

Contractors' Guide to the Freedom of Information and Protection of Privacy Act

What is the Freedom of Information and Protection of Privacy Act?

The principles underlying the Freedom of Information and Protection of Privacy Act are accountability and protection of privacy. The Act provides the public the right to access government records and prohibits the unauthorized collection, use or disclosure of personal information.

How does the Act affect contractors or potential contractors?

The Act applies to all records in the custody or control of local and provincial bodies in British Columbia. As a contractor or a potential contractor, you produce records that will be in the custody or control of the ministry. These records are subject to the access and privacy provisions of the Act.

Information you create or submit to the ministry, even though you may have intended it to be confidential, may be disclosed under the Act if it is requested by a member of the public. This may include information about bids or proposals, as well as information concerning contracts with the ministry, unless the information meets the requirement for one of the exceptions to disclosure discussed later in this brochure.

How are custody and control defined?

Having *custody* of a record generally refers to having physical possession of it. But having custody does not necessarily mean having control of the record. However, the person or organization with custody of a record is usually considered to have control. *Control* refers to having the power or authority to manage, restrict, regulate or administer the use or disclosure of the record. If the ministry has custody of a record, we must respond to requests for access to the record by producing those parts of the record that are not excluded from disclosure.

Although a contractor may have custody of a record, the ministry could have control over it if such control is stipulated in a contract or is granted to the ministry by a specific statutory right of access. In this case, the ministry is responsible for handling access requests, and the contractor is required to produce the record for review by the ministry. The ministry will then disclose those parts of the record that are not excluded from disclosure.

What is a record?

A *record* is any information recorded or stored by graphic, electronic, mechanical or other means. A record could be a book, document, map, letter, voucher or paper.

The ministry tries to specify which records will be under our control by identifying them in the contract. However, records do not have to be specifically identified to be subject to the Act if they are requested.

What records are subject to the Act?

There are three types of records that involve contractors:

1. Records in the custody and control of the contractor (e.g., payroll and personnel records of the contractor's employees).
2. Records in the custody of the ministry (e.g., proposals or bids from contractors).
3. Records under the control of the ministry, which may be in the ministry's or in the contractor's custody (e.g., records created by the contractor while performing the services identified in the contract).

All records in the custody or control of provincial or local governments are subject to the access and privacy provisions of the Act. Records that are not in the custody or control of the province are not subject to the Act.

What are contractors' responsibilities regarding records in their custody?

A contract may require you to collect personal information, such as a person's name, address or opinions. If that information is used to make a decision directly affecting the individual, records must be made accessible to that individual for at least one year.

As a contractor in custody of personal information which is covered by the Act, you have an obligation to protect it against risks, such as unauthorized access, collection, use, disclosure or disposal, by taking reasonable security precautions.

If records are under the control of the ministry, you must make them available according to the terms of the contract. The ministry may specify in your contract any requirements to make records available for a longer time period. When records are requested under the Act, you must forward them to the ministry. Ministry staff will review the records to determine which parts are excluded from disclosure.

What happens when the ministry receives a request for information?

Although the Act gives the public access to information, exceptions to disclosure exist that may apply specifically to you. The Act protects 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 ministry reviews each record requested under the Act to consider whether its release will harm a third party. If there is a risk of harm, the ministry does not release the information. If the ministry does not consider a risk of harm to exist, we may advise the contractor of our decision to release the information.

If it is unclear whether the records should be released, the ministry will give you an opportunity to show that disclosure could harm your interests. You will be provided with a copy of the requested records and asked for your views about whether they should be disclosed. The Act gives you 20 days to respond, in writing, to the ministry.



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It is your responsibility to demonstrate that disclosing the requested information 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.

After receiving your views on disclosure, the ministry has 10 days, under the Act, to reach a final decision and advise you of it. If you are not satisfied with the ministry's decision, the Act gives you 20 days to request a review by the Information and Privacy Commissioner.

What is considered harmful to business interests?

To qualify for an exception under the Act, contractors must demonstrate that there is a real and significant expectation of harm to their business interests. To be withheld from disclosure, a record must meet **each** of the three conditions outlined in Section 21 of the Act. Briefly, these are:

1. The record, if disclosed, would reveal contractors' trade secrets or their commercial, financial, labour relations, scientific or technical information.
2. The record is supplied in confidence. (See explanation following these conditions.)
3. The record, if disclosed, could reasonably be expected to cause one of the following:
 - result in significantly harming a contractor's competitive position or significantly interfering with a contractor's negotiating position
 - result in certain information no longer being supplied if similar information is requested for disclosure
 - result in undue financial loss or gain to any person or organization

- result in revealing certain information related to a labour relations dispute

Stamping a record "confidential" or explicitly stating that information is being submitted in confidence is helpful. However, evidence must also exist to demonstrate that the information needs to be treated as confidential and/or has been treated as such in the past.

What is considered harmful to personal privacy?

The privacy of companies under contract is not protected under the Act. There may be instances, though, in which you may submit personal information about your employees that is subject to the privacy provisions of the Act. Or you may collect personal information about certain individuals on behalf of the ministry.

Here are some examples when disclosure of personal information is presumed to be an unreasonable invasion of a third party's privacy:

1. The personal information relates to a third party's employment, occupational or educational history (e.g., resumes of individuals attached to a proposal).
2. The personal information describes a third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness.
3. The personal information consists of personal recommendations or evaluations, character references or personnel evaluations of a third party (e.g., a psychological assessment of a ministry employee prepared by a consultant).
4. The personal information consists of a third party's name, address or telephone number and is to be used for mailing lists or solicitations by telephone or other means (e.g., the names of individuals who attended a public information meeting).

If you are a contractor who operates out of your home, you should be aware that if your business address is also your residential address, the ministry would not generally consider this to be personal information.

You should also be aware that the names of your employees may sometimes be subject to disclosure.

Before you bid or submit a proposal to the ministry, ask yourself these questions:

- Are you prepared to have information you create or submit to the ministry disclosed to the public if it is requested under the Act and is not covered by an exception?
- Do you understand which records will be under the control of the ministry?
- Do you know which records you will be expected to keep and for how long?
- Will you be collecting personal information?
- Are you familiar with the security standards for storing personal information?

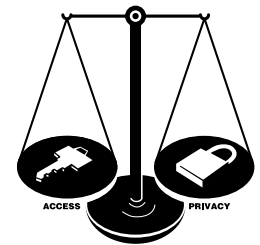
If you are thinking about doing work for the ministry, consider the implications of the Freedom of Information and Protection of Privacy Act. Discuss your concerns with your local Highways Office or the Office that issued the tender or request for proposal. Or call the Freedom of Information Branch at

Freedom of Information Branch
Ministry of Transportation and Highways
Plaza Level, 940 Blanshard Street
Victoria, British Columbia
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