

## What Acts apply to a public body?

*The Freedom of Information and Protection of Privacy Act* (FOIP) applies to government institutions and *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) applies to local authorities. Neither Act applies directly to private businesses or associations.

## What are *The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy Act*?

The principles underlying the Acts are transparency, accountability and protection of privacy. The Acts provide the public with the right to access a public body's records and prohibit the unauthorized collection, use or disclosure of personal information.

The FOIP Act covers all provincial government departments, Crown Corporations and a long list of almost 70 provincial boards, agencies and commissions. The LA FOIP Act covers regional health authorities, universities and colleges, schools and municipalities.

## How do the Acts affect contractors or potential contractors?

The Acts apply to all records in the possession or under the control of a public body in Saskatchewan. As a contractor or a potential contractor to a public body, you may produce or store records that will be under the control of that public body. These records are subject to the access and privacy provisions of the respective Acts.

Records you create or submit to a public body, even though you may have intended it to be confidential, may be disclosed under the Acts if it is requested by a member of the public. This may include information in proposals, as well as contracts with the public body, unless the information falls within one of the exemptions to disclosure permitted by the Acts.

## How are possession and control defined?

*Possession* of a record usually means having physical custody of it. *Control* refers to having the power or authority to manage, restrict, regulate or administer the collection, use or disclosure of the record.

If a public body has either possession or control of a record, it must respond to requests for access to the record by providing access to those parts of the record that are not exempted from disclosure. Although a contractor may have possession of a record, a public body could have control over it if such control is stipulated in a contract or is granted to the public body by a specific statutory right of access. In either case, the public body is responsible for handling access requests, and the contractor is required to produce the record upon request. The public body may disclose those parts of the record that are not exempted from disclosure.

## What is a record?

A *record* is recorded information in any form including notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanism that produces records.

Public bodies should try to specify which records will be under their control by identifying them in the contract. However, records do not have to be specifically identified to be subject to the Acts.

## What records are subject to the Acts?

There are three types of records that involve contractors:

- Records under the control of a public body which may be in the public body's or the contractor's possession (e.g. records created or compiled by the contractor while performing the contracted services).
- Records in the possession of a public body (e.g. contractor's proposals).
- Records in the possession and control of a contractor (e.g. the contractor's payroll and personnel records).

All records in the possession or under the control of a public body are subject to the access and privacy provisions of the Acts. Records in the possession and control of a contractor alone are not subject to the Acts.

## What happens when a public body receives a request for information?

Although the Acts give the public a right of access to records, exemptions to disclosure exist that may apply specifically to you. The Acts protect third parties, such as contractors, by prohibiting disclosures that would harm the business interests of a third party or invade a third party's personal privacy.

The public body reviews each record requested under the Acts to consider whether release will harm a third party. If there is a risk of harm, the public

body does not release the information. If the public body does not consider a risk of harm to exist, the contractor will be advised of the decision to release the record.

If it is unclear whether the records should be released, the public body will give contractors an opportunity to show that disclosure could harm their interests. You will be provided with information about the requested records and asked for your views about whether they should be disclosed. The Acts gives you 20 days to respond, in writing, to the public body.

It is your responsibility to demonstrate that disclosing the requested record could harm your business interests. You should undertake a line-by-line review of the documents in question and provide a detailed explanation to prove that releasing all or part of these documents could be harmful to you. You may wish to seek legal counsel in doing so.

After receiving your submissions on disclosure, a public body has 10 days to reach a final decision and advise you of it. If you are not satisfied with the public body's decision, the Acts give you 20 days to request a review by the Information and Privacy Commissioner.

## What are your responsibilities regarding personal information in your possession or control?

To qualify for an exemption under the Acts, contractors are required to demonstrate that disclosure would pose a real and significant expectation of harm to their business interests. To be withheld from disclosure, a record must meet one of the circumstances outlined in section 19 of FOIP when dealing with a government institution or in section 18 of LA FOIP when dealing with a local authority.

Under either Act, the following exemptions to disclosure apply. The record may contain trade secrets or financial, commercial, scientific, technical or labour relations information. The disclosure of the record could reasonably be expected to result in financial loss or gain, prejudice the competitive position or interfere with the contractual or negotiations of the contractor. The record would disclose financial information about the provision of routine services from the public body.

If you are dealing with a government institution, two additional exemptions to disclosure are available under the FOIP Act. If the record would disclose financial assistance provided to the contractor by a government institution or information supplied in an application for financial assistance from a government institution, the record would be exempted from disclosure.

Stamping a record "confidential" or explicitly stating that information is being submitted in confidence is helpful. However, you may still be asked to show why the information should not be released.

### What do you need to consider before submitting a proposal to a public body?

- Are you prepared to have information you create or submit to the public body disclosed to the public if it is requested under the Act, and is not covered by an exemption?
- Do you understand which records will be under the control of the public body?
- Do you know which records you will be expected to keep and for how long?

- If you will be collecting personal information, do you have a security plan and adequate systems in place for safely storing personal information?
- Are you prepared to comply with the privacy rules set out in Part IV of the FOIP or LA FOIP Acts?

### What are your responsibilities regarding personal information in your custody?

A contract may require you to collect personal information, such as a person's name, address or other information about them. If you have custody of personal information covered by the Acts, you have an obligation to take reasonable security precautions to protect those records from unauthorized access, collection, use, disclosure or disposal. Information you acquire while under contract can only be used for performing services identified under the contract, and not for any other purpose.

If the personal information is used to make a decision that directly affects the individual, the records should be retained for at least one year so an application for access can be made.

If records are under the control of a public body, you are required to make them available according to the terms of the contract. The contract may require you to make records available after the contract has ended. Your obligations apply to subcontractors you engage.

When records are requested under the Acts, they are to be forwarded to the public body. Staff of the public body will review the records to determine which parts are exempted from disclosure.



## A CONTRACTOR'S GUIDE TO ACCESS AND PRIVACY IN SASKATCHEWAN

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