



Office of the Information and  
Privacy Commissioner of Alberta

# Investigation Report F2017-IR-03

*Investigation into allegations of delays and  
possible interference in responding to access requests*

**April 11, 2017**

*Government of Alberta*

*Investigations F8094 (Service Alberta), F8194 (Executive Council),  
F8667 (Aboriginal Relations), F8668 (Agriculture and Rural Development),  
F8669 (Culture and Tourism), F8670 (Education), F8671 (Energy),  
F8672 (Environment and Sustainable Resource Development), F8673 (Health),  
F8674 (Human Services), F8675 (Infrastructure),  
F8676 (Innovation and Advanced Education),  
F8677 (International and Intergovernmental Relations),  
F8678 (Jobs, Skills, Labour and Training), F8679 (Justice and Solicitor General),  
F8680 (Municipal Affairs), F8681 (Seniors), F8682 (Transportation) and  
F8683 (Treasury Board and Finance)*



# Commissioner's Message

When I initiated this investigation in May 2014, one of my goals, as an Officer of the Legislature, was to either quell concerns and reassure Albertans that there was no evidence of political interference in Government of Alberta responses to access requests, or shine a light on government decisions and actions that were contrary to the aims of the *Freedom of Information and Protection of Privacy Act* (FOIP Act), should they exist. For various reasons set out in the report, we were not able to meet this goal.

The report is presented in two parts.

Part One provides findings for each of the investigation's objectives. Some of the findings were not unexpected and are very similar to those outlined in two separate investigation reports recently released by my office.<sup>1</sup> However, the report makes clear that many findings are unreliable for a number of reasons set out in Part Two.

Part Two of the report describes the various challenges we experienced in completing this investigation, including:

- **Chronic delays:** A single Alberta Justice lawyer coordinated the participation and represented all 19 respondent ministries, resulting in a bottleneck that significantly delayed the investigation.
- **Representation issues for interviewees:** The Justice lawyer who represented respondent ministries also represented all Government of Alberta (GoA) FOIP Coordinators during interviews, despite concerns from a number of FOIP Coordinators which my office relayed to Alberta Justice. This is the first time in the history of my office that Alberta Justice has represented both ministries and FOIP Coordinators in an investigation. In addition to chronic delays, this representation may have prevented FOIP Coordinators from candidly sharing their experiences and assessments.
- **Refusal to provide unredacted records:** Nearly 800 pages (30%) of records we requested from FOIP Coordinators were reviewed and redacted by the Justice lawyer, including 466 pages that were entirely blacked out (Appendices E and F). Initially, the purpose of these redactions was not mentioned, let alone explained. Later, we were told the redactions were "due to privilege", although the specific nature of the privilege was not identified. Although redactions due to "privilege" have recently been a concern in my office's investigations,<sup>2</sup> the extent of redactions in this investigation was unprecedented and affected the reliability of findings.
- **Inconsistent redactions:** Content in records that had previously been provided to us, or that, in one case, was provided to an applicant who requested the information under the FOIP Act, was redacted for this investigation. In some instances, comparing unredacted and redacted content raised questions as to why the content was redacted in the first place (i.e., the content does not appear to be "privileged"; Appendix G).

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<sup>1</sup> The OIPC's Investigation Reports F2017-IR-01 and F2017-IR-02 look at delays in the context of specific departments. Both investigations provide findings and recommendations, some of which may be applicable to all GoA departments. Investigation Report F2017-IR-01 is available at <https://www.oipc.ab.ca/media/788396/f2017-ir-01.pdf>. Investigation Report F2017-IR-02 is available at <https://www.oipc.ab.ca/media/788394/f2017-ir-02.pdf>.

<sup>2</sup> Examples can be found in Investigation Report F2017-IR-01, Alberta Justice and Solicitor General, paras. 12-13, and Investigation Report F2015-IR-01, Service Alberta, para. 17, which is available at <https://www.oipc.ab.ca/media/613453/F2015-IR-01.pdf>.

- **Inability to determine completeness of records:** We received no records documenting exchanges between the Deputy Minister of Service Alberta and other Deputy Ministers, the Premier and the Minister of Service Alberta, or the Minister of Service Alberta and other Ministers, even with respect to issues that would reasonably require exchanges of information. This suggests that either information was not provided by GoA departments to the Justice lawyer, information was provided but redacted or no records were created. Each of these possibilities raises concerns.

In March 2015, in response to these challenges, I issued Notices to Produce Records to the Ministers of 13 of the respondent ministries. I did this in part based on a 2008 letter from the then-Minister of Justice and Attorney General to my predecessor, which stated, “You currently have the power to compel production of all records subject to review, even where such records are subject to privilege” (Appendix H). In addition, the Court of Queen’s Bench of Alberta had decided in November 2013 that the FOIP Act granted me the power to compel records to verify claims of privilege.

As the Court of Queen’s Bench decision was under appeal, the GoA requested that compliance with the Notices to Produce Records be put in abeyance. I responded that I required the documents to perform my statutory function and would not be withdrawing or putting in abeyance the Notices to Produce Records. As a result, the GoA sought a judicial review of the Notices to Produce.

In April 2015, Alberta’s Court of Appeal overturned the Court of Queen’s Bench decision, which was subsequently upheld by the Supreme Court of Canada in November 2016.

The Supreme Court of Canada decided that the language of the FOIP Act does not empower me to compel production of records alleged to be subject to solicitor-client privilege. In response, I issued a statement noting that the Court’s decision would affect a significant number of cases before my office (approximately 80-90) and that I would write to the GoA on how to proceed on this issue. I have submitted a separate special report and request to the Legislative Assembly to address this issue.

In the meantime, this investigation was one of those cases affected by the Supreme Court of Canada’s decision. In the interests of avoiding further delays, I instructed the investigator to conclude this investigation. Further, given that the original ministers involved no longer hold positions, the qualified nature of the investigation’s findings, the fact that I have made no recommendations, and the series of challenges that have served to delay and undermine this investigation, I elected to present this report directly to the Legislative Assembly, the body to which I report.

All in all, I am deeply disappointed in how this matter has unfolded. What should have been a relatively straightforward investigation has concluded under a shadow that brings the very notion of independent oversight of the executive branch of government into question and has the potential to erode public confidence in an open and accountable government.

Jill Clayton  
Information and Privacy Commissioner

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# Introduction

- [1] In the spring of 2014, a number of media articles reported on the concerns of opposition parties and interest groups who alleged political interference in the processing of access requests they had made to Government of Alberta (GoA) departments.<sup>1,2</sup>
- [2] On May 30, 2014, the Information and Privacy Commissioner announced she was opening an investigation under section 53(1)(a) of the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to look into delays in responding to access to information requests. Section 53(1)(a) says:

## General powers of Commissioner

53(1) In addition to the Commissioner's powers and duties under Part 5 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

- (a) conduct investigations to ensure compliance with any provision of this Act...

- [3] The following factors contributed to the Commissioner's decision to open this investigation, as outlined in the news release:<sup>3</sup>

- For some time, I have been concerned about the timeliness of responses to access requests. In my 2012-2013 Annual Report, I reported the number of requests for time extensions submitted to my Office increased by 89% from the previous fiscal year. The recent allegations raise questions about the reasons for the time extension requests.
- Statistics on the operations of the FOIP Act for the 2011-2012, 2012-2013 and 2013-2014 fiscal years are not available. While I have heard anecdotally that government departments have seen increasing numbers of access requests, I have no statistics on these numbers or on the response times over the past three fiscal years.
- A number of applicants have informed my Office that public bodies do not respond to access requests within the timelines set out in the FOIP Act.
- The Alberta's NDP Opposition and the Canadian Taxpayers Federation have publicly stated they have written to me asking for an investigation into delays in the release of records and raising concerns about political interference in the processing of access requests. I have received their written requests.
- I have heard anecdotally of concerns and allegations regarding the disclosure of applicant identities during the processing of access requests. This raises questions as to whether the identity of an applicant (e.g. political, media) is a factor in the time taken to respond to a request.

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<sup>1</sup> "Critics call for probe into FOIP-interference allegations", Edmonton Sun, April 23, 2014, retrieved from <http://www.edmontonsun.com/2014/04/24/critics-call-for-probe-into-foip-interference-allegations>.

<sup>2</sup> "Thomas Lukaszuk accused of interfering with access requests", CBC, April 22, 2014, retrieved from <http://www.cbc.ca/news/canada/edmonton/thomas-lukaszuk-accused-of-interfering-with-foip-requests-1.2618257>.

<sup>3</sup> "Commissioner Launches Investigation Into Government's Handling of Access Requests", Office of the Information and Privacy Commissioner, May 30, 2014, retrieved from <https://www.oipc.ab.ca/news-and-events/news-releases/2014/commissioner-launches-investigation-into-government%E2%80%99s-handling-of-access-requests.aspx>.

- [4] The objectives of the investigation were as follows:
- Review steps taken to respond to an access request, including identifying who reviews access request responses before records are released and determining how such reviews impact response times.
  - Review response times by provincial government departments to access requests and the reasons for any time extensions and/or delays in responding/processing.
  - Review evidence to determine whether or not political interference has caused delays in responding to access requests.
- [5] On May 29, 2014, the Commissioner wrote to the then-Minister of Service Alberta to advise him of the investigation. In that letter, the Commissioner indicated this investigation might be extended to other GoA departments as needed.
- [6] On June 17, 2014, this investigation was extended to Executive Council, and on November 27, 2014, it was extended to the 17 remaining GoA departments, as they were named and organized at the time.<sup>4,5</sup>
- [7] My colleagues and I on the Compliance and Special Investigations team were assigned to investigate this matter. I was assigned to write this report.
- [8] This report is presented in two parts. Part One provides the findings for each of the three objectives of the investigation; Part Two presents issues and challenges encountered during the investigation.

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<sup>4</sup> Order in Council 372/2014 of September 2014, available at [http://www.gp.alberta.ca/documents/orders/orders\\_in\\_council/2014/914/2014\\_372.html](http://www.gp.alberta.ca/documents/orders/orders_in_council/2014/914/2014_372.html)

<sup>5</sup> A list of the GoA departments in existence in 2014 is included as Appendix A.

# Part One

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## Methodology

- [9] In conducting this investigation, my colleagues and I:
- Interviewed Service Alberta’s FOIP Coordinator (June 2014)
  - Interviewed the then-Deputy Minister of Executive Council (July 2014)
  - Reviewed statistical information for access requests provided by GoA departments (September 2014)
  - Received records from all GoA departments related to the processing of common access requests (August 2014 to August 2015)
  - Interviewed all GoA department FOIP Coordinators (October and November 2015)<sup>6</sup>
  - Reviewed the Office of the Information and Privacy Commissioner’s (OIPC) statistics for requests for time extensions by GoA departments (January 2017)

## Analysis and Findings

### Objective 1: Review Access Request Response Process

- [10] The first objective of this investigation was to review steps taken to respond to an access request, including identifying who reviews access request responses before records are released and determining how such reviews impact response times.
- [11] Each GoA department has a FOIP office that is responsible for overseeing responses to access requests.<sup>7</sup>

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<sup>6</sup> Although investigation files were opened for 19 GoA departments, we interviewed 15 individuals in 16 sittings, due in part to “Shared Services Agreements”.

<sup>7</sup> Some GoA departments have “Shared Services Agreements” that allow for one FOIP office to administer access requests on behalf of other departments.



[12] At a high level, the steps taken by public bodies to respond when they receive written requests for access to information from an applicant include:<sup>8</sup>

- Receive request, confirm it is a request under the Act
- Consider routine disclosure of information
- Clarify the time period, scope and wording of the request with the applicant, as applicable
- Acknowledge request with applicant
- Send out a call for records, provide guidance to department employees (if needed) to ensure a thorough search of records and that all responsive records are identified and provided to the FOIP office
- Consider need to consult third parties affected by release of records, if applicable
- Receive records from program areas
- Review records and prepare them for disclosure, which includes a review of:
  - The provisions of the FOIP Act, such as mandatory and discretionary exceptions to disclosure<sup>9</sup>
  - Legal precedents such as orders published by the OIPC
  - The opinion of subject matter experts in the department
  - The opinion of legal counsel
  - The impact of the disclosure on third parties identified in the records, such as individuals, organizations or other public bodies<sup>10</sup>
- Obtain approval from the head of the public body prior to responding
- Respond to applicant
- Release records to applicant, as applicable
- Ensure that all of the above happens within 30 calendar days of receiving request, unless circumstances warrant more time, as authorized by the FOIP Act and Regulation

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<sup>8</sup> These steps are based on Service Alberta's *FOIP Guidelines and Practices: 2009 Edition*, Chapter 3, available at <http://servicealberta.gov.ab.ca/foip/resources/chapter-3.cfm>.

<sup>9</sup> Mandatory exceptions require that a public body withhold information in a record requested by an applicant, if the information meets certain criteria. Discretionary exceptions authorize the public body to use discretion in deciding whether to disclose records to an applicant or not.

<sup>10</sup> With regard to consultations, Service Alberta has addressed some these considerations in a dedicated publication, available at <http://www.servicealberta.gov.ab.ca/foip/documents/bulletin10.pdf>.

## Review/Approval Process

- [13] Under the FOIP Act, the person responsible for a public body's compliance with the provisions of the Act is referred to as the "head" of the public body. In the case of GoA departments, this is the Minister of each department. Between the FOIP Act and Regulation, there are approximately 100 provisions for which the head has responsibility.
- [14] Section 85 of the FOIP Act authorizes the head of a public body to delegate some responsibilities to others, and requires this be done in writing. To that end, GoA departments use legal instruments referred to as "delegation matrices" that, for each section of the FOIP Act or Regulation for which the head has responsibility, indicate to which position in the department the responsibility is delegated.<sup>11</sup>
- [15] In the course of our investigation, we obtained and reviewed a copy of the delegation matrix for each GoA department.
- [16] Each public body head is responsible to determine how to most appropriately delegate authorities under the FOIP Act, according to the operational constraints and other internal criteria of each department. We found that, within GoA departments, Ministers typically delegate their authority to five types of positions, although they may retain the authority to make decisions on certain matters: Deputy Minister, Assistant Deputy Minister, FOIP Coordinator, FOIP Advisor or Other.<sup>12</sup>
- [17] In order to obtain the approval of a Deputy Minister or Assistant Deputy Minister within their department, FOIP Coordinators usually provide the package of records with a memorandum to the signatory, and advise that individual of the expected date of release of the records in question. Most GoA departments also indicated that when the sign-off process reaches the executive level in the department, the Ministry's communications office is notified for their awareness, so that communications staff can brief the Minister or Deputy Minister as they see fit. When my colleagues and I interviewed FOIP Coordinators for this investigation, they indicated that a department's Director of Communications may be required to sign off on a package of records to be released, but only in the event that records responsive to a request came from the communications unit of the department.
- [18] The process described in the paragraph above, and the positions responsible to sign off on packages of records to be released is reflected on the sign-off sheets that all GoA departments use to document the approval process. My colleagues and I reviewed the approval documentation in light of each GoA department's delegation matrix and did not identify discrepancies.
- [19] FOIP offices indicated that approvals for the release of records in response to access requests are usually obtained by simply circulating the records package within the

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<sup>11</sup> A sample delegation matrix is provided in Appendix B. Information related to delegation was retrieved in June 2015 from the Service Alberta FOIP website available at <http://servicealberta.gov.ab.ca/foip/resources/appendix-2.cfm>.

<sup>12</sup> The "Other" category is used by some GoA departments to reflect that in some cases individuals in specific positions are better suited to approve of the disclosure of records proposed by a FOIP office. These positions may be division heads, executive directors, human resources managers, or other positions at the manager level within the GoA.

department, but that the FOIP Coordinator may meet with the individual(s) signing off on the release of certain records, depending on the circumstances. These meetings may also involve subject matter experts, or the Assistant Deputy Minister(s) of program areas responsible for the specific records.

- [20] Both the access request process documentation from departments and responses from FOIP Coordinators indicated that there is typically limited time to complete this step so as to respond within legislated timelines.
- [21] Some departments aim to obtain approval of these packages of records in as little as three days, while others have indicated that the sign-off step usually takes between five and 10 days; FOIP Coordinators indicated that the individuals responsible to sign off on records are aware of the importance of their timely approval.

## Findings

- [22] For an applicant, the 30 calendar days available to GoA departments to respond to an access request may seem to give departments ample time to respond to a request and provide records. However, once all steps and the extent of work required for each are accounted for, it becomes clear that the time allowed to respond must be used economically. GoA department heads in general and FOIP Coordinators in particular are aware of this reality. They have established internal processes and timelines with the objective to meet the legislated response times as often as possible.
- [23] Overall, I find that the steps followed by GoA departments are appropriate, and that these steps do not by themselves cause or exacerbate delays in the time GoA departments take to respond to requests made to them under the FOIP Act.
- [24] Further, I find that there are no significant delays incurred by the approval step in the process followed by GoA departments to respond to access requests.<sup>13</sup>

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<sup>13</sup> These findings are based on a high-level review across the GoA. The OIPC's Investigation Reports F2017-IR-01 and F2017-IR-02 look at this issue in the context of specific departments. Both investigations provide findings and recommendations, some of which may be applicable to all GoA departments. Investigation Report F2017-IR-01 is available at <https://www.oipc.ab.ca/media/788396/f2017-ir-01.pdf>. Investigation Report F2017-IR-02 is available at <https://www.oipc.ab.ca/media/788394/f2017-ir-02.pdf>.

## Objective 2: Response Times and Reasons for Delay

- [25] The second objective of this investigation was to review provincial government department response times to access requests and identify the reasons for any time extensions and/or delays in responding/processing.
- [26] Section 11 of the FOIP Act requires public bodies to make every reasonable effort to respond to a request for access to information within 30 days, unless that time limit is extended as permitted under the Act.
- [27] This 30-day limit refers to calendar days, as per the *Interpretation Act*, and includes all the steps previously identified for the preparation of a response for an applicant.
- [28] The FOIP Act recognizes there are situations in which a public body may need more time to respond. In these cases, under section 14 of the Act, a public body may extend the time limit by up to 30 days on its own initiative. This includes when:
- The applicant has not provided enough details in order for the public body to identify records.
  - There is a large number of records to search or to review in response to the request, and responding within the time limit would unreasonably interfere with the public body's operations.
  - The public body needs more time to consult with third parties.
- [29] If the public body determines it needs an extension of the time limit to respond beyond 60 days, it must submit a request for time extension (RFTE) to the Commissioner for authorization.

### GoA Response Times

- [30] Under section 86 of the FOIP Act, Service Alberta is responsible to prepare annual reports on the operation of the FOIP Act. This section reads, "The Minister must prepare an annual report about the operation of this Act and lay the report before the Legislative Assembly."
- [31] These annual reports provide useful information on the operation of the Act, as well as an indication of the general numbers of access requests made to public bodies, including GoA departments.
- [32] At the time the Commissioner announced this investigation (May 2014), the most recent report Service Alberta had made public was for 2010-2011.<sup>14</sup>
- [33] Given the initial absence of publicly available statistics for the years under review,<sup>15</sup> I requested information from Service Alberta regarding the operation of the FOIP Act for fiscal years 2009-2010 to 2013-2014, which Service Alberta provided in September 2014.

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<sup>14</sup> Service Alberta's annual reports on the operation of the FOIP Act are available at <http://www.servicealberta.gov.ab.ca/foip/resources/annual-reports.cfm>.

- [34] Service Alberta indicated that the statistics for the latest fiscal year had not been audited; therefore, I confirmed that the numbers received in September 2014 indeed matched the final numbers included in the annual reports tabled to the Legislative Assembly by the Minister of Service Alberta on November 22, 2016.<sup>15</sup>
- [35] Service Alberta's annual reports provide information about response times at a very high level. All GoA departments and all agencies, boards and commissions for which the various departments are responsible are included. Response times are grouped in three categories – "30 days or less", "31-60 days" and "60+ days" – and reported as a percentage of requests responded to in each time frame.
- [36] My review and analysis of the statistics in the reports considers the following:
- Only general requests made to GoA departments are reflected in the statistics; agencies, boards and commissions (ABCs) of GoA departments, as well as the Public Affairs Bureau and Corporate Human Resources are excluded.
  - I found minor discrepancies in the statistics provided by Service Alberta directly and those published in the annual reports. Therefore, I used the published numbers for my analysis.
  - Access requests made to GoA departments are counted in the fiscal year they are received (i.e. April 1 to March 31).
  - The number of days taken to respond to access requests is based on the fiscal year a given access request was closed. The statistical information compiled by Service Alberta does not reflect active access requests received by public bodies that have not yet received a response.<sup>17</sup>
  - Given the evolving perimeter of GoA departments with each reorganization undertaken, I kept GoA departments grouped together, limiting my analysis to GoA department numbers as a whole.
  - All access requests made by "Business/Commercial" applicants were removed from statistics for Environment and Water from 2009-2010 to 2012-2013, and Environment and Sustainable Resource Development from 2012-2013 and 2013-2014. These were removed because they had a distorting effect on averages and skewed comparisons with other departments<sup>18</sup> and applicant types.

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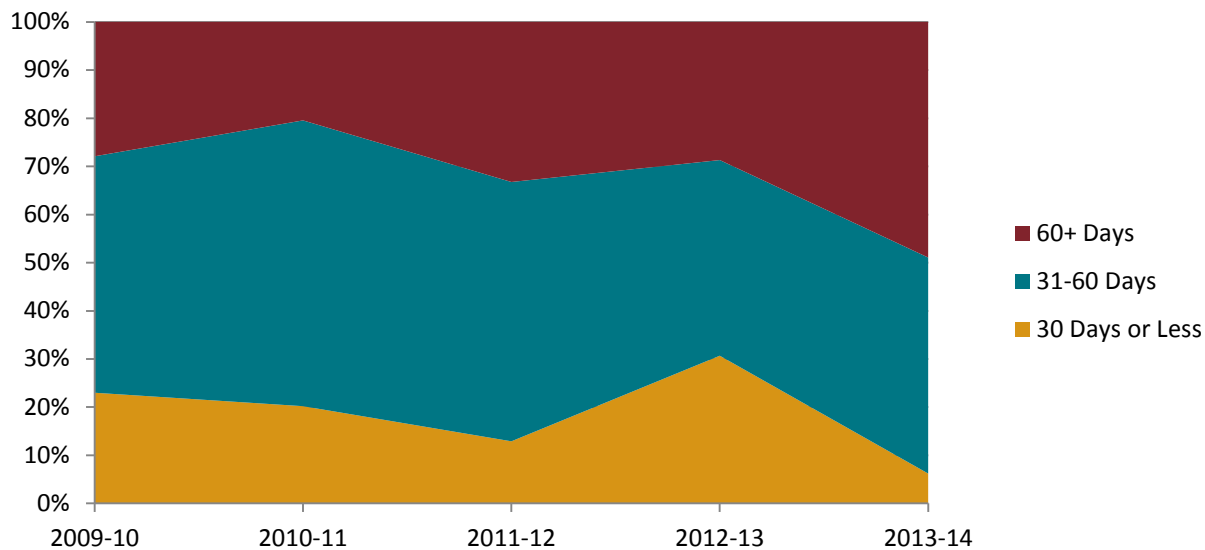
<sup>15</sup> Then-Minister of Service Alberta, Doug Griffiths, tabled reports for 2011-2012 and 2012-2013 fiscal years on July 2, 2014.

<sup>16</sup> Retrieved from Sessional Papers tabled in the 29th Legislature, 2nd Session, see SP 398/2016 available at [http://www.assembly.ab.ca/ISYS/LADDAR\\_files/docs/houserecords/tb/legislature\\_29/session\\_2/20160308\\_1200\\_01\\_tb.pdf](http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/houserecords/tb/legislature_29/session_2/20160308_1200_01_tb.pdf)

<sup>17</sup> This topic is further addressed in OIPC Investigation Reports F2017-IR-01 and F2017-IR-02. Ibid.

<sup>18</sup> This practice is consistent with the approach taken by Service Alberta in its latest annual reports on the operation of the FOIP Act in which it separated requests for access to environmental site assessments records received by Alberta Environment and Parks from businesses, and provided to applicants through a routine disclosure process.

Chart and Table: Average Response Times Across GoA to General Requests



	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014
Number of General Requests	387	391	364	704	981
Response in 30 Days or Less	89 (23%)	79 (20%)	47 (13%)	216 (31%)	61 (6%)
Response in 31-60 Days	190 (49%)	232 (59%)	196 (54%)	286 (41%)	440 (45%)
Response in 60+ Days	108 (28%)	80 (20%)	121 (33%)	202 (29%)	480 (49%)

[37] The chart and table above presents the distribution of access requests according to the time taken to respond. Although the numbers are based on Service Alberta statistics, they differ from the statistics reported by Service Alberta in annual reports due to the considerations listed above.

[38] The most remarkable finding from these response time statistics related to general access requests is that only 6% of access requests were responded to within 30 days while 49% of requests were responded to in more than 60 days in 2013-2014.

### Factors Contributing to Delay

[39] To identify factors that may account for some of the delays in responding to access requests, I reviewed the 143 RFTEs submitted by public bodies to the OIPC between 2009 and 2013, and relied on interviews with GoA FOIP Coordinators.

## Volume and Staffing

- [40] Overall, the number of access requests for general information increased to 1,027<sup>19</sup> in 2013-2014 from 404 in 2009-2010, an increase of 154%.

	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014
General Requests	404	419	405	719	1,027
Yearly Change	-	+4%	-3%	+78%	+43%

- [41] In addition, nearly unanimously, FOIP Coordinators indicated challenges with resources and staffing allocated to FOIP offices, especially for the majority of FOIP offices that experienced increased workloads during this time.
- [42] My review of time extension requests submitted to the OIPC supported what was heard from FOIP Coordinators. Between 2009 and 2013, 81 (57%) RFTEs referenced managing workload that exceeds the public body's resource capacity.

## Complexity of Requests

- [43] FOIP Coordinators mentioned the increasing complexity in requests made to GoA departments. In their view, applicants, and frequent applicants in particular, have become a lot more savvy and knowledgeable about requesting access to information under the FOIP Act.
- [44] For example, some applicants requested access to records held in information systems like ARTS,<sup>20</sup> sought to access specific expense information across all GoA departments, or started making access requests about all records related to the handling of one of their previous access requests.
- [45] Between 2009 and 2013, 14 (10%) RFTEs referred to complex review and severing.

## Number of Responsive Records

- [46] Based on the time extension requests, it is clear that one of the challenges impacting response times is the number of records responsive to access requests.
- [47] Between 2009 and 2013, 124 (87%) RFTEs mentioned a large number of records requested. The average number of responsive records in those requests was nearly 5,000 pages, with one request involving as many as 50,000 pages.
- [48] Decreasing costs of information technology and storage over the last few decades have caused an increase in the number of records created by GoA departments. A constant increase in the number of records has information management repercussions, as well as a significant impact on a public body's ability to comply with the FOIP Act, since the FOIP Act

<sup>19</sup> The totals for the numbers of requests in the previous table were lower because some requests were excluded from the statistics used for that analysis.

<sup>20</sup> Investigation Report F2016-IR-01 issued by the OIPC provides a description of the Action Request Tracking System (ARTS). The report is available at <https://www.oipc.ab.ca/media/649105/f2016-ir-01.pdf>.

applies to all records in the public body's custody or control at the time a request is received.

- [49] My colleagues and I witnessed this first-hand in the course of reviewing records received from GoA departments in this investigation. Some of these records were copies of packages provided to applicants, which included many duplicates of certain emails sent between GoA employees. All records considered, several duplicates of certain emails were provided to us, sometimes in excess of 50 times for the same email. This is not an issue for this investigation, but illustrates some of the challenges arising from the management of electronic records as well as the impact on the work of FOIP staff who review records for release to an applicant.
- [50] The increase in the quantity of records held by public bodies generally, and the associated records management challenges, comes to the fore when there is increased interest from individuals to obtain access to these records. An adequately resourced and well-managed information management regime is the cornerstone of an effective access to information program.

### *Applicant Expectations*

- [51] The FOIP Coordinators interviewed for this investigation said that over time, they have had to adjust to heightened expectations and expertise of applicants.
- [52] For example, certain applicants would specify in the wording of their requests that they were seeking to receive all emails related to a certain topic with duplicates removed. For applicants, there may be a cost implication to receiving duplicate information since fees may apply to each page they could receive. For GoA departments, processing requests with this additional constraint impacts response times.
- [53] In addition, a number of FOIP Coordinators indicated that applicants increasingly were asking to receive the records responsive to their request in electronic format. While this request could easily be accommodated by certain departments, others had difficulty doing so based on a greater reliance on paper in the department or in certain program areas.
- [54] Generally, applicants' expectations have been increasing incrementally by aligning with best practice among GoA departments: if one department did something that an applicant appreciated, this created an expectation from certain applicants that other departments would follow suit. FOIP Coordinators commented that they make efforts to meet their department's duty to assist under the FOIP Act, but that they are sometimes constrained due to different practices in their department compared to others, such as record-keeping practices, financial information systems or relative reliance on paper.

### *Concurrent Requests*

- [55] The FOIP Act allows a public body to ask the Commissioner for a time extension "if multiple concurrent requests have been made by the same applicant or multiple concurrent requests have been made by 2 or more applicants who work for the same organization or who work in association with each other" (section 14(2)).



- [56] This became a more common challenge for GoA departments in 2013-2014 with 15 (5%) RFTEs mentioning concurrent requests. This reason had been relatively uncommon in previous years.

### *Consultations*

- [57] When GoA departments need to consult before deciding to grant access to a record, they may ask the Commissioner for a time extension.
- [58] Between 2009 and 2013, 85 (59%) RFTEs referenced consultations.
- [59] Of note, these consultations were increasingly stated in RFTEs – from 13 in 2011-2012, to 21 in 2012-2013, and to 39 in 2013-2014. The need to consult appears to be a significant factor influencing a public body’s ability to provide a timely response to an access request.

### *Cross-Government Access Requests*

- [60] When we interviewed FOIP Coordinators, they unanimously confirmed a significant increase in the number of “cross-government access requests” made to GoA departments beginning around 2013. These requests refer to the same or similar access request being made to each GoA department by the same applicant in a short time. There were approximately 21 cross-government access requests made to GoA departments between 2012 and 2014.
- [61] In years previous, there had been few instances where cross-government access requests were identified, usually by FOIP offices that were providing services for other ministries under shared services agreements.
- [62] We were told that, in the summer of 2013, faced with an increase in the number of access requests and cross-government access requests, some Deputy Ministers felt that there had to be a better organized approach to responding, in part to improve the efficiency of the FOIP offices as a whole and to increase the consistency of the responses made by various GoA departments.
- [63] To that effect, it was decided that Service Alberta would help coordinate certain steps of the access request response process on behalf of other GoA departments, whenever there was more than a few departments that had received identical or nearly identical requests from the same applicant. This was due in part to the Ministry’s historical function to oversee the administration of the FOIP Act in the GoA,<sup>21</sup> and was made possible by the aggregation of information about access requests in FOIPNet, which Service Alberta manages.<sup>22</sup>
- [64] In interviews with FOIP Coordinators, we were told that, overall, the coordination process was not highly formalized. There are no terms of reference. Service Alberta monitors incoming access requests to identify any request made to two or more GoA departments as

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<sup>21</sup> According to sections 1(k), 86 and 87 of the FOIP Act, the Minister of Service Alberta has certain responsibilities under the FOIP Act.

<sup>22</sup> FOIPNet is an information system put in place by the GoA around 2003. The system serves three primary purposes: Help public bodies in tracking access requests received by recording essential information about the request and allowing users to create a log of activities related to each request; assist public bodies in managing their requests by providing searching and reporting capabilities; and facilitate Service Alberta’s preparation of annual reports on the administration of the FOIP Act.

soon as possible. When such requests are identified, Service Alberta calls a meeting that the FOIP Coordinators of departments impacted by the request were expected to attend. All FOIP Coordinators confirmed that no minutes were taken in those coordination meetings.

- [65] In the eyes of FOIP Coordinators, those meetings were limited to ensuring similar scope and time periods, the search for records, and the general approach to severing. For each meeting, the outcome of the discussion was captured in a document referred to as a “record of decision”, often shortened to “ROD”, prepared by Service Alberta. Most FOIP Coordinators said that they saw value in the discussions with their peers, which at a minimum prevented the applicant from getting calls from all FOIP offices at the same time to clarify the wording or scope of the request. After the meeting, there was an understanding that each FOIP Coordinator would go back to their FOIP office and have their staff process the request in accordance with the content of the ROD.
- [66] When asked about the coordinated process led by Service Alberta, and whether the coordination of requests had caused any delays or, on the contrary, allowed for shorter response times, some of the FOIP Coordinators provided examples of minor delays in responding to a cross-government access request which they attributed in part to the coordinated process. Other FOIP Coordinators found the process saved their office time by having others clarify requests with an applicant, and then report back to the group of FOIP Coordinators. Similarly, FOIP Coordinators stated that Service Alberta FOIP staff were very quick to identify any access request made to two or more departments, and were diligent at calling meetings with the relevant FOIP Coordinators.
- [67] The prevailing sentiment among FOIP Coordinators was that the coordination had only a marginal effect on departments’ response times to access requests; more than the coordinated process itself, it appears that the situation of each department had a much more significant impact on response times.
- [68] In the end, based on the descriptions of the coordinated process by each FOIP Coordinator, the fact that they did not perceive the RODs as being strictly prescriptive about the approach to follow, and each FOIP Coordinator’s assessment of the process, I conclude that while the coordinated process may have caused minor delays in some instances, these were not significant.

### *Shared FOIP Services*

- [69] Over the years, various departments have provided FOIP services for other departments. At the time of this investigation, the following shared services agreements were in effect:
- Treasury Board and Finance supported Culture, Tourism, Parks and Recreation (until September 2014)
  - Transportation supported Infrastructure (until September 2014)
  - Health supported Seniors (until February 2015)
  - Human Services supported Innovation and Advanced Education

- Aboriginal Relations supported International and Intergovernmental Relations
- Service Alberta supported Agriculture and Rural Development (as of September 2014), Culture and Tourism (as of September 2014), as well as Seniors (as of February 2015).

[70] At the time we conducted interviews, there were three FOIP offices providing services for another department, in addition to their own: Human Services (2), Aboriginal Relations (2) and Service Alberta (4).

[71] This delegation of responsibilities is permitted under the FOIP Act, as long as it is established in writing. The trend I observed is that Service Alberta has been assuming FOIP services for an increasing number of departments. Service Alberta assumed FOIP services for two departments in September 2014 (Culture and Tourism, Agriculture and Rural Development) and one in February 2015 (Seniors), for a total of four including its own access requests.

[72] Service Alberta employees mentioned the dual nature of the work fulfilled by the department's FOIP office:

- The functions Service Alberta fulfils as the ministry responsible for the administration of the FOIP Act.
- The functions of a FOIP office for the department of Service Alberta itself, or the three other departments Service Alberta supports.

[73] When it comes to resources, no other department is as important as Service Alberta because it provides leadership to all public bodies across the province. However, the department seems to suffer from resourcing challenges, which are evidenced by the following:

- Both of the employees interviewed confirmed the FOIP office could use more staff.
- Issuing FOIP annual reports has been delayed, as mentioned previously, with publication delays starting in earnest in 2010-2011.
- Service Alberta FOIP resources,<sup>23</sup> which are referenced extensively in this report, have not been updated in years; in fact, few resources have been updated since 2010. For a while, Service Alberta reported on its new or updated publications in its annual report, but it discontinued the practice in its 2011-2012 annual report. One example is the Service Alberta publication titled *Guidelines and Practices: 2009 Edition*. Although it is considered to be one of the key reference documents for public bodies subject to the FOIP Act, it has not been updated since 2009. The situation is the same for FOIP bulletins; this is of concern as Service Alberta is the department providing guidance to all other public bodies across the province.

[74] To be clear, these observations are not aimed at calling into question the quality of the work done by Service Alberta employees who work in the FOIP unit, but rather the GoA's resourcing of that program area.

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<sup>23</sup> Service Alberta FOIP Resources are available at <http://servicealberta.gov.ab.ca/foip/resources.cfm>.

## Findings

- [75] Overall, for the five-year period considered, the time taken by GoA departments as a whole to respond to access requests has increased. Over the same period, the volume of access requests made to GoA departments has increased significantly, which affected GoA FOIP offices' ability to respond in a timely manner to all applicants.
- [76] The most remarkable finding from these response time statistics related to general access requests is that only 6% of access requests were responded to within 30 days while 49% of requests were responded to in more than 60 days in 2013-2014.
- [77] A number of factors contribute in varying degrees to delays, including:
- Volume of requests and staffing
  - Complexity of requests
  - Number of responsive records
  - Applicant expectations
  - Concurrent requests
  - Cross-government access requests
  - Shared FOIP services
- [78] Service Alberta plays an important role in providing leadership to all public bodies across the province. However, the department seems to suffer from resourcing challenges.

## Objective 3: Delays in Responses Due to Political Interference

[79] The third objective of this investigation was to review evidence to determine whether or not political interference has caused delays in responding to access requests. At the outset, it is important to note that there was a limited number of records provided for evidence and interviews were restricted. As a result, the findings related to this objective are inconclusive.<sup>24</sup>

[80] We focused on the following when reviewing and gathering evidence for this portion of the investigation:

- Response times by applicant type, to address concerns that certain requests were taking longer than necessary based on the identity or type of applicant.
- Disclosure of applicants' identities during the access request response process (and disclosure of applicant identity/type when reporting on the administration of the FOIP Act). This was the issue that saw significant media coverage in spring 2014 and discussion in the legislature.<sup>25</sup>
- Cross-government access requests due to allegations that these requests were coordinated for purposes beyond administrative efficiency, including political interference.
- Specific instances of interference that were brought to our attention.

### Volume of Requests and Response Times by Applicant

[81] Information in the following table is based on statistics reported by Service Alberta in its annual reports on the operation of the FOIP Act, and shows the number of requests made to GoA departments by each applicant type between 2009-2010 and 2013-2014. I compiled these statistics according to the methodology discussed in relation to Objective 2.

Applicant Type	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	Change %
Academic / Researcher	31	40	9	14	12	-61%
Business / Commercial	111	106	128	107	134	+21%
Elected Official	70	26	41	220	422	+503%
General Public	102	124	138	187	213	+109%
Media	43	36	48	103	152	+253%
Organization / Interest Group	47	87	41	88	94	+100%
<b>Total</b>	<b>404</b>	<b>419</b>	<b>405</b>	<b>719</b>	<b>1027</b>	<b>+154%</b>

<sup>24</sup> Part Two of this report outlines the concerns about the evidence provided and how the interviews were restricted.

<sup>25</sup> E.g., Alberta Hansard, the 28th Legislature, Second Session, Tuesday afternoon, April 22, 2014, available at [http://www.assembly.ab.ca/ISYS/LADDAR\\_files/docs/hansards/han/legislature\\_28/session\\_2/20140422\\_1330\\_01\\_han.pdf](http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/hansards/han/legislature_28/session_2/20140422_1330_01_han.pdf).

- [82] These numbers show that, over time, the number of requests made by various applicant types has changed significantly. The most notable change is the increased number of requests made by applicants categorized as “Elected Official”, along with increases for most other applicant types. The only group of applicants for which the number of requests decreased is the “Academic / Researcher” group.
- [83] As has been previously discussed, Service Alberta’s annual reports provide information about response times at a very high level. All GoA departments and all agencies, boards and commissions for which the various departments are responsible are included. Response times are grouped in three categories – “30 days or less”, “31-60 days” and “60+ days” – and reported as a percentage of requests responded to in each time frame.
- [84] Grouping response times by category reflects the requirements of the FOIP Act that public bodies respond to a request within a certain timeframe. However, these aggregate numbers do not allow for detailed comparisons beyond tracking the changes of these percentages over the years.
- [85] Given this, I asked Service Alberta to provide me with statistical information on the average number of days it took public bodies to respond to access requests from 2009-2010 to 2013-2014, based on applicant type.
- [86] Service Alberta provided the numbers, and indicated that the totals for each applicant type were averages derived from the total number of requests made to a given department in a given year, and the total number of days taken by each department in the same fiscal year.
- [87] I compiled all numbers received<sup>26</sup> and, for each department, calculated the weighted arithmetic mean (WAM) of the number of days taken to respond for each type of applicant, weighing each average number of days by the number of requests made to each department by each type of applicant in each fiscal year.
- [88] Although the analysis of these statistics is difficult for a number of reasons,<sup>27</sup> I consider the statistics presented here to be a good approximation of the average number of days taken by GoA departments to respond to access requests by applicant type.

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<sup>26</sup> As previously noted, access requests for environmental site assessment reports were excluded.

<sup>27</sup> (1) A simple name change for a department requires some minor adjustments to compile totals. (2) Department reorganizations may cause entire divisions of a department to move to a new ministry, or to an existing ministry; this is particularly problematic when reporting on statistics, since some requests might be recorded as received by a certain department but responded to by a department that has another name. (3) Some access requests might span more than one fiscal year, which is the reporting period of reference; an access request made any given year in March would be responded to in the next fiscal year, even if it is responded to in approximately 30 days. (4) There are access requests that are received by a public body, and for which records are identified, but require consultation with third parties; in some cases, this may lead to a review by the OIPC, if an affected third party chooses to do so. This in turn would cause an access request to remain open for a department, in which case the overall time taken to respond to that access request would include the time taken by the OIPC to conduct its review.

Table: Average Number of Days Taken to Respond to General Requests by Applicant Type

Applicant Type	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	WAM of Days Taken Over Period
Academic/Researcher	36	55	57	43	45	46
Business/Commercial	54	59	70	62	59	61
Elected Official	50	43	50	46	68	58
General Public	57	54	41	39	59	50
Media	49	47	45	50	61	54
Organization/Interest Group	52	37	67	46	55	49
GoA WAM	<b>52</b>	<b>51</b>	<b>55</b>	<b>47</b>	<b>62</b>	<b>55</b>

All values are weighted arithmetic means, rounded to nearest integer.

- [89] Based on these values, there is no clear trend in response times. Overall, the average number of days taken by GoA departments to respond to access requests has increased across applicant categories over the five years considered, with a marked increase in the last fiscal year.
- [90] The suggestion made by some concerned applicants that applicant type had an impact on the time taken to respond to a request does not appear to be supported by the statistical analysis above.<sup>28</sup> If anything, the statistics show an overall correlation between longer response times and higher number of requests made.
- [91] Given this, I decided to compare the change in the number of access requests made to GoA departments, and the corresponding change in the time it took GoA departments to respond.
- [92] To do so, I calculated year-to-year percentages of the change in number of requests made (“requests value”), as well as year-to-year percentages of the change in number of days taken to respond (“days value”). Then I calculated the ratio of the two values, using the days value as the numerator, and the requests value as the denominator.
- [93] The table below shows the change in number of days to respond relative to the change in number of requests made. The ratios expressed in the table can be interpreted as follows:
- If the ratio is greater than 1, it means that the number of days taken to respond grew faster than the number of requests made.
  - If the ratio is less than 1, it means that the number of requests made grew faster than the number of days taken to respond.
  - A value of 1 means that the number of requests grew as fast as the number of days taken to respond.

<sup>28</sup> This analysis is of statistics across the GoA. However, OIPC Investigation Report F2017-IR-02 found there was a 14 calendar day difference in responses to one applicant compared to all other access requests processed by Executive Council and Public Affairs Bureau. The report is available at <https://www.oipc.ab.ca/media/788394/f2017-ir-02.pdf>.

Applicant Type	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014
Academic/Researcher	-	<b>1.18</b>	<b>5.47</b>	<b>2.64</b>	<b>3.23</b>
Business/Commercial	-	<b>1.16</b>	<b>1.14</b>	<b>1.19</b>	0.91
Elected Official	-	<b>2.32</b>	<b>1.72</b>	0.29	0.23
General Public	-	0.78	0.53	0.38	0.49
Media	-	<b>1.14</b>	0.83	0.43	0.36
Organization/Interest Group	-	0.38	<b>1.47</b>	0.47	0.52

[94] The bolded values (>1) in this table show which applicant types experienced longer response times than other applicants in a given fiscal year relative to the number of requests they made.

[95] Based on these values, it appears that the greatest negative impact was on applicants in the “Academic/Researcher” category who, despite making fewer requests in certain years, nevertheless experienced increased response times. Conversely, numbers show that, in relative terms, the least impact was on applicants in the “Elected Official” category who, despite making far more requests, experienced longer response times, but not to an extent that is significantly out of proportion to the increase in the number of requests they made.

[96] In short, there is no linear relationship between increases in response times and increases in number of requests made by specific applicant types. If anything, the table shows that if the number of requests made by one applicant type increases rapidly, it affects the length of time other applicant types have to wait to receive responses to their requests. Beyond this overall relationship, it is difficult to establish a link between applicant type and response time from aggregate statistical information.

## Disclosure of Applicants’ Identity

[97] I next considered whether the identity or type of applicant is disclosed during the access request response process, or when reporting on the status of requests within government, such that knowing the identity of an applicant might influence the response time.

[98] In order to examine this topic, I looked at practices for sharing (or not sharing) applicant identities within GoA departments and in the context of cross-government access requests, and then relative to intra-government reporting on access requests.

### *Within GoA Departments*

[99] The majority of FOIP offices indicated that they only disclosed applicant *type*, not *identity*, to department employees outside the FOIP office in the course of processing access requests. Three departments (Agriculture and Rural Development, Culture and Tourism, Environment and Sustainable Resource Development) did not disclose this information in the course of processing access requests. In particular, these departments specified this information is not disclosed in the course of seeking approval for the release of records to the applicant, and that the signatories “know not to ask”.



- [100] We asked FOIP Coordinators why information about the type of applicant was collected, used and disclosed, since the practice seemed to raise questions for certain applicants about the integrity of the access request response process. FOIP Coordinators had no explanation to offer other than to say it has been a long-established practice. An experienced FOIP Coordinator said that the information was primarily relied on for tracking purposes.
- [101] One public body (Executive Council) reported that names of applicants are “included on correspondence and are therefore made known to staff with delegated authority and direct access to the records” (Deputy Minister, Deputy Secretary to Cabinet, FOIP employees, and finance employees involved in fee collection). This is a clear deviation from the approach of all other departments’ FOIP offices.

### *Cross-Government Access Requests*

- [102] When we interviewed FOIP Coordinators, we specifically asked them about the disclosure of an applicant’s identity in the context of the coordinated response to cross-government access requests. It was noted that, since all participating FOIP Coordinators receive the same request, the applicant’s identity was already known to FOIP Coordinators.
- [103] They confirmed that there was widespread agreement that identifying information of applicants should not be included in records of decision (RODs). In addition, a number of FOIP Coordinators indicated that on one occasion, two identical access requests were made to all GoA departments for records related to two named individuals. All FOIP Coordinators we interviewed, and who participated in a meeting related to that request, said that the group agreed these requests were not well suited for the coordinated process, and were therefore never mentioned again among the group.

### *FOIPNet Weekly Reports*

- [104] All FOIP Coordinators confirmed that their offices submit information on a weekly basis about all access requests for general information. This information is provided to Service Alberta through FOIPNet. From this information, Service Alberta prepares two weekly reports, which Service Alberta described as follows:
- The first report is an Executive Summary which sets out the new general requests received, the general requests that closed, and any new and closed reviews with the OIPC within that week for each department. The details contained within the Executive Summary are: type of requester (business, public, media, etc.), brief request description, department, due date (for open requests), and status (for closed requests and reviews).
- The second report is a detailed report that sets out all of the active general requests and reviews with the OIPC. The report is separated out by department and contain [sic] the following details: date received, type of requester (business, public, media, etc.), brief request description, expected release date (for open requests), and status.
- [105] Service Alberta employees indicated that their role is limited to receiving weekly report information from all GoA departments on Fridays, preparing the weekly reports, and providing these to the Deputy Minister of Service Alberta, the Assistant Deputy Minister of Open Government, and to Service Alberta’s Director of Communications by the following Wednesday. Service Alberta FOIP personnel indicated that three days are needed to remove

any personal identifiers inadvertently included in GoA department FOIP offices' submissions through FOIPNet, as well as to ensure all the information needed is included.

- [106] Service Alberta provided sample weekly reports. I reviewed them closely, including the accompanying cover letters, which confirms that Service Alberta provides the weekly reports to Executive Council, usually on the day the Service Alberta FOIP office makes them available to their Deputy Minister.
- [107] The 20 samples I reviewed were from 2009 to 2013, which equates to four or five reports for each of these years. The content of the weekly reports is mostly unremarkable and fits the description provided by Service Alberta.
- [108] However, I did note a few subtle changes in the cover letters sent with the reports over the period, as well as in the reports themselves.
- [109] From 2009 until 2011, the cover letters mentioned the two reports, and included a description of each. The reports themselves included a caption aimed at flagging some of the access requests included in the reports. The access requests that were flagged were either:
- Requests that were overdue for a response.
  - Requests due for a response in the coming week.
  - Requests that were under review or at inquiry with the OIPC.
- [110] In October 2011, the cover letter sent by the Minister of Service Alberta to the Premier was changed. That letter was undated, but mentioned that it related to access requests made to GoA departments for the week ending October 7, 2011, so it would have been sent around October 12, 2011 if the standard process was followed. In addition to the two reports already mentioned, the cover letter mentioned a third report described as providing:
- ...a detailed summary of **select** general information requests in each department. The report includes requests that are new, closed or overdue during the reporting week; requests due for a response in the forthcoming week; **and requests received from elected officials and the media.**  
[emphasis added]
- [111] The cover letter sent two weeks later, on October 26, 2011, no longer included the description of the third report or requests by media and elected officials, but the caption on the main report was modified to flag not just the requests that had always been flagged (e.g., access requests that had a status change), but also all access requests made by the media or elected officials, regardless of status changes.
- [112] Last but not least, I observed that the cover letter presenting FOIP Weekly Reports was previously sent by the Minister of Service Alberta to the Premier, as the Minister of Executive Council. Although Service Alberta did not include cover letters for the FOIPNet Weekly Reports it provided to me for 2013, it appears that at some point between October 2012 and April 2013, this practice changed, and the letter – and reports – were sent from

the Deputy Minister of Service Alberta to the Deputy Minister of Executive Council, with a copy to the Minister of Service Alberta.

- [113] In my view, the process changes described could suggest that Deputy Ministers were becoming more closely involved in the access request response process, especially for cross-government access requests.
- [114] While I received no evidence to suggest that these changes in access request reporting resulted in attempts to interfere in their processing, I find that it nevertheless creates a perception issue. This was voiced by all opposition parties at the time that FOIP Weekly Reports became widely known.<sup>29</sup> At that time, NDP Opposition Leader Rachel Notley publicly stated that the FOIP Weekly Reports going from Service Alberta to Executive Council created the potential for interference, and commented that then-Minister of Service Alberta's assurances to the contrary were "disingenuous".

### *Intra-Government Reporting on Access Requests*

- [115] Related to the above discussion, on November 29, 2013, then-Deputy Premier Thomas Lukaszuk sent a memo to all members of Cabinet to "gather information about access requests which have the potential to generate media, session, political or other reputational issues for government" and to submit this information to his office on a weekly basis. This memo attracted the attention of opposition parties who primarily used it as a basis for allegations of interference. For that reason, I considered this memo and its impact on access request response processes within GoA departments.
- [116] When my colleagues and I interviewed FOIP Coordinators, we asked about any actions taken in relation to this memo. We were told that they did not implement any process or provide any of the requested information. When asked why the proposed process change in this request did not materialize, they had no explanation to offer other than to say the request was not passed on to them from their respective Deputy Ministers.
- [117] In reviewing the request made by the former Deputy Premier, I noted that the information he asked departments to provide about access requests significantly overlapped with the information provided to Executive Council in the FOIP Weekly Reports, which may in part explain why this initiative did not proceed.

### **Cross-Government Access Requests**

- [118] For the purpose of investigating possible interference in handling cross-government access requests, I requested a copy of all RODs prepared by Service Alberta and all other records in the custody of Service Alberta in relation to this topic. We received all the RODs as well as a number of records (some were redacted), and also interviewed FOIP Coordinators on this topic.
- [119] All FOIP Coordinators indicated that they attended cross-government access request coordination meetings when required. However, FOIP Coordinators had mixed views

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<sup>29</sup> "Alberta government 'manipulating' FOIP system with document dumps, say critics", Edmonton Sun, February 19, 2015, retrieved from [http://www.edmonton\\_sun.com/2015/02/19/alberta-government-to-dump-foip-docs-online](http://www.edmonton_sun.com/2015/02/19/alberta-government-to-dump-foip-docs-online).

regarding the content of RODs. Some found RODs helpful, while others indicated that they took ROD content under advisement, but eventually processed access requests in any way they felt was defensible for their department even if it deviated from the ROD. One FOIP Coordinator stated that naming these summaries “records of decision” was a clear misnomer and that “records of discussion” would have been more fitting. Regardless of each FOIP Coordinators’ view of how binding the RODs were for their department’s processing of requests, none of them expressed serious concerns.

- [120] One cross-government access request that was made for information held in ARTS involved extensive consultations with Executive Council, which Service Alberta coordinated. One FOIP Coordinator commented that he took exception with the extent of the consultations with Executive Council for this request. Specifically, the FOIP Coordinator stated that Executive Council’s recommendations should have been limited to the information in the records that was related to Cabinet confidences, based on that FOIP Coordinator’s experience with the redacting this information in past access requests. Instead, Executive Council reviewed all information from records generated from ARTS by each FOIP office, which the FOIP Coordinator viewed as inappropriate. Beyond this one assessment, other FOIP Coordinators did not state they were concerned by that process.
- [121] In the end, although some FOIP Coordinators had reservations about the coordinated process, they did not express significant concerns about the risk of political interference arising from the process.
- [122] One FOIP Coordinator referred to “angst in the upper echelons” as the reason for the attempts made by Service Alberta in the second half of 2013 to set a coordinated process in place. This alone does not equate to interference, but it is interesting to note that the approximate time mentioned coincides with the change noted above regarding the sender and recipient of FOIP Weekly Reports.
- [123] On that note, my review of the records related to cross-government access requests also revealed that on a number of occasions in 2013, correspondence sent among GoA officials included wording such as “there is no intention to interfere with the proper exercise of your Ministry’s discretion under FOIP” or “the intention is not to interfere in the timing or content of materials being released through the FOIP process”.
- [124] If anything, these refutations reveal that, at the very least, those officials realized the perception that their correspondence might create.
- [125] My colleagues and I received additional documents relevant to the question of cross-government access requests, but these were redacted. Based on the information I was able to obtain, I did not see that the coordinated process to respond to cross-government access requests suffered from significant interference. However, I believe that the formalization of the coordinated process and its timing caused legitimate questions to arise as to the appropriateness of this process and the context in which it was being pursued.

## Specific Instance of Interference

- [126] When my colleagues and I interviewed FOIP Coordinators, we asked them about any instances in which they had experienced pressure from anyone, other than those with delegated authority, to change their interpretation of the FOIP Act or how a responsive record might be redacted.<sup>30, 31</sup>
- [127] In an interview, one FOIP Coordinator described that their FOIP office had been processing three unrelated access requests received from media applicants, and that the requests related to then-Premier Alison Redford. The three requests had been made on different dates.
- [128] At some point in the process, the Deputy Minister of that department asked the FOIP Coordinator to provide records responsive to these three requests to the applicants on the same date because the records were going to be posted online shortly after being provided to the applicant.
- [129] At the time, each of the three access requests was at a different stage in the response process. The Deputy Minister's request effectively meant that the FOIP Coordinator was being asked to:
- Expedite the processing of one access request.
  - Continue the processing of one access request as per its normal timeline.
  - Delay the release of records responsive to one access request.
- [130] The FOIP Coordinator reported advising the Deputy Minister of the implications of the request.
- [131] The FOIP Coordinator also reported that the Deputy Minister provided specific instructions regarding the approach to be taken to prepare the records for disclosure to the applicant, asking the FOIP Coordinator to disclose certain records that the FOIP Coordinator had deemed to be non-responsive to the request. The FOIP Coordinator indicated that these instructions were "unprecedented" and "disconcerting".
- [132] The FOIP Coordinator reported that there is no documentary evidence of this exchange since the Deputy Minister provided instructions orally. However, I note the following:
- The GoA maintains a webpage titled "FOIP Postings".<sup>32</sup> The subtitle on the page reads, "This page lists full documents of access requests that are in the public interest for the Government of Alberta to share." The page describes the scope of past access requests made to the GoA, and also makes available electronic copies of the records provided to

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<sup>30</sup> For reasons detailed in Part Two of this report, comments provided in interviews on this topic may not be reliable.

<sup>31</sup> There were other areas of concern mentioned by FOIP Coordinators during this investigation that were not within the scope of this investigation, and we are following up on those matters, as appropriate.

<sup>32</sup> As of writing, the webpage is still available online at <https://www.alberta.ca/foip-postings.cfm>. A printout of this page is available as Appendix C.

the applicant, or applicants, who made each of these requests. The page does not include any information about the identity of the applicant, or applicants who made the requests, or even the applicant type, although the media coverage at the time of the release of these records leaves no doubt that the access requests were made by the media.

- The page makes available records provided in response to seven access requests made to a total of four GoA departments (Executive Council, Infrastructure, International and Intergovernmental Relations, and Justice and Solicitor General).
- All of the records on the page exclusively relate to expenses incurred by former Premier Alison Redford while in office, or by some of her direct reports. The total number of related records published is 2,433. All of the records were published on the same day.

[133] Among the records posted on this page are the records that the FOIP Coordinator was asked to process in a different fashion, so as to time release to the applicant with the public posting of these records on the website. As reported by media at the time, these records were posted online by the GoA the day after their content was first reported on by the media applicants that requested them.

[134] To be clear, the practice of simultaneous disclosure – publicly releasing responses to access requests – is not, in and of itself, a contravention of the FOIP Act, nor does it necessarily imply interference of some kind. The Commissioner has said that disclosing responses to access requests can be part of an effective access to information regime when guided by policy or legislation.<sup>33</sup> However, the Commissioner has also noted that such initiatives can have negative impacts, including being a disincentive to certain users of the FOIP Act, obscuring important information or targeting certain entities.<sup>34</sup> A thoughtful, consistent, transparent process for simultaneous disclosure can help to alleviate these kinds of concerns and reassure Albertans that such initiatives are in the public interest. Public bodies considering such initiatives have been encouraged to consult with the OIPC and other affected stakeholders, and complete privacy and access impact assessments.<sup>35</sup>

[135] The FOIP Postings webpage indicates that the records in question were released “in the public interest”. This begs the question of the criteria used to determine what was in the public interest given that the posting of access requests made to the GoA had not been done before, has not been done since, and includes only records on the topic of expenses incurred by former Premier Alison Redford and her staff.

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<sup>33</sup> The Commissioner made recommendations in a 2013 review of the FOIP Act on the concept of proactive disclosure. Those recommendations are contained in the OIPC’s review titled *Becoming a Leader in Access: Submission to the 2013 Government of Alberta FOIP Act Review*, which is available at <https://www.oipc.ab.ca/media/387731/Review-of-the-FOIP-Act-Becoming-a-Leader.pdf>.

<sup>34</sup> “Alberta government ‘manipulating’ FOIP system with document dumps, say critics”, Edmonton Sun, February 19, 2015, retrieved from <http://www.edmontonsun.com/2015/02/19/alberta-government-to-dump-foip-docs-online>.

<sup>35</sup> “FOIP changes imminent, internal government emails show”, CBC, February 20, 2015, retrieved from <http://www.cbc.ca/news/canada/edmonton/foip-changes-imminent-internal-government-emails-show-1.2964366>.

- [136] A little less than a month after the GoA published these records, then-Minister of Service Alberta Doug Griffiths was quoted in the media as follows: <sup>36</sup>

Griffiths also claimed that media access requests had nothing to do with the government's unusual release of documents relating to the aborted premier's suite in the Federal Building and former premier Alison Redford's \$45,000 trip to South Africa.

"The irony is a FOIP request never turned up a single thing about that. We are working on open government and open data in the province of Alberta so we have posted salaries, we have posted all of that stuff. The travel logs? That's where that information came to light," he said.

"Everything that's been revealed about the trips, about the apartment, has all been released just from open data, just from the public disclosure that we do all the time. FOIP isn't required for that."

- [137] In my view, the increased attention given to the processing of some of the access requests related to former Premier Redford, and the additional circumstances around their public release, call into question the motivations and decision making process to make these records widely available in this way, including the fact that the records published came from four separate ministries. However, we received no records related to this matter and we are unable to make any definitive findings.

## Findings

- [138] In relative terms, delays in responding had the *least* impact on applicants in the "Elected Official" category who, despite making far more requests than other applicant types, experienced longer response times, but not to an extent that is significantly out of proportion to the increase in the number of requests they made.
- [139] All GoA departments, with the exception of Executive Council, confirmed that they do not disclose the applicant's identity beyond the FOIP office. Some departments indicated that they manage their requests without disclosing applicant type outside the FOIP office at all.
- [140] With respect to cross-government access requests, since all participating FOIP Coordinators receive the same request, the applicants' identity is known to all. FOIP Coordinators confirmed that there was widespread agreement that identifying information of applicants should not be included in records of decision (RODs).
- [141] The changes in access request reporting throughout the GoA could suggest that Deputy Ministers were becoming more closely involved in the access request response process, especially for cross-government access requests.
- [142] While I received no evidence to suggest that these changes in access request reporting resulted in attempts to interfere in processing, I find that it nevertheless creates a perception issue. This was voiced by all opposition parties at the time the existence of the FOIP Weekly Reports became widely known. At that time, NDP Opposition Leader Rachel Notley publicly stated that the FOIP Weekly Reports going from Service Alberta to Executive

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<sup>36</sup> "Alberta Minister says 'frivolous' FOIP requests costing health care millions", Edmonton Sun, April 25, 2014, retrieved from <http://www.edmontonsun.com/2014/04/25/alberta-minister-says-frivolous-foip-requests-costing-health-care-millions>.

Council created the potential for interference, and commented that then-Minister of Service Alberta's assurances to the contrary were "disingenuous".

- [143] With respect to then-Deputy Premier Lukaszuk's November 2013 memo, FOIP Coordinators unanimously said that they did not implement any process or provide any of the requested information.
- [144] With respect to the processing of cross-government access requests, the documentary evidence presented was incomplete due to redactions. Based on the information I was able to obtain, I did not see that the process suffered from significant interference. However, I believe that the formalization of the coordinated process and its timing caused legitimate questions to arise as to the appropriateness of this process and the context in which it was being pursued.
- [145] The increased attention given to the processing of some of the access requests related to former Premier Redford's expenses, and the additional circumstances around their public release, call into question the motivations of the former government to make these records widely available on the FOIP Postings webpage. However, we received no records related to this matter and are unable to draw any conclusions.



# Part Two

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## Investigation Challenges

[146] As mentioned previously, we experienced a number of challenges in completing this investigation, most of which are unprecedented in the history of the office.

### Chronic Delays

[147] On June 17, 2014, Service Alberta wrote to advise us that it had appointed an Alberta Justice lawyer to represent the ministry in this investigation, and to act as the point of contact for the department.

[148] Subsequently, the other 18 GoA departments involved in this investigation informed us that they would also be represented by the same Justice lawyer. Some GoA departments took as little as three days to notify the OIPC that they were going to be represented by the Justice lawyer; no department's notice in this regard took more than three weeks. These were the speediest responses we received in this investigation.

[149] Inevitably, the appointment of a single Justice lawyer to represent all 19 GoA departments resulted in delays. On occasion, we were told this was due to conflicts with the lawyer's schedule or work on other files. In addition, the lawyer received all records we requested from GoA departments in order to review and redact the records prior to providing them to us. As a result, we received numerous requests to extend deadlines we had set for obtaining responses.

[150] It has been the OIPC's practice to grant reasonable requests for extensions, up to a certain point. On one occasion during this investigation, however, the Justice lawyer requested an extension of the deadline in order to make a written request in support of further extending a previously extended deadline. In these extreme instances, we advised that the deadlines had been previously extended and, on one occasion, denied a request to further extend deadlines that had been previously extended.

[151] Similarly, when we contacted FOIP Coordinators to arrange interviews, we were told the Justice lawyer would be representing all interviewees.

[152] We first phoned each FOIP Coordinator on December 16, 2014 in order to schedule interviews in January 2015. That same day, the Justice lawyer contacted me to request that we stop reaching out to FOIP Coordinators. The lawyer wanted to first provide responses to the written questions we had sent to GoA departments, so that interviews could thereafter proceed "in an organized manner". We agreed to this request.

- [153] In the end, due to difficulties we encountered in trying to obtain responses (as described below), we were not able to schedule interviews until October/November 2015, instead of January 2015, a delay of almost 10 months.
- [154] I note that it is very uncommon for GoA departments to appoint legal counsel to represent them in investigations before the OIPC, and a Justice lawyer had never represented FOIP Coordinators. The ensuing bottleneck significantly delayed the investigation.

## Representation Issues for Interviewees

- [155] In addition to delaying interview scheduling, having a single Alberta Justice lawyer represent all FOIP Coordinators and GoA departments raised a number of issues.
- [156] When it came time to interview FOIP Coordinators, the Justice lawyer informed OIPC's Director, Compliance and Special Investigations, on December 18, 2014, that the lawyer would be attending interviews. On that same date, the Director informed the Justice lawyer that we would require letters signed by the FOIP Coordinators, naming the lawyer as their counsel. The Director also asked the Justice lawyer to consider if there was a concern or conflict with the lawyer representing the departments as well as the FOIP Coordinators employed by those departments.
- [157] Prior to the December 18, 2014 conversation, three FOIP Coordinators had expressed concern to us about the Justice lawyer representing them in the interviews.
- [158] On January 9, 2015, the Justice lawyer asked the Director for an email or letter that outlined the concern or conflict previously raised on December 18, 2014, so that the lawyer could consider the issue further and respond to it.
- [159] On January 16, 2015, the Director responded that we would continue with the interviews, but would raise the issue again if it became a concern.
- [160] On February 20, 2015, the OIPC's General Counsel wrote to the Justice lawyer about the issue of potential conflict:

It is typical for a lawyer to represent either a respondent who is the subject of a proceeding or a witness in that proceeding, but not both. A lawyer representing a respondent who is the subject of a proceeding is not in the room when a witness in the proceeding is being interviewed. A lawyer who represents the witness cannot share the information of the witness with the lawyer who represents the respondent or with the respondent.

In this case, you would be hearing the evidence of the witnesses while at the same time advising the respondent ministries who are also your clients.

- [161] The Justice lawyer responded that the question of whether there was any conflict in acting for both the departments and the employees had been carefully considered, and a conclusion reached that there was no conflict. However, if individual circumstances arose that could possibly give rise to a conflict, there was an option to give an individual access to independent counsel, but it was the Justice lawyer's view that such circumstances did not arise in this investigation. The Justice lawyer asked for the authority upon which the OIPC's

General Counsel was relying, before the lawyer could fully respond. It was the Justice lawyer's view that until the matter could be resolved, the interviews with FOIP Coordinators that had been tentatively scheduled for early March 2015 would have to be cancelled.

[162] The OIPC's General Counsel then stated in a March 23, 2015 letter to the Justice lawyer:

It is now time to interview the witnesses, and we want to proceed expeditiously with no further delays. I have put the question to you about potential conflict with your representation of the witnesses. I cannot take on the role of advising you on this. However, I would be prepared to meet with you.

In advance of that discussion, you might want to consider whether the witnesses chose their counsel, chose to have counsel, have been given the option of alternate counsel, and if not, why not. You should also consider the fact that you appear to be acting for the subjects of the investigation and the witnesses in respect of those subjects.

[163] The Justice lawyer and the OIPC's General Counsel met on April 16, 2015. The OIPC's General Counsel followed up that meeting with a letter to the Justice lawyer, dated April 24, 2015. The letter included the following points:

1. OIPC's position is that it wants to interview FOIP Coordinators as witnesses to get their personal views, as opposed to the perspective of their Ministry (see, for example, the attached December 10, 2015 letter from [the OIPC's Director, Compliance and Special Investigations] to [FOIP Director for a Government Department]).
2. Your client's position is that FOIP Coordinators are being interviewed as employees of the particular Ministry, and that you are there to represent them as employees.
3. Your representing FOIP Coordinators in an investigation by the OIPC under the FOIP Act is the first time in the history of OIPC's investigations that Alberta Justice has represented FOIP Coordinators...

[164] In October 2015, prior to the interviews being conducted, a fourth person contacted us to express concern about the Justice lawyer. The Justice lawyer had told the person they would be represented by the lawyer in the interview. The person told us that they did not want the Justice lawyer representing them. We suggested that the person should get independent legal advice about representation, and that we could not give advice because the OIPC is a neutral investigator.

[165] In the interviews with FOIP Coordinators ultimately conducted between October 27, 2015 and November 27, 2015, one FOIP Coordinator was represented by independent legal counsel (not the individual who contacted the OIPC in October 2015), with the Justice lawyer present. The Justice lawyer said that they were there to represent that FOIP Coordinator as the department's employee.

[166] During interviews, the Justice lawyer objected to FOIP Coordinators answering certain questions. Transcripts of some of these interactions are included in Appendix D.

[167] In my view, the presence of the Justice lawyer in interviews may have prevented FOIP Coordinators from openly sharing their experiences and assessments. Again, I note that this was the first time in the history of OIPC's investigations that a Justice lawyer represented FOIP Coordinators.

## Refusal to Provide Unredacted Records

- [168] Service Alberta responded to all our questions, but included a set of records previously prepared for an applicant as part of an access request response package. These records were redacted, and referenced various sections of the FOIP Act (sections 17, 24 and 27) to justify the redactions. I will subsequently refer to these records as the “August 2014 records” since this is the date we received these records in response to the questions we had sent to Service Alberta in June 2014.
- [169] At the time, considering this was just the start of the investigation, my colleagues and I did not make too much of these redactions, and assumed this package of records had been provided to us in error.
- [170] However, later responses provided by the Justice lawyer were also redacted. When providing these responses, the Justice lawyer did not mention the redactions, let alone explain them.
- [171] When we interviewed FOIP Coordinators, we confirmed with them that they had gathered records relevant to questions we had asked and prepared responses. We also confirmed that the Justice lawyer received these responses from the FOIP Coordinators and redacted information in the records.
- [172] When asked why the records were redacted, the Justice lawyer stated that “the redactions were due to privilege”, without any other detail as to the specific nature of the privilege claimed over the information withheld.
- [173] A careful review of the redacted records, and a comparison with the previously mentioned August 2014 records, revealed that some of the redactions were clearly not made to protect privileged information.
- [174] Based on the text that was initially provided to me, and subsequently redacted, it appears that the Justice lawyer was, among other things, redacting references to GoA lawyers (their names), or the fact that they were involved. I believe this is why the words “legal”, “legal review” or “Central Services Counsel” were redacted. I have no explanation for some of the other redactions, such as the acronym “OIPC”, which stands for the Office of the Information and Privacy Commissioner. Examples of redactions are provided in Appendix E.
- [175] To be clear, the few examples of redactions described do not represent the full extent of the information redacted by the Justice lawyer, and I do not raise this issue because of a handful of pages that contained redacted information: as of March 2015, when I prepared a summary table of the records received to that date, there were nearly 800 pages received from the Justice lawyer that were partially or fully redacted.
- [176] Overall, the number of pages partially or fully redacted account for 30% of all pages that GoA departments had intended to provide to us, including 466 pages that were entirely blacked out. In order to get a sense of the relative number of pages withheld, I have included a summary table as Appendix F.

## Inconsistent Redactions

- [177] As a result of correspondence between the Commissioner and then-Minister of Justice and Solicitor General in the spring of 2015, the Justice lawyer indicated that previously redacted records would be reviewed so that only information related to “privilege” or “legal privilege” would be withheld. Leaving aside the fact that this was a *de facto* admission that earlier redactions went above and beyond “legal privilege”, we accepted these revised records, which were provided between May 2015 and August 2015.
- [178] After receiving these records, I compared them to the previously redacted versions. For the most part, the revised records no longer included the redactions that had been made when the records were prepared for release to an applicant under the FOIP Act (the August 2014 records; i.e. redactions under sections 17, 24 and 27). However, many redactions still remained. This was a concern as the records still contained redactions of content previously provided to us.
- [179] Of these redacted records, I particularly note the memo sent on July 30, 2013 by Peter Watson, then-Deputy Minister of Executive Council to all other Deputy Ministers in the GoA. Although this memo was redacted when provided to us, this same record was not redacted in a response to an applicant in spring 2014. The response to that access request was posted on the applicant’s website.<sup>37</sup> Despite this, the same paragraph of the memo was consistently redacted by the Justice lawyer in every duplicate of the memo provided to us by GoA departments in the course of this investigation.
- [180] Effectively, this means that GoA departments, through the Justice lawyer representing them, provided us with less information than Service Alberta had previously provided to an applicant who requested the information under the FOIP Act.
- [181] In August 2015, we received additional records from a department, which consisted of ARTS listings printouts, with some lines redacted. Given the quality of the redaction, it was possible to see the contents that were blacked out. The contents raised significant questions concerning why these records were redacted in the first place and on what basis. No explanation was provided.

## Inability to Determine Completeness of Records

- [182] The above description of the information I know to have been redacted and withheld in this investigation raises serious concerns about the completeness of records provided to us.
- [183] The table below summarizes the sources of the records received in response to the request for records from all GoA departments, and the extent to which records were provided.

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<sup>37</sup> This information had been on the applicant’s website but has since been removed. However, a screenshot is included as Appendix G to note compared redacting between what was provided to the applicant – and subsequently posted online – with what was provided for this investigation.

Table: Summary of Records Received by Source

Description of records requested	Status
1. Records from FOIP offices regarding access request response processes, delegation matrix, templates, etc.	Received, no redactions
2. Records of Service Alberta’s access request response processes, as well as information pertaining to Service Alberta’s leadership role in relation to the FOIP Act.	Received, no redactions
3. Records related to discussions of cross-government access request processing among FOIP offices	Received, partially redacted
4. Correspondence between the Deputy Minister of Executive Council and Deputy Minister of Service Alberta	Some records, partially redacted
5. FOIPNet Weekly Reports and cover letters received	Received, no redactions
6. Briefing note from the Deputy Minister of Executive Council to the Minister of Service Alberta	Received, no redactions
7. Records related to exchanges between Deputy Minister of Service Alberta and other Deputy Ministers	No records received
8. Correspondence between Premier and Minister of Service Alberta	No records received
9. Correspondence between Minister of Service Alberta and other Ministers	No records received

[184] From this table, and based on the evidence that was gathered, I am concerned that we received no records in relation to items 7, 8 and 9.

[185] We were told that numerous access requests had been made to all GoA departments at the same time which, according to a FOIP Coordinator we interviewed created “some angst in the upper echelons, and there was [sic] some complaints coming at the deputy minister level about why things are different”.

[186] In the materials provided to us in this investigation, I saw very few records on this topic at the Deputy Minister level, and no records from the ministerial level. Another example noted earlier in this report related to the lack of records documenting the decision to publish records on the FOIP Postings webpage.<sup>38</sup> This leads me to conclude one of three things:

- The information was not provided by GoA departments to the Justice lawyer.

<sup>38</sup> Ibid.

- The information was provided, but was redacted by the Justice lawyer.
- No records were created.

[187] Each of these three possibilities raises issues, including whether the records were intentionally withheld, properly redacted for “privilege” (although it is hard to imagine that *all* correspondence between Deputy Ministers or Ministers meets the test for solicitor-client privilege), or not created in the first place (this would give rise to whether or not a duty to document was met or should have been).

## Investigation Interrupted by Court Action

### Notices to Produce

[188] Given the inconsistencies and challenges described above, on March 9, 2015, the Commissioner issued Notices to Produce to the Ministers of 13 ministries, based on the following:

- In 2008, then-Minister of Justice and Attorney General Alison Redford had sent a letter to former Commissioner Frank Work, informing him that he had the power to compel production of all records subject to review, even where such records were subject to privilege (Appendix H).
- In 2013, the Court of Queen’s Bench of Alberta had held that the FOIP Act granted the Commissioner the authority to compel production of records to verify claims of solicitor-client privilege.<sup>39</sup> This decision had been appealed but no decision had been issued.
- For the previous 18 years, government ministries under the FOIP Act had provided those records to the Commissioner’s office for review.

[189] The Commissioner’s March 9, 2015 letter to the Ministers said in part:

I find it necessary to take this extraordinary step because most of the ministries are not providing me with complete information for this investigation. Instead, the ministries are treating me as if I have made an access to information request, and are redacting information from the records that they are providing to me.

Redactions of records provided as evidence in an investigation under the FOIP Act are unprecedented and unacceptable.

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<sup>39</sup> *University of Calgary v JR*, 2013 ABQB 652 (CanLII), <http://canlii.ca/t/g1t5g>.

## Correspondence with Minister of Justice and Solicitor General

[190] On March 11, 2015, the then-Minister of Justice and Solicitor General responded to the Commissioner on behalf of himself and his Cabinet colleagues to whom the Commissioner had issued Notices to Produce Records. The Minister requested that compliance with the Notices to Produce Records be put in abeyance until the Court of Appeal's decision in *University of Calgary* was issued.<sup>40</sup>

[191] On March 13, 2015, the Commissioner's reply included:

4. Records are allegedly being withheld on the basis of "legal privilege"

In the current investigations, records have been withheld or redacted on the basis of "legal privilege", with no further explanation. There has been no case before the Courts, and there is presently no case before the Courts, on whether I can compel records that are subject to "legal privilege", which encompasses all common law and statutory privileges. In my view, withholding records from me on the basis of "legal privilege" is contrary to law.

5. There are inconsistencies in severing the records on the basis of legal privilege

My staff have been through all the records provided to date. Information has been withheld in some records on the basis of legal privilege. In duplicate records, the same information has been disclosed. This has occurred, despite centralizing the redaction of records with one Justice lawyer. In comparing the duplicate records, some of the information that has been redacted is clearly not subject to any kind of legal privilege, much less solicitor-client privilege. While I do not think that the redactions are an attempt to mislead me, the inconsistencies with redactions do not give me confidence that solicitor-client privilege applies, if that is what is being claimed under legal privilege.

6. Records stated to be subject to legal privilege are not redacted under legal privilege

Records have been redacted under sections 17 (personal privacy), 18 (individual or public safety) and 24 (advice from officials) of the FOIP Act. Those provisions are not legal privilege: see, in particular, the records from the Premier as the Minister of Aboriginal Relations.

Up to now, I and my predecessor Commissioners have only infrequently had to resort to issuing Notices to Produce records. The reality of the first 18 years of the FOIP Act has been cooperation between public bodies and the Office of the Information and Privacy Commissioner to attempt to resolve matters through informal mediation and investigation, and occasionally (in approximately 10% of cases each year), through inquiry. Only a very small percentage of cases that were not finally resolved through inquiry went on to judicial review by a Court.

However, in the last 18 months or so, I have observed a disturbing trend of the Government public bodies' refusing to allow either me or my staff to review records, and forcing me into the Courts to get records to perform my functions. It is not clear to me what has changed in the past 18 months that saw public bodies providing me with records, to public bodies refusing to provide me with records.

[192] In March 18, 2015 correspondence to the Commissioner, the then-Minister of Justice and Solicitor General said, among other things, that "my officials are currently in the process of

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<sup>40</sup> *University of Calgary v JR*, 2015 ABCA 118 (CanLII), <http://canlii.ca/t/gh192>.



reviewing the redacted information and will voluntarily produce all information that is not subject to solicitor-client privilege.” The Minister asked to hear from the Commissioner before it would be necessary to commence legal proceedings.

[193] On March 19, 2015, the Commissioner replied to the Minister:

I have received your March 18, 2015 letter. It is clear that we do not agree with each other.

I do not see this as being a negotiation. As an officer of the Legislature, I have a statutory function to fulfil that is independent of the Executive branch of government.

I require the documents to perform my statutory function. Therefore, I will not be withdrawing or putting in abeyance the Notices to Produce.

## Subsequent Events

[194] On March 19, 2015, Alberta Justice and Solicitor General, on behalf of Her Majesty the Queen in right of Alberta, filed in Court a judicial review application of the 13 Notices to Produce Records.

[195] On April 4, 2015, the Court of Appeal released its decision on appeal of the *University of Calgary* case. The Court decided that the language of the FOIP Act did not authorize the Commissioner to order a public body to produce to her records over which it had asserted solicitor-client privilege.<sup>41</sup>

[196] After the May 2015 provincial election, all the Ministers to whom the Commissioner had issued Notices to Produce Records were no longer Ministers as a result of the NDP coming into power.

[197] On June 1, 2015, the OIPC’s General Counsel wrote to the Justice lawyer, reminding the lawyer that, based on the March 18, 2015 letter from the former Minister, the Commissioner anticipated that all the redacted records would be reviewed, and that all information that was not subject to solicitor-client privilege would be produced.

[198] On June 19, 2015, the Justice lawyer wrote to the OIPC’s General Counsel, advising that the lawyer was reviewing the redacted records to confirm that the redactions made were for “privilege”. In contrast to the former Minister’s March 18, 2015 letter in which he said that all information that was not subject to solicitor-client privilege would be produced, the lawyer did not say that they were reviewing the redactions only for information that was subject to solicitor-client privilege, but rather for “privilege”.

[199] The Commissioner applied for and received leave to appeal the *University of Calgary* case to the Supreme Court of Canada.<sup>42</sup> The *University of Calgary* case to decide whether the Commissioner has the power to compel the production of records was heard by the

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<sup>41</sup> *University of Calgary v JR*, 2015 ABCA 118 (CanLII), <http://canlii.ca/t/gh192>.

<sup>42</sup> “Supreme Court of Canada Grants Leave to Appeal in Case Involving Solicitor-Client Privilege”, Office of the Information and Privacy Commissioner, October 29, 2015, retrieved from <https://www.oipc.ab.ca/news-and-events/news-releases/2015/supreme-court-of-canada-grants-leave-to-appeal-in-case-involving-solicitor-client-privilege.aspx>

Supreme Court of Canada on April 1, 2016 and the decision was released on November 25, 2016.<sup>43</sup>

[200] In its decision, the Supreme Court of Canada found that the language of the FOIP Act does not empower the Commissioner to compel production of records alleged to be subject to solicitor-client privilege.

[201] Following the ruling of the Supreme Court of Canada, the Commissioner issued a statement saying that the Court's decision would affect a number of cases before the office and that she would be "writing to the Government of Alberta to provide options and a recommendation for how to proceed on this issue".<sup>44</sup> This matter is the subject of a separate special report by the Commissioner to the Legislative Assembly.

## Conclusion

[202] In light of the Supreme Court of Canada's decision, and in the interests of avoiding any further delays, the Commissioner instructed me to conclude this investigation. I have done so, but note that my findings are qualified given my reservations about the evidence that was made available throughout the course of this investigation.

[203] I would like to thank FOIP Coordinators and public bodies who tried to cooperate with the OIPC in this investigation.

Chris Stinner  
Senior Information and Privacy Manager

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<sup>43</sup> *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), <http://canlii.ca/t/gvskr>.

<sup>44</sup> "Commissioner Issues Statement in Response to Supreme Court of Canada Decision", Office of the Information and Privacy Commissioner, November 25, 2016, retrieved from <https://www.oipc.ab.ca/news-and-events/news-releases/2016/commissioner-issues-statement-in-response-to-supreme-court-of-canada-decision.aspx>.

# Summary of Findings

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## Objective 1: Review Access Request Response Process

- For an applicant, the 30 calendar days available to GoA departments to respond to an access request may seem to give departments ample time to respond to a request and provide records. However, once all steps and the extent of work required for each are accounted for, it becomes clear that the time allowed to respond must be used economically. GoA department heads in general and FOIP Coordinators in particular are aware of this reality. They have established internal processes and timelines with the objective to meet the legislated response times as often as possible.
- Overall, I find that the steps followed by GoA departments are appropriate, and that these steps do not by themselves cause or exacerbate delays in the time GoA departments take to respond to requests made to them under the FOIP Act.
- Further, I find that there are no significant delays incurred by the approval step in the process followed by GoA departments to respond to access requests.

## Objective 2: Response Times and Reasons for Delay

- Overall, for the five-year period considered, the time taken by GoA departments as a whole to respond to access requests has increased. Over the same period, the volume of access requests made to GoA departments has increased significantly, which affected GoA FOIP offices' ability to respond in a timely manner to all applicants.
- The most remarkable finding from these response time statistics related to general access requests is that only 6% of access requests were responded to within 30 days while 49% of requests were responded to in more than 60 days in 2013-2014.
- A number of factors contribute in varying degrees to delays, including:
  - Volume of requests and staffing
  - Complexity of requests
  - Number of responsive records
  - Applicant expectations
  - Concurrent requests
  - Cross-government access requests
  - Shared FOIP services
- Service Alberta plays an important role in providing leadership to all public bodies across the province. However, the department seems to suffer from resourcing challenges.

## Objective 3: Delays in Responses Due to Political Interference

- In relative terms, delays in responding had the *least* impact on applicants in the “Elected Official” category who, despite making far more requests than other applicant types, experienced longer response times, but not to an extent that is significantly out of proportion to the increase in the number of requests they made.
- All GoA departments, with the exception of Executive Council, confirmed that they do not disclose the applicant’s identity beyond the FOIP office. Some departments indicated that they manage their requests without disclosing applicant type outside the FOIP office at all.
- With respect to cross-government access requests, since all participating FOIP Coordinators receive the same request, the applicants’ identity is known to all. FOIP Coordinators confirmed that there was widespread agreement that identifying information of applicants should not be included in records of decision (RODs).
- The changes in access request reporting throughout the GoA could suggest that Deputy Ministers were becoming more closely involved in the access request response process, especially for cross-government access requests.
- While I received no evidence to suggest that these changes in access request reporting resulted in attempts to interfere in processing, I find that it nevertheless creates a perception issue. This was voiced by all opposition parties at the time the existence of the FOIP Weekly Reports became widely known. At that time, NDP Opposition Leader Rachel Notley publicly stated that the FOIP Weekly Reports going from Service Alberta to Executive Council created the potential for interference, and commented that then-Minister of Service Alberta’s assurances to the contrary were “disingenuous”.
- With respect to then-Deputy Premier Lukaszuk’s November 2013 memo, FOIP Coordinators unanimously said that they did not implement any process or provide any of the requested information.
- With respect to the processing of cross-government access requests, the documentary evidence presented was incomplete due to redactions. Based on the information I was able to obtain, I did not see that the process suffered from significant interference. However, I believe that the formalization of the coordinated process and its timing caused legitimate questions to arise as to the appropriateness of this process and the context in which it was being pursued.
- The increased attention given to the processing of some of the access requests related to former Premier Redford’s expenses, and the additional circumstances around their public release, call into question the motivations of the former government to make these records widely available on the FOIP Postings webpage. However, we received no records related to this matter and are unable to draw any conclusions.

## Appendix A: GoA Departments Investigated

File Number	Ministry	Date Investigation Opened
F8094	Service Alberta	May 29, 2014
F8194	Executive Council	June 17, 2014
F8667	Aboriginal Relations	November 27, 2014
F8668	Agriculture and Rural Development	November 27, 2014
F8669	Culture and Tourism	November 27, 2014
F8670	Education	November 27, 2014
F8671	Energy	November 27, 2014
F8672	Environment and Sustainable Resource Development	November 27, 2014
F8673	Health	November 27, 2014
F8674	Human Services	November 27, 2014
F8675	Infrastructure	November 27, 2014
F8676	Innovation and Advanced Education	November 27, 2014
F8677	International and Intergovernmental Relations	November 27, 2014
F8678	Jobs, Skills, Training and Labour	November 27, 2014
F8679	Justice and Solicitor General	November 27, 2014
F8680	Municipal Affairs	November 27, 2014
F8681	Seniors	November 27, 2014
F8682	Transportation	November 27, 2014
F8683	Treasury Board and Finance	November 27, 2014

## Appendix B: Sample Delegation Matrix

Duty, power or function of Head	Section reference	Retained by Head	Delegated to FOIP Coordinator	Delegated to other person(s) (provide title(s) – specific or generic)
<b>Right of Access</b>				
Authority to declare request abandoned	8(1)			
Authority to grant continuing request	9(2)			
Duty to assist applicants	10(1)			
Duty to create records	10(2)			
Authority to decide on content of response/ grant or refuse access	11, 12(1)			
Authority to refuse to confirm or deny the existence of a record	12(2)			
Authority to decide how access will be given	13 Regulation 4			
Authority to extend time limit	14(1), (3)			

Sample table obtained from Service Alberta's *Guidelines and Practices: 2009 Edition*, Appendix 2, available at <http://www.servicealberta.ca/foip/resources/appendix-2.cfm>.

# Appendix C: GoA FOIP Postings Webpage

Source: <https://www.alberta.ca/foip-postings.cfm>

The screenshot shows the Government of Alberta website's FOIP Postings page. At the top, there is a navigation bar with links for 'Government of Alberta Home', 'Ministries', 'Services', and 'Contact Government'. Below this is the 'Alberta Government' logo and a search bar. A secondary navigation bar includes 'Home', 'News', 'Jobs', 'Education & Training', 'Health', 'Personal & Family Supports', 'Community & Recreation', and 'A-Z Listings'. A breadcrumb trail shows 'Alberta.ca > Newsroom > foip-postings'. The main content area is titled 'FOIP postings' and contains an introductory paragraph: 'This page lists full documents of FOIP requests that are in the public interest for the Government of Alberta to share.' Below this, there are several sections of related records, each with a list of links to documents:

- Records related to expenses claimed by Ryan Barberio**
  - Records from International and Intergovernmental Relations - spreadsheet (PDF, 13 pages)
  - Records from International and Intergovernmental Relations - receipts, emails, travel itineraries (PDF, 200 pages)
  - Records from Executive Council - expense claims and receipts (PDF, 220 pages)
- Records related to expenses for Michelle Tetreault**
  - Records from International and Intergovernmental Relations - spreadsheet (PDF, 15 pages)
  - Records from International and Intergovernmental Relations - receipts, emails, travel itineraries (PDF, 610 pages)
- Records related to former Premier Redford's trips to Jasper, Alberta**
  - File includes itineraries, emails and speaking notes. (PDF, 56 pages)
- Records related to the Calgary Police Service providing protective duties**
  - File includes Calgary Police Service Premier Security Detail. (PDF, 340 pages)  
Emails, plans
  - File includes expected costs per year. (PDF, 142 pages)  
Emails, briefing notes
- Records related to Premier Redford's trip to South Africa**
  - Records from International and Intergovernmental Relations (PDF, 101 pages)  
Emails, federal travel plans
  - Executive Council FOIP requests (PDF, 138 pages)  
Emails, aircraft request, travel plans
- Records related to development of the 11<sup>th</sup> Floor of the Federal Building**
  - Alberta Infrastructure and Kasian Architecture Interior Design and Planning Ltd. 1 of 2 (PDF, 100 pages)  
Emails, memos, change notices
  - Alberta Infrastructure and Kasian Architecture Interior Design and Planning Ltd. 2 of 2 (PDF, 419 pages)  
Emails, memos, change notices
- Records related to Executive Council allowances**
  - Records of "Living Allowances" and "Other Allowances and Benefits" (PDF, 10 pages)  
Report of allowances from October 1, 2011 to March 14, 2014, pulled directly from the Government of Alberta's financial data system.

On the right side of the page, there are two sidebars: 'Subscribe' with links for 'Public news', 'Media news', and 'Emergency alerts'; and 'Related Links' with links for 'Search announcements', 'Activities & events', 'Spokesperson contacts', and 'Public consultations'. The footer contains links for 'Alberta.ca', 'Copyright', 'Using this Site', 'Privacy', and 'Contact Government'.

## Appendix D: Interview Quotes

The quotes below refer to statements made during our interviews of FOIP Coordinators in the fall of 2015. They have been anonymized, and are presented in a random order.

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### Interview A

Government Lawyer: Well, I prefer that you just give your experience.

(The FOIP Coordinator was going to offer a personal opinion.)

---

### Interview B

Government Lawyer: Yeah. I think you should talk about what you did as opposed to what you were advised or told by anyone – by a lawyer.

---

### Interview C

FOIP Coordinator: And if anything... If you have any other questions, feel free—

OIPC: Yeah, we... we appreciate you... we appreciate--

Government Lawyer: Don't encourage that. Just wait.

FOIP Coordinator: ...

Government Lawyer: Just let them tell you.

---

### Interview D

OIPC [to FOIP Coordinator]: Okay. And did you do any of the severing related to the documents when they came to us?

Government Lawyer: I can tell you no.

OIPC: Okay.

Government Lawyer: For all of them, it's no.

---

### Interview E

FOIP Coordinator: I was advised by [name of DM], that's the difficulty. Like, I was given specific direction on how to do my job based on that memo.

Government Lawyer: Based on a memo that we call a legally privileged memo.

---

### Interview F

FOIP Coordinator: This highlighted one, it's about Section 27 stuff.

Government Lawyer: Oh, really? Oh, then so I should have redacted it. Sorry. Okay. Don't go into any detail.

---

### Interview G

FOIP Coordinator: Yeah. The lawyer was... was not assigned to participate in that process as a lawyer. (...) They did not give me any legal advice. They were just the lawyer. However, the reason why that person was assigned is why that—



Government Lawyer: Well, lawyers really only give legal advice. That's my concern. So, I don't understand.

---

#### **Interview H**

FOIP Coordinator: Those would all be with cabinet at this point. So I'm not at liberty to delve into how it's being discussed.

---

#### **Interview I**

Government Lawyer: Okay. I just want you to be careful. If we're talking about things that are privileged, don't go into detail about what's in there. I'm not sure what document you're talking about, but if... You should know what it is, and so if it's privileged, we're not allowed to talk about what's in it.

FOIP Coordinator: I don't know if it's privileged, it's a document that was sent from Executive Council.

Government Lawyer: Well, was a lawyer involved?

FOIP Coordinator: That's all it takes to be... privileged?

Government Lawyer: Pretty much. I think for this purpose, we'll err on the side of caution, yeah.

FOIP Coordinator: Well, [named Alberta Justice lawyer] is the person that provided all the recommendations—

Government Lawyer: Yeah. So that's privileged then. If we're talking about the recommendation from [named Alberta Justice lawyer], it's privileged, and we're not going to go into detail.

---

#### **Interview J**

Government Lawyer: Okay. You don't want to talk about legal advice given. You don't want to give that advice.

---

#### **Interview K**

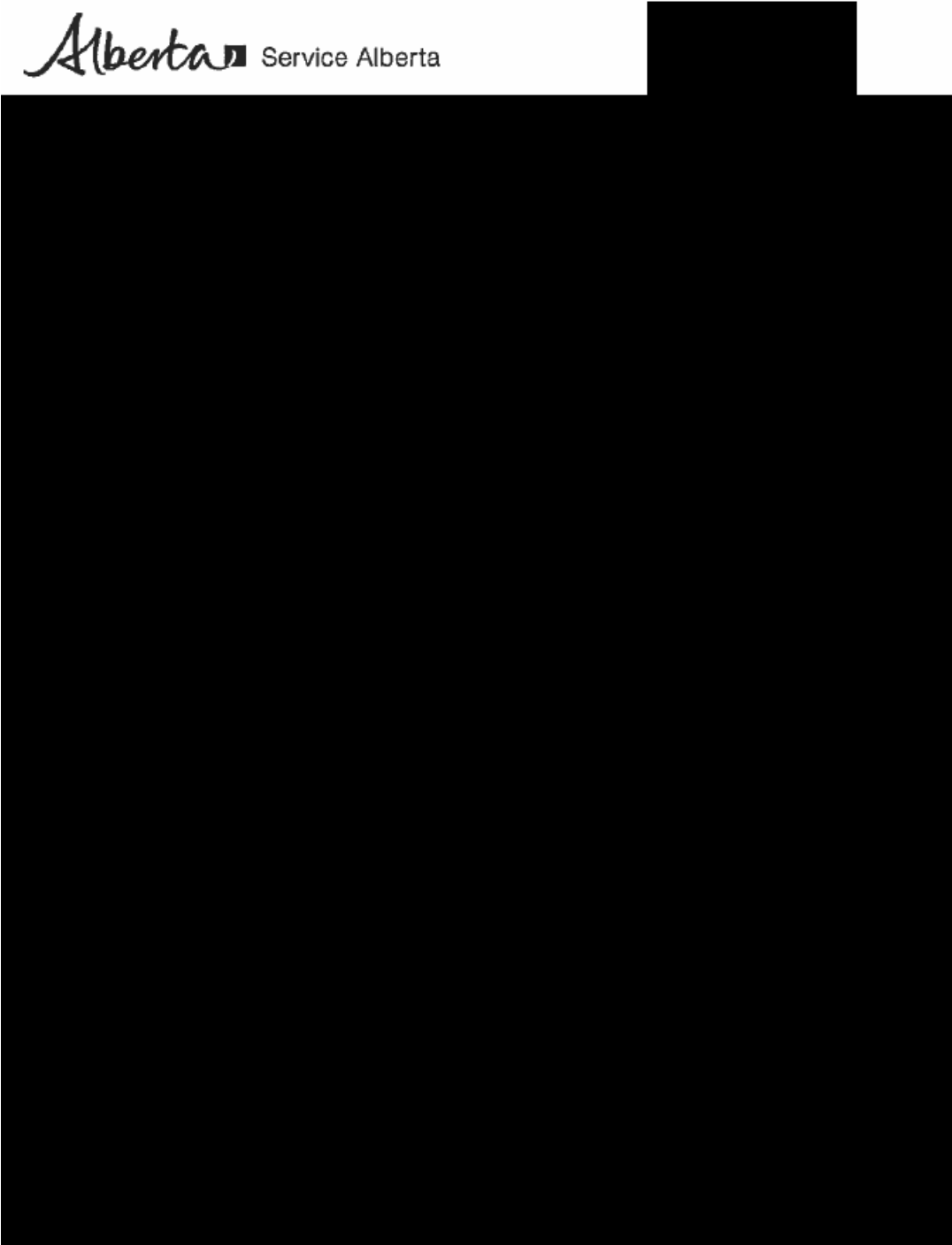
FOIP Coordinator: I... I found the process to be very disconcerting, and it was... The process was done in real time, reviewing the document line by line with two members of Executive Council and a lawyer. So I can't tell you exactly what we did, but I did do my job as a FOIP Coordinator and say where the recommendations were wrong or... Or not supported by the proper interpretation of the Act, and I did the best I could.

And then where there was [sic] changes, I believe they did notify the deputy minister. Our... our deputy minister notified the deputy minister of Service Alberta and Executive Council. But, you know, it required a lot of effort and a willingness to... to provide information that felt like it was not wanted. I can't tell you what they said in the meeting, I guess, because the lawyer was present. And... but, you know...

Government Lawyer: That's right.

---

# Appendix E: Redaction Examples



[REDACTED]

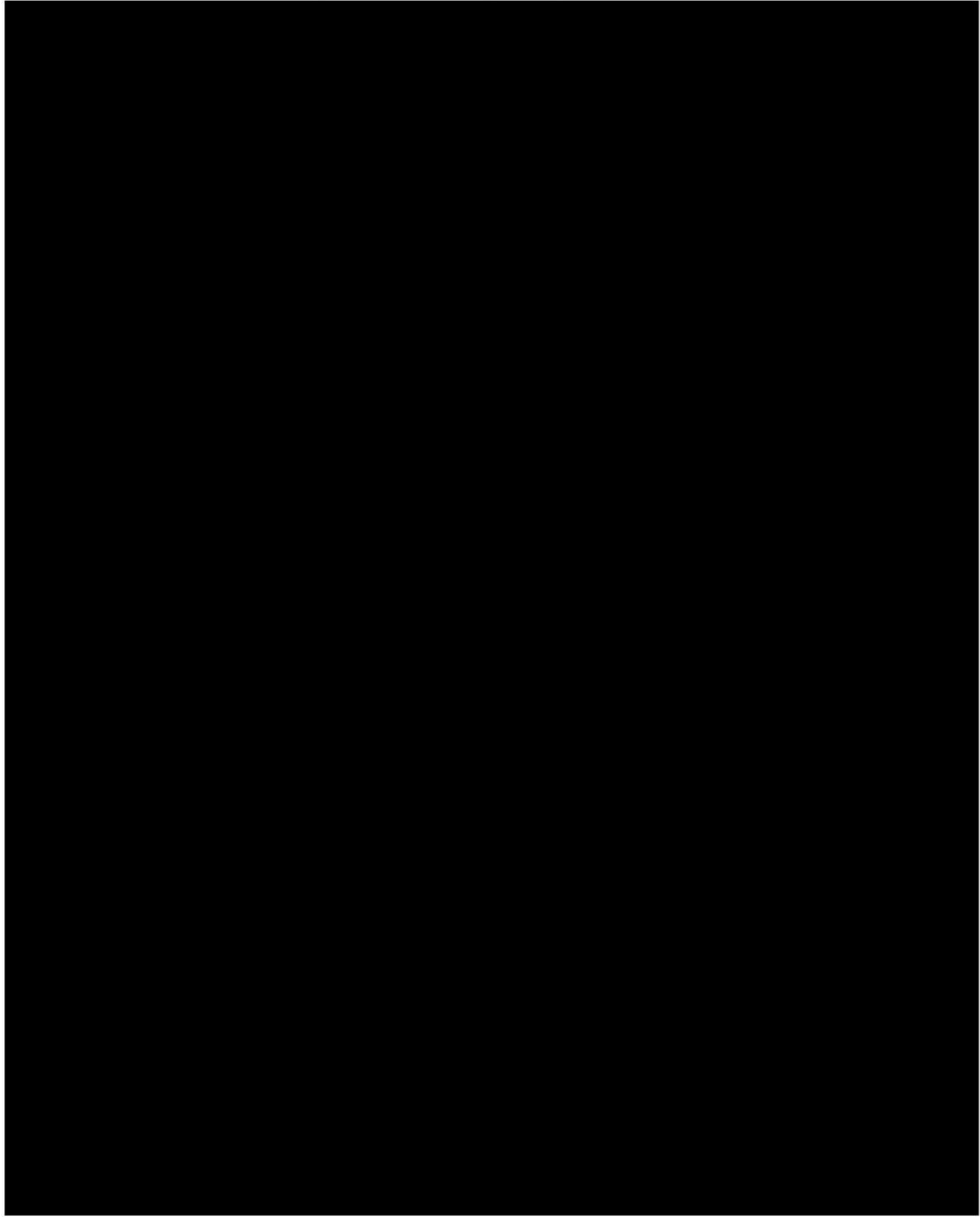
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Redact Page



SA 2013-G-0052

0050

## Appendix F: Summary of Records Redactions

As of March 2015.

File	Department	Total Pages	Fully Reacted Pages	Partially Redacted Pages
F8094	Service Alberta	500	260	38
F8194	Executive Council	40	0	2
F8667	Aboriginal Relations	20	0	2
F8668	Agriculture and Rural Development	29	0	0
F8669	Culture and Tourism	30	0	0
F8670	Education	200	24	39
F8671	Energy	40	0	0
F8672	Environment and Sustainable Resource Development	47	0	0
F8673	Health	120	1	4
F8674	Human Services	543	66	65
F8675	Infrastructure	47	0	3
F8676	Innovation and Advanced Education	164	43	45
F8677	International and Intergovernmental Relations	20	0	2
F8678	Jobs, Skills, Training and Labour	13	0	0
F8679	Justice & Solicitor General	100	21	10
F8680	Municipal Affairs	296	34	39
F8681	Seniors*	-	-	-
F8682	Transportation	157	2	34
F8683	Treasury Board and Finance	225	15	40
<b>Total</b>		<b>2,591</b>	<b>466</b>	<b>323</b>

\*No records were provided for this department since its access request processing function was assumed by other departments' FOIP offices over the time period in scope of this investigation.

# Appendix G: Compared Redaction

## Record received after the Justice lawyer redacted "only for privilege"

-----Original Message-----  
 From: Rilla Gowdin  
 Sent: Tuesday, July 30, 2013 7:39 AM  
 To: Deputy Ministers  
 Cc: dm-assistants  
 Subject: Message from Peter Watson - ARTS FOIP Request

Colleagues:

As you are likely aware, FOIP requests have been received by various Ministries for the following:

'A list from the Action Request Tracking System of briefing notes submitted to the Minister's Office and Deputy Minister's Office, including briefings/advice to the Premier and MLAs, and memos written in the Minister's or Deputy Minister's name. Please also include Action Request numbers, subjects, the individual(s)/units an Action Request is assigned to and due dates.'

Given the likelihood that much of the information requested will relate to confidential Cabinet information, Executive Council has asked to review all packages before they are released to the applicant in order to ensure that Cabinet privilege is maintained where appropriate.

All Ministries are being asked to process their responsive records, including the application of any relevant exceptions and severing as appropriate. Once the responsive records are fully processed, the Ministry should (if they have not already done so) forward the records to Executive Council.

Once in possession of the records, a team at Executive Council will review the package to ensure that all information subject to Cabinet privilege has been properly identified.

Given the time needed for this consultation to take place, all Ministries will be required to extend the timeline for responding by an additional 30 days as permitted under section 14(1)(c) of FOIP.

2013-G-0052

0231

[Redacted]

In order to streamline this process and promote consistency across the Government, the FOIP Office at Service Alberta has responsibility for responding to the applicant on behalf of all Ministries from this point forward, including advising the applicant of the time extensions.

## Record disclosed to the Applicant

-----Original Message-----  
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 Sent: Tuesday, July 30, 2013 7:39 AM  
 To: Deputy Ministers  
 Cc: dm-assistants  
 Subject: Message from Peter Watson - ARTS FOIP Request

Colleagues:

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Once in possession of the records, a team at Executive Council will review the package to ensure that all information subject to Cabinet privilege has been properly identified.

Given the time needed for this consultation to take place, all Ministries will be required to extend the timeline for responding by an additional 30 days as permitted under section 14(1)(c) of FOIP.

Please also note that Cabinet approval is required in order to waive legal privilege. Any application to Cabinet to release information that is subject to section 27(1)(a) must be made in consultation with the Minister of Justice and Solicitor General.

In order to streamline this process and promote consistency across the Government, the FOIP Office at Service Alberta has responsibility for responding to the applicant on behalf of all Ministries from this point forward, including advising the applicant of the time extensions.

The Executive Council FOIP Office will be circulating further information to all Ministry FOIP coordinators through the Service Alberta corporate FOIP office to assist them with this process.

2013-G-0052

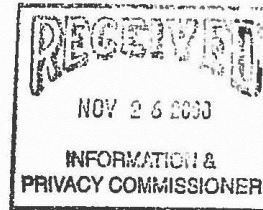
0231

# Appendix H: Letter from then-Minister of Justice and Attorney General Alison Redford



ALBERTA  
JUSTICE AND ATTORNEY GENERAL  
*Office of the Minister*

3500 12



AR 30981

NOV 25 2008

Mr. Frank Work, Q.C.  
Information and Privacy Commissioner  
#410, 9925 - 109 Street NW  
Edmonton, AB T5K 2J8

Dear Mr. Work:

Thank you for your letter dated October 28, 2008 regarding the Solicitor-Client Privilege Adjudication Protocol you have recently adopted.

Solicitor-client privilege is a fundamental part of our legal system and ought to be protected wherever possible. I wonder however whether your protocol is unnecessarily complex.

You currently have the power to compel production of all records subject to review, even where such records are subject to privilege. The wording used in our various privacy statutes closely resembles what is present in the federal *Privacy Act*. While the Supreme Court unfortunately declined to consider the true effect of such wording, it is noteworthy that they did recognize that the intent is to enable the production of privileged records. As a result, you have such a power until a Court determines otherwise.

In the interim, the *Blood Tribe* decision offers some important comments on when such a power, if it is present, ought to be exercised. The suggestion is that the power to compel the production of privileged records should only be exercised judiciously and not as a rule. To that extent, your protocol for not demanding routine production of records over which solicitor-client privilege has been claimed is prudent.

I wonder whether the three options you provided under the protocol are not unnecessarily complicated. The decision in the *Blood Tribe* case would seem to suggest that the second option is the appropriate one. An attempt should be made to resolve the issue of privilege through evidence and argument first and that production of such records for your review should only be done as a last resort. I appreciate your attempt to answer all possible situations that may arise in this regard, however am concerned that in doing so the protocol has been rendered unnecessarily complex.

Thank you for the opportunity to provide you with my comments.

Yours truly,

Alison Redford, Q.C.  
Minister