



FOI General Awareness and Process Review

*Freedom of Information
and Protection of Privacy Act*

Developed and presented by
Information Access Operations
Ministry of Citizens' Services and Open Government

Today's Objectives

- Overview of the *Freedom of Information and Protection of Privacy Act*
- Know the difference between an FOI request and a request for information
- Receive clarification on roles and responsibilities when dealing with FOI requests and the access process
- Recognize exceptions under the Act
- Appreciate legislated timelines
- Understand the dynamic relationship between FOI and Records Management

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What is the Purpose of the Act?

Accountability to the Public

- Legislated right to access all government records - specifying limited exceptions (ie make what is commonly referred to as a 'FOI request')

Protection of Privacy

- Provides a right of access to individuals own personal information
- Regulates how public bodies collect, use and disclose personal information
- Right to request correction of personal information

To provide for an independent review of the public bodies decision regarding release of information

- Commissioner

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Who is Covered by the Act?

All provincial ministries, and most provincial agencies, boards, commissions, crown corporations and smaller agencies

Local public bodies

- School Districts
- Colleges and universities
- Regional health boards

Self-governing professions and occupations

- Teachers
- Doctors
- Nurses

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What Records are Covered by the Act?

- All records in the **custody** or under the **control** of a public body.

What is a Record?

- Any information recorded or stored by any means whether in hard copy or in electronic format.
- Regardless of content and subject matter, the following are subject to an FOI request:
 - Briefing Notes
 - Vouchers
 - Telephone Records
 - Black Books
 - Contractor Records
 - Email
 - Blackberries
 - Transitory Records

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What is a Transitory Record?

- Temporary usefulness that are not regularly filed;
- Only required for a limited period of time for the completion of a routine action or the preparation of an ongoing record; and
- Not required to meet statutory obligations or to sustain administrative or operational functions.
- Examples of Transitory Records include:
 - Working materials
 - Convenience copies
 - Drafts
 - Unnecessary duplicates

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How Does an Individual Make a FOI Request?

A person seeking access to records can make a request under the FOIPP Act. In doing so, the request:

- Needs to be in writing.
- Provide sufficient detail to easily identify the records sought.
- Include proof of authority if acting on the behalf of an individual.
- Should be directed to the public body who has control and custody of the records.

Information or Records?

- Although the Act is called Freedom of 'Information' it only provides access to 'records'

So....

- The question is: Is the applicant wanting answers to questions or does he/she seek access to records?
- If it is a request for *Answers to Questions* :
This is an operational matter for the public body to address – a formal request under the Act is likely not required.

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What should you do if you receive a FOI Request Directly?

- Immediately upon receipt, forward the FOI request to FOI.Requests@gov.bc.ca
- During this early stage program staff should advise if they require clarification, potential for fees, etc.
- Once records are received, IAO will confer with program area to gain a better understanding of any harms that may result from release.

Standardized Processes – Call for Records

- Standard Call for Records Forms and Guidelines for record submissions provided to all ministry program areas.
- Ministry responsibilities include provision of the following information to IAO:
 - Where search for records conducted (i.e. TRIM files, databases, off-site records)
 - duration of search time by ministry program area
 - who conducted the record search
 - potential HARMS that could result from disclosure of records gathered
 - ISSUES associated with disclosure of records gathered
 - regional locations where records pertaining to this request may reside
- ❖ HARMS – Disclosure of the records would significantly harm ministry position on a give topic. The harms assessment allows FOI staff to better understand the context of the records and make informed severing recommendations based on potential harms.
- ❖ ISSUES – Issues associated with the possible disclosure of records through the FOI process should be communicated to your ministry executive and/or Government Communications and Public Engagement.

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Exceptions to Disclosure Under the FOIPP Act

- There are eleven exceptions to disclosure.
- Some exceptions are mandatory and some exceptions are discretionary.
- Release unless...

Mandatory Exceptions

The head must **not** release requested information:

- Cabinet Confidences – Section 12
- Third party business information – Section 21
- A third party's personal information – Section 22

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Cabinet Confidences – Section 12

- Prevents the harm to government that is presumed to occur if the substance of Cabinet deliberations is revealed.
- Should a request result in responsive records that may reveal Cabinet Confidences, the records are submitted for consultation with the Office of the Premier.

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Third Party Business Information – Section 21

The three part test and all three parts must be met:

- Trade secrets or scientific, technical, commercial, financial, or labour relations information

AND

- Supplied to government in confidence

AND

- Where such disclosure could significantly harm the business interests of a third party.

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Personal Information – Section 22

The Act protects the personal privacy of individuals whose personal information is held by a public body and includes:

- Name, address, and telephone number
- Race, nationality, ethnic origin, colour, religious or political beliefs or associations
- Age, sexual orientation, marital status or family status
- An identifying number or symbol assigned to the individual. Example: S.I.N
- Anyone else's opinions about the individual
- The individual's personal views or opinions, except if they are about someone else.

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Discretionary Exceptions

Gives the head of the public body discretion to refuse or to disclose information.

- Policy Advice, recommendations or draft regulations – Section 13
- Legal Advice (solicitor-client privilege) – Section 14
- Law Enforcement – section 15
- Intergovernmental relations or negotiations – Section 16
- Financial or economic interests – Section 17
- Heritage sites and any rare or endangered living resources – Section 18
- Danger to health and safety – Section 19
- Information soon to be published or released – Section 20

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Policy Advice, Recommendations or Draft Regulations – Section 13

- Intended to allow open and frank discussion of policy issues among and within public bodies, preventing harm which would occur if the deliberate process were subject to excessive scrutiny.
- Factual information presented in support of the advice. Must be released unless another exception applies.
- Must be able to demonstrate that the public body exercised discretion in applying this exception.

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Legal Advice – Section 14

Protects information flowing in both directions between the legal advisor and the client:

- Solicitor client privilege applies to client generated documents as well as opinions.
- Document may be as formal as a communication between lawyer and client or as simple as notes on the file made to assist the lawyer in litigation.

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Disclosure Harmful to Law Enforcement – Section 15

- Law enforcement information is especially sensitive by nature (mosaic effect)
- Law enforcement is not limited to the investigative activities of police forces
- Provides for a wide variety of investigations and proceedings by a public body
- To enforce compliance or remedy non-compliance with standards, duties, and responsibilities under statutes and regulations

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Disclosure Harmful to Intergovernmental Relations or Negotiations – Section 16

- Information that would harm British Columbia's relationship with other governments including Aboriginal governments

OR

- Information that is received in confidence from other governments or international bodies

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Disclosure Harmful to Economic and Financial Interests of a Public Body – Section 17

- Information which could harm the economic, financial competitive or negotiating interests of the British Columbia government or one of its public bodies.
- Includes plans, negotiations, etc... of a public body that have not yet been implemented or made public.

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Disclosure Harmful to the Conservation of Heritage Sites, etc. – Section 18

The head of the public body may refuse to disclose information if the disclosure could reasonably be expected to result in damage to or interfere with the conservation of:

- Bear den
- First Nations Cultural Site
- Endangered Species

Disclosure Harmful to Individual or Public Safety – Section 19

Information which, if made public, could threaten the safety or health of an individual or interfere with public safety

- May include an individual's own personal information if it would result in immediate and grave harm to the individual's safety, mental, or physical health.

Information That Will be Published or Released Within 60 Days – Section 20

- Information may be exempt from disclosure if there are reasonable grounds to believe that the information will be published or released within 60 days.

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Public Interest Paramount – Section 25

- Must release information about a risk of significant harm to environment or public health or safety.
- High threshold, immediate and/or grave harm.

FOIPPA Resources

- Information Access Operations - <http://www.gov.bc.ca/citz/iao/>
- Office of the Chief Information Officer - <http://www.cio.gov.bc.ca/cio/index.page>
- Office of the Information and Privacy Commissioner - <http://www.oipc.bc.ca/>
- Core Policy and Procedures Manual - <http://www.fin.gov.bc.ca/ocg/fmb/manuals/cpm/cpmtoc.htm>
- Open Information Website – <http://www.openinfo.gov.bc.ca>

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Section 12 – Cabinet Confidences

- Premature disclosure of Cabinet deliberations inhibits the ability of Cabinet members to debate issues openly and freely, thereby reducing the effectiveness of Cabinet's decision making role.
- The Supreme Court of Canada stated that an important reason for protecting Cabinet documents was to avoid the creation of ill-informed public or political criticism.
- The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly.

Will cover 2 issues regarding section 12:

- **How section 12 is applied**
 - To better identify when to consider consulting on section 12
 - Better explain its application (or not) to your Ministry
- **The section 12 process**
 - Tips on identifying s.12 for consultation, what to provide, understanding the consultation process

Section 12 - Substance

- Section 12(1) - Must refuse to disclose to an applicant information that would reveal the **substance** of deliberations of Cabinet Committees



- The Act outlines limitations in sub section 12(2)

- Information in a record that has been in existence for 15 or more years



- Information in a record of a decision made by Cabinet or any of its committees on an appeal under an Act.

(In some cases, Cabinet may have jurisdiction to review cases before court)



- Information in a record the purpose of which is to present **background explanations** or analysis to Cabinet if the decision has been made public, has been implemented, or 5 or more years have passed since the decision was made or considered.

Distinguishing between the substance of Cabinet deliberations versus background information



In decision 01-02 the Commissioner defines
“substance of deliberations” as follows:

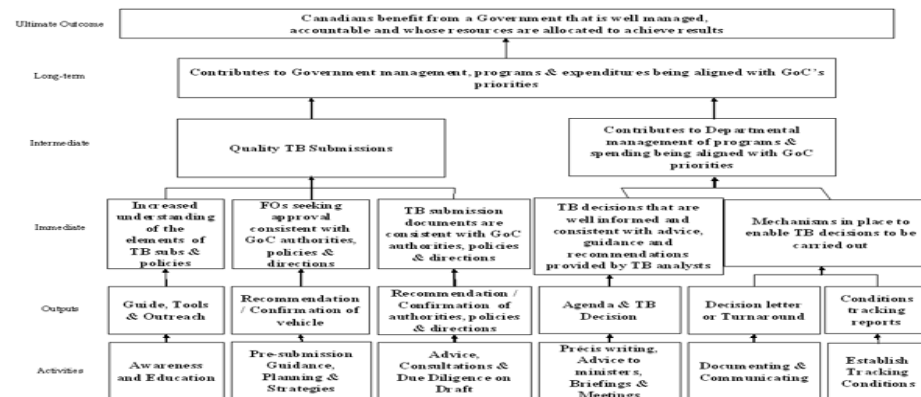
- “Recorded information that reveals the oral **arguments, pro and con, for a particular action or inaction of the policy considerations**, whether written or oral, that motivated a particular decision.



Examples of Substance

- In a situation where Cabinet is considering making a decision that will affect the forest industry, the fact that the European Economic Community is also considering actions that might affect British Columbia's forest industry may be a consideration that will affect policy.
- In a situation where Cabinet is considering raising the minimum wage, the projected implications on employment levels in the service sector may be assessed. This would be a policy consideration.

- **Background"** means explanatory or contributory information or circumstances which provides background to the Cabinet deliberations. The attachments to a Cabinet submission usually perform this function.
- Charts of process, who is involved, etc.



- **Examples of background**
- An attachment to a Cabinet submission that illustrates and analyzes the economic situation that led up to the purpose of the submission: to decide whether stumpage fees should be raised in the forest industry.
- An attachment to a Request for Legislation that provides background information and analysis of the approach taken to the legislative issue in other jurisdictions.

The consultation process

- Current policy dictates that a Ministry **must** consult (Send to Central Agency Team via intake)
- Consider taking extension
- May need to provide all records rather than only documents identifying Cabinet for context

Consultation- Key words/phrases to consider to identify section 12 in documents

- **Legislation**
- **Cabinet**
- **Treasury Board**
- **Submission**
- **Order in Council** (official documents implementing Cabinet's decisions regarding day-to-day government operations)
- **Funding approval**
- **Executive Council**

Cabinet Committees

- Priorities and Planning Committee
- Treasury Board
- Cabinet Committee on Families First
- Cabinet Committee on Jobs and Skills Training
- Cabinet Working Group on Family Affordability
- Environment and Land Use Committee
- Cabinet Committee on Open Government and Engagement
- Legislative Review Committee

Examples of records that may require S. 12 review

- An agenda, minute or other record that documents the matters addressed by Cabinet
- Any records authored by the Cabinet Secretary, Secretary to Treasury Board, or Chair of Treasury Board
- A briefing note placed before Cabinet or its Committees
- A draft or final Cabinet or Treasury Board submission
- E-mails that discuss the content of a submission or decisions of a Cabinet Committee

Also...

- Drafts of Legislation and associated working materials.



- Section 12 **may** apply to Information that has not yet have been placed before Cabinet however there is a reasonable expectation that it will be
- Section 12 may also apply if one could reasonably infer a link to Cabinet



Summary form/description of record:

| Date of Record | Description of Record | Draft or Final? | Why do you think S.12 may apply? | Decision implemented and/or made public Y/N? | Research (e.g. date of news release, date RFP issued, internet posting) | # of pages |
|----------------|-----------------------|-----------------|----------------------------------|--|---|------------|
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