



BY FAX: (250) 387-9066

April 21, 2010

Ron Cantelon
Chair
Special Committee to Review the *Freedom
of Information and Protection of Privacy Act*
East Annex, Parliament Buildings
Victoria BC V8V 1X4

Dear Mr. Cantelon:

Special Committee to Review the *Freedom of Information and Protection of Privacy Act*—OIPC File No. F09-39874

Thank you for the opportunity to present our submission to the Committee on Wednesday, March 31, and for this further opportunity to submit comments on written submissions made to the Committee.

I also wish to take this opportunity to highlight our own submission.

1. Highlights of OIPC Submission

Our recommendations for improvements with respect to privacy protection are to add provisions that would:

- Recognize that the right to privacy means that an infringement of privacy must be proportional to the public interest that is achieved;
- Establish the position of Chief Privacy Officer in government;
- Establish a code of privacy practice to be developed by a new Chief Privacy Officer to set enforceable standards for data sharing along the lines of other Commonwealth jurisdictions, particularly New Zealand, Australia and the UK;
- Establish a new ethics review committee for government research projects; and
- Require privacy impact assessments for electronic record projects at the conceptual, design and implementation phases.

On the access side, our recommendations would:

- Take advantage of information technology through electronic reading rooms and electronic disclosure;
- Strengthen and improve the review process that we administer; and
- Extend the application of the Act in response to government outsourcing.

We also recommend that our Office be given responsibility to monitor compliance with the *Document Disposal Act* to ensure there is appropriate access to records of government decisions.

As indicated in our submission, we made a number of these recommendations during the last review of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) in 2004. The Special Committee endorsed them at that time but the government has not yet implemented them.

2. Response to Government Submission

Although we provided some comments on government’s submission orally during our appearance before the Committee, we had not had the opportunity to review government’s submission in detail at that time. As a result, we have the following further comments and clarifications that are set out below in the order in which they appear in the conclusions and recommendations of the government submission at pages 86 to 88.

Consent, Collection and Disclosure

We strongly disagree with government’s submission that FIPPA should permit collection of personal information with consent. One of the internationally recognized privacy principles is that the collection of personal information must be limited to that which is necessary for the purposes identified by the organization. Permitting government to collect more than is necessary via a consent mechanism violates this privacy principle and would be inconsistent with all other public sector privacy legislation in Canada. Any “consent” would be meaningless given that citizens would not have any genuine or real choice to consent if they want or need to obtain government services.

Disclosure of personal information between public bodies is currently authorized under FIPPA with consent. The current provisions that authorize disclosure [ss. 33 to 36] are appropriate and require no alteration. They facilitate such initiatives as the sharing of updated demographic information between public bodies.

Common or Integrated Program or Activity

Generally, we are of the view that the current provisions of FIPPA work well to protect privacy. We do not agree with government’s position that FIPPA should be amended to facilitate information sharing for integrated service delivery. There is existing authority for data sharing within government under provisions permitting disclosure for consistent purpose and integrated program or activity. We are of the view that this authority is sufficient and appropriate in order to retain the integrity of FIPPA and the distinct

responsibilities of public bodies to protect personal information in their custody and control. These provisions permit integrated service delivery programs such as the Downtown Community Court and the Prolific Offender Management Program to proceed while requiring some formal structure to establish the program through memoranda of understanding, shared budgets and information-sharing agreements.

We do agree that government should have the authority to disclose personal information to the Royal Canadian Mounted Police (“RCMP”) when the RCMP is participating in integrated service delivery programs of government such as the Prolific Offender Management Program. The RCMP is subject to federal privacy and access law so any amendment would have to be very specific and carefully worded so as to avoid the confusion of overlap and duplication. Examples of existing provisions that address similar specific disclosure requirements are provisions relating to disclosures by ICBC [s. 33.1(1)(j)] and relating to disclosures by governing bodies of professions [s. 33.1(1)(k)].

With respect to permitting disclosure to non-governmental organizations and social service providers, we are of the view that the existing authority in FIPPA [ss. 33.1(1)(e.1) and 33.2(c)] to disclose to service providers would authorize these disclosures.

Research and Evaluation

Government’s recommendation to amend FIPPA “to include language confirming a broader approach to research” is unnecessary. The office has recently expressed the view that, with respect to the Homelessness Intervention Project, disclosure for the purposes of research does include research for the purposes of quality assurance or quality improvement activities. Therefore, in our opinion, there is no need to broaden the approach to research through a legislative amendment.

Ministry of Housing and Social Development

We strongly disagree with the suggestion of the Ministry of Housing and Social Development that the defined term of “personal information” be replaced with “private information”. Personal information is a well-understood term that is universally used in privacy legislation. The new proposed definition of private information is not helpful and could potentially increase the risk of identity theft because the Ministry’s proposal would allow for the disclosure of information such as driver’s license numbers if they are not associated with an identifiable individual. However, numbers from key pieces of identification could be used as building blocks and connected to other personal information gleaned from other sources. We are generally not in favour of distinguishing between sensitive and less sensitive personal information because the degree of sensitivity depends on the particular context and individual circumstances.

Ministries of Attorney General and Public Safety and Solicitor General

We do not agree that there is any need to broaden the definition of law enforcement or add specific provisions with respect to custody setting security footage or police audits. FIPPA already provides that where the disclosure of security footage would harm a law

enforcement matter, facilitate the escape from custody of a person or would harm the security of any property or system the public body has the discretion to refuse to disclose the footage [s. 15(1)].

We are not in favour of broadening the exclusion for records in a court file to all court records given our serious privacy concerns with respect to Court Services Online. We have received complaints from individuals that have been prejudiced by the personal information that is made available indefinitely online.

At page 19 of government's submission, there is a recommendation to clarify the disclosure and collection of information among justice, social and health providers to protect the safety of victims in domestic violence cases. FIPPA already permits disclosure of personal information, without consent, in emergency or urgent situations where there are compelling circumstances that affect anyone's health or safety [s. 33.1(1)(m)].

The indirect collection of personal information from the RCMP may not be authorized, however, and therefore a limited and very precise amendment to s. 27 could be considered. This would not be necessary if s. 33 of FIPPA is amended to permit disclosure to the RCMP as discussed above. This is because s. 27 permits indirect collection of personal information if the information is disclosed to the public body in compliance with s. 33 [s. 27(1)(b)].

The real problem is very often the lack of understanding and training with respect to authorized collection and disclosure of personal information in situations such as these.

Ministry of Health Services and Healthy Living and Sport

We are very concerned by the submission of the Ministry of Health Services and the Ministry of Healthy Living and Sport that FIPPA should be amended to permit a free flow of data among all public bodies in the "health sector family". There is already an existing vehicle to authorize data flows through databases of the Ministry of Health Services and the health authorities—the *E-Health (Personal Health Information Access and Protection of Privacy) Act* ("E-Health Act"). The Office of the Information and Privacy Commissioner supported the E-Health Act when it was passed by the Legislature in 2008 but, to date, the Act has not been implemented in the way it was intended. We have pursued this matter with the Ministry of Health Services on several occasions because of outstanding issues related to existing data flows and our preference that they be addressed through the open, transparent, and privacy protective framework of the E-Health Act.

3. Other Written Submissions Received by the Committee

We disagree with a number of recommendations advocating sector-specific exceptions to FIPPA. In our view, any concerns with respect to the application of FIPPA should be dealt with in amendments to other enabling legislation. To the extent possible, FIPPA should remain a law of general application. We also note that, in its May 2004 report, the previous Special Committee rejected recommendations to exclude various types of

records, saying such a move would be a backwards step for public access rights and government accountability.

We are not, for example, in favour of the Insurance Corporation of British Columbia's ("ICBC") recommendation to carve-out files that are the subject of active litigation. This is yet another example of the "creeping repeal" of the Act and it would be difficult to establish whether litigation is, in fact, active in the various sectors where this exception might apply. Access to information pursuant to FIPPA is not necessarily a parallel process to the discovery process during litigation. Applicants in each process receive a different scope of record. In addition, where a record is received in response to a request under FIPPA, there are no restrictions on the further use or dissemination of the information. By contrast, information received in the discovery process is subject to strict rules regarding any further dissemination. Therefore, the discovery process does not ensure that the public has the information it needs to hold government accountable.

Moreover, "litigation" is not limited to the types of cases ICBC referred to. The former Commissioner found that labour arbitrations and environmental review board processes are also "litigation". Thus, the adoption of ICBC's recommendation to exclude records related to "active litigation" from the scope of FIPPA would apply to a broader range of records than anticipated.

We also consider unnecessary the recommendation from the Victoria and Vancouver Police Departments that there be an exclusion from the scope of FIPPA for active police investigation files. As we noted in our submission to the 2004 Special Committee, police records already enjoy substantial protection. Moreover, a number of our office's orders have confirmed that the police may withhold information on active investigations under s. 15(1).

Similarly, we do not favour suggestions to exclude labour relations or employment related information from the scope of FIPPA. Doing so would seriously weaken FIPPA's purpose of giving individuals the right of access, including to their own personal information.

Turning to other recommendations, with respect to those about fees, our position is that fees should not be increased. This includes our view that there should be no change to the types of services for which public bodies can charge.

We also disagree with the recommendation of the Law Society of BC that the Court, rather than the Information and Privacy Commissioner, rule on issues regarding the validity of non-disclosure on the basis of solicitor-client privilege. Our view that the Commissioner should decide this matter is consistent with his general responsibilities under FIPPA and the purposes of FIPPA. It is also consistent with the decision of the Supreme Court of Canada in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* 2 S.C.R. 574, 2008 SCC 44.

Finally, we do not agree with recommendations to change the provisions that permit information to be withheld where it would be harmful to the financial or economic interests of a public body or harmful to business interests of a third party [ss. 17 and 21]. In our view, these sections as currently worded appropriately balance public

accountability with protection of public body or business interests. Changes such as those proposed would seriously undermine FIPPA's accountability and transparency purposes and thus public access rights.

I hope these comments are helpful to you in your deliberations. Please contact me if you have any questions or would like further input from my office. I look forward to your recommendations in due course.

Sincerely,

ORIGINAL SIGNED BY

Paul D. K. Fraser, Q.C.
Acting Information and Privacy Commissioner
for British Columbia