BRITISH COLUMBIA | Ministry of Citizens' Services

2018 Information Note
Advice to Minister

Date: December 7, 2018 **Ref: 110995**

Issue: Revised Ministerial Directives Requiring Proactive Disclosure

Conclusion:

- Two ministerial directives that repeal and replace existing directives are attached for signature:
  - 01-2018: Disclosure of Summaries of Open and Closed Freedom of Information Requests.
  - 02-2018: Disclosure of Records Released in Response to a Freedom of Information Request.
- The new directives will not affect the availability of information published under the previous directives. That information will remain online and accessible.

Next Steps:

- The two directives will be published on the Open Information site.

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- The two directives are designed to come into effect at the beginning of January 2019.
- Government Communications and Public Engagement will prepare necessary communications.

Background:

- Proactive disclosure is any release of government information to the public without a formal Freedom of Information (FOI) request.
- Establishing new categories of records to be proactively disclosed is one of the ways that government can increase the amount of information available to the public, fostering transparency and public accountability.
- In 2016, eight ministerial directives were issued.
- These directives require ministries to disclose specific categories of information without an FOI request.
- Two of these ministerial directives will be repealed and replaced with amended versions (see Attachments A and B).
- The amendments are in response to concerns from the media, the Information and Privacy Commissioner, and the Minister's Office.

Analysis:

Directive 01-2018: Disclosure of Summaries of Open and Closed FOI Requests

- This directive requires the publication of two reports:
  - a weekly report that provides information about "general" FOI requests opened in the period of 60 days to 30 days previous; and
  - a quarterly report that provides information about "general" FOI requests closed in the previous quarter.
- After the announcement of the 2016 ministerial directives, the Information and Privacy Commissioner and the media expressed concerns that the "descriptions" of FOI applicants' open FOI requests were being made public before the applicants received their response packages.
- Some stakeholders continue to express concerns with the practice of releasing the "description" of open FOI requests.
- Directive 01-2018 will repeal and replace Directive 05-2016, resulting in two changes:
  - going forward, in response to stakeholder concerns, the requirement to publish the "description" of an open request will no longer be published; and
  - at the request of the Minister's Office, ministry names will no longer be published.
- These data sets are accessed on a regular basis by members of the public with an interest in the information. Once the new open FOI request report is published, Information Access Operations may receive FOI requests for the two columns of information that will no longer be published proactively (i.e. the "ministry name" and the "description" columns).

Directive 02-2018: Disclosure of Records Released in Response to an FOI Request

- This directive requires online publication of response packages that are provided to FOI applicants who have made "general requests", with some exceptions.
- Concerns have been expressed about Directive 06-2016, as some stakeholders believe that the media and other applicants may be deterred from making FOI requests, if the minimum time before a response package is proactively disclosed is five business days after it is released to the applicant.
- Directive 02-2018 will repeal and replace the original Directive 06-2016, resulting in one change: going forward, in response to stakeholder concerns, the minimum time delay will be extended from five business days to ten business days.

Both revised directives have been reviewed by ministry solicitors.

Attachments: *Attachment A: Directive 01-2018; Attachment B: Directive 02-2018*

Contact: *Joel Fairbairn, A/Assistant Deputy Minister 778 698-5845*

FREEDOM OF INFORMATION (FOI) REQUESTS

DIRECTIVE RESPECTING RECORDS AVAILABLE TO THE PUBLIC WITHOUT A REQUEST UNDER THE *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*

DIRECTIVE:	01-2018
SUBJECT:	**Disclosure of Summaries of Open and Closed Freedom of Information (FOI) Requests**
AUTHORITY:	This directive is issued under section 71.1 of the *Freedom of Information and Protection of Privacy Act*.
APPLICATION:	This directive applies to the Ministry of Citizens' Services.
EFFECTIVE DATE:	January 2, 2019

Minister of Citizens' Services

Directive to the Ministry of Citizens' Services issued under section 71.1 of the *Freedom of Information and Protection of Privacy Act*

Under section 71.1 (1) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (FOIPPA), I, Jinny Jogindera Sims, Minister of Citizens' Services, establish the following as a category of records available to the public without a request under that Act:

> **Summaries of open and closed FOI Requests, where an FOI Request is a request made under FOIPPA for access to a record. Summaries must not include personal information which if disclosed would constitute an unreasonable invasion of an individual's privacy.**

Under section 71.1 (4) and (5) of FOIPPA, the summaries must contain the following information and must be disclosed in the manner and by the timelines set out below:

(1) A summary report of open FOI Requests received between November 1, 2018 and December 10, 2018 must be posted to the Open Information website by January 9, 2019.

(2) Once posted, the summary report referred to in (1), above, must be updated on a weekly basis to include summaries of FOI Requests received after December 10, 2018.

These weekly updates must be posted to the Open Information website at least 30 calendar days after the requests included in each update were received.

(3) A summary report of closed FOI Requests that were closed in the third quarter of the 2018 fiscal year must be registered in the BC Data Catalogue and made accessible as open data under the Open Government Licence of British Columbia by January 31, 2019.

(4) The summary report referred to in (3), above, must be updated on a quarterly basis, to include summaries of FOI Requests closed in subsequent quarters.

These quarterly updates must occur not later than 30 calendar days after the end of each quarter.

(5) Each of the summaries of open FOI Requests must include, at a minimum, the following information for each FOI Request:

a) The date the request was opened;

b) The request file number;

c) The applicant type;

d) The status of the request; and

e) The date by which the ministry or ministries must respond.

(6) Each of the summaries of closed FOI Requests must include, at a minimum, the following information for each FOI Request:

a) The date the request was opened;

b) The ministry or ministries to which the request is made;

c) A description of the request;

d) The request file number;

e) The applicant type;

f) The final disposition of the request;

g) The date on which the request was closed; and

h) Whether the response to the request was posted on the Open Information website and, if not, the rationale for not posting.

(7) A summary report of open FOI Requests posted to the Open Information website or a summary report of closed FOI requests registered in the BC Data Catalogue and made accessible as open data under the Open Government License of British Columbia pursuant to Directive 05-2016 is not affected by this directive.

This directive rescinds and replaces Directive 05-2016 issued on May 30, 2016.

This directive is effective as of January 2, 2019.

19th Dec. 2018
Date

Minister of Citizens' Services

RECORDS RELEASED IN RESPONSE TO A FREEDOM OF INFORMATION (FOI) REQUEST

DIRECTIVE RESPECTING RECORDS AVAILABLE TO THE PUBLIC WITHOUT A REQUEST UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

DIRECTIVE:	02-2018
SUBJECT:	**Disclosure of Records Released in Response to a Freedom of Information (FOI) Request**
AUTHORITY:	This directive is issued under section 71.1 of the *Freedom of Information and Protection of Privacy Act*.
APPLICATION:	This directive applies to all ministries.
EFFECTIVE DATE:	January 2, 2019

Minister of Citizens' Services

Directive to all Ministries issued under section 71.1 of the *Freedom of Information and Protection of Privacy Act*

Under section 71.1 (1) of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165 (FOIPPA), I, Jinny Jogindera Sims, Minister of Citizens' Services, establish the following as a category of records that is available to the public without a request under that Act:

Records released as responsive to an FOI Request, where an FOI Request is a request made under FOIPPA for access to a record, excluding the following:

- **Records released in response to a personal information request (which is a request made by an individual or their representative for access to their own personal information); or**
- **Records exempted from disclosure based on one or more of the attached exemption criteria.**

Under section 71.1 (4) and (5) of FOIPPA, these records must contain the following information and must be disclosed in the manner and by the timelines set out below:

1) Records released as responsive to an FOI Request must be posted with a copy of the response letter to the applicant, subject to the redaction of any personal information in the response letter which if disclosed would constitute an unreasonable invasion of an individual's privacy.

2) The responsive records and the response letter must be posted to the Open Information website no sooner than 10 business days after their release to the applicant.

This directive rescinds and replaces Directive 06-2016 issued on May 30, 2016.

This directive is effective as of January 2, 2019.

19th Dec. 2018 — Jinny Sims

Date — Minister of Citizens' Services

EXEMPTION CRITERIA FOR DIRECTIVE 02-2018

Records released as responsive to an FOI Request may be exempted from disclosure on the Open Information website, either in whole or in part, if they contain any of the following:

a) Personal information, if the disclosure would constitute an unreasonable invasion of an individual's privacy;

b) Information that may harm relations with a First Nation;

c) Information that may harm relations with another government;

d) Information that may harm a third party's business interests;

e) Information that may threaten the safety of a person or harm the security of any property or system; or

f) Information which should not be disclosed on the Open Information website for other legal or compelling public interest reasons.

BRITISH COLUMBIA | Ministry of Citizens' Services

2017 Information Note
Advice to Minister

Date: January xx, 2018 **Ref:**

Issue: Rescind and Replace two Ministerial Directives on Proactive Disclosure

Next Steps:

- Approve and sign Directive 01-2018, which will:
  - Rescind Directive 05-2016, which requires the disclosure of summary information about open and closed FOI requests; and
  - Require the disclosure of summary information about closed FOI requests only.
- Approve and sign Directive 02-2018, which will:
  - Rescind Directive 06-2016, which requires the online publication of records released in response to general FOI requests, a minimum of five business days after their release to the applicant.

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Background:

- On May 9, 2016, the Minister responsible for the *Freedom of Information and Protection of Privacy Act* announced that government would begin proactively releasing several new categories of records commonly requested through Freedom of Information (FOI).
- Among those disclosures were:
  - Directive 05-2016, which requires the disclosure of summaries of open and closed FOI requests.
  - Directive 06-2016, which requires the online publication of records released in response to general FOI requests.
- Subsequent to the directives being announced, the Information and Privacy Commissioner and the media expressed concerns about the disclosure of information about open FOI requests (Directive 05-2016).
  - The directive was amended at that time, with the agreement of the Information and Privacy Commissioner, to provide publication on a monthly, rather than a weekly, basis.
- Concerns have since been expressed about Directive 06-2016.
  - Those concerns are that media and other applicants may be deterred from making requests if the release package is proactively released in close proximity to the time it is released to the applicant and/ or where the subject of their request is made public.[1]
  -
- The rationale for posting summary information respecting the status of open FOI requests was to

[1] Note that the Directive increased the lag between release to the applicant and publication to the Open Information site; prior to the directive being in place, since 2011, the Open Information and Open Data Policy had required publication a minimum of 72 hours after its release, if the response is sent electronically to the Applicant, or five business days after its release if a hard copy is mailed to the applicant.

allow applicants to track the status of their requests and to create an additional incentive for ministries to work toward meeting their legislative timelines.

- Directive 06-2016 mostly formalizes the requirements and processes that are already established by policy. It also introduced new timelines for publishing records released in response to an FOI request and as such was deemed to effectively supersede the policy requirement that had been in effect since 2011. This directive requires that all records relating to general FOI requests, regardless of medium, are published a minimum of five business days after their release to the applicant.
- Subsequent to the directives being announced, the Information and Privacy Commissioner and the media expressed concerns about the disclosure of information respecting open FOI requests.
- In particular, concerns were raised that media and other applicants may be deterred from making requests if the release package is proactively released in close proximity to the time it is released to the applicant and/ or where the subject of their request is made public.
- This potential for deterring applicants from making requests is especially conceivable where the applicant could feel they may not have enough time to properly review the material before it is proactively released.
- The release of open requests on a monthly basis was intended to maintain transparency of government's management of FOI requests, while simultaneously introducing a reasonable publication delay to allow applicants to review material before any information is made public.

Analysis:

Publishing FOI Request Descriptions (05-2016)

- Despite moving to monthly reporting, some stakeholders continue to express concerns with the practice of releasing the subject of FOI requests.
- Prior to the May election, the NDP suggested they would support ending this practice in a questionnaire administered by the BC Freedom of Information and Privacy Association (FIPA) (see question 9 of attachment, 'FIPA survey NDP response').
- Replacing directive 05-2016 with a new directive, 01-2017, would *remove the need to release the subject* of FOI requests while continuing to require the reporting of statistical information about requests (see draft directive, option one).
- The new directive, 01-2017, could additionally remove the requirement for reporting summary information on open requests, instead proactively reporting *on closed requests only* (see draft directive, option two).
- Directive 01-2017 could represent a reasonable balance between the original policy intent and the need to address the issues of concern.

Publishing FOI Response Packages (06-2016)

- Despite allowing a five day period before response packages are proactively released media continue to express concerns that a "chill effect" on applications may be in existence. There are concerns that this five day period is not sufficient and that applicants may be discouraged from submitting requests due to the risk of information being pre-emptively shared with the public before applicants have had an opportunity to properly review them.

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- By refining the commitment to open information and continuing to proactively disclose records, government would demonstrate its pledge to improve rules around access to information.
- The amended directive would continue to fulfil the Act's purpose, to facilitate access to

information in general, and support the understanding that general information once disclosed belongs not to any one person but to the general public at large.

Attachments:

Contact: David Curtis, Assistant Deputy Minister 778 698-5845

v.linkedin.com/shareArticle?
rl=http://engage.gov.bc.ca/infoaccess/2018/02/23/blog-
=&summary=&source=)

Discussion #1: Welcome

February 23, 2018

Thank you for visiting B.C.'s Freedom of Information and Protection of Privacy Act (FOIPPA) review website.
There are many different perspectives on Freedom of Information (FOI) and Privacy. We want to hear from people and organizations across our Province who have an interest in access to information and privacy and have thoughts to share on how to make change.

This is the first time that government has directly engaged British Columbians in a discussion about potential improvements to the rules that govern both FOI and the protection of your personal information.
We hope you'll take the time to explore the site and share your thoughts. You'll be able to read submissions from others about changes they would like to see, as well as blog posts that will focus on what we know are some of the key issues. You can participate by commenting on the blog, or by writing down your own ideas and submitting them. Maybe your idea is about the information we make available online, or maybe it's about the FOI process. Maybe your idea is about FOIPPA and a way to improve the rules that are set out in it. This is your chance to join the discussion.

The website will be live until April 9, 2018. Then we'll use all the ideas we gathered to inform a report on recommended improvements.
Government is the steward of important information that belongs to British Columbians. That information can be used to support public transparency and accountability, provide effective service delivery, and preserve the historical record of the Province.
It's important to recognize that some of that information is your personal information. And we need to make sure we protect it.

Thanks for participating. We look forward to hearing from you about how we can make real improvements that will strike the right balance between making information available so that you can engage with government on topics that interest you, and ensuring that we protect your personal information.

Discussion #2: The FOI Process → (http://engage.gov.bc.ca/infoaccess/2018/02/23/discussion-2-the-foi-process/)

Sort

Oldest comments ▾

21 responses to "Discussion #1: Welcome"

[ ] Bob 2 months ago

My initial comment is this. Why further delay needed reforms, when, as opposition, the NDP tabled a suite of democratic reform private members' bills? All were rejected by the BC Liberal government. Why waste any more time? Dust off those private members' bills, table them as government bills and fulfil your promise to make B.C. better. To refresh your memory, Minister Sims, here is the link to those private members' bills > http://bcndpcaucus.ca/wp content/uploads/sites/5/2017/02/Backgrounder Democratic reform suite.pdf (http://bcndpcaucus.ca/wp content/uploads/sites/5/2017/02/Backgrounder Democratic reform suite.pdf)

9 3 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-7)

[ ] Bob 2 months ago

On April 27, 2017, the B.C. NDP responded to the B.C. Freedom of Information and Privacy Association's election questionnaire. (The link to the NDP response is at bottom.) Below are key questions posed by FIPA and the corresponding NDP responses (edited for brevity). Why delay long overdue FOI reforms, when you have already made promises?

Q: Do you accept the April 2017 report of the Ombudsperson into the firings at the Ministry of Health, and will you bring in whistleblower protection legislation by March 2018 as recommended?
A: Yes.

Q: Will your government support the creation of penalties against those who interfere with information rights?
A: Yes.

Q: Will your government act on the Commissioner's recommendations to put a "duty to document" in the Freedom of Information and Protection of Privacy Act?
A: Yes.

Q: In 2017, the Special Legislative Committee reviewing FIPPA repeated the recommendation from the 2010 Committee that subsidiaries created by educational public bodies like colleges and universities should be made subject to the Act. Will your government make this change and if not, why?
A: We support the Act being expanded to capture subsidiaries created by public bodies and will consult with affected organizations.

Q: The BC government now posts the texts of Freedom of Information requests it receives even before releasing any information the requester. This practice has been criticized by FIPA and many others as measure that can intimidate requesters while providing no additional transparency on government operations.
A. Do you agree with this policy, and if so, why?
No.
B. If not, will your government end this practice?
Yes.

https://fipa.bc.ca/wordpress/wp content/uploads/2018/01/BC NDP Response.pdf (https://fipa.bc.ca/wordpress/wp content/uploads/2018/01/BC NDP Response.pdf)

8 5 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-8)

[ ] A. 2 months ago

Municipalities as well hold back studies and information that belongs to the public. If not released quickly to public, ever more advantage naturally accrues to insiders who can potentially profit from advance knowledge. Default should be, if a public institution, its public info, with as few, only truly necessary exceptions as possible.

I think the news media will still find plenty of shocking information in just helping the public understand the ramifications of releases. And please keep growing real investigative reporting wherever it takes you.

6 5 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-17)

[ ] Dylan 2 months ago

Thanks for creating this opportunity to for the public to comment on this critical issue.

I think this consultation provides a tremendous opportunity to finally rid the Act of the ineffectual and counterproductive data residency requirement (FIPPA section 30.1). On its surface, the requirement might seem to protect Canadian residents against the boogeymen of Homeland Security and the Patriot Act; however, most information security experts will tell that's just not how the internet works and locating servers in Canada provides almost no protection (in and of itself) against foreign governments accessing our residents' data.

The data residency requirement is not benign either – it creates a situation in which large multinational IM/IT companies that can source access to Canadian server farms (primarily located outside of British Columbia) are able to compete on government contracts, while smaller British Columbian companies are locked out because of their dependence on U.S. cloud based services (primarily the ubiquitous Amazon Web Services cloud). British Columbian taxpayers also pay an extra premium on all government IM/IT contracts because of data residency requirements, without meaningful extra protections as a result.

Higher costs for taxpayers, local companies locked out of government procurement, and no meaningful privacy protections for our residents – the data residency requirement should be considered for repeal.

8 2 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-68)

[ ] Mike 1 month ago

Completely agree with this. One of the fundamental barriers to maximizing productivity based technologies is the archaic restriction on using services that have international servers. Products from Google, Microsoft, and Amazon are critical to modern workplace efficiency and FOIPPA is an outright barrier. This aspect of FOIPPA should be aligned with PIPA.

4 0 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-113)

[ ] Adrian 1 month ago

I support retaining the data residency requirements. The US PATRIOT Act (and successors) give so many rights to government, including access to all data held by US based corporations, that I would not trust our government to hold the data securely if a strong residency requirement is not retained.

1 3 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-82)

[ ] John 2 months ago

We used to be world leaders in FOI legislation and practices; now we are an embarrassing backwater of delays and inflated costs.

3 1 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-71)

[ ] Chris 2 months ago

As an experienced archivist I find the access rules and fees with regards to research on individual surveys and land titles to be problematic. In researching an 1880's land survey of an individual land title within a block where the original posts have long since disappeared, the modern title holder is expected to hire a professional researcher, a lawyer or surveyor for a fee to research the early surveys and land titles. Pre 1921 the Lands Office has Absolute Fee Books (AFB) which record individual titles which are presently not indexed and not accessible except perhaps by a researcher at great expense to the individual property owner. (Land Titles staff do not even acknowledge that these books exist.) Furthermore, where highways were involved in expropriating land all pre 1960's records have been removed from records and it difficult to access records through FOIPIP unless you can find the record series numbers at the B.C. Archives. As an archivist and researcher I was able to access the historical surveys under a special arrangement and get copies for a fee. But I was not able to access the AFB for our lot. A modern survey had changed boundary of our lot resulting a loss or 1/3 of the property and situation where a neighbour asked us to move our house. We tried to find the evidence that the survey was mistaken but without on the ground evidence we could not convince the LTSA about the location of the original boundary. The only way to do that would have been to access the AFB which are only now going to begin to be digitized in 2018. It took more than 2 years to access the Highway records. These also did not provide the evidence we needed. In the end we were forced to negotiate an easement with the neighbour costing us about $5,000 and decided to sell the house. As an archivist I think access to the early public records in Highways and the LTSA should be free and that they should have to have a knowledgeable archivists to service these records.

2 1 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-77)

[ ] Ryan 1 month ago

Hi,
I have had a very hard time obtaining any information from public bodies in BC using these laws, which seem almost designed to assist in avoiding being legally forced to disclose documents through broad interpretation of the acts, while appearing on first glance to be the opposite. I volunteer my case for the government to use to audit the entire system of seeking disclosure and information from a public body, as it demonstrates the many pitfalls of the system and legislation as they are.

5 0 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-86)

[ ] Ian 1 month ago

I believe that all information that the government creates or uses is the property of the people of British Columbia. It is financed from our taxes and it should be our right to see everything that the government generates.

The current level of secrecy allows special interests to operate in secret and permits corruption to go unpunished.

3 1 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-97)

[ ] Patricia 1 month ago

I support the CCPA BC's submission.

1 3 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-98)

[ ] Lars 1 month ago

Open and transparent governments are the only hope for Citizens to actually "make a difference" in OUR World of Today. So form this Legislation with "making a difference" uppermost in your Minds, and don't cheapen IT with political stagecraft.

6 3 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-106)

[ ] Glen 1 month ago

Start living up to the issue of FREEDOM of information the whole government concept is an absolute joke.

3 2 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-111)

[ ] Mike 1 month ago

A portion of my work involves managing litigation in front of administrative tribunals (labour arbitration, the Labour Relations Board, and the Human Rights Tribunal). On occasion, FOIPPA has been used to end run the litigation disclosure process which interferes with the ability to resolve disputes. Parties to litigation should not be able to use privacy legislation for disclosure purposes.

FOIPPA should be amended such that it does not apply to a live matter before a court or administrative tribunal. Once adjudicated or settled, no such restriction should exist, but FOIPPA should not be available to be used as an obstructionist tool to parties in litigation.

3 4 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-118)

[ ] Ellen 1 month ago

I would like to see the NDP stand by their pre election committments to:

Include "duty to document" in the Freedom of Information and Protection of Privacy Act. Create penalties for those who interfere with information rights.

Create a duty to investigate instances of unauthorized destruction of government information and remove legal immunity from officials who fail to disclose documents, making contraventions of the act an offence subject to punitive fines

Place limitations on the use of Section 13, which allows government to refuse to release anything it considers policy advice.

Make the use of Section 12 of the legislation, which now requires government to refuse to release anything that might reveal cabinet discussions, "including any advice, recommendations, policy considerations or draft legislation or regulations" discretionary. This is already done in Nova Scotia.

Extend coverage of the legislation to capture subsidiaries created by public bodies.
Amend Section 25 (public interest override) of the legislation to remove the requirement of "urgent circumstances" before disclosure of information which is clearly in the public interest.
Require mandatory notification of data breaches.

End the practice of posting the texts of Freedom of Information requests it receives even before releasing any information to the requester.

Ensure the retention of B.C.'s domestic data storage requirements in the Freedom of Information and Protection of Privacy Act.

Require that private corporations delivering public services to be subject to Freedom of Information legislation.

Reduce costs and delays in using FOI.

5 11 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-121)

[ ] Chris 1 month ago

The person should hold the highest value of privacy, any data collected off a person should not be used without consent and payment.
Goverment should have No privacy, you are public empolyees and need to be held accountable to insure private interest do not get involved
Business are not people and their books should be open too, they are operating in public domain

11 9 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-123)

[ ] Gisela 1 month ago

I wholeheartedly support the excellent recommendations of the CCPA. I hope that this government will take bold action to restore public faith in the transparency of government–it is sorely needed.

5 8 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-126)

[ ] M.E. 1 month ago

Hello,
I am writing to the committee in support of the 21 well considered recommendations submitted by the CCPA. Access to information supports the public accountability of our governments, and is therefore fundamental to democracy. I urge the committee to take steps to ensure British Columbia has a robust democratic foundation as regards Information Access and Privacy. For that reason I support the 21 recommendations of the CCPA:

Recommendation 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
Recommendation 2 In the event that a public body fails to meet legislative timelines any fees connected to the request should be waived with the funds immediately returned to the requester if funds have been paid.
Recommendation 3 The Committee should recommend penalties of $500 per day for failing to meet the obligations of section 7. These penalties would commence when a public body was in breach of timelines for five days. Revenues obtained from this penalty should be directed to the Office of the Information Commissioner to assist the office in dealing with backlogs. Heads of public bodies should also receive financial penalties for failing to carry out their duties in compliance with the legislation
Recommendation 4 The Committee should endorse the recommendation of the Information and Privacy Commissioner that Government define and implement steps to eliminate the backlog of access to information requests and, in the forthcoming budget cycle, give priority to providing more resources to dealing with the greatly increased volume of access requests.
Recommendation 5 The BC Legislature should be encouraged to provide additional resources to the Office of the Information and Privacy Commissioner to reduce the backlog of reviews in her office.
Recommendation 6 The Committee should endorse the recommendation of the Information and Privacy Commissioner that the minister responsible for FIPPA should

develop a system to proactively disclose calendar information of ministers, deputy ministers, assistant deputy ministers as well as certain other staff whose calendars are routinely subject to FOI requests. This release should, at a minimum, contain the names of participants, the subject and date of meetings and be published on a monthly basis.
Recommendation 7 The timeline for response to requests should be reduced from 30 working days to 20 working days
Recommendation 8 Section 10 should be amended so that the public body must not only inform the applicant of a decision to take an extension, they must inform the applicant at the time the extension is taken and provide reasons for the extension.

Recommendation 9 Section 10 should be amended to require that a public body making application for an extension under section 10(2) make the application at least seven business days before the expiry of the time limit under section 7(1) and that a copy of this request must be provided to the applicant at the time the application for extension is made. The Commissioner's response to such a request should also be provided to the applicant.

Recommendation 10 The BC Government should adopt the discretionary standard for release of information covered by Cabinet confidentiality used in the Nova Scotia legislation.

Recommendation 11 The BC government should adopt the standard of 10 years for the release of information covered by Cabinet confidentiality rather than the current standard of 15 years.

Recommendation 12
The recommendations from the 2004 Committee remain valid today and we urge the current Committee to repeat the following items: Recommendation No. 11 — Amend section 13(1) to clarify the following: (a) "advice" and "recommendations" are similar terms often used interchangeably that set out suggested actions for acceptance or rejection during a deliberative process, (b) the "advice" or "recommendations" exception is not available for the facts upon which advised or recommended action is based; or for factual, investigative or background material; or for the assessment or analysis of such material; or for professional or technical opinions and, Recommendation No. 12 — Amend section 13(2) to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public.
Recommendation 13 The Committee should recommend that section 13(3) be amended to reduce the time limit on section 13(1) from ten to five years.
Recommendation 14 Public bodies change the manner in which briefing books are assembled, so that policy advice and Cabinet confidences are easily separable from factual information.
Recommendation 15 Government should increase the hours of free search time under the Freedom of Information and Protection of Privacy Act with consideration being given to adopting the standard now current in legislation in Newfoundland and Labrador
Recommendation 16 The Committee should recommend amendments to the legislation waiving fees where more than 20% of the material provided is blanked out
Recommendation 17 Section 10 should be amended to require that fees be waived in cases where the public body has failed to meet timelines under the legislation.
Recommendation 18 The Committee should recommend creation of an expedited process in which the Commissioner could make a ruling as to whether or not fees should be waived. This would eliminate the possibility of fee demands being made solely to delay the

process.
Recommendation 19 Add to Schedule 1 of the legislation private bodies paid by a public body to exercise functions of a public nature or to provide services which are the function of a public body. The application of the Freedom of Information and Protection of Privacy Act would only apply to those public functions provided by the private company and paid for by a public body.
Recommendation 20 In Schedule 1 the definition of "educational body," "health care body," "local government public body" and "public body" should be changed to include similar provisions for the treatment of bodies created, owned or controlled by the public body. The provision should be expanded from the definition currently in "local government public body" so that the legislation covers "any board, committee, commission, panel, agency or corporation that is created, controlled or owned by a public body or group of public bodies."
Recommendation 21 The section of the legislation requiring public bodies to store personal information in their custody or control in Canada subject to existing exceptions should not be changed.

10 8 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-132)

[ ] Judith 1 month ago

Without transparency, true democracy is not only improbable, it is impossible. It is therefore critical that the legislation be amended in accordance with the exhaustive recommendations already long proposed. The unconscionable delays and prohibitive costs that have previously and routinely confounded ordinary citizens attempting to access information that rightfully belongs to all of us as citizens must be addressed immediately. This gaping structural inequality affects how effectively we can be an informed electorate, holding our legislators to account for their decisions on policy and governance that daily affect our lives.

I would endorse the submission from CCPA BC, as well as the entirely of the exhaustive and compelling presentation by Mr. Stanley Tromp, with particular emphasis on the following key points…

"The Act needs to be amended to clarify and emphasize that Section 13 cannot be applied for facts and analysis, only for genuine advice. The section also requires 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), and the United Kingdom (Sec. 36).
The second problem is that public bodies – such as UBC and BC Hydro – have been creating wholly owned and controlled puppet shell companies to perform many of their functions, and manage billions of dollars in taxpayers' money, whilst claiming these companies are not covered by FOI laws because they are private and independent – a form of "information laundering."
The Act needs amendment to state that the its coverage extends to any institution that is controlled by a public body; or performs a public function, and/or is vested with public powers; or has a majority of its board members appointed by it; or is 50 percent or more publicly funded; or is 50 percent or more publicly owned. This includes public foundations and all crown corporations and all their subsidiaries.
The third problem is that of "oral government" – whereby government officials do not

create or preserve records of their decisions, actions or policy development because they do not wish such records to be publicized through the FOI process.
The case of the triple deletion of emails related to the missing women on the Highway of Tears was expertly analyzed in the report Access Denied in 2015 by the B.C. Information and Privacy Commissioner Elizabeth Denham. Then former Commissioner David Loukidelis thoroughly reviewed the matter in a new report, with exemplary recommendations for future record best practices – all of which should be implemented.
The B.C. FOIPP Act should be amended to add a duty for public bodies to document key actions and decisions based on the definition of "government information" found in the Information Management Act."

Please, at long last, just fix this.

9 8 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-136)

[ ] Elizabeth 1 month ago

I want to see more timely and less reluctant release of information by the BC government upon request. I'd also like to see an end to the destruction of documents that have or may be requested. That is behavior worthy of a dictatorship, not BC.

7 5 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-141)

[ ] Stanley 4 weeks ago

This is Stanley Tromp, BC FOI advocate and journalist for 20 years. You can view my report on the BC law, "The Vanishing Record," with my 67 recommendations for reform, at my FOI website – http://www3.telus.net/index100/foi (http://www3.telus.net/index100/foi)

0 1 perma ink (http://engage.gov.bc.ca/infoaccess/2018/02/23/b og-post-1/#comment-166)

Comments are closed.

Read the Archived Online Discussion

(http://engage.gov.bc.ca/infoaccess/read-the-archived-discussion/)

Sign up to Receive Updates

(/infoaccess/sign-up-to-receive-updates/)

Sime, Mark CITZ:EX

From: Vincent Gogolek <vgogolek@hotmail.com>
Sent: Wednesday, March 14, 2018 2:42 PM
To: FOI Reform CITZ:EX
Subject: Response to consultation on FIPPA reform
Attachments: BC govt FOI consult sub vg1.pdf

Hello,
Please find attached a copy of my submission to this consultation. If you have any questions or if there are problems with the submission, please feel free to contact me directly.
Sincerely,
Vincent Gogolek
s.22

Vincent Gogolek
• Vancouver BC •

March 14, 2018

By email: FOI.Reform@gov.bc.ca.

Dear Minister Sims,

Re: Submission to public engagement process on the *Freedom of Information and Protection of Privacy Act* (*FIPPA*)

I am writing to you in response to your Ministry's consultation on long overdue reform of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).

As your website states, there have been a number of reports from Special Legislative Committees, as well as by a succession of Information and Privacy Commissioners related to this topic. The recommendations for reform are well known and a matter of broad consensus. Your party's critic in the previous Legislature has also made a number of recommendations for reform which were tabled as Private Member's Bills.

This means that although this consultation may provide a useful opportunity to receive an update on, but should not serve to delay action to bring about these necessary and overdue reforms.

I would like to start by referring you to the submission of the BC Freedom of Information and Privacy Association (FIPA) to the Special Legislative Committee which reviewed the law in 2015-16. As one of the authors and the presenter of FIPA's submission, I believe it still provides useful material for reform, especially since nothing has happened to improve the situation since the Committee reported in 2016.

Among the many reforms are such initiatives as:

- Implementing a legislative duty to document in *FIPPA* itself,
- Ending the over-application of certain exceptions to disclosure, particularly sections 12 (cabinet records) and 13 (policy advice) of the *Freedom of Information and Protection of Privacy Act,*
- Bringing the subsidiaries of educational and other public bodies within the scope of the *FIPPA,* and
- Implementing mandatory breach notification (which should also be done in the *Personal Information Protection Act*)

More generally, the exceptions to release contained in Part 2 of the *Act* should be harms based. Some already are, and there is no reason why the others should not be put on the same basis.

In terms of procedures under *FIPPA*, there is an action which should be taken immediately.

During the last election, FIPA asked the three major parties about a policy brought in by the previous government to post "the texts of Freedom of Information requests it receives even before releasing any information [to] the requester." FIPA asked two questions, which are set out below along with your party's responses:

Q: Do you agree with the policy, and if so, why?

A: No.

Q: If not, will your government end this practice?

A: Yes.

This practice continues, despite your party's very clear statement that it does not agree with it and will end it. It does nothing to improve transparency of government, but does serve to intimidate requesters and should be eliminated forthwith.

I would like to conclude on an optimistic note. BC's FOI and privacy law was a groundbreaking piece of legislation when it was brought in by the NDP government of Mike Harcourt in the early 1990s. It has since become outdated and is in need of serious reform, but if you and your government follow in the footsteps of your predecessors like Colin Gabelmann and Mike Harcourt, you can bring about a major improvement to transparency in this province.

I thank you for the opportunity to provide input into the process and look forward to seeing improvements to the *Act* and its related processes in the very near future.

Sincerely,

Vincent Gogolek

Sime, Mark CITZ:EX

From: s.22
Sent: Thursday, March 22, 2018 5:35 PM
To: FOI Reform CITZ:EX
Subject: Information Access review suggestions

- Include “duty to document” in the Freedom of Information and Protection of Privacy Act.
- Create penalties for those who interfere with information rights. (In their response, the B.C. NDP noted their previously proposed legislation creating a duty to investigate instances of unauthorized destruction of government information and removing legal immunity from officials who fail to disclose documents, which would make contraventions of the act an offence subject to fines of up to $50,000.)
- Place limitations on the use of Section 13, which allows government to refuse to release anything it considers policy advice.
- Make the use of Section 12 of the legislation, which now requires government to refuse to release anything that might reveal cabinet discussions, “including any advice, recommendations, policy considerations or draft legislation or regulations” discretionary. This is already done in Nova Scotia.
- Extend coverage of the legislation to capture subsidiaries created by public bodies.
- Amend Section 25 (public interest override) of the legislation to remove the requirement of “urgent circumstances” before disclosure of information which is clearly in the public interest.
- Require mandatory notification of data breaches.
- End the practice of posting the texts of Freedom of Information requests it receives even before releasing any information to the requester.
- Ensure the retention of B.C.’s domestic data storage requirements in the Freedom of Information and Protection of Privacy Act.

The above are suggestions to improve public access to government information requests.
s.22

Sime, Mark CITZ:EX

From: Woodward, Jon <Jon.Woodward@bellmedia.ca>
Sent: Wednesday, April 4, 2018 10:18 AM
To: FOI Reform CITZ:EX
Cc: BC FIPA (fipa@fipa.bc.ca); 'shannon@policyalternatives.ca'; s.22
Subject: Written Submission for FOI Consultation
Attachments: 20180404 - Information Consultation Submission.docx

Hi

Please find attached my submission for the FOI consultation. Those copied might find this of interest.

Thanks

Jon
604-351-1831

Jon Woodward
Reporter, CTV News
500-969 Robson Street
Vancouver, BC
V6Z1X5
Jon.woodward@bellmedia.ca

Via e-mail: FOI.Reform@gov.bc.ca

April 4, 2018

To Whom It May Concern:

I am writing as a reporter for CTV News, who uses the Freedom of Information laws regularly to tell stories of interest to our readers and viewers and also in the public interest. I have argued cases in written hearings with the Privacy Commissioner and have a familiarity with the laws and the procedures. In my opinion Freedom of Information is a crucial tool.

I would give unqualified support of the submissions of FIPA and of the CCPA, including for whistleblower protection, duty to document, and penalties for those interfering with information rights. Exemptions for policy advice should also not exclude factual information, and cabinet confidences should be optional. Subsidiary organizations created by public bodies should obviously be included to avoid the temptation to hide records inside them. And urgent circumstances should just be a consideration, rather than a requirement, in disclosures under Section 25.

But I would like to spend some time on some matters that specifically affect my work as a reporter that I believe have weakened the ability of journalists to find out and relay information about important subjects to viewers, readers and the public. In some cases this has quite clearly made our society less able to perceive actual threats to our safety individually and collectively, and consequently harmed our ability to respond to them.

1. Naming the dead.
    a. The B.C. Coroners Service is responsible for fact-finding about public deaths in B.C., with an eye to understanding them better so that they may not be repeated. Part of this mission is disclosing publicly what happened to who and why, making recommendations to prevent it, and ensuring that we can trust our institutions to be accountable when the worst happens and someone dies.
    b. Recently the Coroners Service changed a policy of theirs and, invoking the privacy rights of the dead, decided to no longer reveal their names. This has included ceasing naming the dead upon request, not accepting requests for coroners reports unless the name of the dead is already known by some other means, and also severing the names of the dead from reports that are released under FOI.

c. This unfortunately compromises their mission in a significant way. Without knowing who the dead are we cannot begin to ask questions about the larger circumstances of their lives and other factors that may have come into play around how they died. Specifically in the media, a name is can be a crucial tool that can link disparate parts of a dead person's life to show a surprising or overlooked aspect of a death.
d. For example, as casinos in B.C. were expanding, I did a story looking at suicides that had been linked to gambling. We had known that a Victoria-area man had killed himself after stealing some $300,000 from a youth soccer association. A coroners report described a man who had died in a simliar situation and linked it to gambling, but without a name it was very difficult to link the death to the theft. With some digging and some luck we could confirm that the two events were one and the same, and that this man had victimized young soccer players to feed a gambling habit. It's the kind of event that is incredibly traumatic for a community, and it's vital to discuss this as gambling expands in this province. Instead, the B.C. Coroners Service policy change made it harder, not easier, to address the significant public safety issue inherent in that death. There are many cases that we reporters will not be so lucky, and important public interest observations will go unmade. https://bc.ctvnews.ca/368k-theft-suicide-at-soccer-club-was-gambling-related-coroner-1.2972963
e. The identities of those who died in significant or public ways should continue to be released, and media should be sensitive in their approach to the stories. The public interest of investigating how these people died and making the living safer outweighs the privacy interest of the dead.

2. Real-time disclosure.
    a. In the mid-1990s, when this existing law was drafted, computers were nothing like they are today, and the law is written for paper records. Some updates have happened – such as the finding that a digital record is a record – but one update is necessary: the ability to authorize ongoing, automated disclosure of simple data feeds via an FOI request.
    b. For example: Recently first responders in the Lower Mainland encrypted their radio systems. This had the effect of protecting the private information contained in those calls, but it also deprived citizens of information about the events in their community such as fires, crimes and most importantly disasters.
    c. We explored how the encryption would delay citizens from finding out about potentially life-threatening events, and hurt their ability to protect themselves in a disaster here: https://bc.ctvnews.ca/going-dark-scanner-silence-means-citizens-in-danger-will-wait-for-info-1.3829679
    d. In essence, the unavoidable bureaucratic delays of message approval translate into half an hour or more of silence from our authorities while genuine threats can harm people. Police and firefighters may be able to inform people personally of the threat at the scene, but I believe the standard should be higher: what about the people driving towards the

scene? What about people in the vicinity? In the case of the Port Coquitlam railyard fire, neighbours told CTV News they read the news of the disaster and made themselves better prepared. As one woman said: "When the RCMP told us it was time to leave, we understood why."

e. Not only that, but in cases where the threat is a limited disaster or danger, agencies are waiting days or a week to inform the public about pressing issues.
    i. In one case, a man died in front of his children while jumping into a trampoline pit. Richmond RCMP waited four days before releasing any information about that death while the facility remained open to customers, and only after four days were local media able to explore the significant public safety hazards in that pit's construction.
    ii. In another case, a massive car crash on the Coquihalla Highway was officially reported some 13 hours after it happened, and well after the crash was cleared. In that case, media using scanners heard radio communication, confirmed the story, and the public was informed in a timely way.
    iii. In another case, Vancouver police waited 5 days before informing the public about an assault with a weapon – only deciding to do so when the agency needed help finding the perpetrator. That man had been on the lam and a public safety threat for a week before the public was even aware there was a problem.
        1. I have attached the press releases in each case below.
        2. We covered some of those incidents in context here: https://bc.ctvnews.ca/going-dark-we-need-to-let-local-media-know-immediately-public-safety-minister-says-1.3831917?autoPlay=true
        3. All of these events would have been discussed on first responder radios.

f. The decision to encrypt also handicapped a natural accountability mechanism for our first responders, which is a real-time account of the work they are doing and the effectiveness of the resources that we as a society deploy.

g. It is possible via FOI to ask for dispatch records as an accountability measure. However this takes over a month, and does not solve the more pressing life safety concern.

h. It is possible to both protect the privacy of those involved in fire department responses and also inform the public about what is happening via a live feed of dispatch data, possibly to a website.
    i. Toronto does this very well (https://www.toronto.ca/community-people/public-safety-alerts/alerts-notifications/toronto-fire-active-incidents) as do a variety of American cities. That city has decided to leave its fire dispatch radios unencrypted.

ii. The cities of Calgary and Regina have shared with media scanners that can de-encrypt communications, with an agreement to not share private data. This is another form of real-time disclosure.
iii. E-Comm has an e-mail notification system called E2MV that communicates basic details about any dispatch. It can be customized as to what each e-mail address receives by type of incident. It is a ready-made system that could be deployed immediately to media to help let the public know about events in their community and events that are dangerous.

i. Any of these could serve as a first notification to media that something is going on, media can do some legwork to confirm something, and the public can be informed much more quickly. This results in a safer, more informed public.
j. I believe data like this should be disclosed in real time, and I believe that it naturally follows from Section 25: the public body has an obligation to inform people of danger when there is a risk. But we should not wait for a lengthy process of appeals and decisions from the information commissioner. This is a public safety issue and it needs to be addressed quickly.
k. The provincial government should mandate real-time disclosure of basic details about emergency response through legislation, in a way similar to Toronto, and provide a legal option to request real-time disclosure where the situation warrants.

3. Open courts versus private information.
    a. Our courts are open. Meanwhile our governments are obligated to protect private information of people.
    b. So: what happens when you ask a government to refer you to a court file involving a person?
    c. I think it's obvious that a government body and its officials should admit that it has a responsibility to inform citizens about its involvement in a court case, refer the journalist to a court file, and let the open court process allow the journalist to continue his or her research, whether it involves identifying the people involved or not.
    d. But when I asked for a referral to the court cases where drivers of off-brand Uber-like ride-hailing companies were suing the Ministry of Transportation over their tickets, I was told information about those court cases was private. Without details about the cases or the plaintiffs, it would be a herculean task to find them at the court.
    e. This is unacceptable on several levels. But it speaks to a culture problem as bureaucracies see violations of privacy as something to avoid, but there are no penalties to clamp down on transparency. Admitting that there is a trial – unless it is somehow sealed by the courts – should not be a problem.
    f. This review should result in clear guidelines for bureaucrats: they should not interfere with the open court principle and the mere existence of court cases are not secrets.

4. Information collected by the IIO
    a. Our court system is presumptively open, and that is one of the bright spots in transparency in this province. There are those who may doubt a court's decision but I rarely find someone who doubts the courts make themselves truly accountable for the decisions that they make. Such transparency encourages trust in the courts as an institution and encourages citizens to follow their judgments. It is also an important window into what happened in any significant event and why.
    b. However there is a significant gap in transparency when a case makes it to an accusation stage but does not make it to a hearing. I will focus today on the most pressing of those cases: when the accused is a police officer.
    c. The IIO in this province was created to increase police accountability by acting as an independent agency. When they recommend charges, transparency functions well, the officer is named, and information comes out in a usual fashion at the courts.
    d. When the officer is not charged, there can be problems in transparency, and I would highlight a case where there are systemic issues at play. It's well known that police dog bites are among the highest causes of in-custody injuries. There was a significant attack by a police dog in Nanaimo. It was recorded by a bystander, who supplied his video to the IIO. The IIO investigation did not result in any criminal charges against the dog handler. There was no disclosure of the evidence in this case, including the video. Outsiders were left to wonder whether the IIO's case had proceeded properly, and why the victim of the attack had been charged instead. My request for the video was denied on Section 15 grounds, prosecutorial discretion. It was upheld on review by the OIPC's review. This had the effect of cutting off our ability to question this suspect decision, and also it meant we could not see the dog bite in action – something that can help the public see how these dogs are truly deployed, and inform the debate about their use.
    e. We must hold our police officers to a higher standard, we must hold the IIO to a higher standard, and allow the public to see the evidence to make sure we have trust in the justice system. It is my hope that this review will mandate release of some evidence from the IIO in the case that there has been no criminal charge.

5. Frivolous rejections
    a. This is the pattern: a reporter asks a question of a public body. The media contact informs the reporter the public body can't say anything, vaguely referring to FOI laws. An FOI reveals there is actually quite a lot they can do and say.
    b. This has happened to my colleagues and me too many times to count. It is a waste of our time and it's a waste of taxpayer funds. Often the e-mails we receive are word-for-word cut and pastes of previous e-mails. My favourite example recently was a series of claims from the Abbotsford

Police Department that "The BC provincial Freedom of Information and Protection of Privacy Act does not allow us to provide you with any information concerning third parties." Never mind that kind of discussion is routine and happens on an ongoing basis – even with the Abbotsford Police Department. When they choose to, of course.

c. Again, I believe this is a culture problem: it is viewed as bad to release information, and not viewed as bad to hide it. An information requester can be viewed as vexatious or frivolous for asking too many questions – but there is no such complaint for someone who routinely denies obviously immediately releasable information, or invokes FOI rules in bad faith.
d. We need to introduce an ability to complain to the information commissioner about a pattern of frivolous, offhand rejections by public bodies or certain people in those public bodies, and obtain guidance or orders for them to better answer questions from the public and the media. This would discourage bad faith responses, lessen the burden on the FOI system and needlessly delay important information from being discussed or released.

6. Delaying posting reports
    a. It's important to me to have some time to craft a story before the information in an FOI is posted publically, as widespread release means that others can take advantage of my insight and hard work. However I support the widespread release of the documents after a reasonable time (say 3 days) as that is a natural compromise that encourages open government while also encouraging original journalism.

Overall: we need to respect privacy rules. But we need to get the balance right. Too often I see public employees, both well-meaning and otherwise, routinely refusing to disclose something that is presumptively public because of privacy. Sometimes it's in good faith, sometimes in bad faith, and sometimes it's a pretext to avoid disclosure. That attitude seriously harms our ability to do responsible journalism, which harms the public's right to know and our ability to live in a safe society with a responsible, accountable government. I would hope that observation helps guide this consultation process.

I am happy to provide any more information on the above subjects or answer any questions you see fit.

Sincerely,

Jon Woodward
604-351-1831

Sime, Mark CITZ:EX

From: stromp <stromp@telus.net>
Sent: Monday, April 9, 2018 11:37 PM
To: FOI Reform CITZ:EX
Cc: stromp@telus.net
Subject: S. Tromp APPENDIX to submission
Attachments: Appendix to S.Tromp sub..docx

APPENDIX TO MY FOI REFORM SUBMISSION

By Stanley Tromp. April 8, 2018

Page 035 to/à Page 036

Withheld pursuant to/removed as

Copyright

Sime, Mark CITZ:EX

From: Fairbairn, Joel CITZ:EX
Sent: Friday, December 22, 2017 1:38 PM
To: Plater, Carmelina CITZ:EX
Subject: FW: FOI law reform in 2018 Throne Speech?

From: Curtis, David CITZ:EX
Sent: Thursday, December 21, 2017 5:45 PM
To: Rorison, Trish GCPE:EX; Fairbairn, Joel CITZ:EX
Subject: FW: FOI law reform in 2018 Throne Speech?

From: stromp [mailto:stromp@telus.net]
Sent: Thursday, December 21, 2017 5:40 PM
To s.17
Cc: stromp@telus.net; Kot, Jill CITZ:EX; Curtis, David CITZ:EX; Van El, Wendy M CITZ:EX
Subject: FOI law reform in 2018 Throne Speech?

Dear Minister Sims,

B.C. freedom of information advocates are deeply disappointed and baffled there has been no real action from the Ministry on urgently needed FOI law reforms this year – nor any specific indicator there will be any next year.

The public will soon wonder if the NDP's written reform pledges of the April 27, 2017 questionnaire will be betrayed, as such pledges were under the Liberal regime. As we have too long seen, vague or abstract good intentions amount to absolutely nothing without fixed deadlines. Work tends to expand to fill the time allotted for it, and if there is no deadline (as here), than the work expands indefinitely. Yet after 20 years no more study is required, just an enactment of the 2016 Legislative FOIPP review committee report advice .

Will the pledges be fulfilled in the Spring 2018 Throne Speech? Many believe if they are not, then they never will be, and so the situation is truly "now or never." Fearing this prospect, and with nothing to lose, there will likely be a media campaign and perhaps a public petition for FOI reform presented to the Legislature in the first two months of next year, etc.

(If there is no reform by then, I seriously believe our struggle may extend for another 20 years. As I am age 55 now, by 75 I may be repeating the same arguments on Section 13 and UBC Properties coverage to my grandchildren, whereupon they may need to carry on the effort after my demise. Why would this be impossible?)

One problem that could be easily fixed within hours is the pernicious and widely abhorred open FOI request website, which the NDP pledged to eliminate eight months ago but did not. (Any bureaucratic notion that this website cannot be deleted in isolation but only as part of a "reform package" is utter nonsense and solely a delaying method.)

Surely we can, and must, do much better.

Respectfully yours,
Stanley Tromp, FOI author, Vancouver
604-733-7595

P.S. Both pledges below were followed by the opposite result, and yet one hopes this old pattern can be broken…..

"We will bring in the most open and accountable government in Canada. I know some people say we'll soon forget about that, but I promise that we won't!"
-Newly elected B.C. premier Gordon Campbell, victory night speech, 2001

"We're committed to being the most open government in Canada by May 2013."

- *C. premier Christy Clark to Vancouver Sun, October 26, 2011*

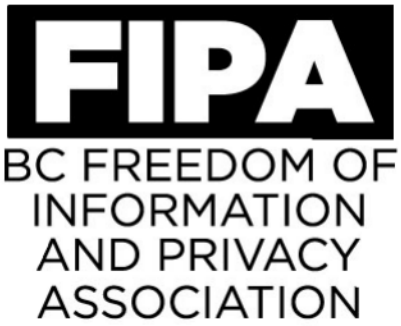
==========

Sime, Mark CITZ:EX

From: sara@fipa.bc.ca
Sent: Friday, April 6, 2018 3:46 PM
To: FOI Reform CITZ:EX
Subject: BC Freedom of Information and Privacy Association Submission
Attachments: FIPA sub to Ministry Public Engagement 2018.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Please find BC Freedom of Information and Privacy Association Submission for the FOI Reform engagement.
Regards,
Sara Neuert
Executive Director
BC Freedom of Information and Privacy Association
103-1093 West Broadway
Vancouver, BC V6H 1E2
Phone: 604-739-9788
Fax: 604-739-9148
Website: https://fipa.bc.ca
Twitter: @bcfipa
BC FIPA is located on unceded Coast Salish territory, including the lands belonging to the xʷməθkʷəy̓əm (Musqueam), Skwxwú7mesh (Squamish) and səl̓ílwətaʔɬ /Selilwitulh (Tsleil-Waututh) Nations.



Submission to the Ministry of Citizens' Services Public Engagement regarding the Review the *Freedom of Information and Protection of Privacy Act*

April 5, 2018

BC Freedom of Information and Privacy Association
103 – 1093 West Broadway
Vancouver, BC V6H 1E2
T: 604-739-9788 | F: 604-739-9148
fipa@fipa.bc.ca

FIPA would like to acknowledge the Law Foundation of British Columbia. Their ongoing support of our work in the areas of law reform, research and education makes submissions like this possible.

INTRODUCTION

The BC Freedom of Information and Privacy Association (FIPA) is a non-partisan, non-profit society that was established in 1991 to promote and defend freedom of information and privacy rights in Canada. Our goal is to empower citizens by increasing their access to information and their control over their own personal information. We serve a wide variety of individuals and organizations through programs of public education, public assistance, research and law reform.

We thank the Ministry of Citizen Services for the opportunity to provide input as part of the of the public engagement on Freedom of Information and Protection of Privacy. We hope you will find these suggestions helpful. We look forward to the outcome of this engagement process, and we hope that it will inform an update to the *Freedom of Information and Protection of Privacy Act.*

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When the *Freedom of Information and Protection of Privacy Act* (herein referred to as *FIPPA* or the *Act*) was passed in 1992, it was at the leading edge of freedom of information (FOI) and privacy legislation, and was praised internationally for being the best legislation of its kind.

After almost a quarter century later, it is clear that while the *Act* itself is basically sound, it needs a number of improvements and updates to reflect developments both in government and in technology.

Changes to FOI

On the freedom of information side, the promise of the *Act* was that it would help create a culture of openness within government; that FOI requests would be necessary only as a last resort and that routine release of information would be the rule. Today, however, we frequently see public bodies either failing to create records, or destroying them in order to avoid the possibility of release to FOI requesters. This is a crisis not just for freedom of information, but for the proper conduct of government business.

There have also been victories for transparency. The Office of the Information and Privacy Commissioner has taken action to curb the government's practice of redacting large parts of records on the pretext that they are 'outside the scope' of a given request.[1] One ministry estimated that they used this dodge in 25-40 per cent of requests when they could not find

[1] These orders include Orders F15-23 https://www.oipc.bc.ca/orders/1801 , F15-24 https://www.oipc.bc.ca/orders/1802 and F15-25, https://www.oipc.bc.ca/orders/1803 ,

an exception that applied.[2] The elimination of this practice will have a huge beneficial effect, primarily for less sophisticated requesters who may be unaware of their rights or reluctant to challenge unsupported redactions to the records they receive.

Another victory was the former Commissioner Denham's decision to change how section 25 of the *Act*, the public interest override, would be interpreted, in order to better reflect the letter and spirit of the *Act*.[3] We have a great deal to say about this decision, and need for legislative reform to supplement what the former Commissioner has done. In fact, we are worked with the Environmental Law Clinic at the University of Victoria to produce a more detailed proposal in 2015, which was provided to the Special Committee for review.

Changes to privacy

On the privacy side, BC has taken a step backward. The 2011 amendments to the *Act* reflect a position—largely criticized by the Special Committee that reviewed FIPPA for being overly intrusive—that the government had advanced during the prior year's statutory review. Other changes to the *Act* suggested that year—such as mandatory breach notification—should have been brought in, but were not.

Further, we will argue that the *FIPPA* be altered to be better-aligned with the *Personal Information Protection Act* (*PIPA*).

This public engagement

S. 80 of the *Freedom of Information and Protection of Privacy Act* requires a special committee of the Legislative Assembly to undertake a comprehensive review of the Act every six years. The last review commenced in 2015, and the Special Committee released its Report in May 2016[4]. This Report contains numerous important recommendations for reform to the FIPPA, many of which have not been adopted. Our submission to this engagement process builds on our submission to the Special Committee.

The present public engagement is taking place approximately two years after the Special Committee report was filed. We regard this engagement as an important opportunity for the Ministry to solicit additional and updated input from individual and organizational stakeholders. However, we also hope that the Ministry and the Government regard the 2016 Report of the Special Committee as a clear starting point for comprehensive reforms to the FIPPA.

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[2] Order F-15-24, para 16.

[3] Investigation Report F15-02 https://www.oipc.bc.ca/investigation-reports/1814

[4] Report of the Special Committee(May 2016): https://www.leg.bc.ca/content/committeedocuments/40th-parliament/5th-session/foi/report/scfippa_report_2016-05-11.pdf

With the benefit of both a Special Committee report and a public engagement process within a two-year period, we believe that the Government is in a position to expand, enhance and protect information and privacy rights through reforms to the FIPPA. These reforms are necessary and of great value and importance.

HOW GOVERNMENT INFORMATION BECOMES PUBLIC

There are essentially three ways information is released to the public. These are routine release, release through freedom of information and unauthorised informal release.

Routine release

Routine release of information is an absolute necessity for 'open government'. Routine release, also called proactive disclosure, is the forward trend in government information management in all the world's democracies.

FIPPA was amended in 2011 to include a new subsection, 71.1, which gives ministries power to establish categories of records to be routinely disclosed =without a FOI request.

We worked with the University of Victoria's Environmental Law Clinic to produce recommendations in this area; The full report titled "In Public Interest: Unlock the Vault"[5]and detailed recommendations can be found on the FIPA website.

Freedom of information requests

The second method of release of information is by request under the *Act*. *FIPPA* provides a complete code for making access requests to government, and a process for the review of decisions to refuse release. The *Act* balances citizens' right to information, and government's need for confidentiality in certain clearly defined, limited circumstances. However, FOI requests should not be—and were not intended to be—the primary method of release.

Unauthorized informal release

The third method of information release is what happens when there is no FOI system, or when the system is dysfunctional. That is unauthorized release, also known as whistleblowing in cases where a public employee "leaks" information. *FIPPA* protects government employees who blow the whistle in good faith in s. 30.3, but there have been

[5] https://fipa.bc.ca/wordpress/wp-content/uploads/2015/01/FIPPA-Submission-FINAL-Sent-to-Cttee.pdf

repeated calls (including from the Auditor General) for greater protection for whistleblowers.

FIPA recommends that the protections provided to whistleblowers be set out in law. This would ideally be done through the creation of a separate law, as was done at the federal level.

PRIMARY AREAS OF CONCERN

In this submission, we are highlighting particular areas of concern rather than attempting to redraft the *Act*. Our comments are based on our experience and the experiences of people who contact our office for assistance. We will also touch on administrative issues which have a large impact on FOI and privacy management.

Regarding freedom of information, the biggest issue is the destruction of records or the failure to create them in the first place. In order for the *Act* to have any relevance, on one side **there must be an obligation to create records,** and on the other side, **records must not be destroyed without proper procedures being followed.**

The issue of **delay** has long been identified as a problem with the *Act* and its administration. **Fees** have also been used to delay or block release under the *Act*, or to discourage requesters.

There is also a need to prevent what we call **'information laundering'**. This involves public bodies hiding behind private contractors or corporations that they fully control, in order to avoid scrutiny.

We will also provide recommendations regarding reform of several exceptions to release in Part 2 of the *Act*. These include exceptions for Cabinet confidences, policy advice, legal privilege and law enforcement.

The ability to **release information in the public interest** must be clarified. The current interpretation of this section is such that almost no information meets the standard, and we have a number of recommendations for potential revisions.

Finally, as the present public engagement is potentially broader than a review focused on the Act, we have taken this opportunity to recommend **an end to the practice of posting summaries of open FOI requests** prior to the release of formal responses. This practice is not mandated by law, and it is regarded by many users of FOI processes as a disincentive.

On the privacy side, we have a number of concerns. The government has an almost unlimited ability to do what it wants with any personal information that it controls. New technology means that **government's ability to data match and data mine** are no longer

subject to technical constraints. We need legal protections that are currently missing from *FIPPA* to limit government's uses of personal information, and to prevent data matching and mining.

There is also a serious issue with **domestic data storage provisions in s.30.1**. Those requirements are being circumvented by the government through the use of tokenization. We are also concerned about the possible future effects of international trade agreements – including the revised *Trans Pacific Partnership* (TPP) and pending renegotiation of the *North American Free Trade Agreement* (NAFTA) – on B.C.'s domestic data storage provisions under *FIPPA*.

FREEDOM OF INFORMATION

An obligation to create records and penalties for improper destruction

There can be no public access to records if records are not created. Unfortunately, as noted in several recent reports from the Office of the Information and Privacy Commissioner (OIPC), there has been an increasing trend toward oral government. 6 An "oral culture" is growing in government as officials choose not to record sensitive information or to delete it as soon as possible. This is in complete opposition to *FIPPA*'s legislated purpose of making public bodies more open and accountable.

In September 2012, FIPA filed a complaint with the OIPC about the rapidly increasing number of non-responsive answers to FOI requests.[7] The OIPC's investigation not only confirmed our theory, but also went on to show that the problem is even worse than we originally suspected. Most damning was the finding that the Office of the Premier had seen a dramatic spike in non-responsive FOI requests over the past year. In the 2011/12 fiscal year, 45% of all FOI requests received by the Premier's Office were returned with no responsive records.

Media requesters were hit the hardest by this decline in responsive records. In the 2010/11 fiscal year, Denham's investigators found 37% of media requests filed with the Office of the Premier came back unresponsive. By the end of the 2011/12 fiscal, that number had jumped to 49%. Denham pointed to the growing oral culture as one cause of the problem.

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[6] Investigation Report F13-01 Increase in No Responsive Records to General Access to Information Requests: Government of British Columbia https://www.oipc.bc.ca/investigation-reports/1510
See also FIPA's complaint:
https://fipa.bc.ca/new-fipa-calculations-show-dramatic-decline-in-foi-performance-4/

[7] https://fipa.bc.ca/new-fipa-calculations-show-dramatic-decline-in-foi-performance-4/

Her report showed that most communication in the Premier's Office happens verbally or is classified as "transitory," meaning it is either never written down or quickly deleted.[8]

The former Commissioner Denham's report recommended the creation of a legislative "duty to document" to ensure records are in fact created, but the government's response was that it preferred to wait for the 2015 Special Committee to consider the questions as part of its review. In March, 2017, then –Finance Minister Mike de Jong introduced a Bill entitled the *Information Management (Document Government Decisions) Amendment Act.*[9] In fact, the legislation, did not introduce a duty to document. It amends the *Information Management Act*, S.B.C. 2015, c 27, to state, *inter alia,* that "The chief records officer may issue directives and guidelines to a government body in relation to a matter under this *Act*", including the creation of records. However, this power is discretionary (as reflected by the use of the phrase 'may issue'), making it the opposite of a legal duty, which should involve the words 'must' or 'shall'. At present, there remains no meaningful legal duty to document in British Columbia. Now is the time to do this, in the interest of enhancing government transparency.

When government officials avoid scrutiny by failing to create records, this is a threat not only to access, but also to the archival and historical interests of the province. Left without records of their predecessors' thoughts, decisions and precedents, other officials are deprived of the benefit of their wisdom – and their folly. History is impoverished and our collective wisdom is diminished. As the saying goes, those who fail to learn the lessons of history are doomed to repeat them; if there is no history, it will be impossible to learn any lessons at all.

FIPA recommends that a positive duty to create and maintain records be incorporated into *FIPPA* or other legislation. This would be a duty to record decision making, and would set out minimum requirements for record keeping in critical areas.

Related to the duty to create records, there should also be a specific duty to retain documents subject to FOI requests or containing personal information, and there should be penalties for intentional destruction or alteration of documents.

Seven provinces and territories, plus the Canadian government have introduced penalties for document tampering into their FOI acts.[10] Canada's *Access to Information Act* includes fines of up to $10,000 and jail terms of up to two years for anyone who tries to deny the

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[8] This is apparently what happened with the investigation of former chief of staff Ken Boessenkool.

[9] BILL 6 – 2017 INFORMATION MANAGEMENT (DOCUMENTING GOVERNMENT DECISIONS) AMENDMENT ACT, 2017: https://www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#%2Fcontent%2Fdata%2520-%2520ldp%2Fpages%2F40th6th%2F1st_read%2Fgov06-1.htm

[10] Newfoundland and Labrador, Prince Edward Island, Nova Scotia, Quebec, Manitoba, Alberta and Yukon.

right of access to information by destroying, falsifying or concealing records, or counseling another to do so.[11]

Alberta's *Freedom of Information and Protection of Privacy Act* includes fines of up $10,000 for anyone who, among other things, destroys records for the purpose of blocking a freedom of information request.[12]

In 2015, we were shocked when heard a former of the political staffer of BC's minister of transportation alleged that he was ordered to delete dozens of emails relating to the Highway of Tears consultation, which were being requested under the *Act*.[13] The former Commissioner Denham investigated this case and in October 2015 released OIPC Investigation Report F15-03, "Access Denied: Record Retention and Disposal Practices of the Government of British Columbia".[14] The Commissioner's Office referred the matter to the RCMP for investigation pertaining the staffer's lie under oath regarding the deletion of records. In 2016, the then-former staffer was fined $2,500 for lying under oath – but faced no penalty for the actual 'triple deletion' of the emails in question.[15]

Section 74 of the *FIPPA* is intended to deal with cases where the destruction of records takes place in the face of a request for information under the Act, and appears to be designed to frustrate an actual request being processed by a public servant. Specifically, section 74(1) states that a person who willfully "obstruct[s] the commissioner or another person in the performance of the duties, power or functions of the commissioner or other person under this *Act*" faces a fine of up to $5,000. Section 6 of *FIPPA*, which imposes a duty on public bodies to assist requesters, may also apply.

It does not appear, however, that current legislation is adequate to deal with situations like this, but where there is not an actual FOI request or OIPC investigation underway. These are cases where records are not kept or where records are destroyed under claims that they are "transitory".

As the former Commissioner noted in her report on FIPA's complaint about no responsive records and in her investigation of the 'quick wins' scandal[16], the move to oral government and failure to keep adequate or any records is a growing problem. She also found "the general practice of staff in that office [the Office of the Premier] is to communicate verbally

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[11] *Access to Information Act*, RSC c. A-1 s.67.1
[12] *Freedom of Information and Protection of Privacy Act*, RSA 2000 c.F.25, s.86.
[13] http://www.huffingtonpost.ca/2015/05/29/former-bc-staffer-alleg_n_7463762.html
[14] OIPC Investigation Report F15-03: Access Denied: Record Retention and Disposal Practices of the Government of British Columbia (October 22, 2015): https://www.oipc.bc.ca/investigation-reports/1874
[15] Vancouver Sun (July 14, 2016): Former political aide George Gretes fined $2,500 for misleading B.C.'s privacy commissioner: http://vancouversun.com/news/local-news/former-political-aide-george-gretes-fined-2500-for-misleading-b-c-s-privacy-commissioner
[16] SeeF13-04 Aug 1, 2013 *Sharing of Personal Information as Part of the Draft Multicultural Strategic Outreach Plan* https://www.oipc.bc.ca/investigation-reports/1559

and in person. We were informed that staff members do not usually use email for substantive communication relating to business matters, and that most emails are 'transitory' in nature and are deleted once a permanent record, such as a calendar entry, is created."[17]

As Commissioner Denham stated regarding the complete absence of records in the investigation of the resignation of the Premier's former Chief of Staff:

> *It appears that government has chosen not to document matters related to the resignation of the former Chief of Staff. The OIPC has investigated hundreds of complaints where government claimed requested records did not exist because they were never created in the first place. There is currently no obligation under* FIPPA *that requires public bodies to document their decision-making. As such, government did not contravene* FIPPA *in opting to conduct a verbal investigation regarding the former Chief of Staff.*[18]

Another major problem is the misunderstanding (either deliberate or through ignorance) of the nature of a transitory record.

Commissioner Denham pointed to another factor in the absence of records – they were being destroyed because they were considered transitory. She expressed doubts that these records would fall under any definition of the word:[19]

> *Staff in the Office of the Premier use the following factors in determining whether a record is transitory:*
>
> - *Temporary usefulness;*
> - *Drafts;*
> - *Convenience copies of items that originate in other offices or are filed by other departments. Examples: copy of a meeting request, copy of an incoming letter to the Premier;*
> - *Only required for a limited time or for preparation for an ongoing record;*
> - *Not required to meet statutory obligations or to sustain administrative functions; and*
> - *Phone messages.*

Commissioner Denham pointed out that current government policy governing what is to be considered a transitory record was not being followed by the BC government.

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[17] Investigation Report F13-01 p.4
[18] Ibid., p.18
[19] Ibid., p.17

> *The Office of the Chief Information Officer ("OCIO"), the central office responsible for information management in government, offers guidance on transitory records on its website, stating that "Transitory records are records of temporary usefulness that are needed only for a limited period of time in order to complete a routine action or prepare an ongoing record." The Ministry of Citizens' Services and Open Government provides a similar definition in its approved government-wide records schedule on transitory records.*
>
> *The OCIO makes it clear that not all drafts or working papers are transitory records. The OCIO also states that some, but not all, email records are transitory. I believe that the determination of whether a record is transitory is not dependent on the medium of communication, but instead depends on whether it is a record of action or decision-making. The Office of the Premier should ensure that its practices regarding transitory records align with the government policy as recommended by the OCIO.*[20]

The Premier's Office is not the only part of government where the word 'transitory' is treated as a magic incantation that allows the destruction of inconvenient or embarrassing records.

In one set of records available on the BC government's open information website, a senior bureaucrat sends an email to staff, telling them to "please delete all drafts of the materials and e-mail correspondence should be treated as transitory."[21] This is not the only case where this has happened.

Records are either transitory or they are not. One does not have the option of "treating them as transitory", and the CIO has set out clear rules and procedures that set out what records are transitory and subject to destruction.

BC needs sanctions for the wanton destruction of information, but unfortunately it looks like the government has been moving in the opposite direction. In Bill 5, the *Government Information Act*, the government brought in much-needed measures to improve electronic preservation and access to government records. It updates the Depression-era *Document Disposal Act*, which used to govern how information could be handled, kept or destroyed.

Unfortunately, the good news stops here. Bill 5 failed to bring in a legal duty to document, which is essentially a requirement that bureaucrats create records of what they do. Compounding the problem, Bill 5 also brought in the removal of the possibility of anybody being charged for violating the law regarding the destruction of government records.

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[20] Ibid., p.18

[21] http://docs.openinfo.gov.bc.ca/D45786213A_Response_Package_JTI-2013-00073.PDF

Where the *Document Disposal Act* created a provincial offence for violations, Bill 5 abolished that law without preserving that possibility that someone destroying records contrary to the law could face legal consequences.

But this was not the only instance where the BC government absolved wrongdoers of any consequences for their actions.

In Bill 11, which amended the *School Act*, the government brought in some profound changes [22]to how student records are to be handled. Under the previous section 170, it was an offence to "knowingly disclose any information contained in a student record that identifies a student."

Bill 11 still restricts the purposes for which what is now to be called "student personal information" can be used for, but it removes the offence of +improperly disclosing the information.

The common element here is the elimination of either personal or organizational responsibility or liability for the misuse of information held by a public body. Even if these provisions were seldom if ever used, they did serve as a deterrent; that deterrent has now been removed.

We recently commissioned an Ipsos poll on several issues related to freedom of information in British Columbia, including both the duty to document and penalties.[23] The results of this poll demonstrate strong public opinions on both issues:

> *1. In your opinion, how important is it that provincial government officials are legally required to keep accurate and complete records of what they do on the job?*
>
> - *Very important – 81%*
> - *Somewhat important – 17%*
> - *Not very important – 1%*
> - *Not at all important – <1%*
> - *Don't know – 2%*
>
> *2. BC's information and privacy law currently does not have penalties for interfering with information access rights. Many other Canadian jurisdictions do have such penalties. Should government officials who interfere with access to information rights face penalties?*
>
> - *Yes – 85%*
> - *No – 3%*

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[22] http://www.huffingtonpost.ca/2015/03/26/bcs-plans-for-professi_n_6951326.html

[23] https://fipa.bc.ca/poll-2/

- *Don't know – 12%*

Time limits and delay

What started out as a thirty-calendar-day response time has been turned into thirty business days, and the government amended s.10 of the *Act* to give itself a thirty-day extension if they feel "meeting the time limit would unreasonably interfere with the operations of the public body".[24]

As a practical matter, this delay is at the discretion of the public body, as there is no way for a requester to complain to the Commissioner about the additional time being taken, nor would the matter be heard by that office before the end of the additional thirty-business-day period. This means there is no recourse where a public body takes additional time.

This is a serious problem.

Under s.6, the head of a public body must "…make every reasonable effort to assist applicants and to respond without delay..."

Black's Law Dictionary defines duty as:

> *A human action which is exactly conformable to the laws which require us to obey them. Legal or moral obligation. Obligatory conduct or service. Mandatory obligation to perform.*

A duty is not discretionary, nor subject to whim or budget constraints.

Timeliness is extremely important in the context of FOI. *FIPPA* is perhaps the only statute on the books that is routinely violated without any chance of penalty.

One recent and egregious example can be found in the OIPC mediation summaries.[25] In that case, the public body denied access to audit summaries on the basis of s.12(3). When that failed to convince the OIPC, the public body moved on to s.22. After the privacy argument was shot down, the public body moved on to s.15, saying release could harm investigative techniques, could not point to any likelihood of harm. As a final gambit, the public body resorted to s.21, again shot down because of the weakness of their proposed arguments. After a delay of six months while these increasingly implausible exception claims were raised, the requester finally received the records they were entitled to all along.

This case illustrates the need to have some type of sanction to prevent public bodies from wantonly engaging in this type of high handed and wasteful behavior.

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[24] FOIPPA s.10(1)(b)

[25] F15-10MS https://www.oipc.bc.ca/mediation-summaries/1817

FIPA recommends that a section be added to *FIPPA* that penalizes any person or public body that flagrantly breaches the duty to assist requesters by obstructing access rights or failing to properly document government decisions.

Fees are also used to delay and discourage requests

FIPA has experienced numerous instances where fees have been levied by a public body, only to have them reduced or eliminated on review. We have developed a practice of paying the deposits requested to avoid the delays set out in s.7(4) and s.7(5), but other FOI users may not be able to be afford the fees, and either abandon their request or go through an extended delay while they protest the fee.

We have also noticed that some public bodies are refusing to accept requests for fee waivers that accompany the request for information, insisting that such requests can only be made once fees have been assessed and requested. The only conceivable reason for such a demand is s.75(5.1), which requires a head of a public body to respond within twenty days to a request for a fee waiver. **FIPA recommends s.75(5.1) be amended to clarify that a fee waiver can be requested as part of the request for information.**

The first Special Committee agreed that public bodies should be encouraged to complete information requests in a timely manner. They recommended:

> *That public bodies comply with time lines under section 7 of the* Act*, and that in the event of non-compliance with time lines, fees for requests that are not fulfilled within the prescribed time be waived.*

FIPA recommends that an automatic fee waiver for non-compliance be implemented.

The provincial government has had a centralized system for handling of FOI requests for several years, which means that misdirected FOI requests can be sent to the relevant ministry or public body immediately, rather than being transferred from one ministry to another. Section 11 of *FIPPA*, however, still provides a twenty day period for transferring misdirected requests. This is not necessary due to the provincial government's current practices.

FIPA recommends that section 11 of the *Act* be amended to altogether eliminate the twenty day transfer period for public bodies which are part of the new FOI request system.

"Information laundering"

Access to records of 'quasi-governmental' bodies

The trend of the past two decades to outsource work formerly done entirely within government has created new problems for access to records related to public functions.

Some of these responsibilities and functions have been transferred out of the public sector proper and into the sector of organizations that have been called "quasi-governmental" or "quasi-public" bodies. These bodies include multi-governmental partnerships, government-industry consortia, foundations, trade associations, non-profit corporations and advisory groups.

Access to records of subsidiaries of educational public bodies

It has been more than ten years since- Education Minister Shirley Bond promised to put the subsidiary companies of school boards under *FIPPA*. This promise was made in response to a report about school board subsidiaries losing huge amounts of taxpayer money, which included the recommendation that those subsidiaries be subject to *FIPPA*. This is also an issue for post-secondary institutions in the wake of an unfortunate BC Supreme Court decision in *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*.[26] That decision was a judicial review of an adjudicator's decision regarding a private company owned and operated by Simon Fraser University (SFU). Some of the relevant facts regarding this company are:

- Its shares are 100% held by SFU
- All its directors are appointed by SFU
- Its physical presence is entirely within SFU without even a distinct office
- All records were held on SFU's campus
- Its activities are 100% dedicated to marketing SFU research

The adjudicator had found that due to these factors, SFU had control of those records for the purposes of *FIPPA* and should therefore provide them to the requester,[27] but Mr. Justice Leask disagreed, finding that "the Delegate erred in law by piercing SFU's corporate veil without applying the proper legal standard for doing so. I also find that the Delegate erred

[26] Simon Fraser University v. British Columbia (Information and Privacy Commissioner 2009 BCSC 1481
[27] Order F08-01 at para 93

in finding that those records were under the control of SFU and hence subject to the *FIPPA*..."[28]

Justice Leask's decision was appealed, but the BC Court of Appeal shut down its hearing of this case[29] after the death of the requester on the grounds of mootness.

The former Commissioner Denham wrote to the Minister of Citizens Services in 2011to express her concern about this situation and to seek amendments to the *Act*.[30] In her letter she pointed out that *FIPPA* provides language that would deal with these subsidiaries, since it covers the subsidiary companies of local government bodies.

It includes in the definition of a "local government body":

> *(n) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in paragraphs (a) to (m) and all the members or officers of which are appointed or chosen by or under the authority of that body*

By using a similar definition for 'educational bodies', the gap could easily be closed. It would also remove an anomaly in the way education subsidiaries are covered compared to those of municipalities.

The Minister responded that this was a complicated question and would require extensive consultation. That was almost 7 years ago, and there is no indication that there has been any serious consultation at any point since then.

FIPA recommends that the definition of education body in Schedule A of the *Act* should be amended to mirror the definition of 'local government body'.

Legislative overrides of *FIPPA*

A large number of bills have been passed which take advantage of s.79 to specifically override some or all parts of *FIPPA*. One recent example is Bill 39, passed in the Legislature, the *Provincial Immigration Programs Act*. The former Commissioner expressed her concern[31] about yet another use of the legislative override in a situation where the existing protections in the *Act* (in s.22) appear to be entirely adequate to deal with the claimed purpose of the override.

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[28] Simon Fraser University v. British Columbia (Information and Privacy Commissioner), op cit para 81

[29] BCCA File CA 37692

[30] https://www.oipc.bc.ca/public-comments/1138

[31] Letter to Minister Bond https://www.oipc.bc.ca/public-comments/1869

It is not acceptable for BC to have 44 laws on the books in this province that include overrides of *FIPPA* in whole or in part. Especially since *FIPPA*'s existing exceptions to release appear to be entirely adequate to protect the other societal interests involved.

The problem seems to be based on the preference of public bodies to simply claim the protection of an exception without going to the trouble of showing why it would apply to the records in a given situation. However, exceptions to our information rights should not be made simply for the convenience of the bureaucracy.

FIPA recommends that no further overrides be made to the *FIPPA*, and that existing overrides be examined to see if *FIPPA's* current exceptions would be suitable. Public written justification should be provided for each.

Exceptions to release

These exceptions were set out in the original version of the *Act* to balance the right of access to information with various other societal interests.

Over the years a number of these exceptions have come to be more broadly interpreted by government and in some cases by the courts, leading to diminished access rights and ever greater scope for preventing the release of information.

Ideally all exceptions would be harm based. Public bodies should be required to show not just that a particular interest is engaged, but that there is a real risk of harm to that interest if access is given to certain records. The *Act* already contains a number of harms tests, and these have not proven to be insurmountable barriers to protecting legitimate exceptions to release.

Cabinet confidences (s.12)

There was once a time (1968) when conventional legal wisdom was that Crown privilege meant a police officer's notebook could not be released for use in a civil case about a traffic accident.[32]

Since that time, the concept of Crown privilege has been restricted primarily to the deliberations of Cabinet and related records that might reveal what ministers were discussing. The preservation of such confidences is necessary to maintain conventions of responsible government, such as Cabinet solidarity, and to protect the integrity of decision making.

[32] *Conway v Rimmer* [1968] AC 910; 1 All ER 874 (HL)

The common law approach to Cabinet confidences in Canada was set out in *Babcock v. Canada*[33] by Chief Justice McLachlin. This involves balancing the public interest in disclosure against the need for Cabinet confidentiality.

> *At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield. Courts began to weigh the need to protect confidentiality in government against the public interest in disclosure, for example, preserving the integrity of the judicial system. It follows that there must be some way of determining that the information for which confidentiality is claimed truly relates to Cabinet deliberations and that it is properly withheld. At common law, the courts did this, applying a test that balanced the public interest in maintaining confidentiality against the public interest in disclosure.*[34]

The rules governing what is not subject to release in response to a request under *FIPPA* are set out in s.12 of the *Act*.

The leading interpretation of this section is found in the 1996 BC Court of Appeal decision in *Aquasource Ltd. v. British Columbia (Information & Privacy Commissioner)*.[35]

That decision turned on wording in s.12(1) as to whether information requested by an applicant must be refused because it "would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees."

The Court in *Aquasource* took a very broad view of what was included in "substance of deliberations". In the words of Mr. Justice Donald,

> *I do not accept such a narrow reading of s.12(1). Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted ...". That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet*

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[33] Babcock v. Canada (Attorney General), 2002 SCC 57, [2002] 3 S.C.R. 3.

[34] Ibid. para 19

[35] Aquasource Ltd. v. British Columbia (Information & Privacy Commissioner) (1998), 8 Admin. L.R. (3d) 236 BCCA

considered (or would consider in the case of submissions not yet presented) in making a decision.[36]

Since *Aquasource* was decided, other provinces with similar or identical provisions in their FOI laws have declined to follow the decision of the BC Court of Appeal, preferring a less restrictive approach which still protects the actual deliberations of Cabinet. One leading case is the Nova Scotia Supreme Court decision in *O'Connor v. Nova Scotia*.[37]

In that case, the court considered two possible interpretations of this section:

> *[20] In this context, the word "substance" may allow two potentially conflicting interpretations. It could broaden the meaning of "deliberations" to include all information upon which the deliberations are based. That was the approach taken by the British Columbia Court of Appeal in Aquasource Ltd. v. B.C. (Information and Privacy Commissioner), [1998] B.C.J. No. 1927 when interpreting British Columbia's equivalent provision.*
>
> *[21] On the other hand, "substance" could refer to Cabinet's actual deliberation process. In other words, only that information touching on the actual deliberations would be protected. This view would significantly limit the s. 13(1) exception in favour of more Government disclosure.*
>
> *[22] With respect, when comparing the two approaches, I prefer the latter interpretation. To interpret the "substance of deliberations" as protecting all information "form [ing] the basis of Cabinet deliberations", would paint Cabinet confidentiality with too broad a brush. Cabinet may base its deliberations on a variety of data, some of which deserves no protection at all.*

FIPA's experience has been that where the s.12 exception is claimed, the government is taking an ever-wider interpretation to the already very broad approach set out in *Aquasource*. Fortunately, the courts do not seem inclined to follow the government's lead, requiring the release of subject headings of agendas for example.

It is imperative that BC's FOI laws reflect the proper protection of the deliberations of Cabinet, and not a notion that any document however vaguely related, falls within this mandatory exception.

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[36] ibid at 39

[37] O'Connor v. Nova Scotia, 2001 NSSC 6

Local public bodies

We are at a loss as to why section 12(3), which applies to local public bodies, lacks a parallel to s. 12(2)(c), which applies to Cabinet confidences.

Section 12(2)(c) states that Cabinet confidentiality does not apply to "…information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if

> (i) the decision has been made public,
>
> (ii) the decision has been implemented, or
>
> (iii) 5 or more years have passed since the decision was made or considered."

The lack of similar qualifying language in 12(4) allows local public bodies to withhold background materials or analysis in the above conditions not allowed to Cabinet. FIPA finds this to be inappropriate and we recommend that the exception be amended to remedy what we conclude was an unfortunate oversight.

Subsections (5), (6) and (7) provide that records of what are known as Caucus Cabinet Committees are to be treated as actual committees of Cabinet. These subsections were enacted after the Commissioner found that these committees could not be construed to be actual Cabinet committees for the purposes of s.12.

The Commissioner was correct, and these extensions of what should be an exception limited to the protection of the deliberations of Cabinet are contrary to the spirit (and what was the letter) of the *Act*.

FIPA recommends that:

- **Section 12 should be amended to clarify that "substance of deliberations" only applies to the actual deliberations of Cabinet or a local public body.**
- **Section 12 should be made discretionary and that the time limit for withholding records should be reduced to 10 years.**
- **Section 12(4) should have similar qualifying language to s. 12(2) (c)**
- **Section 12(5)(6) and (7) should be removed.**

Advice and recommendations (s.13)

The purpose of the exception in s.13 is to allow for the unfettered discussion and development of policy within government by public servants for decision by their political masters.

As the BC government itself once stated:

> *The Ministry submits that the underlying intent of section 13 is "to allow full and frank discussion of advice or recommendations within the public service, preventing the harm that would occur if the deliberative process of government decision and policy making was subject to excessive scrutiny." (Submission of the Ministry, paragraph 5.02) (emphasis added)*
>
> *A common step in the deliberative process of government decision making is the preparation of a discussion paper which lists and evaluates recommendations developed by the Public Body for change in policy or programs. This process requires full and frank discussion within the Public Body of the advice and recommendations which are developed. This is exactly the type of information which section 13 is intended to protect from disclosure. (Reply Submission of the Ministry, paragraph 5)* (emphasis added)[38]

Clearly the intent of the legislature in the design of s.13 was to protect the legitimate interest of society in allowing public servants to freely and candidly provide advice or recommendations to decision makers in government without fear of premature disclosure.

However, the legislature only intended to protect the advice and recommendations of public servants, not to create a blanket that could be thrown over any information provided for use in the deliberative process.

In a speech to the 2007 BC Information Summit, former Attorney General Colin Gabelmann (the Minister responsible for the original *FIPPA*) pointed out that the intention of the legislature in drafting s.13 was very different from what the BCCA in *College of Physicians* thought it was:[39]

> *Section 13 was so clear and obvious that there was not a word spoken by any member of the House on it during the committee stage debate. Not a word! Somehow, the B.C. Court of Appeal in 2002 determined that the Information and Protection of Privacy Commissioner got it wrong in interpreting the words "advice and recommendations" in*

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[38] Order 215-98. See also Order No. 193-1997 p7

[39] See: http://thetyee.ca/Views/2007/10/15/FOI/

this manner. They said the trial judge was wrong, too, in concurring with the commissioner.

I have to tell you that the Appeal Court quite simply failed to understand our intention - the intention of the legislature - when using these words as we did…. I can't think of another example where the Appeal Court got something as wrong as they did here. The Act should not really have to be amended because it is really clear in every way, but unfortunately an amendment has been our only option for the past five years. A government which believes in freedom of information would have introduced amendments in the first session of the legislature after that Appeal Court decision to restore the act's intention.

Now, the Appeal Court decision means that the secrecy advocates in government are using the two sections of the Act in tandem to refuse to allow public access to material that is at the very heart of the principles of freedom of information. This is an outrage and must be remedied.

The legislature also foresaw the potential for abuse in subsection (1) if there was an overbroad reading of the words advice and recommendations. In subsection (2) they added an extensive list of types of information which could not be withheld under the rubric of 'advice and recommendations', even though they may have formed much of the basis for the advice or recommendation.

The John Doe decision

In 2015, the Supreme Court of Canada had the opportunity to pronounce on the nature of the policy advice exception in a case called *John Doe v. Minister of Finance*.[40]

In that case, the high court held that a series of drafts were covered under s.13 of the Ontario law (which also covers policy advice) and did not have to be released to the requester.

In the words of the court,

Protection from disclosure would indeed be illusory if only a communicated document was protected and not prior drafts. It would also be illusory if drafts were only protected where there is evidence that they led to a final, communicated version. In order to achieve the purpose of the exemption, to provide for the full, free and frank participation of public servants or consultants in the deliberative process, the applicability of s. 13(1) must be ascertainable as of the time the public servant or

[40]John Doe v. Ontario (Finance) 2014 SCC 36 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13633/index.do

> *consultant prepares the advice or recommendations. At that point, there will not have been communication. Accordingly, evidence of actual communication cannot be a requirement for the invocation of s. 13(1). Further, it is implicit in the job of policy development, whether by a public servant or any other person employed in the service of an institution or a consultant retained by the institution, that there is an intention to communicate any resulting advice or recommendations that may be produced. Accordingly, evidence of an intention to communicate is not required for s. 13(1) to apply as that intention is inherent to the job or retainer.*[41]

There is a great deal of concern that information which was previously available to requesters through FOI will now be denied by public bodies, forcing another lengthy legal fight to determine just how far this exception can be stretched.

And it appears to stretch quite far indeed.

In a decision following the *John Doe* decision, the BC Court of Appeal upheld the decision of a judge of the BC Supreme Court in a case involving a request not for audits, but the summaries of audits that had been released without an FOI by other health authorities.[42]

The Commissioner has also identified audits as the types of records that should be released as best practices for open government.[43]

It would be perverse if the Supreme Court of Canada's ruling in *John Doe* becomes the means by which public bodies are able to prevent the release of information through the FOI process – especially when that information is the type that the Commissioner would recommend to be released proactively.

We ask that you eliminate the uncertainty, and take action to amend s.13 to restore it to its proper role: of protecting the advice of public servants to their political masters.

FIPA recommends that the s.13 advice and recommendation exception be amended to include only information which recommends a decision or course of action by a public body, minister or government.

Legal privilege (s.14)

The operation of this section has come to our attention as a barrier to transparency.

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[41] Ibid., para 51

[42] Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner), 2013 BCSC 2322

[43] Investigation Report F11-02 Investigation Into The Simultaneous Disclosure Practice Of BC Ferries https://www.oipc.bc.ca/investigation-reports/1243 Appendix A

In 2010 the OIPC handed down a ruling in a case involving the Vancouver School Board (VSB).[44] The VSB claimed that a review of its policies and practices prepared by a lawyer was exempted from release because it was covered by s.14. The Adjudicator disagreed, pointing out that there was no indication in the retainer letter or elsewhere that the lawyer was retained for the purpose of providing the public body with legal advice.[45]

Subsequent orders have shown that where public bodies retain lawyers to provide reports which do not themselves constitute or contain legal advice, they are now careful to include a line in their retainer that the lawyer is also retained for the purpose of providing legal advice.[46]

This loophole allows public bodies to avoid releasing reports (especially controversial ones) by retaining a lawyer through an agreement that mentions legal advice, and then employing s.14.

Clarifying this section to prevent this practice would not undercut the importance of the legal privilege exception, but would properly frame its application in the FOI context. This is not a problem exclusive to BC: The Ontario Commissioner is now hearing a case involving a university whose hockey team was involved in sexual assault allegations. The university hired a law firm, and the firm then engaged a consultant to conduct an investigation of the incident. A journalist requesting the report was told that it was privileged because the law firm had hired the consultant. The hearing has taken place and we are awaiting the Commissioner's decision[47]. If this maneuver is successful in blocking access to the consultant's report, we can expect to see this type of activity take place in this province unless the law is changed.

Law enforcement (s.15)

A decision made in 2015 by the former Information and Privacy Commissioner raised the question of when an investigation is open for the purpose of the *Act*.

In a response to FIPA's complaint about the mysterious RCMP investigation into the Ministry of Health data breach firings, the former Information and Privacy Commissioner Elizabeth Denham found that it was "not unreasonable" for the BC government to believe an

[44] Order F10-18
[45] Ibid., at para 34.
[46] See for e.g. Order F12-05 (2012 BCIPC No. 6), para 23: https://www.oipc.bc.ca/orders/923
[47] https://decisions.ipc.on.ca/ipc-cipvp/orders/en/item/134807/index.do

RCMP file was not really closed, because it would be reopened "if and when" the government's own related investigation was completed.[48]

Responding to a FOI request from FIPA, the BC government claimed an RCMP investigation could be harmed by releasing the requested records. The RCMP sent an email supporting the government's position, but after the hearing, and before the OIPC made their decision, the RCMP closed the file and told the BC government that it would be reopened "if and when" the latter completed their investigation into the matter.[49]

This continues to leave some uncertainty about when an investigation can be finally defined as concluded, and it also raises the question of whether

FIPA recommends that s.15(1)(a) be amended to add the word "active" before "law enforcement matter".

Release in the public interest (s.25)

There has been important and positive change in the way this section was being interpreted by former Commissioner Denham since the 2010 review of the *Act*.

In a major report released in July of 2015[50], Commissioner Denham made a major reinterpretation of the law dealing with release of information in the public interest without a freedom of information request.

Commissioner Denham told the government to have all other departments to look through their files for information that must be released under a new interpretation of Section 25 of *FIPPA*.

Section 25(1) of *FIPPA* requires a public body to release information "without delay" without a FOI request where there is "…a risk of significant harm to the environment or to the health or safety of the public or a group of people", or that is "for any other reason, clearly in the public interest."

According to the former Commissioner's new interpretation, the element of urgency implied by the words "without delay" applies to the release of information by the public body. In other words, all information that is clearly in the public interest must be released without delay – not just emergency information.

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[48] https://fipa.bc.ca/wordpress/wp-content/uploads/2015/09/OIPC-resp-ltd-re.-Cowan-letter-F15-61767.pdf
[49] See: http://www.vancouversun.com/health/RCMP+probe+fired+health+workers+never+happened/11106928/story.html
[50] Investigation Report F15-02 https://www.oipc.bc.ca/investigation-reports/1814

This new interpretation is similar to one we have suggested to in previous submissions, and which have included a recommendation in the 2010 and 2015 Special Committee Reports.[51]

In our view, and that of the former Commissioner, the current interpretation of section 25, which claims it contains an 'implied' temporal requirement is in error. Information need not be of an urgent nature to be disclosed in the public interest[52]. The only temporal requirement set out in law is that of the public body to disclose, without delay, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or which is otherwise clearly in the public interest.

The former Commissioner had previously released another investigation report on the lack of use of s.25 by public bodies in 2013, stating that the reading-in of a temporal requirement into s.25(1)(b) has resulted in a situation where; "[t]he intention of Legislature with respect to this provision is not being achieved."[53]

In that report, the former Commissioner had also recommended the BC government amend the law to remove the 'urgency' requirement.[54]

FIPA's preferred solution to this problem would be for s.25 to be amended to restore its original intent. The purpose of the provision is to ensure that, regardless of other interests that may tend to influence the decision of a public body, the final decision regarding the disclosure of records is made in the public interest.

FIPA recommends that s.25 be amended in accordance with the Commissioner's recommendation to remove the temporal requirement.

The Posting of Summaries of 'Open' Freedom of Information Requests

Most of the issues addressed in our submission concern the content and application of the FIPPA. This issue, by contrast, concerns an administrative practice adopted by the BC Government. In 2016, the BC Government announced that it would begin posting summaries of open freedom of information requests on its Open Information website.[55] This was framed as a reflection of the Government's commitment to proactive disclosure. The practice continues to this day, and visitors to the website can download a regularly-updated

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[51] Op cit, Recommendation 19

[52] https://www.oipc.bc.ca/rulings/sectional-index/

[53] Investigation Report F13-05 – Information & Privacy Commissioner for B.C., p. 36

[54] Ibid.

[55] https://www2.gov.bc.ca/gov/content/governments/about-the-bc-government/open-government/open-information/browse-search-catalogue/open-freedom-of-information-requests

spreadsheet that provides the start date, Ministry, request number, request type, applicant type, due date, status, and a summary description of open FOI files.

We strongly support the posting of records associated with completed FOI requests, but we call on the Ministry to cease the practice of posting summaries of open requests. Under the current system, summary information regarding requests made to Provincial ministries or the Office of the Premier is made publicly available prior to an applicant receiving any requested records.

This practice, while framed as a matter of proactive disclosure and transparency, can serve as a discouragement to potential *FIPPA* applicants. Media applicants, in particular, benefit from being able to prepare and file requests with some expectation of exclusive knowledge during the processing period. We have heard from numerous journalists and media researchers about the practice of posting open requests, and we consistently hear that it serves as a disincentive to investigative reporting using FOI. FOI-based journalism requires a considerable investment of time, energy, and resources. This investment is weighed, on balance, against the prospect of using the results of this research as part of a breaking public interest story. The posting of summaries of open files reduces the likelihood that a given story will indeed be exclusive.

For some non-media applicants, the prospect of having a summary of their open request posted online prior to the conclusion of the request process can be intimidating.

The practice of posting summaries of open FOI requests to the Office of the Premier and provincial Ministries is not mandated by *FIPPA*. Nor is it consistent with the practices of other public bodies subject to *FIPPA*. It was implemented without public consultation, through an executive-level decision. This practice could be suspended immediately without the need for any amendments to *FIPPA* or other legislation.

FIPA recommends that the BC Government immediately suspends the practice of posting summaries of open FOI requests to its Open Information website.

PRIVACY PROTECTION

The BC government has had a record of accomplishment in the privacy sector. It has shown leadership among the provinces, first by introducing the *Personal Information Protection Act* and second by strengthening the privacy provisions of *FIPPA* to counter the potential impact of foreign legislation when the personal information of British Columbians is disclosed to foreign-owned corporations.

However, there are some storm clouds on their way.

During the 2010 consultation, the provincial government made a number of requests for greater ability to share personal information in the name of "citizen-centred services". The Special Committee to review the *FIPPA* in 2010 were not convinced and specifically rejected many of the government's recommendations.[56] However, the government went ahead and instituted those changes in 2011.

Domestic data storage (s.30.1)

This section was added to the *Act* in 2004 after a huge controversy over the outsourcing of pharmacare information to a subsidiary of the American company Maximus.

The amendment followed the recommendations in an extensive Special Report by the Office of the Information and Privacy Commissioner entitled *Privacy and the USA Patriot Act – Implications for British Columbia Public Sector Outsourcing*.[57] That report recommended that *FIPPA* be amended to, among other things,

> *Prohibit personal information in the custody or under the control of a public body from being temporarily or permanently sent outside Canada for management, storage or safekeeping and from being accessed outside Canada;*[58]

This provision has ensured that all public bodies in BC store personal information in this country, but has been – and continues to be – under threat.

One source of threat is the negotiation and renegotiation of international trade agreements, including the *Trans-Pacific Partnership* and the *North American Free Trade Agreement*. In the context of a globalized digital economy that is driven, in part, by transnational flows of data, a number of states, corporations, and public bodies have characterized 'data localization' provision as barriers to trade and commerce. This issue arises regularly, and is not limited to a particular agreement or negotiation process.

For example, a 2015 backgrounder to the then-proposed Trans-Pacific Partnership agreement included the following points under the heading of Electronic Commerce:

- *Prevents governments in TPP countries from requiring the use of local servers for data storage.*

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[56] Report of the Special Committee to review *FIPPA* 2010, p.22 "We do not support the idea of indirect collection of personal information, without consent, except for the extenuating circumstances specified in the existing Act, nor the addition of an implicit consent clause. With regard to the recommendations promoting information sharing, we do not think a compelling case was made in general terms to expand the consistent-purpose provision, and the language of the amendments was not specific enough to guide committee members during their deliberations."

[57] OIPC Oct 29, 2004 https://www.oipc.bc.ca/special-reports/1271

[58] Ibid., Recommendation 1 (a)

- *Prevents governments in TPP countries from demanding access to an enterprise's software source code.*[59]

The intention, in this case, was to prevent governments from having laws on their books which require domestic data storage, and s.30.1 of *FIPPA* would clearly have contravened such an agreement.[60]

In case there was any doubt about what the drafters of the treaty intended in this chapter, the federal government provided a cheerful example of how it would work to help businesses:

> ***Bringing down virtual barriers***
>
> *An entrepreneur has developed a proprietary system for electronic payments that protects both the consumer and vendor with every transaction. When he heard about the TPP, he knew it would help him expand his business into important Asian markets. He is pleased with the TPP's dedicated Electronic Commerce Chapter, which will help establish an environment that is more conducive to the type of work he and his customers do.* ***Of particular interest to this entrepreneur are provisions that enable the free flow of data across borders and prevent the Parties from requiring the local establishment of computing facilities.*** *That means that not only can he sell his technology to online vendors in TPP markets right from his home in Canada, but there will be more demand for his technology as online vendors in TPP markets expand their own business to take advantage of the benefits of the TPP.*[61] (emphasis added)

It is possible that provisions along these lines would not apply to *FIPPA*, but this would require that the *Act* be covered by what is known as a 'reservation'. A reservation is usually contained in an appendix to the treaty in question and it lists existing laws of the various signatories which are specifically exempted from the operation of the treaty's general provisions. Absent a reservation for *FIPPA*, BC would be forced to amend the *Act* to remove its data localization provision, exposing personal information collected by BC public bodies up to laws in the jurisdictions where this information is stored . Failing to make such a change could open the federal government up to legal action from companies prevented from bidding on (and making a profit on) storage of public sector controlled personal

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[59] http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/13-E-Comm.aspx?lang=eng

[60] It should be noted that the Canada-Europe Trade Agreement (CETA) does not use this language. http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/18 aspx?lang=eng

[61] Ibid.

information. It is unclear exactly how much that could cost the federal government, but other cases have seen settlements in the millions of dollars.[62]

More recently, the issue of data localization has arisen in the context of the renegotiation of NAFTA. In its July 2017 Summary Objectives for the NAFTA Renegotiation document, the Office of the United States Trade Representative stated the following under the heading Digital Trade in Goods and Services and Cross-Border Data Flows:

> *Establish rules to ensure that NAFTA countries do not impose measures that restrict cross-border data flows and do not require the use or installation of local computing facilities.*[63]

This language represents a direct challenge to BC's domestic data storage requirement on section 30.1 of FIPPA. In response, and also In July 2017, we made a formal submission to the federal government's consultation on NAFTA.[64] Our submission urged the federal government to resist efforts to erode the privacy protections afforded by the domestic data storage requirements found in British Columbian and Nova Scotian information and privacy laws. At the time of this submission, the outcome of the latest round of NAFTA talks is still uncertain.

This is an area where there is an urgent need for sustained commitment and vigilance by the BC Government. The local data storage requirement under *FIPPA* represents a privacy-protective best practice. It serves to ensure that personal information collected and stored by public bodies in BC remains in Canada and therefore subject to laws that reflect our democratic processes and commitments to privacy. There is no doubt that local data storage requirements will continue to come under attack from parties who regard them as a barrier to business. There is a need to ensure that such challenges are met by a firm stance in defence of British Columbians' privacy rights under section 30.1.

FIPA recommends that any amendments to *FIPPA* preserve the local data storage requirement under section 30.1, and that the BC government actively defends this requirement during its participation in the negotiation or renegotiation of international trade agreements.

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[62] Bowater

[63] https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf

[64] https://fipa.bc.ca/wordpress/wp-content/uploads/2017/07/FIPA-Sub-re-NAFTA-2017-vg1.pdf

Tokenization and BC government contract with Salesforce.com

There is another aspect to the domestic data storage provisions of the *Act*, one that is playing out behind closed doors in government.

In October 2013, a contract was signed with CRM software giant Salesforce.com. This contract is referred to in a memo from the CIO to Assistant Deputy Ministers and ministerial information officers urging them to contract the office of the CIO for more information on how to use the services offered by Salesforce.com, despite it being a US-based company.[65]

The government is of the view that tokenization of the personal information is a means to avoid the domestic data storage provisions of *FIPPA*.

Commissioner Denham had been contacted by the BC government about the possibility of using tokenization to get around the domestic data storage requirements in s.30.1 of the *Act*. The Commissioner released her response in June 2014.[66]

This is how Commissioner Denham described tokenization:

> *Tokenization involves replacing information in an electronic record with a randomly-generated token. The original information can only be linked to the token by what is known as a 'crosswalk table'. Tokenization is distinct from encryption; while encryption may be deciphered given sufficient computer analysis, tokens cannot be decoded without access to the crosswalk table.*[67]

In her response to the CIO, the Commissioner stated that the government's plan could be in compliance with *FIPPA* if tokenization of the information being stored outside Canada was "adequate" and the personal information was not identifiable without the 'crosswalk table' which had to be stored in Canada and not be accessible outside Canada. In this situation, the Commissioner states that the information would no longer be 'personal information' for the purposes of the *Act*, so there would be no prohibition on storing it outside the country.

This leaves us with a number of questions.

Is the government's tokenization adequate? We have no idea to what extent information is being tokenized before it is being sent to Salesforce. The Commissioner states in her letter that she has concerns about the level of tokenization and the possibility of the individuals being identifiable from the untokenized information. If only the names of individuals—and not the rest of their personal information—are being tokenized, then clearly that would be

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[65] http://docs.openinfo.gov.bc.ca/d11384614a_response_package_ctz-2014-00009.pdf
[66] Ibid.
[67] OIPC public comment June 16, 2014 Updated guidance on the storage of information outside of Canada by public bodies https://www.oipc.bc.ca/public-comments/1649

inadequate. We need to know what is happening with this personal information that is being sent to the United States.

It is difficult if not impossible to supervise the level of tokenization across the government and in each individual case. What might be adequate tokenization for a person living in a large city may not be adequate for someone living in a small town.

FIPA recommends that the BC government and other public bodies be required to make public the details of any tokenization system they use to avoid the operation of the domestic data storage requirements of *FIPPA*.

Posting of personal information contained in government reports

The reports in question deal with the mysterious Ministry of Health data breach firings (the McNeil report) and with excessive executive payments at Kwantlen University (the Mingay Report). Both reflect unfavourably on the government and senior officials.

In order to avoid posting the reports, the government had claimed that *FIPPA*'s section 33.2 prevented them from posting the reports—which contained personal information, and might run counter to the "reputational interests" of public servants or public figures—online, where they would be "accessible" outside Canada.

Strangely, other public bodies like the BC Lottery Corporation go out of their way to post the personal information of lottery winners on their website, but the BC government has not seen fit to require them to put a stop to this practice.

In response to our complaint[68], the OIPC has now confirmed and clarified that *FIPPA* would not be an impediment to the posting of such reports online – it just requires the minister to make an order.[69]

Clearly this is not the best way to ensure that these reports are posted, and in the letter to FIPA the OIPC stated that the law should be changed to eliminate this anomalous two-step procedure:

> *This matter can, and the Commissioner believes should, be put to the Special Committee reviewing* FIPPA*, which was struck in May 2015, so that the Legislature can assess whether and how to authorize the online publication of personal information contained in such reports. This would be consistent with the broad purposes of* FIPPA *and in particular the need to hold government accountable in s. 2.*

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[68] https://fipa.bc.ca/wordpress/wp-content/uploads/2015/01/Complaint-Letter-re-BC-govt-refusal-to-post-vg1.pdf

[69] https://fipa.bc.ca/wordpress/wp-content/uploads/2015/08/OIPC-letter-to-FIPA-re-s33-150730.pdf

Our Office encourages stakeholders to bring any matters of concern of this nature to the attention of the Special Committee.[70]

FIPA recommends that the *Act* be amended to allow posting of government reports and similar publications without the need for a ministerial order.

When privacy rights collide with government programs

Government bodies routinely collect, use and disclose a huge amount of sensitive personal information about citizens. Often this information is collected under the force of law in situations where receiving a license, benefit or a government service depends on the individual providing the information.

Consider the range and detailed nature of the personal information gathered by public bodies in the course of administering, for example, health care services, income assistance programs, family and child support services, and education. It is clear that government possesses an intimate and detailed picture of all our lives.

This information is used every day to make life-affecting administrative decisions about individuals – decisions that affect our family lives, our jobs, our financial and physical well-being, and even our freedom.

The collection of much of this information is necessary for government to carry out its programs properly and efficiently. But the possession by government of a vast amount of information about our personal lives can also present a serious threat to such constitutionally-guaranteed rights as privacy, freedom of expression and freedom of assembly.

Most people would agree that citizens in a democracy should know as much as possible about their government. But how much should a government know about its citizens? That is to say "what about privacy?" After all, if government can look into your health, your mental state, your consumer habits, your finances, even your sexual behavior, and it can go further and share this information across ministries and assemble it into comprehensive files on each citizen, what privacy is left to protect?

Governments have been well aware of this dilemma for some time, and this awareness is reflected in privacy protections that have been created in the *Canadian Charter of Rights and Freedoms* and in privacy legislation at both the federal and provincial levels.

The Supreme Court has much to say about our constitutional right to privacy. As stated *R. v. Dyment*,

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[70] ibid

> *Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.*[71]

The right to privacy with respect to documents and records was addressed by the Supreme Court in *R.* v. *Plant* as follows:

> *In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the* Charter *seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.72*

The basic question to be addressed is where the balance should be struck between privacy rights and government demands for increased powers to match and mine data.

Collection, use and disclosure of personal information by private-sector agencies of government operating under contract as social service providers

We have raised this in previous reviews pertaining to the *Personal Information Protection Act* (*PIPA*), which governs the private sector in this province.

There are several hundred BC public bodies, most of which engage private sector entities to assist with some provision of services, at least some of the time. In such cases, these agencies may have access to highly sensitive personal information of citizens. Such information is collected by the private sector entity, on behalf of or for the public body, in order that the citizen may obtain needed public services, including health care, mental health care, social services or education services, among other things.

Typically, the public body is obliged to take the position that the private sector agency is a "service provider" under *FIPPA*, and to require the agency to execute an agreement in respect of the protection of personal information. The agreement typically contains terms by which the service provider agrees to comply with the duties under the *Act* in respect of all the information collected by it for the purposes of the services. The public body may also require employees or contractors to sign confidentiality agreements, and other related agreements such as security terms.

But this is not always the case. Sometimes the public body and the private sector agency do not adequately identify the obligations and laws that apply; sometimes the parties fail to

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[71] *R. v. Dyment* [1988] 2 S.C.R. 417

[72] *R.* v. *Plant*,[1993] 3 S.C.R. 281, para. 19

execute the necessary agreements. The impact of these failures is that often each of the parties implicitly relies on the other to protect the information and neither does an adequate job.

This becomes particularly problematic when information is collected by an agency for social services purposes, and then disclosed by that agency into a government information system. Who is responsible for the data collection? Who is responsible for notifying the individual of their rights, responding to access requests, protecting the data during the collection and disclosure process? Is consent necessary for the collection of the personal information, or not? When the individual is dealing with a private sector service provider but the services are funded in whole or in part by government, what does the individual know about their privacy and confidentiality?

These are important questions because in order for the individual to trust the agency enough to provide reliable information, he or she needs to understand his or her rights. The problem is, their rights under *FIPPA* and *PIPA* are quite different.

PIPA requires the individual to provide some form of consent for the organization to collect, use and disclose her personal information. This consent must be voluntary, and informed. This regime is fundamentally different than that under the *FIPPA* which is not consent-based and permits collection, use and disclosure where relates directly to or is necessary for an operating program or activity of the public body, or for a wide range of other permitted purposes. Further, *FIPPA* permits personal information to be disclosed by the public body to another public body for a very long list of purposes. The reality is that once a public body collects an individual's personal information, it can be shared with other public bodies under *FIPPA* much more readily than it could be by any organizations subject to *PIPA*.

While there are good reasons that *FIPPA* is not consent-based, it is unquestionably a less rigorous standard. Currently, there are several government systems now operating or in development which will require personal information being transferred by agencies subject to *PIPA*, to public bodies subject to *FIPPA*.

The effect of this move towards further integration of systems and social services agencies with public bodies is to apply the less rigorous standard of *FIPPA* to private sector organizations. What this means is that the individual client seeking assistance and believing the services to be provided on a confidential basis may not be aware that their personal information is being disclosed, as a matter of course, to a public body that may then decide—quite lawfully, under *FIPPA*—to further share the personal information with other public bodies.

Take, for example, a single parent, coping with poverty, struggling to adequately provide for his or her children, while dealing with their own emotional or physical health problems. Increasingly we are seeing small non-profits collaborating to share space and resources.

Their funding and services might be funded in whole or in part by different public bodies; one may be funded by the Ministry of Social Development and Social Innovation, another by the local health authority, the third by the Ministry of Children and Family Development.

That parent might have come through the doors seeking help from one agency, and end in using all of them. This may be an efficient way to ensure the individual can get all the support available, but if the agencies share their information amongst themselves on their own behalf and then disclose that information to the public body funding some or all of their services, the individual must be provided notice and an opportunity to consent or not. Suddenly the parent seeking confidential assistance for a mental health concern may find that her personal information has been shared among the agencies, and by each of them with their funder. Now this parent may fear that the agency is reporting her to the government and may withdraw. Ultimately the client's trust is undermined and the agency's ability to provide services is compromised.

This is not just a theoretical concern. We conducted a study several years ago, and looked at a number of agencies in BC. We found that for clients who access several services provided by different programs and potentially linked to funding from several Ministries, the failure to maintain confidences could have far-reaching implications. Our stakeholder survey suggested that failure to maintain client confidences could severely affect access and referrals to many community social services.[73]

Our research indicates that clients will refuse to access the services they need if their confidentiality is not assured. When that happens, social services costs, health costs and costs to society inevitably increase. The data is less reliable because people are less trusting, and less truthful. There are poorer outcomes for families and wasted taxpayers' dollars on systems that are ineffective. Thus the value of the government's investment in such electronic systems is diminished as is the reliability of the data collected.

Clearly, it is essential that individuals understand where their personal information goes. Even though the *FIPPA* does not require consent for a public body to collect personal information, *PIPA* does require consent. Agencies that are subject to *PIPA* but provide service under service-provider contracts with public bodies must be made aware of their obligation to provide notice to individuals (as they are required to do as the agent of the public body) *and to obtain the individual's consent*, as they are required to do as an organization subject to *PIPA*.

[73] Survey done for Culture of Care or Culture of Surveillance 2010 https://fipa.bc.ca/wordpress/wp-content/uploads/2014/03/Culture_of_Care_or_Culture_of_Surveillance_March_2010.pdf

This may not require an amendment. It is possible that the problem can be remedied through a policy change that would add a clause to the standard Privacy Protection Schedule required by the Ministry of Technology, Innovation and Citizens Services.

We recommend that *FIPPA* be amended to provide that where an organization collects personal information on behalf of a public body, it is obliged to ensure that the individual is provided notice and that all the rights including the right to refuse consent and be advised of the consequence of such refusal, apply in the circumstances.

Mandatory breach notification

At present there is no requirement for notification of the Commissioner if a public body suffers a privacy breach.

The former Commissioner pointed out in her report in September 2015 on Health Authority Privacy Breach Management[74] that breach notification is required by a directive in the federal public sector and is legislatively mandated in Newfoundland and Nunavut, while six jurisdictions require breach notification in their health information statutes.

The Special Committee that reviewed *PIPA* 2015 recommended mandatory breach notification and reporting for the private sector in BC. The 2016 report of the Special Committee to review the *FIPPA* also supported mandatory breach notification.[75]

FIPA recommends that there should be mandatory breach notification for public bodies included in *FIPPA*.

* * *

CONCLUSION

Mandatory reviews of the *FIPPA* by Special Committees occurred in 2010 and in 2015. The final report of the 2015 Special Committee contains a number of valuable recommendations that, if implemented, would make meaningful improvements to information and privacy rights in this province. Equally important is the fact that the 2010 and 2015 Special

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[74] Special Report Examination of British Columbia Health Authority Privacy Breach Management Sept 30, 2015

[75] https://www.leg.bc.ca/content/committeedocuments/40th-parliament/5th-session/foi/report/scfippa_report_2016-05-11.pdf

Committees rejected a number of proposals from the government which would have undermined those rights.

Our own submission to the present public engagement is based, in large part, on our 2015 submission to the Special Committee, as our concerns and recommendations at that time remain valid.

The current moment represents a unique and important opportunity to for the Ministry and the Government of BC to make decisive and long-overdue reforms to the *FIPPA*:

- The recommendations of the 2015 Special Committee are recent and relevant. This all-party Committee received and reviewed submissions from many individuals and organizations active in the information and privacy rights fields. The Report of the Committee contains many important recommendations that could form the basis of a bill to update the *FIPPA*.
- Recent and ongoing revelations regarding the sweeping and unauthorized access of personal information through private-sector social media applications - including allegations involving Facebook and AggregateIQ and the related joint investigation by the BC OIPC and Office of the Privacy Commissioner of Canada [insert reference to joint investigation statement] - Have reinvigorated public debates about privacy rights in an era of big data. The implications of data scraping and 'micro-targeting' for the democratic process have been the subject of considerable discussion and concern. People in BC and around the world are engaged in important conversations about privacy, personal information, and democracy, and there are calls for government action on these issues [insert CBC reference]. This presents an important opportunity - indeed, a mandate - for the Government to act to protect and extend privacy rights, both under *FIPPA* and under the *Personal Information Protection Act*.
- The BC public has expressed strong support for freedom of information reform. We recently commissioned an Ipsos poll of British Columbians on a number of FOI and privacy issues. Ipsos surveyed 803 people. The results, released in January 2018, are consistent with our recommendations in this submission: 97% of British Columbians support a legal duty to document; 85% believe that government officials who interfere with access to information rights should face penalties (with 12% stating they don't know); 84% of respondents believe that *FIPPA* reforms should be made prior to the next provincial election; and 87% believe that educational subsidiaries should be brought under the scope of the *FIPPA* [insert reference to FIPA poll].

British Columbia has the potential to stand as a provincial leader in information and privacy rights. We hope that the present public engagement will provide energy and momentum that will inform revisions to the *FIPPA* in the near future. We urge you to consider our recommendations carefully, and thank you for the opportunity to share our views.

Sime, Mark CITZ:EX

From: Duffy, Robert <Robert.Duffy@bcgeu.ca>
Sent: Monday, April 9, 2018 2:16 PM
To: FOI Reform CITZ:EX
Cc: s.22
Subject: Submission to the BC Freedom of Information and Privacy Review from the BCGEU
Attachments: BC Freedom of Information and Privacy Review Submission - 04062018.pdf; FIPPA_40-4_BCGEU.pdf

To: The BC Ministry of Citizens' Services,

Please see the two attached documents for a submission to the BC Freedom of Information and Privacy Review from the BC Government and Service Employees' Union (BCGEU).

Please confirm upon receipt, and contact me if there are any problems opening the attachments.

Best regards,

Rob Duffy
Staff Representative
Research and Interactive Services
BC Government and Service Employees' Union
Email: Robert.duffy@bcgeu.ca
Phone: 604-474-1278 (ext. 4278)

April 6, 2018

Via email: FOI.Reform@gov.bc.ca

Ministry of Citizens' Services
Freedom of Information and Privacy Review
Parliament Buildings
Victoria, BC V8V 1X4

Re: Submission to the BC Freedom of Information and Privacy Review

On behalf of the 75,000 members of the B.C. Government and Service Employees' Union (BCGEU), we thank you for this opportunity to present our perspective on freedom of information and privacy reform in B.C. Our diverse membership includes direct government employees, as well as workers throughout the broader public and private sectors. The BCGEU represents not only its membership, but also—through its advocacy for well-designed, resourced and staffed public services—the broader interests and wellbeing of society as a whole.

As a chief stakeholder, and as a voice for working families and communities across the province, we engage continually in debates on policy and program delivery, as well as labour and human rights. We do so, in large part, with reliance on information about what our government is doing, has done, and is planning to do in the future. Similarly, we advocate for the integrity of private records and the protection of individuals' personal information in accordance with existing provincial and federal legislation. We defend these rights of individuals in our daily business and we expect the highest from government and its public bodies in upholding its duties to this end.

In 2016, the BCGEU made a submission to Special Committee to Review the British Columbia Freedom of Information and Protection of Privacy Act containing proposals that we would like to be considered as part of this consultation. In that submission, the BCGEU issued 10 recommendations to the committee to inform needed amendments in the legislation. They are aimed broadly at bringing the regulation into greater balance with the current information environment and to update best practices, thereby ensuring better accountability and transparency, and the better protection of rights.

The submission is appended for reference, and may also be found at https://www.leg.bc.ca/content/CommitteeDocuments/40th-parliament/4th-session/foi/WrittenSubmissions/Organizations/FIPPA_40-4_BCGEU.pdf

4911 Canada Way, Burnaby, BC, V5G 3W3 www.bcgeu.ca
Tel.: 604-291-9611 Toll Free: 1-800-663-1674 Fax: 604-291-6030 Toll Free Fax: 1-800-[illegible]

The BCGEU broadly supports commitments made by the BC NDP in a 2017 response to the BC Freedom of Information and Privacy Association, and we hope that the government will begin acting on those commitments as soon as possible. Many of these commitments are in line with proposals made in our 2016 submission referenced above. Notably, we support pledges that an NDP government will:

- Include a “duty to document” in the *Freedom of Information and Protection of Privacy Act* (FIPPA).
- Support FIPPA being expanded to capture subsidiaries created by public bodies (in consultation with affected organizations).
- Place limitations on the use of Section 13 of FIPPA ("Policy advice and recommendations") to prevent the release of information.
- Make use of Section 12 of FIPPA ("Cabinet Confidences") discretionary, as recommended by the B.C. Information Commissioner.
- Implement penalties against those who interfere with information rights.
- Create a duty to investigate instances of unauthorized destruction of government information
- Remove legal immunity from officials who fail to disclose documents, making contraventions of the Act an offence subject to fines of up to $50,000.
- Require mandatory notification of data breaches.
- Amend Section 25 ("Public Interest Override") of FIPPA to remove the requirement of “urgent circumstances” before disclosure of information that is clearly in the public interest.
- End the practice of publicly posting Freedom of Information requests before releasing information to the requester.
- Ensure the protection of B.C.’s domestic data storage requirements in the *Freedom of Information and Protection of Privacy Act*, particularly in the face of efforts by the U.S. government to attack B.C.'s requirements as a "trade barrier" in trade negotiations with Canada.

While the commitments outlined above address the first four proposals from our 2016 submission to Special Committee, we would also like to restate the six other core recommendations from that document:

- The government should ensure relevant organizational departments are adequately funded, staffed and resourced so that they are able to properly process all requests for information as outlined and provided for in the legislation.
- Multiple extensions and excessive delays to FOI requests should only be allowed if approved by the Office of the Information and Privacy Commissioner (OIPC).
- The Ministry of Citizens’ Services’ FOI Access Request eForm should be expanded and further developed to provide a single and more navigable point of electronic filing access to all public bodies and agencies, rather than individual ministries.

- Fees (if applicable) should be waived if the public body fails to meet the timelines required of it by the legislation.
- Fees (if applicable) should be waived if a significant portion of the returned documents has been redacted or blacked out.
- That the government review and amend the definition of “data-linking” under FIPPA and introduce new oversight and accountability measures to ensure that personal data are used only for the original, intended purpose(s).

The foundation of public trust in government is transparency, accountability, and a consistently demonstrated respect for the rights of individuals. We hope these recommendations will inform essential updates and improvements to FIPPA, in the interest of all British Columbians. Thank you for the opportunity to submit our views on this issue.

Sincerely,

Stephanie Smith
President
RD/gg/MoveUP

Submission to the Special Committee to Review the Freedom of Information and Protection of Privacy Act

January 27, 2016
Burnaby, BC

Submitted by: B.C. Government and Service Employees' Union

4911 Canada Way, Burnaby, BC V5G 3W3 Te (604) 291-9611 www.bcgeu.ca

un for 467 MoveUP

B.C. Government and Service Employees' Union – Who we are

The B.C. Government and Service Employees' Union (BCGEU) represents approximately 65,000 workers in various sectors and occupations from more than 550 bargaining units throughout British Columbia. Our diverse membership includes direct government employees who protect children and families; provide income assistance to vulnerable individuals; fight forest fires; protect the environment; manage our natural resources; deliver care to people with mental health issues and addictions; administer BC's public system of liquor control, licensing and distribution; staff correctional facilities and the courts; and provide technical, administrative and clerical services.

Our membership also comprises workers throughout the broader public and private sectors where members provide clinical care and home support services for seniors and people with developmental disabilities; a diverse range of community social services; highway and bridge maintenance; post-secondary instruction, as well as other non-governmental industries, including financial services, hospitality, retail and gaming.

Why we are making this submission

The BCGEU represents not simply its membership, but also through its advocacy for well-designed, resourced and staffed public services the broader interests and wellbeing of society as a whole. As a chief stakeholder, and as a voice for working families and communities across the province, we engage continually in debates on policy and program delivery, as well as labour and human rights. We do so, in large part, with reliance on information about what our government is doing, has done, and is planning to do in the future. Similarly, we advocate for the integrity of private records and the protection of individuals' personal information in accordance with existing provincial and federal legislation. We defend these rights of individuals in our daily business and we expect the highest from government and its public bodies in upholding its duties to this end.

For 20 years now the *Freedom of Information and Protection of Privacy Act* (FIPPA) has served as the bedrock legislation for information access and privacy protection in our province. Its dual objective effective access to public information and the maintenance of personal privacy balances two essential and equally important components of a functioning and vibrant democracy: public accountability and transparency, and the protection of individual rights. But as our society's technical capacities and communications technologies have changed and evolved, FIPPA has also required regular review and amendment.

Today it is more important than ever: the generalized extent of technological and media transformation (seen everywhere), coupled with the practices of public actors in B.C. has outstripped the purpose and provisions of our legislation. Furthermore, the changing structure and increased complexity of our public landscape in B.C. and its institutions has altered the ability of citizens and organizations to locate and obtain basic data and information on programs, services, agencies, and various records of public interest. We now operate in an environment where the public capacity to access this information meaningfully and efficiently is greatly in doubt. At the same time, our government and its bodies either through ministries, crown corporations or contracted agencies now possess tremendous powers to amass, compile and match information on individuals and organizations far beyond what was once imagined. This potentially undercuts the spirit and purpose of our governing legislation on information management and the right to privacy.

As a result, a series of tensions and contradictions has taken root. The expanded scope of data collection and new communications practices, as well as the expectations for meaningful information management in the public interest, has not been matched with a transparent framework to create easily accessible public records either for organizations such as the BCGEU or individuals on their own. As a result, collectively, we continue to struggle for access to the public information we need in order to engage meaningfully in democratic, public dialogue over planning and policy, decision making, and basic accountability.

Simultaneously, the invasive potential of technologies and platforms means that our appointed bodies and representatives are able to know more about citizens at a time when the desire to be open about public matters is arguably low at the highest levels of government. Last year it was revealed by the Office of the Information and Privacy Commissioner (OIPC) that senior government officials had ordered emails be permanently deleted (a procedure now known as "triple delete") which contained pertinent information requisitioned through a Freedom of Information (FOI) request.

The dual objective of ensuring public transparency and accountability, and protecting personal privacy, is now compromised due to legislation that has lost pace with transformation and practice in the information environment. Moreover, the evolving approach to governance has increasingly excluded private individuals, as well as social and civic organizations, from reasonable access.

Fundamentally, the BCGEU, its members and the clients and communities they serve now face numerous and increasing challenges, including: less proactive disclosure of public documents and records; growing reliance on cumbersome FOI requests; frequent delays and extensions in the processing of requests; higher assessed fees; a growing occurrence of unresponsive requests ("No Responsive Records") as well as redacted information; expanded privatization of public bodies and the increased use of contracted services that puts information beyond the reach of FIPPA; risks associated with the handling and management of personal data by private and/or contracted (and largely unaccountable) agents and bodies; the degradation of formal documentation and record-keeping standards (for example, transitory electronic communications and records, deleted government emails, and the rise of so-called "oral government"); broader interpretations of certain exemptions under FIPPA (e.g. Section 13) preventing access to pertinent, factual information; and a culture of governance that has become generally avoidant and opaque with respect to information.

The BCGEU issues 10 recommendations to the committee in its review of FIPPA to effect needed amendments in the legislation. Many are reiterations of previously made recommendations by the BCGEU and other organizations. They are aimed broadly at bringing the regulation into greater balance with the current information environment and to update best practices, thereby ensuring better accountability and transparency, and the better protection of rights. Our recommendations address the following areas of concern:

- Duty to document
- Coverage and access
- Policy advice and recommendations
- Wait times, delays and extensions
- Protection of privacy and "data-linking"

Duty to document

The digital age of government communication has dramatically altered both the volume and nature of information content. Written correspondence, memoranda, and in-person meetings still occur, yet unquestionably, email has become the primary mode of transaction not only for scheduling and logistical purposes, but substantive communications as well.

This electronic basis of communication and transaction creates a misleading assumption, however, about the permanence of the content as public records: electronic records are far from indelible, nor stable or readily accessible either externally or internally. In the absence of clear and carefully crafted procedures for formal documentation, emails and other electronic communications remain highly transitory, dispersive and difficult to track and therefore less reliable and dependable in the long term as accessible sources of information.

The risk is two-fold. Most immediately, accountability and transparency regarding public matters may be affected by administrative oversights, or in some cases, deliberate mishandling. In the longer term, the informational basis for formulating an historical and archival account of public decisions, activities or events may also become deeply eroded.

Recommendation #1

> **Add to FIPPA new language and provisions that outline a "duty to document" and that clearly articulate an active and positive obligation to create and retain *formal records* that are "reliable and dependable." This must apply to all public bodies, including subsidiary entities that are created by, and therefore responsible to, public bodies.**

Coverage and access

With several years of deep and persistent privatization, deregulation, and public reorganization, members of the BCGEU now work to serve the public through an increasingly diverse number of agencies, quasi-public entities, outsourced and/or contracted bodies. This decentralization of services and service delivery has made the management of information and its accessibility to the public less accountable and more complex.

Regardless of the appearance and operation of the current administrative and service delivery landscape, it is made up of entities that possess a public mandate, receive public funds, and therefore remain responsible to the public. The fragmentation of our public services, however (and the problematic logistics of how they are managed and delivered) is no excuse for permitting distance and new barriers between members of the public and relevant public information. In fact, in this environment, meaningful and timely access to records and information is more important than ever.

Recommendation #2

> **Clarify the language and definitions in FIPPA related to "public bodies," including entities created by public bodies, in order to make sure no public or government-related services, bodies, associations or subsidiaries are beyond the reach of the legislation and its provisions.**

Policy advice and recommendations

The interpretation of Section 13 of the *Act* (providing for exceptions on the disclosure of documents and records concerning the development of policy within government) has been broadened through recent

legal decisions and government practices. While the BCGEU sees s.13 as an important protection for public servants who discuss and evaluate policy options (and who must be free to make recommendations to elected officials in government), the growing application of this exception has had a significant impact on the public's legal right to factual and investigative background information on policy.

Of particular concern are instances where government has contracted policy analysis and advice from the private sector (and outside the public service), and where such information is withheld under "advice and recommendations." This was recently demonstrated when a 2014-15 report created for government by EY (formerly Ernst & Young) influenced widespread reforms throughout the province's public system for liquor control, licensing and distribution. To date, the findings of this report "factual" or otherwise have been withheld by government and protected from legitimate public analysis and review. This report has the ability to affect the livelihood of our members who work in the government liquor distribution system.

Recommendation #3

> **Amend s.13 to prevent the use of the exception to exclude the release of factual background information, including the professional and/or technical analysis of such materials.**

Recommendation #4

> **Introduce language that clarifies "advice" and "recommendations" (often used interchangeably) to reduce the occurrence of excessively broad and sweeping exemptions (those that would exempt legitimate "factual" material), while still protecting the ability of public servants or elected officials to freely discuss policy options.**

Wait times, delays and extensions

In addition to restrictions on access that stem from problems of coverage, documentation, record-keeping and exemptions, freedom of information requests (FOI) are regularly frustrated by inordinate processing delays and frequent extensions by responsible ministries, agencies and bodies. While it is justifiable that applicants make thoughtful and purposeful (rather than gratuitous) use of the process, it is inexcusable that FIPPA's excessive legislated wait time (30 business days) and a growing pattern of delays, missed deadlines and imposed extensions have become a disincentive for those requesting important public records and information.

For example, at this particular point in time, the BCGEU has just been notified of a third extension on one of its high-priority FOI requests, bringing the expected response date for the file to nearly four months.

Applicants require timely access in order to exercise meaningful access. Requests are often a matter of obtaining actionable information not out of retrospective interest. Organizations and individuals want (and need) to be involved in the policy process, and are not interested simply in finding out critical information well after the fact.

Furthermore, with the vast and expanding array of government bodies and entities conducting public business in B.C., the process of filing an application itself remains confusing, inaccessible and overly burdensome for the individual or organization making the inquiry. In an era where online platforms often improve convenience, government must do more to help applicants locate the relevant body of

interest (often FOIs must be sent directly to subsidiary entities rather than parent ministries), and to better standardize points of access, as well as necessary forms.

Recommendation #5

> **Ensure that relevant organizational departments are adequately funded, staffed and resourced so that they are able to properly process all requests for information as outlined and provided for in the legislation.**

Recommendation #6

> **Multiple extensions and excessive delays should only be allowed if approved by the OIPC.**

Recommendation #7

> **The Ministry of Technology, Innovation and Citizens' Services' *FOI Access Request eForm* should be expanded and further developed to provide a single and more navigable point of electronic filing access to *all* public bodies and agencies, rather than individual ministries.**

Recommendation #8

> **Fees (if applicable) should be waived if the public body fails to meet the timelines required of it by the legislation.**

Recommendation #9

> **Fees (if applicable) should be waived if a significant portion of the returned documents has been redacted or blacked out.**

Protection of privacy and data-linking

The expansion of computing capacity and new integrated data technology have enabled public bodies to amass fragments of personal information from various unrelated sources, compile and consolidate it, and share it across ministries and agencies through "linking" (or "matching"). Often justified on the grounds of developing "shared" and more efficient services, these practices lack transparency and pose certain risks as well as contradictions.

Firstly, linking may involve the use of data far beyond the original purposes and the uses for which it was supplied or obtained. Secondly, the resulting composite may not be reliable, thereby jeopardizing both the interests of the individual, as well as the desired objective for policy. Thirdly, it is patently unacceptable for government bodies to formulate and utilize information databases on individuals that are beyond their awareness, especially when they fail in their own obligation to create, maintain and disclose public records in a reliable, dependable and responsible manner.

Recommendation #10

> **Review and amend the definition of "data-linking" under FIPPA and introduce new oversight and accountability measures to ensure that personal data are used only for the original, intended purpose(s).**

Conclusion

The foundation of public trust in government is transparency, accountability, and a consistently demonstrated respect for the rights of individuals. FIPPA is designed to protect and uphold these values; yet, public practice in information management and the pace of change in communications technologies has put the effectiveness of the legislation under significant stress. We hope these recommendations will inform essential updates and improvements in the interest of all British Columbians. Thank you for the opportunity to submit our views on this issue.

Delaney-Spindler, Chelsea CITZ:EX

From: vincent@fipa.bc.ca
Sent: Thursday, February 22, 2018 9:16 AM
To: OfficeofthePremier, Office PREM:EX
Subject: Letter regarding FOI reform
Attachments: Joint Letter_FOI reform vg update1 with signatories.pdf

Dear Premier Horgan,
Please find attached a letter regarding FOI and privacy reform.
If there is a problem with this attachment or the e mail itself, please contact me directly.
Sincerely,
v

--
Vincent Gogolek
Executive Director
BC Freedom of Information and Privacy Association www.fipa.bc.ca @bcfipa

FIPA BC FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

February 22, 2018

The Honourable John Horgan
Premier of British Columbia
Victoria, BC

BY Email: premier@gov.bc.ca

Info Pkg

Dear Premier Horgan:

Re: Reform of Freedom of Information and Privacy Legislation

We are writing you regarding the need for immediate action in bringing about long-delayed reform of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).

Doubtless you appreciate that although that law was groundbreaking for the early 1990s, (when it was brought in by the NDP government of Mike Harcourt), it has become outdated and is in need of serious reform, as last year's Special Legislative Committee outlined in its report. Some of the reforms called for include:

- Implementing a legislative duty to document in *FIPPA* itself,
- Bringing in legislative solutions to end the over-application of certain exceptions to disclosure, particularly sections 12 (cabinet records) and 13 (policy advice) of the *Freedom of Information and Protection of Privacy Act,*
- Bringing the subsidiaries of educational and other public bodies within the scope of the *FIPPA,* and
- Implementing mandatory breach notification.

It is our view that work must begin immediately on updating the *Act.*

In the meantime, we would like to remind you of an action your government can take immediately to demonstrate a concrete commitment to improving the system.

During the last election, your party was asked by the BC Freedom of Information and Privacy Association about a policy brought in by the previous government to post "the texts of Freedom of Information requests it receives even before releasing any information [to] the requester." BC FIPA asked two questions, which are set out below along with your party's responses:

103 - 1093 W. Broadway, Vancouver, BC V6H 1E2
Tel (604) 739-9788 Fax (604) 739-9148 Email: info@fipa.bc.ca Web: www.fipa.bc.ca

Q. Do you agree with this policy, and if so, why?
A. No.
Q. If not, will your government end this practice?
A. Yes.

This practice continues to this day, despite your party's very clear statement that it does not agree with it and will end it.

This does not require legislation or Chamber time, so we are puzzled as to why your government has yet to carry out your party's quite categorical commitment to end it.

Finally, we would like to mention the result of a poll conducted last month by Ipsos Canada for BC FIPA. When asked how important they thought it was that your government bring in reforms to the information and privacy law before the next BC election, *47 percent said it was very important, and 38 percent said it was somewhat important.*

We are available to work with your government to help bring about positive changes to protect the information rights of all British Columbians and build a stronger democracy.

Please let British Columbians know when we can expect this work to begin.

Yours Truly,

Vincent Gogolek
Executive Director

Micheal Vonn, Policy Director, ***BC Civil Liberties Association***
Glen Hansman, President, ***BC Teachers Federation***
Nick Taylor-Vaisey, President / National director, ***Canadian Association of Journalists***
Darrell Evans, President, ***Canadian Institute for Information and Privacy Studies Society***
Tamir Israel, Staff Lawyer, ***Canadian Internet Policy and Public Interest Clinic***
Randy Christensen, Staff Lawyer, ***Ecojustice***
Dermod Travis, Executive Director, ***Integrity BC***
John Hinds, President and Chief Executive Officer, ***News Media Canada***
Sharon Polsky, President, ***Privacy and Access Council of Canada***
Neil Self, Chairperson, ***Positive Living Society of British Columbia***
Beth Clarke, Development and Program Director, ***Wilderness Committee***
Stanley Tromp, Journalist

103 - 1093 W. Broadway, Vancouver, BC V6H 1E2
Tel (604) 739-9788 Fax (604) 739-9148 Email: info@fipa.bc.ca Web: www.fipa.bc.ca

From:	Kot, Jill CITZ:EX
To:	Peddle, Jennifer CITZ:EX
Subject:	ctz-2018-88032
Date:	January 8, 2019 5:33:17 PM
Attachments:	s.12

From: Curtis, David CITZ:EX
Sent: June 7, 2018 5:47 PM
To: Kot, Jill CITZ:EX
Cc: Cook, Jeannette CITZ:EX ; Biggs, Jackie CITZ:EX
Subject: P&A Speaking Notes
Please find the draft P&A speaking notes and accompanying presentation attached.
I would appreciate any comments or edits that you may have.

Regards,

David

Page 093 to/à Page 094

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s.12

Page 095

Withheld pursuant to/removed as

s.12;s.13

Page 096 to/à Page 100

Withheld pursuant to/removed as

s.12

Page 101

Withheld pursuant to/removed as

s.12;s.13

Page 102 to/à Page 103

Withheld pursuant to/removed as

s.12

Page 104

Withheld pursuant to/removed as

s.12;s.13

Page 105

Withheld pursuant to/removed as

s.12;s.16

Page 106 to/à Page 110

Withheld pursuant to/removed as

s.12;s.13

Page 111

Withheld pursuant to/removed as

s.12

Page 112 to/à Page 119

Withheld pursuant to/removed as

s.12;s.13

Page 120

Withheld pursuant to/removed as

s.12

Page 121 to/à Page 129

Withheld pursuant to/removed as

s.12;s.13

Page 130

Withheld pursuant to/removed as

s.12

From:	Kot, Jill CITZ:EX
To:	Peddle, Jennifer CITZ:EX
Subject:	CTZ-2018-88032
Date:	January 8, 2019 5:30:41 PM
Attachments:	s.12

confidential

From: Curtis, David CITZ:EX
Sent: June 20, 2018 7:52 AM
To: Kot, Jill CITZ:EX
Cc: Cook, Jeannette CITZ:EX
Subject: P&A

Please find the current draft of the amended Cab Sub attached. The speaking notes have been amended but require some additional work to reduce the length. I expect to be able to share the next draft of the speaking notes today.
Regards,

David

Page 132 to/à Page 143

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s.12;s.13

Page 144 to/à Page 145

Withheld pursuant to/removed as

s.12;s.16;s.13

Page 146 to/à Page 147

Withheld pursuant to/removed as

s.12;s.13

From: Kot, Jill CITZ:EX
To: Peddle, Jennifer CITZ:EX
Subject: CTZ-2018-88032 record
Date: January 8, 2019 5:26:46 PM
Attachments: s.12

Cabinet confidential

From: Curtis, David CITZ:EX
Sent: June 24, 2018 12:56 PM
To: Kot, Jill CITZ:EX
Cc: Cook, Jeannette CITZ:EX ; Biggs, Jackie CITZ:EX
Subject: Presentation and Speaking Notes

Hi,

Please find the revised Cab Sub presentation and speaking notes attached s.12
s.12

Regards,
David

Page 149 to/à Page 150

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s.12

Page 151

Withheld pursuant to/removed as

s.12;s.13

Page 152

Withheld pursuant to/removed as

s.12

Page 153 to/à Page 167

Withheld pursuant to/removed as

s.12;s.13

From:	Kot, Jill CITZ:EX
To:	Peddle, Jennifer CITZ:EX
Subject:	CTZ-2018-88032 responsive record
Date:	January 7, 2019 12:11:50 PM

From: stromp
Sent: January 12, 2018 3:50 PM
To: Kot, Jill CITZ:EX
Cc: stromp@telus.net
Subject: Solution on open FOI website, for Minister

Dear Ms. Kot,

Thank you much for the update today. When you next meet with the Minister, could you please explain my compromise idea on the open FOI posting website, below – which would be very popular, easily done in a day, morally right, save funds, needs no law reform, and fulfills the NDP's written pledge of last April. 27. (Any notion that this website cannot be dealt with in isolation but only as part of an overall "reform package" is simply incorrect.)
My editorial on the problem - De Jong change to FOI would impair scrutiny of government *The Province* (May 13, 2016) http://theprovince.com/opinion/stanley-tromp-de-jong-change-to-foi-would-impair-scrutiny-of-government

- Stanley Tromp. 604-733-7595

Nov. 13, 2017
Dear Premier,
I am very grateful for my meeting with the Citizens Services ministry on Nov. 10, which was more than I could have expected in the previous decade. It may indeed be a harbinger of future progress for FOI reform. I only fear that with no concrete deadline for legislation (the Spring 2018 session?), it could be delayed indefinitely, as before.
I have one compromise to propose about the open FOI posting website (the most pernicious relic to persist from the secretive former regime).
Liberal Minister De Jong in May 2016 imposed it by an abrupt directive, with zero consultations, and roughshod over the objections of the many FOI applicants who are still harmed by it. The Ministry of Citizens Services says FOI changes should be done only after consultation. By this logic, that website is now illegitimate.
This situation creates a reverse onus, or burden of proof. That is, it is best to *suspend* this website for now - per the NDP pledge to FIPA of April 27, 2017, which is easily done in minutes – and then consult on it, which would be a very popular move.
It is up to those who endorse this website idea to prove why it should be posted - not for those who oppose it to prove why it should not. Then if, after wide consultations on this topic (one that the Liberals should have done but never did), it is convincingly demonstrated for the first time that it is a good idea, the website could be reinstated - and it would then have a public legitimacy that it now completely lacks.
Respectfully yours,

Stanley Tromp, journalist, Vancouver
604-733-7595

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Please fulfill pledge to stop open FOI request postings

Oct. 9, 2017

Dear Premier John Horgan:

This letter is not about Freedom of Information law reform, per se, but on a serious procedural harm, one you can easily correct in a day.

The NDP promised it would stop the Liberals' widely-condemned practice of posting open FOI requests, a change - perhaps by Order in Council - for which no legislation is needed. Yet that pernicious link is still active today - and freshly updated. Why?

http://www2.gov.bc.ca/gov/content/governments/about-the-bc-government/open-government/open-information/browse-search-catalogue/open-freedom-of-information-requests

The NDP gave this specific pledge in a questionnaire to FIPA of April 27, 2017. (See https://fipa.bc.ca/wordpress/wp-content/uploads/2017/05/BC-NDP-Response.pdf)

"9. The BC government now posts the texts of Freedom of Information requests it receives even before releasing any information the requester. This practice has been criticized by FIPA and many others as measure that can intimidate requesters while providing no additional transparency on government operations.

1. Do you agree with this policy, and if so, why?

No.

1. If not, will your government end this practice?

Yes."

This Liberal practice (ordered with zero consultation) is truly a calamity, as noted in the editorial "Undermining the Information Act" in the Premier's hometown newspaper *The Goldstream News Gazette* of May 25, 2016: The *FOIPP Act* "is on the verge of being seriously degraded…. it will gravely damage the media's ability to conduct investigations into government decisions…. [it] may well compromise confidential sources."

http://www.goldstreamgazette.com/opinion/380690761.html

What was Liberal Minister Mike de Jong's implausible defence of the plan? "The idea is that people who have made a request are able to go online and know with certainty that their application hasn't got lost somewhere, hasn't got misplaced but it's actually been registered and it's in the system and being tracked," he said.

But if applicants want to check on their request's progress, they can simply call or email the FOI analyst, as they regularly do now. If there must be such an online database (a very dubious claim), applicants' access to it should be password-protected and limited to their own requests only, with the subjects hidden from all others' eyes, until two weeks after they are released.

"This summary is designed to create somewhat more open pressure on the government to meet deadlines," the minister added. Yet such political "pressure" can be accomplished by statistical reporting in the Commissioner's reports, legislative debates, op-eds, and many other means.

In sum, it is widely agreed the real undeclared goal of the site is to intimidate applicants from filing FOI requests, which negates the law's purpose, and hence undermines democracy itself.

"I must express my grave concern over the news that Minister de Jong has directed that active FOI requests be made public," wrote lawyer Dan Burnett, QC, to Victoria in 2016.

Lawyer David Sutherland added that when law firms use FOI requests in aid of litigation, these are a privileged part of a solicitor's brief, to be kept secret from the other side. "Public posting will alter the balance or, more likely, cause law firms to disguise their identity by using agents," he said. "That would achieve nothing but ineffective complexity."

Natalie Clancy, investigative reporter of CBC Vancouver, wrote: "I am writing on behalf of investigative journalists at CBC in British Columbia to urge you to not allow the provincial government to start publishing active FOI requests. This change will defeat the spirit of the act

. . . . [it] may well compromise confidential sources, and lead to defamation lawsuits."
Also see the FIPA and BCCLA astute joint complaint at: https://fipa.bc.ca/complaint-to-oipc-re-bc-government-posting-individual-foi-requests/
In 2011, the Information and Privacy commissioner reviewed B.C. Ferries' practice of publishing responses to FOI requests at the same time they were sent to applicants. She concluded that it "frustrates the purposes" of the Act because it may discourage people from filing requests. The same is true for Minister de Jong's directive, yet its impacts are far worse.
A year ago I wrote an editorial on this problem in *The Province* (May 13, 2016) at: http://theprovince.com/opinion/stanley-tromp-de-jong-change-to-foi-would-impair-scrutiny-of-government Now, regrettably, I may need to write another one about this lapsed electoral pledge, and raise a campaign among media and lawyers' associations, as we did a year ago.
The solution could not be faster or simpler – to fulfill this (popular) NDP promise today, you can eliminate this open request webpage in mere minutes with a few keystrokes.
Respectfully yours,
Stanley Tromp, journalist. Vancouver, 604-733-7595
P.S. I also much support extending the exclusivity period upon record release from 72 hours to one week – and better longer - to aid the beleaguered weekly newspapers (such as Black Press in your hometown).
cc: Acting B.C. Information and Privacy Commissioner Drew McArthur
==========

From:	Kot, Jill CITZ:EX
To:	Peddle, Jennifer CITZ:EX
Cc:	Cook, Jeannette CITZ:EX
Subject:	CTZ-2018-88032 responsive record
Date:	January 7, 2019 10:03:43 AM
Attachments:	18.02.28.BC ATI Amend.let.pdf ATT00001.htm

From: Toby Mendel **On Behalf Of** Toby Mendel
Sent: February 27, 2018 11:01 PM
To: s.17
Cc: Kot, Jill CITZ:EX ; Curtis, David CITZ:EX
Subject: Letter for the attention of the Honourable Jinny Sims on FIPPA

Please find attached a letter for the attention of the Honourable Jinny Sims on FIPPA.

We are also copying the Deputy Minister, Jill Kot, and the Assistant Deputy Minister, David Curtis.

Best wishes,

Toby Mendel
Executive Director

Centre for Law and Democracy
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Fax: +1 902 431-3689
www.law-democracy.org

Honourable Jinny Sims
Minister of Citizens' Services
PO Box 9068
Stn Prov Govt
Victoria, BC
V8W 9E2

CC:
Honourable John Horgan
Premier of British Colombia
PO Box 9041
Stn Prov Govt
Victoria, BC
V8W 9E1

28 February 2018

Dear Minister:

We are writing to commend you for announcing, on 26 February 2018, that you are planning to host consultations on amending the British Colombia Freedom of Information and Protection of Privacy Act (FIPPA), running from that date until 9 April.

CLD believes that it is high time to amend the FIPPA and that these consultations are, therefore, very timely. According to our assessment, FIPPA earns only 97 points out of a possible 150 on the RTI Rating (see https://www.law-democracy.org/live/global-rti-rating/canadian-rti-rating/). This puts it in second place in Canada, down from first place following the 2015 reforms in Newfoundland which vaulted that province into top position nationally. But British Colombia only ranks 37th place when compared to other countries around the world, just behind Russia. Major reforms are clearly needed.

CENTRE FOR LAW AND DEMOCRACY

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Law reform, especially on public policy issues, should always be the subject of consultation. But these issues have been studied and discussed for literally decades and we know – and experts largely agree on – what needs to be done. This is true across Canada as well as specifically in British Colombia, where public consultations by a Special Committee of the Legislative Assembly in the fall of 2015, to which CLD contributed (see our submission), led to a comprehensive report in May 2016 containing 39 concrete recommendations for reform.

The urgency of this matter is informed not only by the facts that reforms are long overdue and that extensive consultations on this matter have already been held. Moving forward promptly with these reforms can help avoid a situation we have witnessed all too often in Canada, namely that pledges to reform access to information laws fall by the wayside or get substantially watered down if they are not implemented early in the mandate of a new government.

We therefore urge you to follow consultations promptly with concrete law reform proposals. CLD will support this process by providing inputs into the process. We hope that British Colombia can once again claim top position in Canada regarding access to information, a key issue for democratic engagement.

Finally, we understand that the practice of posting online publicly the texts of access to information requests even before they have been responded to, which was established by the previous government, remains in place. This practice has been widely criticised and, for fairly obvious reasons, exerts a chilling effect on certain types of uses of FIPPA, in particular for investigative journalism. Ending this practice, which is rare if not unknown not only across Canada but also around the world, requires neither consultation nor legislative action. We urge you to bring it to an end as soon as possible.

Yours truly,

Toby Mendel
Executive Director