

The Commissioner's commentary on D2D from Hansard:

"A duty to document does not necessarily require the production of more records.

[...]it requires the deliberate production and retention of records about specific mandated activities.

[...]public bodies determine what functions and what activities they are responsible for and, therefore, what records they should create.

Records that are created are those that support a public body's purpose, its operational needs, its statutory responsibilities.

This brings clarity to the process of determining when a record needs to be created or should otherwise exist.

The second concern about a duty to document is that the disclosure of government's inner workings will chill the decision-making processes that are so vital to good government.

Public servants, it's been argued, will be less willing to express frank views, including difficult truths that politicians may not want to hear, for fear they will be misunderstood if these views are publicly exposed.

However, our existing access-to-information law already takes into account this concern in the advice and recommendations exception under FIPPA.

Certain kinds of behind-the-scenes discussions are not subject to disclosure, thus allowing for frank discussions.

It does not follow that a duty to document will result in a duty to disclose."

Interpretation:

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Ministry of Finance

BRIEFING DOCUMENT

To: Honourable
Michael de Jong, Q.C.
Minister of Finance

Date Requested: Dec 12, 2015

Initiated by: Privacy and Legislation
Branch

Date Required: Dec 29, 2015

Date Prepared: Dec 18, 2015

**Ministry
Contact:** Sharon Plater

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Cliff #:

TITLE: Special Committee to Review the Freedom of Information and Protection of Privacy Act – Status Update

PURPOSE: FOR INFORMATION

COMMENTS: A Special Committee to review the Freedom of Information and Protection of Privacy Act was struck in May. The Committee is currently accepting submissions from stakeholders and will be producing a report with recommendations for changes to FOIPPA in spring 2016.

BACKGROUND:

The Freedom of Information and Protection of Privacy Act (FOIPPA), British Columbia's public sector privacy legislation, was passed in June of 1992 and came into force for provincial government public bodies in October 1993. FOIPPA applies to all public bodies in BC and governs the collection, use and disclosure of personal information by the public sector.

Section 80 of FOIPPA states that at least once every six years, a Special Committee of the Legislative Assembly must be appointed and undertake a comprehensive review of the Act. The most recent Special Committee was struck on May 27, 2015 and has received submissions during the current consultation period from government, the Office of the Information and Privacy Commissioner (OIPC) and other stakeholders. Once the consultation period has ended, on January 29, the Special Committee will have until May 27th to submit a report of its review to the Legislative Assembly, which will include recommendations for changes to the Act.

DISCUSSION:

The OIPC presented to the Special Committee and provided their written submission on November 18th.

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As part of the consultations conducted by the Special Committee, stakeholders from the public and private sector, as well as interested citizens, were invited to present during four scheduled public hearings, which took place in October and November. In addition, the Special Committee will continue to accept written submissions up until the January deadline.

Among the wide range of stakeholders who have participated in the public consultation, the Special Committee has heard from the BC Freedom of Information and Privacy Association, the Centre for Law and Democracy, Vancouver Coastal Health Authority

and members of the media. Though the Special Committee received presentations on a myriad of topics, covering privacy, access, records management and government processes, the following issues were discussed in depth:

- The inclusion of subsidiary corporations in FOIPPA
- Elimination of access fees
- Data residency
- The inclusion of a legislated duty to document key actions and decisions
- Expansion of the “public interest” disclosure provision

On November 18th, Government Chief Information Officer, Bette-Jo Hughes, also presented to the Special Committee on behalf of government. This presentation dealt largely with:

- Data residency
- Harmonization with global privacy standards
- The increasing proliferation of records in a digital age
- Availability and impact of metadata
- Access through proactive disclosure
- Government’s Privacy Management and Accountability Policy
- Proposed changes to FOIPPA

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As stated above, the next milestone in the Special Committee process will be the culmination of the consultation period on January 29th. Once completed, the Special Committee will prepare their report, including a list of recommendations which are expected to echo those of the Commissioner. This has been typical of past Special Committees and is anticipated for this year as well.

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2015 OIPC Recommendations to the FOIPPA Special Committee

Recommendation	New / Previously Recommended by OIPC
1. Add to Part 2 of FIPPA a duty for public bodies to document key actions and decisions based on the definition of government information” in the Information Management Act.	Previously recommended
2. Section 13(1) of FIPPA should be amended to clarify the following: <ul style="list-style-type: none"> • “advice” and “recommendations” are similar and often interchangeably used terms, rather than sweeping and separate concepts; • “advice” or “recommendations” set out suggested actions for acceptance or rejection during a deliberative process; • the “advice” or “recommendations” does not apply to the facts upon which the advice or recommendation is based; and • the “advice” or “recommendations” does not apply to factual, investigative, or background material, for the assessment or analysis of such material, or for professional or technical opinions. 	Previously recommended
3. Amend FIPPA to move paragraph (n) of the definition of “local government body” into the definition of “public body” in Schedule I, so that entities such as subsidiaries of educational bodies and the BCACP fall within the scope of FIPPA.	Previously recommended
4. Amend ss. 71 and 71.1 of FIPPA to require the publication of any categories of records that are established by the head of a public body or the Minister and made available to the public without an access request. This list should include links to relevant information or records.	New
5. Amend FIPPA to require public bodies to ensure that the name and type of applicant is only disclosed to the individual at the public body that receives an access request on behalf of that public body, while providing for limited exceptions where the applicant is requesting their own personal information or where the name of the applicant is necessary to respond to the request.	Previously recommended

<p>6. Add an exception to s. 33.1(1) that states that a public body may disclose personal information inside or outside of Canada, if the information is contained in a non-statutory investigation or fact finding report commissioned by a public body, where the head of the public body concludes the public interest in disclosure outweighs the privacy interests of any person whose personal information is contained in the report.</p>	New
<p>7. Add to FIPPA a requirement that public bodies have a privacy management program that:</p> <ul style="list-style-type: none"> • designates one or more individuals to be responsible for ensuring that the public body complies with FIPPA; • is tailored to the structure, scale, volume, and sensitivity of the personal information collected by the public body; • includes policies and practices that are developed and followed so that the public body can meet its obligations under FIPPA, and makes policies publicly available; • includes privacy training for employees of the public body; • has a process to respond to complaints that may arise respecting the application of FIPPA; and • <u>is regularly monitored and updated.</u> 	New
<p>8. Add to Part 3 of FIPPA a breach notification and reporting framework which includes:</p> <ul style="list-style-type: none"> • A definition of a privacy breach: includes the loss of, unauthorized access to or unauthorized collection, use, disclosure or disposal of personal information. • A requirement to notify individuals when their personal information is affected by a known or suspected breach, if the breach could reasonably be expected to cause significant harm to the individual. • A requirement that a public body report to the Commissioner any breach involving personal information under the custody or control of that public body, if the breach or suspected breach could reasonably be expected to cause harm to an individual and/or involves a large number of individuals; • A timing requirement that process of notification and reporting must begin without unreasonable delay once a breach is discovered; • Authority for the Commissioner to order notification to an individual affected by a breach; and • A requirement that public bodies document privacy breaches and <u>decisions about notification and reporting</u> 	Previously recommended
<p>9. Add a de-identification requirement to s. 33.2(l) of FIPPA for any personal information that is disclosed for the purposes of planning or evaluating a program or activity of a public body.</p>	New
<p>10. That FIPPA be amended to limit the exemption in s. 3(J)(e) to Part 2 of FIPPA.</p>	New
<p>11. Add to s. 29 of FIPPA a requirement that public bodies correct personal information when an individual requests that his or her personal information be corrected if the public body is satisfied on reasonable grounds that the request made should be implemented.</p>	New

<p>12. Amend s. 42 of FIPPA to expand the Commissioner's oversight by granting the Commissioner the jurisdiction to review matters or allegations of unauthorized destruction of records.</p> <p>The Commissioner should have jurisdiction over the unauthorized destruction of records as set out in:</p> <ul style="list-style-type: none"> • any enactment of British Columbia, or • set out in a bylaw, resolution or other legal instrument by which a local public body acts or, if a local public body does not have a bylaw, resolution or other legal instrument setting out rules related to the destruction of records, as authorized by the governing body of a local public body. <p>The oversight over unauthorized destruction should come with complementary offences and penalties under FIPPA.</p>	New
<p>13. Amend the definition for "data-linking" in Schedule I of FIPPA to define data-linking as the linking or combining of data sets where the purpose of linking or combining the information is different from the original purpose for which the information in at least one of the data sets that was originally obtained or compiled, and any purposes consistent with that original purpose.</p>	Previously recommended
<p>14. Repeal s. 36.1(2) of FIPPA to remove the exemption of the health care sector from the data-linking oversight provisions of the Act.</p>	Previously recommended
<p>15. Penalties for offences committed by individuals under FIPPA should be raised to be up to a maximum of \$50,000 for both general and privacy offences.</p>	New
<p>16. Add a privacy protection offence to s. 74.1 that makes it an offence to collect, use, or disclosure personal information in contravention of Part 3 of FIPPA.</p>	New
<p>17. Amend Part 6 of FIPPA to require government to list provisions in statutes that prevail over FIPPA in a schedule to the Act, and amend s. 80 of FIPPA to include a review of those provisions as part of the statutory review of the Act.</p>	New
<p>18. Amend s. 56 of FIPPA to permit the Commissioner to extend the 90 day time limit to review requests in a manner that is consistent with s. 50(8) of PIPA.</p>	Previously recommended
<p>19. Amend parts 4 and 5 of FIPPA to combine the complaint process and the review and inquiry process into a unitary process for the Commissioner to investigate, review, mediate, inquire into and make orders about complaints respecting decisions under FIPPA or other allegations of non compliance with FIPPA.</p>	Previously recommended
<p>20. Government should enact new comprehensive health information privacy legislation at the earliest opportunity.</p>	New
<p>21. Amend section 80 (1) of FIPPA to change the review cycle from 6 years to every 3-4 years.</p>	New

2015 Special Committee Submissions		
Category	Issue	Entities Raising Issue
Access	Subsidiary Corporations	FIPA Center for Law and Democracy UBC AMS Student Society UBC Student Newspaper S. Tromp - Media R. DePieri - Secretary Treasurer and Privacy Officer CUPE 116 D. Decosse - Member of the public S. Bohus - Member of the public O. Munro/J.Smith - Langara College R.Wipond
	Amend section 6 to add a duty to make publicly available information about how to exercise the right of access	S. Levine - Lawyer
	Amending the Act so that records that are not responsive, needn't be reviewed for harms if included in a records package	S. Levine - Lawyer
	Narrowing section 13	FIPA S. Tromp - Media
	OIPC rulling on section 25 (Support of) - Expanding application of 25	FIPA R. Botterell - Former ED of Privacy Branch J. Rush - Rt. Lawyer
	Restricting the use of section 14	FIPA Center for Law and Democracy
	Expanding the application of section 14 - encompass litigation privilege and settlement privilege	S. Levine - Lawyer
	Elimination of fees	Center for Law and Democracy S.B. - Vancouver Resident UBC Student Newspaper
	Reduction of access timelines	Center for Law and Democracy S.B. - Vancouver Resident
	Removal of time limit to transfer an FOI request	Center for Law and Democracy
	Adding a harms test to Sections 12 and 13	Center for Law and Democracy
	Removal or reduction of time extentions for access requests	UBC AMS Student Society UBC Student Newspaper
	Automatic fee waivers for requests in the public interest (defined as any general request)	UBC AMS Student Society
	Difficulty accessing information about deceased family member	L. Fraser - Member of the public
	Penalties for failing to comply with FOIPPA	UBC AMS Student Society R. Wipond Regional District of Central Kootenay
	Adding Police Associations to FOIPPA	R. Wipond
Privacy	Creation of a central office of privacy and access - similar to Provincial Health Officer	S. Levine - Lawyer
	Concerns surrounding Trans-Pacific Partnership	FIPA
	TPP and implications for section 30.1	Canadian Internet Policy & Public Interest Clinic
	Privacy implications regarding the BC Services Card	R. Wipond
	Tokenization	FIPA
	Surveillance at schools	R. Wipond
	Limiting FOIPPA overrides in other legislation	Center for Law and Democracy
	Section 30.1 - Concern with the limitations placed on using service providers and technology based outside of Canada	Vancouver Coastal Health Authority D. Felske - FutureBook Printing Inc. P. Hancock - Research Universities Council of BC - UBC College of Registered Nurses of BC
Records Management	Duty to document	FIPA S. Tromp - Media L. Millar - Information/Records Consultant R. Wipond
	Lack of offenses in the IMA	FIPA, L. Millar - Information/Records Consultant
	Manditory records management training	L. Millar - Information/Records Consultant

Recommendation No. 12

In November 2006, the B.C. Information Commissioner launched an effective new ‘expedited inquiry’ process to curtail delays, noted at [http://www.oipc.bc.ca/advice/PoliciesProceduresRevised\(Nov2006\).pdf](http://www.oipc.bc.ca/advice/PoliciesProceduresRevised(Nov2006).pdf) Consider amending the Act to enshrine this “expedited inquiry” plan into law.

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Recommendation No. 17

Amend the Act to mandate that B.C. *FOIPP Act* performance measurements including response times will be recorded, and that these measurements shall be published online in an annual FOI report card of all public bodies.

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Recommendation No. 19

To reduce delays, “sign off” authority levels and processes must be streamlined and simplified. Consider vesting such authority at the lowest reasonable level, normally with the information officer if there is one.

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Recommendation No. 20

To lessen overall response times, public bodies must give records to the applicant in staged releases if he or she requests it.

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Recommendation 35

Amend Sec. 13 to include a harms test, wherein a policy advice record can be withheld only if disclosing it could cause “serious” or “significant” harm to the deliberative process. The best models can be found in the FOI laws of South Africa (Sec. 44), the United Kingdom (Sec. 36), or Article 19’s Model Freedom of Information Law (2001).

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Recommendation 41

Amend Sec. 22 to state that a B.C. *FOIPP Act* applicant's identity must not be revealed within government without a strict need to know (which is, mainly to locate the records being sought).

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Recommendation 42.

Amend Sec. 22 to state that bonuses of named officials and employees of all entities covered by the FOIPP Act are not the private information of individuals, and encourage the government to post them online, as it does for salaries and expenses.

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Recommendation No. 44

Consider amending Sec. 22 to permit the release of the premier's telephone records, for institutional but not personal contacts, in reply to FOI requests.

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Recommendation No. 50

The deadline to appeal to the Commissioner on a B.C. *FOIPP Act* related matter should be doubled to 60 days. The deadline to file an appeal of a FOIPP ruling to Judicial Review should also be doubled to 60 days.

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Recommendation No. 51

Amend the Act so that upon the conclusion of an investigation, the Commissioner's office will have the power to recommend to the Attorney General's office that it lay charges and fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal. These amounts will be determined in further amendments or regulations.

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Recommendation No. 61

Consider a policy directive for the ministry that administers the FOIPP system to educate and promote the FOIPP process to the general public.

Alternatively, the Commissioner could be encouraged to educate and promote the FOIPP process to the general public. If so, government must provide adequate funds for this task, and it would be a dedicated, stand-alone part of the Commissioner's budget.

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Recommendation No. 62

The B.C. government should pass an effective *Archives and Information Management Act*, designed to regulate the entire life-cycle of government-held information.

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Recommendation No. 66

That B.C. pass a strong and comprehensive whistleblower protection statute for both the public and private sector.

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Molyneux, Jennifer MTIC:EX

From: Hughes, Bette-Jo MTIC:EX
Sent: Friday, January 8, 2016 12:09 PM
To: Molyneux, Jennifer MTIC:EX
Subject: FW: Highlights of Special Committee public submissions

From: Plater, Sharon MTIC:EX
Sent: Tuesday, October 20, 2015 10:15 PM
To: Hughes, Bette-Jo MTIC:EX
Subject: Highlights of Special Committee public submissions

To date the Special Committee reviewing FOIPPA has held one day of public consultation. There were five presenters - Vincent Gogolek of the Freedom of Information and Privacy Association, Michael Karanicolas of the Centre of Law and Democracy, UBC AMS Student Society, Stephen Bohus resident of Vancouver, and Gordon Watson anti-abortion protester - and the key points of their presentations are below.

1. The Freedom of Information and Privacy Association

- Duty to Document (increase sanctions and address transitory records)
- Remedy lack of offenses in the IMA
- Cover subsidiary Corporations
- Narrow section 13 (policy advice)
- Support the OIPC's section 25 ruling
- Restrict use of legal privilege in access requests (lawyers often hired to work that is non-legal so that records can be withheld)
- Some undefined concerns about the Trans-Pacific Partnership
- Some questions about tokenization but the essence of these are contained in its written submission which the Special Committee had not received yet.

2. Centre for Law and Democracy

- Generally agree with FIPPA's submission
- Identifies Newfoundland's access law as best in country
- Cover subsidiary corporations

- Scrap all access fees
- Shorten response time frame to 20 working days
- Remove 20 days for transferring an access request
- Limit solicitor-client privilege to litigation privilege
- Limit overrides to FOIPPA in other legislation
- Add a penalty for obstructing right to access
- Add harms test to Cabinet and public body confidences exception

3. UBC AMS Student Society

- Cover subsidiary corporations
- Remove the provision to allow a public body to unreasonably delay responding (believe they mean a public bodies ability to take a 30 extension on their own if certain criteria, such as a large amount of records, are met) and remove ability to request extensions for responding
- Address public bodies non-compliance with 'duty to assist' requirement by adding penalties and automatic fee waivers
- Add automatic fee waivers in requests that are in the public interest (define public interest as any action taken by a public body that does not involve personal things like employment issues)
- Introduce a set fee schedule

Stephen Bohus, Vancouver resident

- Change response time back to 30 calendar days, but 14 days would be better
- Have reasonable or no fees

Gordon Watson - nothing of relevance

Molyneux, Jennifer MTIC:EX

From: Hughes, Bette-Jo MTIC:EX
Sent: Friday, January 8, 2016 12:10 PM
To: Molyneux, Jennifer MTIC:EX
Subject: FW: Freedom of Informaiton and Privacy Association

From: Plater, Sharon MTIC:EX
Sent: Thursday, July 30, 2015 10:48 AM
To: Hughes, Bette-Jo MTIC:EX
Cc: Sime, Mark MTIC:EX; carm plater s.22 ; Reed, Matt MTIC:EX
Subject: Freedom of Informaiton and Privacy Association

Vince Gogolek was interviewed yesterday about the Special Committee (the transcript is in clippings). He cited his Association's top areas of interest are going to be:

Duty to Document;
Penalties for not writing things down;
Penalties for interfering with access requests; and
Subsidiary corporations (primarily at schools, colleges and universities)

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