

Guidance for Delegation of Powers

Section 60 of *The Freedom of Information and Protection of Privacy Act*

This document will provide guidance to ensure obligations regarding delegation of powers and duties of the head are met under section 60 of *The Freedom of Information and Protection of Privacy Act* (the Act).

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Powers and Duties under the Act

Power vested in head

The Freedom of Information and Protection of Privacy Act contains numerous powers and duties which are vested in the head of the government institution. For example, section 17(a) of the Act gives a discretionary authority to the head to refuse to give access to a record that could reasonably be expected to disclose “advice, proposals, recommendations analyses or policy options developed by or for a government institution or a member of the Executive Council.”

Who is the head?

Section 2(1)(e) of the Act provides the interpretation of “head”:

2(1) *In this Act:*

(e) **“head”** means:

- (i) *in the case of an agency mentioned in subclause (d)(i), [the office of Executive Council or any department, secretariat or similar agency of executive government] the member of the Executive Council responsible for the administration of the agency; and*
- (ii) *in the case of a board, commission, Crown corporation or body mentioned in subclause (d)(ii), the prescribed person.*

In other words, the minister of a ministry or agency of executive government is the “head”.

For boards, commissions, Crown corporations or other bodies mentioned in subclause 2(1)(e)(ii) of the Act, section 4 of *The Freedom of Information and Protection of Privacy Regulations* (the Regulations) prescribes the role of the head:

4 *For the purposes of subclause 2(1)(e)(ii) of the Act:*

- (a) *the chief executive officers of Crown corporations that are prescribed as government institutions pursuant to clause 3(a) are prescribed as the heads of their respective Crown corporations;*
- (b) *the chief executive officers of Crown corporations that are the parent corporations of subsidiaries that are prescribed as government institutions pursuant to clause 3(b) are prescribed as the heads of the respective subsidiaries;*
- (c) *the chairperson of all other bodies that are prescribed as government institutions pursuant to clause 3(a) or the chairpersons of the boards of those bodies, as the case may be, are prescribed as the heads of their respective government institutions; and*
- (d) *in the case of a corporation sole prescribed as a government institution pursuant to clause 3(a), the individual that constitutes the corporation sole is prescribed as the head of that government institution.*

In these cases, the chair or chief executive officer is, in most circumstances, the head.

Establishing Delegation of Powers

In many circumstances it may not be the head that makes decisions under the Act – it is often the deputy minister or another senior official. The Act provides authority for the head to delegate authority for those other circumstances.

Legislative Authority to Delegate

Section 60 of the Act states:

- 60(1)** *A head may delegate to one or more officers of the government institution a power granted to the head or a duty vested in the head.*
- (2)** *A delegation pursuant to subsection (1):*
- (a) is to be in writing; and*
 - (b) may contain any limitations, restrictions, conditions or requirements that the head considers necessary.*

Departments or agencies of executive government

To the extent that the head's powers and duties will be exercised by the deputy minister, no formal delegation under section 60 is required. This is because section 23(1)(d) of *The Interpretation Act, 1995* already authorizes a deputy minister to carry out such functions in the minister's stead.

However, if an official other than the deputy minister is acting as the "head" for the purposes of the Act, written delegation under section 60 should be made, delegating powers from the minister to the appropriate official or officials in the ministry.

Crown corporations, agencies, boards and commissions

The chief executive officer or chairperson of these types of government institutions may provide written delegation of powers and duties of the head to one or more official, for the purposes of the Act.

What powers can be delegated?

There are a number of powers, duties and authorities assigned to the head by the Act. These powers or duties can be recognized by the words “the head shall” or “the head may” or “the head must” (or similar language) take some action or has a particular power or duty. For a complete listing, please refer to the attached *DELEGATION OF POWERS AND DUTIES TABLE*.

Note that most privacy responsibilities under the Act rest with the government institution and not the head, therefore no delegation under section 60 is required (or possible). With the exception of those few privacy powers or duties listed in the *DELEGATION OF POWERS AND DUTIES TABLE*, assignment of responsibility for privacy is a matter internal to a government institution. It is recommended that, wherever practicable, the functions of access and privacy be combined within a single unit / position.

Who can be delegated a power of the head?

Subsection 60(1) of the Act provides that one or more officers of a government institution can be delegated a power or duty of the head. Note that the person receiving the delegation must be an officer of the government institution for which the head has authority.

The Information and Privacy Commissioner strongly encourages public bodies to delegate powers to one person – in other words, a FOIP (*Freedom of Information and Protection of Privacy*) Coordinator, Access Officer and Privacy Officer would be one person. There are some advantages to this approach, given the need for access officials to be familiar with privacy obligations, and vice versa. Concentrating the delegation of powers in one official does not mean that official must do all the work; just that he or she is accountable.

Delegating the powers to a single person is not a requirement of the Act; it is a management decision. Please consider what will work best in your organization.

Whether the powers are delegated to a single person or to more than one person, the delegation should ideally be to a senior official(s) with overall accountability for access and privacy in the organization.

Restrictions on the delegation

Section 60(2)(b) of the Act allows for limitations, restrictions, conditions or requirements to be placed on the powers and duties delegated.

Here are some examples:

- A senior official could be delegated certain powers, but not others. For example, the delegation could allow decisions related to the extension of time for responding to an access request, but not for invoking certain exemptions provided for in the Act.
- A delegation might be to two people, naming one to act in the absence of the other.

Limitations or restrictions are not required by the Act, but they can be included if required.

Please ensure an appropriate delegation exists

Please review current requirements and ensure a written delegation is in place where required.

Sample delegation

The following resources are attached:

- Sample delegation memo – *Delegation of Power and Duties*
- *Delegation of Powers and Duties Table*

Appendix A: Memo and Table for Delegation of Powers and Duties

Memorandum



[Government Institution]

From: Minister [or head as defined in the Act] of
[insert name of government institution]

Date:

Phone:

To: Deputy Minister [or permanent head] of
[insert name of government institution]

Fax:

[NOTE: This memo could be addressed to anyone - including to file, provided it is approved by the head under the Act.]

Re: Delegation of Power and Duties
Section 60 of *The Freedom of Information and Protection of Privacy Act*

Section 60 of *The Freedom of Information and Protection of Privacy Act* (the Act) states the following:

60(1) *A head may delegate to one or more officers of the government institution a power granted to the head or a duty vested in the head.*

(2) *A delegation pursuant to subsection (1):*

(a) is to be in writing; and

(b) may contain any limitations, restrictions, conditions or requirements that the head considers necessary.

[Choose only one of the following two sentences.]

Pursuant to Section 60 of the Act, effective [Date], I hereby delegate all powers and duties of the head under the Act as per the attached Delegation of Powers and Duties Table.

Pursuant to Section 60 of the Act, effective [Date], I hereby delegate all powers and duties of the head under the Act to the following official: [Name of Delegate(s) / Job Title]

For greater clarity, nothing in this delegation affects my authority to exercise the powers or perform the duties of the head under the Act in any particular matter that I may choose.

[Head of government institution (e.g.: Minister of x)]

cc: [Senior official(s) receiving powers]
Access and Privacy Branch, Ministry of Justice

DELEGATION OF POWERS AND DUTIES TABLE
THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT (FOIP)

Instructions:

1. Write the name of the official receiving the delegation of powers, duties or functions at the top of the table.
2. Place an "x" in the box(s) in the column below that person's name to indicate that a power, duty or function has been delegated to that person. Please consult the Act for specific language of the sections listed below.
3. Attach the form to a memo signed by the head with the authority to delegate pursuant to section 60 of the Act.

This form must be attached to and form part of the delegation memo in writing signed by the head to satisfy the requirements of section 60 of *The Freedom of Information and Protection of Privacy Act*.

- Note that most privacy responsibilities under the Act rest with the government institution and not the head, therefore no delegation under section 60 is required (or possible). With the exception of those few privacy powers or duties listed in the Delegation of Powers and Duties Table, assignment of responsibility for privacy is a matter internal to a government institution. It is recommended that, wherever practicable, the functions of access and privacy be combined within a single unit / position.

Duty, power or function of Head	Section reference	[Name of official]	[Name of official]	[Name of official]
ALL POWERS, DUTIES and FUNCTIONS				
Delegation of all powers under FOIP	All sections referenced below			

Part II: Access to Records

APPLICATION				
Duty to seek clarification of request, where the record cannot be identified based upon the initial request.	6(3)			
RESPONSE REQUIRED				
Duty to give the applicant written notice of the decision regarding their application or to transfer the application to another local authority or government institution.	7(1)			
Duty to give written notice to the applicant, within 30 days, advising if access will be granted or if the record is published or will be published, and, if access will not be given, noting why.	7(2)			
Authority to refuse to confirm or deny that a record exists or ever did exist.	7(4)			

SEVERABILITY				
Duty to give access to as much of the record as can reasonably be severed without disclosing information to which the applicant is refused access.	8			
FEE				
Duty to issue a fee estimate.	9(2)			
Authority to request a deposit that does not exceed one-half of the fee estimate.	9(4)			
Authority to waive fees in accordance with the regulations.	9(5)			
MANNER OF ACCESS				
Duty to provide access to a record in accordance with section 10.	10(1)			
Authority to decide the manner of access, in accordance with section 10.	10(2)			
Authority to decide means of reviewing a record, in accordance with section 10.	10(3)			
TRANSFER OF APPLICATION				
Authority to transfer an application to another government institution, in accordance with section 11. Duty to give written notice to the applicant.	11(1)			
EXTENSION OF TIME				
Authority to invoke an extension of time - in certain circumstances, to respond to the access request.	12(1)			
Duty to give notice of the extension to the applicant.	12(2)			
Duty to give a written notice required by section 7 to the applicant within the period of extension.	12(3)			

Part III: Exemptions to the Right of Access

RECORDS FROM OTHER GOVERNMENTS				
Duty to refuse access to records that were obtained in confidence from another government institution, unless certain conditions in section 13 are met.	13(1)			
Authority to refuse access to records that were obtained in confidence from a local authority.	13(2)			
INFORMATION INJURIOUS TO INTERGOVERNMENTAL RELATIONS OR NATIONAL DEFENCE				
Authority to refuse access to a record that contains information injurious to intergovernmental relations or national defence.	14			
LAW ENFORCEMENT AND INVESTIGATIONS				
Authority to refuse access to a record in respect of a lawful investigation or legal proceeding.	15(1)			

CABINET DOCUMENTS				
Duty to refuse access to a record that could disclose a confidence of Cabinet, unless circumstances of 16(2) apply.	16(1)			
ADVICE FROM OFFICIALS				
Authority to refuse access to records that could disclose information that contains advice from officials in accordance with this subsection.	17(1)			
Authority to refuse access to reports, statements, memorandum, etc. pursuant to <i>The Evidence Act</i> .	17(3)			
ECONOMIC AND OTHER INTERESTS				
Authority to refuse access to records that could disclose information about economic and other interests of the government institution.	18(1)			
Duty to not apply subsection 18(1) to a record that contains the results of product or environmental testing, subject to certain exemptions.	18(2)			
THIRD PARTY INFORMATION				
Duty to refuse access to records containing trade secrets, financial, commercial, etc. related to a third party.	19(1)			
Authority to give access to third party information with the written consent of the third party.	19(2)			
Authority, subject to Part V of the Act, to give access to a record that is in the public interest as it relates to public health, public safety or protection of the environment.	19(3)			
TESTING PROCEDURES, TESTS AND AUDITS				
Authority to refuse access to a record relating to testing or auditing procedures, tests and audits.	20			
DANGER TO HEALTH OR SAFETY				
Authority to refuse access if disclosure could threaten the safety, physical or mental health of an individual.	21			
SOLICITOR-CLIENT PRIVILEGE				
Authority to refuse access to records that are subject to solicitor-client privilege.	22			

Part IV: Protection of Privacy

DISCLOSURE OF PERSONAL INFORMATION				
Opinion of the head required to disclose personal information for research or statistical purposes, or if public interest in disclosure outweighs any invasion of privacy that could result.	29(2)(k) and (o)			
PERSONAL INFORMATION OF DECEASED INDIVIDUAL				
Authority to disclose personal information of a deceased individual to the individual's next of kin.	30(2)			

INDIVIDUAL'S ACCESS TO PERSONAL INFORMATION				
Authority to refuse access to records that determine an individual's suitability, eligibility or qualifications for employment or awarding of government contracts or other benefits.	31(2)			
RIGHT OF CORRECTION				
Duty to advise an individual of the outcome of request for correction to their personal information.	32(2)			
COMMUNICATING WITH THE COMMISSIONER				
Ability to be heard by the commissioner as required in 33(b).	33(b)			

Part V: Third Party Intervention

NOTICE TO THIRD PARTY				
Duty to give written notice to a third party of the intention of the head to disclose information subject to third party protection in 19(1) or to disclose personal information pursuant to 29(2)(n).	34(1)			
Authority to dispense with giving notice to a third party, where head determines giving notice is not reasonably practicable.	34(4)			
RIGHT TO MAKE REPRESENTATIONS				
Authority to waive the requirement that third party representations must be in writing.	36(2)			
DECISION				
Duty to, after receiving third party representations, decide whether or not to give access. Duty to give written notice of decision to third party.	37(1)			
Duty to give access to a third party record or a specified part of it unless the third party requests a review.	37(3)			

Part VII: Review and Appeal

NOTICE OF APPLICATION FOR REVIEW				
Duty to give written notice of a review to a third party.	52(1)			
Duty to give written notice of the review to the applicant.	52(2)			
CONDUCT OF REVIEW				
Authority to make representations to the commissioner in the course of a review.	53(2)(c)			
DECISION OF HEAD				
Duty to decide to follow the recommendation of the Commissioner or make any other decision considered appropriate. Duty to give notice of the decision to the commissioner, the applicant and the third party.	56			

APPEAL TO COURT				
Duty to give notice of an appeal by an applicant to the third party.	57(2)			
Duty to give written notice of an appeal by a third party to the applicant.	57(3)			
EXERCISE OF RIGHTS BY OTHER PERSONS				
Authority to give access, where the individual is less than 18 years of age, to the individual's legal custodian.	59(d)			

Part VIII: General

DELEGATION				
Duty to make the delegation of powers in writing.	60(2)			
BURDEN OF PROOF				
Duty to establish reasons for granting or refusing access to a record.	61			

List any limitations, restrictions, conditions or requirements of the delegations on the above delegations, here: