaigning and campaign issues.

Constituency records would include records dealing with an elected official’s constituency or campaign office, those who may have worked on an election campaign and details about the campaign. Records relating to an election campaign are subject to other legislation, such as the *Local Authorities Election Act*, the *School Act*, or the *Metis Settlements Act*.

An Adjudicator in the Office of the Information and Privacy Commissioner has noted that it can be a challenge to distinguish between records that come to an elected official in his or her role as a member of the governing body of a public body and records that come to the elected official in his or her political role. As the Adjudicator observes, unlike elected members

of the provincial government, elected members of local public bodies do not have the luxury of two offices with a separation of staff and function (*IPC Order F2005-010*).

The Adjudicator notes that the FOIP Act should not be read as confining constituency records to records relating to political organizing and elections. The Adjudicator emphasizes that the Act intends to exclude records of an elected official that relate to constituency business (*Order F2005-010*). Constituency business may include an inquiry about an activity in the constituency and a request for action from a public body.

The Act does not, however, exclude records that relate to the governance or business matters of the local public body. The exclusion for constituency records would not, for example, apply to correspondence between an elected official and a constituent that deals with the day-to-day business of a public body.

PROCESSING A FOIP REQUEST

When a FOIP request is received, the FOIP Coordinator must assemble all the records in the custody or control of the public body that may be responsive to the request. A search for responsive records should include records that may be personal or constituency records of an elected official, or personal records of an appointed official, only if there is any uncertainty as to whether the records are responsive.

The FOIP Coordinator will then review the records and determine whether **section 4(1)(m)** or **section 4(1)(n)** applies. If either provision applies, the record in question is not subject to the FOIP Act.

Where excluded records make up a portion of the records responsive to a request, the local public body may decide to refuse to disclose the records, or may

choose to disclose the records outside the FOIP Act. If the public body decides to disclose the records, the response to the applicant should include an explanation that the records are excluded from the FOIP Act, and the public body has decided to provide them outside the FOIP process in this case.

If the applicant makes a complaint to the Information and Privacy Commissioner, the Commissioner can review the decision as to whether **section 4(1)(m)** or **section 4(1)(n)** applies.

For more information on processing FOIP requests involving excluded records, see *FOIP Guidelines and Practices*, produced by Access and Privacy, Service Alberta, and the Information and Privacy Commissioner's Practice Note 4: *Section 4 – Exclusions from the Act*.

RECORDS MANAGEMENT

Many of the indicators of custody and control concern the management of records. For example, if records have been filed in the official records of the public body, this is one factor that may be considered in determining whether records are in the control of a public body. It is therefore advisable to keep personal and constituency records separate from the official records of the local public body.

Transitory records should be discarded when no longer needed. For example, an official may take notes during a meeting as a memory aide. These notes could be discarded once the meeting minutes have been prepared. The disposition of transitory records should be addressed in the records retention policy of the public body.

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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