

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2005-029**

January 30, 2007

**CITY OF CALGARY**

Case File Number 3282

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant applied to the City of Calgary (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) for property assessment information relating to a number of properties leased by the Applicant for its stores.

The Public Body refused to provide the information on the basis that the *Municipal Government Act* (MGA) prevails over the FOIP Act relative to the requested information, and the Information and Privacy Commissioner has no jurisdiction.

The Commissioner agreed that the MGA prevails and that he does not have jurisdiction over the information request in question.

**Statutes Cited: AB:** *Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-20; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 5, 6, 16, 16(2), 20, 24, 25, 25(1), 30, 30(1), 72; *Funeral Services Act*, R.S.A. 2000, c. F-29; *Interpretation Act*, R.S.A. 2000, c. I-8, s. 9; *Municipal Government Act*, R.S.A. 2000, c. M-26, ss. 299, 300, 301, 301.1; *Public Health Act*, R.S.A. 2000, c. P-37.

**Orders Cited: AB:** Orders 2000-002, 2001-005, 2001-036, F2005-007.

## **I. BACKGROUND**

[para 1] By letter dated February 8, 2005, the Applicant applied to the City of Calgary (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) for property assessment information relating to 13 properties (whose addresses and tax roll numbers accompanied the request) leased by the Applicant for its stores. The information sought was:

- a. The gross leasable area of [the Applicant’s stores (the “demised premises”)] used in the assessment;
- b. The fair market rent ascribed to the demised premises;
- c. The vacancy and expense allowances ascribed to the demised premises; and
- d. The capitalization rate used to establish the shopping complex value or the value of the demised premises.

[para 2] By letter dated March 2, 2005, the Public Body refused to provide the information. It based this decision on its position that the FOIP Act does not apply in this situation, by reference to FOIP Act section 5, and to section 301.1 of the *Municipal Government Act*.

[para 3] The Applicant applied to this Office for a review of the decision. Mediation was not successful and the matter proceeded to inquiry.

## **II. RECORDS AT ISSUE**

[para 4] The records consist of a table (two pages) containing the requested information, compiled by the Public Body’s Business Assessment Unit for the purposes of the request.

## **III. ISSUE**

[para 5] The issue as stated in the Notice of Inquiry is:

Does section 5 of the FOIP Act apply to the records/information?

## **IV. DISCUSSION OF THE ISSUE**

[para 6] The question that was framed for this inquiry is whether section 5 of the FOIP Act applies. Section 5 provides:

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

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

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

The other enactment that is relevant in this case is the MGA. The relevant sections of that act provide as follows:

*299(1) An assessed person may ask the municipality, in the manner required by the municipality, to let the assessed person see or receive sufficient information to show how the assessor prepared the assessment of that person's property.*

*(2) The municipality must comply with a request under subsection (1).*

*300(1) An assessed person may ask the municipality, in the manner required by the municipality, to let the assessed person see or receive a summary of the assessment of any assessed property in the municipality.*

*(2) The municipality must comply with a request under subsection (1) if it is satisfied that necessary confidentiality will not be breached.*

*301 A municipality may provide information in its possession about assessments if it is satisfied that necessary confidentiality will not be breached.*

*301.1 Sections 299 to 301 prevail despite the Freedom of Information and Protection of Privacy Act.*

#### *Arguments of the parties*

[para 7] The Public Body relies on earlier decisions of this Office (Orders 2001-005 and 2001-036) in which it was decided that there is a conflict or inconsistency between the FOIP Act and sections 299 to 301 of the MGA. These cases held that consequently, section 5 of the FOIP Act applied, and the Commissioner had no jurisdiction.

[para 8] The Applicant argues that these earlier decisions “must be revisited” in light of the facts of its case and the principles of statutory interpretation. It says that the provisions can be read as having no conflict. It points to the principle of statutory interpretation that different statutes are to be interpreted in harmonious fashion, and that this principle of coherence and consistency applies across statutes as well as within them, to the entire body of statute law. In the Applicant’s view, the MGA provision should be read as fostering a wider access, rather than ousting the Commissioner’s jurisdiction to make orders. It says that a harmonious reading of the two enactments is that the limited exceptions to disclosure under FOIP should not interfere with the right of access under the MGA.

[para 9] Based on these assertions, the Applicant argues that the Commissioner should embark on his usual course of inquiry to determine if the requested information falls within the limited exceptions in the FOIP Act. The Applicant also contends that the

proper application of the FOIP Act, in particular section 16, would result in disclosure of the information.

*How is jurisdiction determined?*

[para 10] In this case, both the FOIP Act and another enactment contain provisions that pertain to requests for the information at issue, and the other enactment expressly provides that it prevails despite the FOIP Act. In addition to the two cases mentioned above, there are a number of other decisions from this office that have dealt with such situations. These decisions developed a way of deciding whether I have jurisdiction over the information request. They say that section 5 of the FOIP Act governs this question, and that this section requires the following decisions:

Section 5(2) requires that I first decide whether the information falls within another enactment or a provision of it that expressly provides that the enactment or provision of it prevails despite the FOIP Act. If so, I must then decide whether there is an inconsistency or conflict between a provision of the FOIP Act and the other enactment or a provision of it. If there is an inconsistency or conflict, that enactment or a provision of it prevails despite the FOIP Act.<sup>1</sup>

This analysis requires that I determine if there is an inconsistency or conflict between the FOIP Act and the MGA.

*Can the information be requested under both enactments?*

[para 11] The first step to demonstrate a conflict is to show that both the FOIP Act and the other enactment contain provisions that pertain to requests for information of the kind at issue in this case.

[para 12] Dealing first with the FOIP Act, this Act allows requests for information in the custody or control of a public body. The information about assessments in this case is information in the custody and control of the Public Body. The general rule is to allow access, but there are specific, limited exceptions. The exceptions that must be considered depend on the nature of the information. If the information consists of or contains financial or business information supplied to a public body by a third party (as the Public Body in this case contends), section 16 of the FOIP Act (disclosure harmful to business interests of a third party) contains the relevant considerations. Section 30(1) of the FOIP Act would also require the Public Body, if it were considering giving access, to notify the third parties whose interests under section 16 could be affected. If the information was created by the Public Body's assessor, and is the information of the Public Body (as the Applicant in this case contends), section 24 (advice from officials) and, depending on the facts, possibly section 25 (economic interests of a public body), contain the relevant considerations.<sup>2</sup>

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<sup>1</sup> Order 2000-002, paragraph 22.

<sup>2</sup> If the information or some of it had been created or generated by the Public Body and was the Public Body's own information, for example, if the information included analytical tools or methodology for

[para 13] Turning to the MGA, each of the three provisions raised in the arguments of the parties (sections 299, 300, and 301) describes the information that can be requested under it differently. Section 299 permits requests for information sufficient to show “how the assessor prepared the assessment”. Section 300 permits requests for the “summary of the assessment” of an assessed property. Section 301 permits requests for information “about assessments”.

[para 14] Dealing first with section 299, in its rebuttal submission, the Public Body says that the requested information is information about “how the assessor prepared the assessment”. The Applicant does not assert in its submissions that section 299 applies to its request. However, according to its submission, the requested information indicates certain formulas or percentage figures that were applied to given features of the property to arrive at the assessed value. Thus it appears that this information shows how an assessment was prepared. In my view, the information requested is such that a request could be made for it under section 299.

[para 15] I turn next to section 300 of the MGA. As noted, this section allows for requests for “a summary of the assessment of any assessed property”. “Summary of the assessment” is not defined in the legislation. The Applicant seems to suggest that the information it requests is covered by section 300.<sup>3</sup>

[para 16] I note that “assessment summary reports” are available to the public on the Public Body’s website. These assessment summaries contain the square foot “parcel area” of the properties, and the total assessed value, but they do not contain information, such as that requested by the Applicant, about formulas or percentages applied to features of the assessed properties to determine their value.<sup>4</sup>

[para 17] There is a question, therefore, whether “summary of the assessment” in the context of section 300 refers to information such as that found in the website, or to information such as that requested by the Applicant, or to some other information. In my view, based on the principle of statutory interpretation that provisions are not to be read as redundant, sections 299 and 300 do not cover the same type of information. Clearly, the scheme of the provisions is that persons who own the property are entitled to more information (under section 299) than persons (albeit those who are “assessed persons” relative to some other property) who do not (under section 300). Thus I interpret section 300 as referring to information less extensive than that asked for in the request – possibly

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determining assessments developed by the Public Body, or provided to the Public Body’s decision makers by its officials, it would be necessary to consider whether this information falls under section 24 of the FOIP Act (advice from officials), or possibly under section 25(1) (economic interests of a public body).

<sup>3</sup> At paragraph 2 of page 3 of its initial submission it says it is requesting “summaries of property assessments”. The submission does not directly assert that the requested information falls within “a summary of the assessment” referred to in section 300. However, the assertion that section 300 applies to the request seems to indicate this is what the Applicant means.

<sup>4</sup> The reports have fields for the following additional information: roll number, location, class, type, property use, taxation status, land use designation, net rentable area, gross building area.

only the type of information available on the Public Body's website.<sup>5</sup> However, I will, for the sake of certainty, consider what the position would be (in terms of whether there is an inconsistency or conflict between the sets of provisions) as though the information at issue were covered under section 300.

[para 18] I turn finally to section 301. This section is very general in its language, referring to "information about assessments". Both of the parties agree that this provision covers the information at issue.<sup>6</sup> In my view, it clearly does so. The request is for "information about assessments".

*Is there an inconsistency or conflict between the enactments?*

*Meaning of "inconsistent or in conflict"*

[para 19] With respect to the meaning of the phrase, I will apply the test stated in many former decisions of this office. There is an inconsistency or conflict between two provisions, within the terms of FOIP Act section 5, where compliance with one provision would entail a breach of the other – in other words, where the two statutes cannot stand together. (See Order 2001-005 at paragraph 21.) I will refer to this as the "compliance/breach" test.

[para 20] Illustrating the inconsistencies or conflicts between two different provisions is not necessarily an exhaustive exercise. I will try to point out some of the key ones, but there may be others.

*Section 299*

[para 21] I will begin by comparing the FOIP Act provisions to section 299. A key difference is that to apply under section 299, the requestor must own the property in question. A person who is not an owner may apply for the information under FOIP, and if none of the exceptions apply, the information must be released. Thus FOIP may require disclosure of information that shows how an assessment was prepared in a circumstance

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<sup>5</sup> I note the language of section 300 allows applications under it only by "assessed persons". Arguably, therefore, the information on the website, available to anyone, is less than the information covered by this section. However, it is possible that the Public Body has decided that the type of information it has placed on its website is that part of the information described in section 300 that does not breach "necessary confidentiality", and has disclosed it to the public pursuant to its power to release any information about assessments under section 301. Even if the information described in section 300 is more information than that in the website material, it does not follow that a "summary of the assessment" as these words are used in the section would include the type of information requested by the Applicant in this case.

<sup>6</sup> The Applicant says that the records fall under both sections 300 and 301. However, in its rebuttal it argues that these provisions "are inoperative" because (it says) there is in this case no question of confidentiality relative to third party information. However, this is a different point from whether the information is of the type that may be requested under the sections. Even if I accepted there were no third party information in this case, this would mean at most that an argument could be made that the "necessary confidentiality" would not be breached. It would not render the words of the provision 'inoperative', nor would it make section 300 or 301 inapplicable.

in which section 299 of the MGA would deny it because the Applicant did not have the standing to apply.<sup>7</sup>

[para 22] Even for a requestor who was an owner and thus had the standing to apply, there would be an inconsistency as to the factors for making the decision. A decision under section 299 would be made on the basis of whether the information was necessary to meet the test that sufficient information has been provided to explain how the assessment had been prepared. Under the FOIP Act, the key considerations are whether either the privacy interests of third parties or of the Public Body need protection. (The privacy interests of third parties come into play if the information is third party business information and disclosure could harm the third party's economic interests; the privacy interests of the Public Body come into play if the information is of a kind the Public Body wishes to keep confidential.) If no privacy interests were impacted, release of the requested information would be mandatory - its sufficiency in terms of elucidating the assessment process would be irrelevant. Thus there could be information that would be disclosable under the FOIP Act on a mandatory basis, but that could be withheld under the MGA because it was not necessary to meet the test in section 299.

### *Section 300*

[para 23] I turn to section 300 of the MGA. I have already noted my view that the requested information does not fall within the language "summary of the assessment"; thus the section does not apply to the information in this request. Despite this, for greater certainty, I will consider the "inconsistency" question with reference to this section as well. The first difference is that, as with section 299, there is a distinction as to who may apply under each provision. Thus there will be circumstances under which a person could receive the information contained in a "summary of the assessment" under FOIP, but would be denied it if they applied under the MGA because they were not an "assessed person".<sup>8</sup>

[para 24] Turning to the other factors to be considered, Section 300 contains a condition for disclosure that "necessary confidentiality" not be breached. It is possible that in deciding if disclosure would breach "necessary confidentiality", the Public Body would possibly consider some factors that are the same as or similar to the factors under the sections of the FOIP Act (sections 16, 24 or 25) that protect the confidentiality of business information or of a Public Body's information.<sup>9</sup>

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<sup>7</sup> The Applicant says that by virtue of its leasehold interests in the properties, it has as much of a proprietary interest in them as the landlords, which might be taken as a suggestion section 299 would apply if it were to make a request under it. Throughout its submission, the Applicant makes some other points that might be taken to suggest the same thing. I do not accept that the Applicant is an owner. Thus I think section 299 does not apply to this request. Even if the Applicant were an owner, this would mean an application could be made under both the MGA and the FOIP Act, but it would not mean that the *provisions* were consistent.

<sup>8</sup> In this case, I note that the Applicant is an assessed person, and thus could apply under either statute. However, as noted in the preceding footnote with respect to section 299, this does not make the *provisions* consistent.

<sup>9</sup> Another way of understanding the significance of the "necessary confidentiality" proviso is that it refers to some sort of confidentiality undertaking on the part of the requestor, together with the Public Body's

[para 25] However, it does not follow that the privacy-related considerations under each enactment are consistent.

[para 26] First, it is probable that in interpreting what “necessary confidentiality” means and deciding whether it will be breached in a particular case, the decision makers will have a specialized knowledge about assessment matters and the related privacy considerations that will bear on their decision, as well as the history of decision making under this clause of the MGA, including any established policy. Thus in applying the “necessary confidentiality” clause, they are likely to take into consideration factors, that could lead to denial of a request because “necessary confidentiality” would be breached, that are not addressed in the FOIP Act. Similarly, the FOIP Act exceptions may be applied so as to take into account considerations that would lead to denial of a request, on a mandatory basis, that would not be considered under the MGA. This would mean that the MGA could require withholding in a situation in which FOIP required disclosure, or the reverse.

[para 27] There are also other circumstances that could give rise to withholding on a mandatory basis under FOIP even though there could be disclosure under section 300 of the MGA. Section 16(2) of the FOIP Act presents such an obstacle to treating the provisions as consistent. It creates an absolute prohibition against release of information about third parties that is collected for the purpose of determining tax liability. Some of the information that the Public Body routinely discloses, for example, in its “Similar Property Reports”, contains information about third parties that was collected to determine tax liability. (Though the reports do not include the names of the owners, they do include the locations, so that the owners could be identified by requestors in some cases.) It appears the Public Body does not regard this release as breaching “necessary confidentiality” within the terms of section 300.

[para 28] Another point of difference between section 300 (as well as 301) of the MGA on the one hand, and the FOIP Act on the other, is that the process for determining whether privacy interests are breached is different under the two enactments. Under the FOIP Act, if the information sought included the business information of a third party<sup>10</sup>, and a public body was considering disclosing it, it would be obliged, by section 30, to contact the third parties and provide them with an opportunity to make representations as to whether the factors in section 16 were met. There is no parallel requirement in the MGA. Consideration of the factors raised by a third party could result in mandatory denial of a request under FOIP, whereas these factors might not be recognized under the MGA.

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being satisfied that such an undertaking would not be broken. If this is the right way to understand the MGA provision, it imports a completely different consideration than any that exists in the FOIP Act. The latter does not require requestors to make assurances about what they will do with information disclosed to them.

<sup>10</sup> Whether all the information is business information is a fact disputed between the parties. However it is clear the request includes at least some such information, in particular, the “gross leasable area”.



### Section 301

[para 29] Turning to section 301 of the MGA, the consideration *expressed* in section 301 is whether “necessary confidentiality” will be breached if the information is disclosed.

[para 30] The considerations under the FOIP Act have already been canvassed above. Which of them is to be considered would depend, again, on the nature of the information – whether it is third party business information, or information collected on a tax return, or is the information of the Public Body’s assessor. In the case of this request, sections 16 or 24 would likely come into play.

[para 31] As with section 300, it is possible that an analysis under the MGA of whether “necessary confidentiality” would be breached relative to third parties would take into account at least some policy considerations the same or similar to those in section 16 of the FOIP Act. Likewise, assuming “necessary confidentiality” under the MGA can take into account the privacy concerns of the Public Body as well as of third parties, it is possible an analysis of “necessary confidentiality” under the MGA would take into account some policy considerations the same or similar to those in section 24 or 25 of the FOIP Act.

[para 32] However, even if the two enactments can be said to be ‘consistent’ in this way, in addition to the other differences already canvassed under section 300, section 301 has an additional difference. This is the discretionary nature of the section. For situations in which it is appropriate to conclude that requested information does not need protection under section 16, 24 or 25, under the FOIP Act, the Public Body would likely be obliged to disclose it.<sup>11</sup> In contrast, under section 301, even if “necessary confidentiality” would not be breached, the Public Body maintains a discretion to withhold the information. Information may still be withheld from a person making a request under section 301 even where the condition that “necessary confidentiality” not be breached is met. The MGA gives no indication of the considerations for the exercise of this discretion. There are some limitations to how this discretion can be exercised - the factors have to be relevant and related to the overall purposes of the MGA. Beyond this, however, the range of possibilities is unlimited. It is clear, therefore, that the information could be withheld under the MGA in circumstances in which disclosure under the FOIP Act was mandatory.

[para 33] In my view, all of the comparisons just made satisfy the “compliance/breach” test set out at paragraph 19 above. This is also true if the provisions that are compared are only those that in my view apply to the specific facts of this case (that is, the FOIP Act and section 301 of the MGA).<sup>12</sup>

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<sup>11</sup> Potentially the information could fall under some other exception such as section 20 (harmful to law enforcement) but this would be exceptional. The withholding would in any event be on the basis of an expressed criterion.

<sup>12</sup> As discussed above, in my view, section 299 does not apply because the Applicant does not own the property to which the information relates, and section 300 does not apply because the information requested is not the same as the information that is available under the section.

[para 34] For these reasons I do not accept the Applicant's argument that the MGA and the FOIP Act can be read as capable of standing together and having no conflict. I find that there is an inconsistency or conflict within the terms of section 5 of the FOIP Act, and that I have no jurisdiction in the information request in this case.

*Comparison having regard to the specific facts*

[para 35] The foregoing comparison of the two enactments was general in the sense that all the provisions that related to access to the information at issue in both enactments were compared. Inconsistency or conflict can also be demonstrated at a more particular level – that is tied to the facts of the information request in this case.

[para 36] The Applicant contends that I should undertake a FOIP analysis of the request, and if the result of the analysis is that the Public Body should give access under the FOIP Act, then I should order access. For the purpose of this demonstration I will assume (without deciding) the best-case scenario for the Applicant in terms of the facts: I will assume that the business interests of the property owners do not require protection under FOIP section 16, and also (a matter the Applicant did not address) that there are no Public Body confidentiality interests in the information that should be protected under section 24 or 25 of the FOIP Act. If both these things were true, the result would be that access under FOIP would have to be allowed under section 6.

[para 37] Turning to the MGA, I have said that in this case, the Applicant cannot apply under section 299 because it is not an owner of the property to which the information relates, and it cannot get the information under section 300 because the information it wants is more than what is accessible under that section. This means the only section under which the Applicant can apply for the information at issue is section 301.

[para 38] I will assume another “best case scenario” for the Applicant - that the considerations relative to “necessary confidentiality” are meant to be the same as the considerations under FOIP that protect the privacy or confidentiality interests of third parties and public bodies – so that if no privacy interests protected by FOIP were adversely impacted, the condition of not breaching necessary confidentiality would be met under the MGA.<sup>13</sup> If this were the case, the result for the hypothetical facts under section 301 of the MGA would be that the Public Body would have a discretion whether or not to disclose the records, in accordance with the unstated factors implicit in that section. In other words, it would be a situation in which disclosure was mandatory under the FOIP Act, but the records could be withheld on a discretionary basis under the MGA. Requiring the Public Body to disclose the records under the FOIP Act would involve infringing its power to withhold the documents on a discretionary basis under the MGA by reference to the factors relevant to the exercise of that discretion. Thus an “inconsistency or conflict” in the sense described at paragraph 19 above (the “compliance/breach” situation) is demonstrated, even if the comparison is limited by

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<sup>13</sup> I have already said that in my view this is not likely the case. See the discussion at paragraph 26 above.

applying the applicable provisions to specific facts that are most favourable to the Applicant, and “necessary confidentiality” is given a similarly favourable interpretation (as consistent with FOIP privacy concerns).

*Alternative analysis for determining jurisdiction*

[para 39] There is a second way of determining jurisdiction in this case, that departs somewhat from the analysis traditionally applied by this office, but that leads to the same result. This analysis was adopted recently in Order F2005-007.

[para 40] As noted earlier, the traditional test is formulated as though for the express override in the other enactment to actually have effect, it must be demonstrated that the other enactment is inconsistent or in conflict with the FOIP Act within the terms of section 5.

[para 41] The alternative analysis is based on the idea that section 5 is not to be read as imposing any condition on whether a provision in another Act that overrides the FOIP Act should be given effect. Rather, section 5 is read as doing no more than creating a general rule that the FOIP Act prevails over conflicting legislation, but neutralizing this override where another provision contains an override. In other words, the words after “unless” in section 5 have the limited effect of neutralizing the FOIP Act override in particular circumstances. In those circumstances, there will be no override in the FOIP Act to conflict with the override in the other act. However, the words in the latter part of section 5 do not purport to give the override in the other statute its effect. The other override has force by virtue of its own language.

[para 42] Under this analysis, to give the override provision in the other enactment its effect – to hold that the other enactment prevails - it is not necessary to demonstrate that there is an inconsistency or conflict within the terms of section 5. Rather, it is necessary to *interpret the override provision in the other statute*, and to give effect to its language.

[para 43] The override in the other act - MGA section 301.1 - says that “sections 299 to 301 prevail despite the *Freedom of Information and Protection of Privacy Act*”. This language can be interpreted in two quite different ways. These words do not say, as some other statutes do<sup>14</sup>, that it prevails “to the extent of any inconsistency or conflict” with the FOIP Act. One may therefore ask whether such a qualifier is to be read into the override. In other words, it raises the following question:

Is section 301.1 to be interpreted as operating only to the extent that sections 299 to 301 are inconsistent or in conflict with the FOIP Act?

If the answer to that question is yes, it would also be necessary to decide whether or not there is such an “inconsistency or in conflict” in this case.

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<sup>14</sup> For example, the *Alberta Health Care Insurance Act*, the *Public Health Act*, and the *Funeral Services Act*. (The first two prevail over the *Health Information Act* rather than the FOIP Act.)

[para 44] Arguably it would be sensible to read “despite the FOIP Act” as “despite provisions in the FOIP Act that are inconsistent or in conflict with sections 299 to 301”. However, the other possible reading - “despite provisions in the FOIP Act that deal with requests for the same information” (a reading that would not require demonstration of an inconsistency or conflict) – is equally sensible. Under this latter interpretation, it would be as though the Legislature had said: “Of the two sets of provisions identified here that might govern the question in this case (whether information is to be provided), only one – the one specified - is to be applied to decide it.” On the latter reading, the override would apply even though the two provisions could stand together.

[para 45] The presence of express language in some other statutes which is absent in this one is an argument against reading the “inconsistent or in conflict” condition into section 301.1.

[para 46] Another argument against reading in the qualifier is that in the present circumstance there is no *need* for a test of inconsistency. This is in contrast to a situation governed by the first part of section 5 – the part that says that FOIP prevails if there is an inconsistency or conflict. The first part of the section does not specify the other provisions over which FOIP prevails, but instead provides a test for identifying them. Because inconsistency or conflict is a precondition to the first part of section 5 having effect, in such a case, it must be demonstrated. In contrast, where – as in MGA section 301.1 - the Legislature has already identified two sets of provisions that pertain to the same issue, and has specified that one prevails, there is no need to show a conflict.<sup>15</sup>

[para 47] In Order F2005-007, I said the following relative to whether inconsistency or conflict need be shown:

The second rule in section 5 of the FOIP Act is that another Act or a regulation under the FOIP Act may expressly provide that the other Act or regulation, or a provision of it, prevails despite the FOIP Act. The second rule is independent of the first rule and does not require an analysis of whether provisions are inconsistent or in conflict. Under the second rule, the FOIP Act does not apply. The other Act or regulation, or a provision of it, applies, according to its own terms.

As expressly provided by section 15(1)(g) of the FOIP Act Regulation, section 12(3) and now section 15(1) of the *Maintenance Enforcement Act* prevail over the FOIP Act. Consequently, sections 12(3) and 15(1) apply, according to their own terms.

Sections 12(3) and 15(1) of the *Maintenance Enforcement Act* do not contain the words “inconsistent” or “in conflict with”. The Legislature could have included those words in sections 12(3) and 15(1), as it did in the paramountcy provision in section 75 of the *Public Health Act*, for example, but it did not. Therefore, I must

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<sup>15</sup> As already noted in the preceding footnote, there are some statutes in which the override itself requires demonstration of an inconsistency or conflict, but this is not such a case.

conclude that the legislature did not intend that sections 12(3) and 15(1) be analyzed for inconsistencies or conflicts with the FOIP Act. The rationale for my conclusion is that the legislature has already recognized that the FOIP Act and the *Maintenance Enforcement Act* are inconsistent or in conflict, and has provided the mechanism for resolving the inconsistency or conflict by allowing sections 12(3) and 15(1) to prevail over the FOIP Act. [See paragraphs 55 to 57.]

[para 48] On this reasoning, it is not necessary for me to compare the two sets of provisions for inconsistency or conflict. In any event, as I have already demonstrated, there is clearly a conflict or inconsistency, in the sense described at paragraph 19 above (the “compliance/breach” situation), between the two enactments at issue. Thus the words of section 301.1 apply whether or not the comparison is to be done, and sections 299 to 301 of the MGA govern the request for information in this case.

### *Conclusion*

[para 49] Section 301.1 of the MGA provides that sections 299 to 301 of the MGA, which pertain to requests for the information at issue, prevail over the FOIP Act. Because section 5 applies, there is no conflicting override arising under the FOIP Act. Sections 299 to 301 prevail, and I do not have jurisdiction to apply the provisions of the FOIP Act to the request for access to information in this case. I do not have jurisdiction to apply the MGA.

## **V. ORDER**

[para 50] I make this Order under section 72 of the Act.

[para 51] I find I have no jurisdiction over the request for information in this case.

Frank Work, Q.C.  
Information and Privacy Commissioner