

Confidentiality

1. Introduction

This document explains the handling of confidential information and records that are received by Alberta Agriculture and Forestry (“AF”) for, by way of example, procurement, research, or business development purposes.

2. The Importance of Confidentiality

AF and its employees receive confidential information regularly from outside parties as a part of its operations. AF is required to treat confidential information carefully. All AF employees take an oath of office set by the *Public Service Act (Alberta)* not to disclose records or information without authorization. In addition, because of the laws and policies governing the Alberta Government, the Alberta Government and its employees do not enter into separate confidentiality agreements with outside parties.

3. The Laws and Policies of the Government of Alberta

a. FOIP

The *Freedom of Information and Protection of Privacy Act (Alberta)* (“FOIP”) places duties on the Alberta Government and its employees to deal with records and information in a specific manner. The Alberta Government is bound by law to comply with FOIP and cannot contract out of its FOIP obligations. These obligations restrict the ability of AF to enter into confidentiality agreements, as AF cannot enter into any confidentiality agreement that would be contrary to FOIP.

A “record” is defined very broadly in FOIP as recorded information in any form. If an application to access records in the custody or control of AF is received, AF must comply unless the application relates to information that is excepted from disclosure under FOIP. Examples of exceptions to disclosure include information that would be harmful to your business interests, would be an unreasonable invasion of your personal privacy or would be harmful to individuals or to public safety.

b. Records and Information Management

The Alberta Government’s records and information management system is based on the use and needs of the Alberta Government. The *Records Management Regulation (Alberta)* (“RMR”) requires Alberta Government departments to develop and follow records retention and disposition schedules for all records under their control. A schedule developed under the RMR contains time periods for records and information management that a department considers to be reasonable, and which are based on a classification system. Because of the RMR and given the significant amount of confidential information received as part of daily operations, AF cannot create a records and information management system tailored to a specific confidentiality agreement.

c. Confidential Materials

Subject to FOIP, materials identified and marked as confidential are considered to be confidential, including, but not limited to, all technical, scientific, financial, business, personal and other information; and all documents, methods, techniques, formulations, operations, know how, experience, skill, trade secrets, computer programs and systems, processes, practices, ideas, designs, devices, manuscripts, publications, reports, samples, plans and drawings.

d. Governing Law

As a matter of policy, the Alberta Government does not submit to the laws or courts of a jurisdiction outside of Alberta.

e. Remedies

Alberta law prevents the application of most remedies sections contained in confidentiality agreements. Under the *Proceedings Against the Crown Act* (Alberta), remedies such as “injunctive relief” and “specific performance” cannot be imposed on the Alberta Government. Instead, remedies such as declaratory relief or any other terms that an Alberta court deems just and proper are available to the party potentially suffering damages as a result of the pending disclosure of sensitive information.

4. Submission of Sensitive Information to AF

If you wish to submit information to AF that you would like kept confidential, please mark the specific areas of concern within each piece of information as “sensitive” or “confidential”. This process helps AF identify information that could cause you harm if it were publicly disclosed. For example, if a third party applies for access to information, including your information or records, that is in the custody or control of AF, disclosure of that information will be refused if it meets the requirements outlined in section 16 of FOIP (see the attached excerpt).

Generally, information must not be disclosed to an applicant under FOIP if disclosure would reveal trade secrets, or commercial, financial, labour relations, scientific or technical information, that was supplied in confidence, and the disclosure of the information could cause significant harm to a competitive position or interference with a negotiating position, result in information no longer being supplied to AF when it is in the public interest that similar information continue to be supplied, or could result in undue financial loss or gain.

Section 16 sets out the above noted complex, multi-factor test for determining whether information will be considered confidential. Therefore, it is important that you review section 16 in its entirety. For the purposes of the program or project that AF is working on with you, the information that you mark as sensitive or confidential will be treated as confidential. Please note, however, that in the event of a FOIP application, although your markings are seriously considered, and you will have an opportunity to comment as part of the FOIP process, the head of AF (or those with delegated authority) will make the final determination as to what is “confidential” information for the

purposes of section 16. Accordingly, please use the criteria in section 16 as a guide to the material you mark as sensitive or confidential.

Before marking the information as sensitive or confidential, please note the following types of information that are already considered to be in the public domain:

- a. patent office registrations;
- b. disclosures of publicly traded corporations that are filed and accessible by the public;
- c. information given to regulatory bodies or courts where the public already has access to this information;
- d. information available on public websites;
- e. press releases;
- f. publicly available annual reports; and
- g. “good neighbour” materials that are prepared for distribution to show benefits to the community.

Despite the markings of sensitivity or confidentiality, it should be noted that AF undertakes no confidentiality obligation with respect to subject matter that:

- a. AF can show was lawfully in its possession prior to receiving it from you;
- b. was in the public domain at the time AF received it;
- c. after AF’s receipt, becomes part of the public domain, through no fault or failure to act on the part of AF;
- d. after receipt by AF, is subsequently and lawfully received by AF from a third party.

For more information about FOIP, please visit the FOIP website at www.foip.alberta.ca/ or contact:

Joanne Gardiner
Information Access and Protection
Service Alberta
T: 780-422-7326
Email: Joanne.Gardiner@gov.ab.ca

Providing FOIP services on behalf of Agriculture and Forestry

Note: This document is not intended to be legal advice.

-----EXCERPT-----

Freedom of Information and Protection of Privacy Act

Part 1: Division 2: Exceptions to Disclosure

Section 16: Disclosure harmful to business interests of a third party

16(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

- (i.) trade secrets of a third party, or
- (ii.) commercial, financial, labour relations, scientific or technical information of a third party

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

- (i.) harm significantly the competitive position or interfere significantly with the negotiating position of a third party
- (ii.) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
- (iii.) result in undue financial loss or gain to any person or organization, or
- (iv.) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

(2) The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax.

3) Subsections (1) and (2) do not apply if

- (a) the third party consents to the disclosure,
- (b) an enactment of Alberta or Canada authorizes or requires the information to be disclosed,
- (c) the information relates to a non-arm's length transaction between a public body and another party, or
- (d) the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta...