OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

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

February 5, 2004

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1 Section 71 should be amended to require public bodies to make available to an individual his or her own personal information free of charge and without an access request, but subject to any access exceptions under the Act.

2 The Act should be amended to require public bodies, at least at the provincial government level, to adopt and implement schemes approved by the OIPC for routine disclosure of information, with disclosure of information under these schemes being by electronic means wherever possible.

3 Consistent with the existing requirement under s. 69 to perform privacy impact assessments, the Act should be amended to require public bodies to use prescribed access design principles in designing and adopting any information system or program.

4 Section 12 should be amended by adding a subsection that allows Cabinet to waive the protection of that otherwise mandatory provision.

5 Sections 12(2) and (4) should be amended to reduce the time limit in those provisions to 10 years from 15 years.

6 Section 13(1) should be amended to clarify the following:

(a) "advice" and "recommendations" are similar and often interchangeably used terms, not sweeping separate concepts,
(b) "advice" or "recommendations" set out suggested actions for acceptance or rejection during a deliberative process,
(c) the "advice" or "recommendations" exception is not available for the facts upon which advised or recommended action is based,
(d) the "advice" or "recommendations" exception is not available for factual, investigative or background material, for the assessment or analysis of such material, or for professional or technical opinions.

7 Section 13(3) should be amended to reduce the time limit on s. 13(1) from 10 years to five years.

8 Section 22(4) of the Act should be amended to state that it is not an unreasonable invasion of third-party privacy to disclose the personal information of an individual who has been dead more than 20 years.

SUBMISSIONS ON PRIVACY PROTECTION

9 Section 35(1)(a.1) should be repealed or, in the alternative, amended to permit disclosure of contact information to a researcher where it is not practicable for the disclosing public body to contact prospective research participants on behalf of the researcher.

10 The Act should be amended to require public bodies to consider, as part of any assessment respecting the privacy impact of a law, policy, program or technology under consideration, with that assessment being conducted according to a privacy charter incorporated in the Act or enacted as a free-standing statute. Where the privacy impacts cannot be minimized to an acceptable level, the proposal should be abandoned.

SUBMISSIONS ON THE SCOPE OF THE ACT

11 Section 3 should be amended to clarify that records, including personal information, created by or in the custody of a service-provider under contract to a public body are under the control of the public body for which the contractor is providing services.

12 Section 20(1)(a) should be repealed and s. 3(1) amended to state that the Act does not apply to records available for purchase by the public.

13 The Act should be amended to allow Cabinet to prescribe, by regulation, a government-wide policy on access to published information by public interest groups.

SUBMISSIONS ON ADMINISTERING ACCESS REQUESTS

14 Section 10 should be amended to give the Commissioner the authority to extend the time for responding to an access request where the Commissioner considers it fair and reasonable to do so. The amendment should not authorize the head of a public body to extend the response time on this ground.

15 Section 11 should be amended to authorize a public body to transfer an access request to any public sector entity that is subject to a federal, provincial or territorial access to information statute.

16 There should be no change in the cost-burden on access applicants, as the fee schedule and provisions in the Act reflect an appropriate user-pay approach.

17 Section 75(1)(b) of the Act should be amended to define or otherwise clarify what is permitted when charging a fee for “preparing the record for disclosure”.

18 The Act's Schedule of Fees should be amended to reflect use of electronic media such as CDs and DVDs and to reflect decreases, since the Schedule was created a decade ago, in the costs of providing access to information in electronic form.

19 Section 3 of the FOI Regulation should be amended to make it consistent with ss. 1 to 4 of the Personal Information Protection Act Regulations.

SUBMISSIONS ON OIPC POWERS & PROCESSES

20 Section 42 should be amended to explicitly give the Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom of information requests, in a form and manner that the Commissioner considers appropriate.

21 Section 42 should be amended to give the Commissioner the explicit authority to require applicants to attempt to resolve complaints and requests for review with public bodies in a manner that the Commissioner directs. The wording should be similar to that of s. 38(4) of the *Personal Information Protection Act*.

22 Section 56 should be amended to provide that the 90-day period it sets out does not include any time taken for an OIPC referral back to the public body. The wording should be similar to s. 50(9) of the *Personal Information Protection Act*.

23 Section 42 should be amended to require public bodies to provide draft legislation to the Commissioner before its introduction in the Legislature, so that the Commissioner may comment on implications for access to information or protection of privacy of that draft legislation.

24 Sections 44(1) and (2) should be amended to eliminate incorporation of powers by reference to the *Inquiry Act* and to provide express powers, applicable to public bodies and others, for the Commissioner to:

(a) order the production of records or things;
(b) order the attendance of individuals and their oral or electronic examination on oath, affirmation or in any other manner, in connection with any investigation, audit or inquiry under the Act, and
(c) be able to file and enforce Commissioner's orders as orders of the Supreme Court of British Columbia.

25 The Act should be amended to combine the complaint process and the review and inquiry process into a unitary process for the Commissioner to investigate, review, mediate, inquire into and make orders about complaints respecting decisions under the Act or other allegations of non-compliance with the Act.

26 The Act should be amended to give protection from testimonial compulsion to the Commissioner and those acting for or under the direction of the Commissioner.

27 Section 56(6) should be amended to give the Commissioner the ability to extend the 90-day time limit. The wording should be similar to that in s. 50(8) of the *Personal Information Protection Act*.

28 Sections 58(2) and (3) should be amended to permit the Commissioner to order a public body to perform the s. 4(2) duty to sever excepted information and disclose the remainder of requested records.

29 The Act should be amended to provide a mechanism for the enforcement of the Commissioner's orders as orders of the Supreme Court of British Columbia.

30 Section 59(2) should be amended and a new s. 59(3) added to inhibit abuse of the judicial review process by time-limiting the automatic stay of the Commissioner's order:

> (2) If an application for judicial review is brought before the end of the period referred to in subsection (1), the order of the Commissioner is stayed for 60 days from the date the application is brought.
>
> (3) A court may abridge or extend, or impose conditions on, a stay of the order of the Commissioner under subsection (2).

31 The Act should be amended to expressly provide that the Commissioner is a full party respondent to applications for judicial review.

32 Simplify and lend consistency to judicial reviews by amending the Act to add a privative clause, such as is found in the *Labour Relations Code*, concerning the finality and exclusivity of the Commissioner's authority under the Act.

A. INTRODUCTION

A well-crafted freedom of information law is indispensable to the proper functioning of any democratic government and balanced, but meaningful, privacy rights are critically important in protecting individuals from the state's power. As the Supreme Court of Canada has recognized in relation to access to information[1]:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 Can. J. of Econ. and Pol. Sci. 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.
>
> …
>
> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsible and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.

The United States Supreme Court has on many occasions said similar things about freedom of information. In one case dealing with the United States federal *Freedom of Information Act*[2], the Court said the following[3]:

> The basic purpose of [the Act] … is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.

A 1996 United States House of Representatives report said this about the *Freedom of Information Act*[4]:

> … access to unpublished agency records has resulted in many disclosures of waste and fraud in the Federal Government. The Act reflects the view that the full disclosure of information to the public about government wrongdoing and other mistakes will ultimately generate appropriate corrective responses. Such revelations may have a certain degree of preventive effect, prompting a higher degree of probity and conscientiousness in the performance of government operations. Exposures resulting from FOIA disclosures, and the reactions they produce, are critical to maintaining an open and free society.

Privacy protection is a fundamental value in modern, democratic societies[5]. As an "expression of an individual's unique personality, privacy is grounded on physical and moral autonomy—the freedom, or personhood, to engage in one's own thoughts, actions and decisions"[6]. Among the various concepts of privacy, British Columbia's *Freedom of Information and Protection of Privacy Act* ("Act") deals with information privacy, which is, like other kinds of privacy, based on the concept of the dignity and integrity of the individual. Canadian courts have repeatedly recognized the importance of information privacy[7]:

> In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained… .

Simply put, British Columbia's Act has, for over a decade, served the vital functions of guaranteeing public access to information and protecting individual privacy. It is a foundation upon which government remains open and accountable to the citizenry. All laws, however, must periodically be reviewed and amended, to correct errors or oversights and keep pace with changing needs. This is no less true with the Act than any other piece of legislation.

In May 2003, the Legislative Assembly resolved, as contemplated by s. 80 of the *Freedom of Information and Protection of Privacy Act*, to create the Special Committee to Review the *Freedom of Information and Protection of Privacy Act*. The Act has been reviewed once before by an all-party Special Committee of the Legislative Assembly, which recommended amendments in its July 15, 1999 report. Amendments stemming from that report have been made over the past few years. The Act was amended in 2002 and 2003 as a result of an internal government review of the Act, initiated at the direction of the Premier in a June 2001 letter to the Minister responsible for the Act. Like the first Legislative Assembly review, the present review is being undertaken by the Legislative Assembly—the legislative branch of the provincial government—and not by the executive branch of government, which has already completed its recent review of the Act.

The present government campaigned in the last provincial election on an explicit promise to make the provincial government the "most open, accountable and democratic government in Canada"[8]. Consistent with this commitment, this Committee has an excellent opportunity to recommend amendments to ensure that the public's right of access to information under the Act remains vigorous and meaningful in the years to come. This Committee also has the opportunity to ensure that the Act's privacy protections remain strong and relevant in the face of advances in information technology and new policy initiatives respecting private sector delivery of public services. To ensure the health of fundamental democratic and human rights, this Committee must focus on

the larger picture and the longer term. It can and should recommend amendments that ensure public access to information—and thus public body accountability—is guaranteed, effective and meaningful in the coming years. It can and should suggest changes to the Act that protect personal privacy in the face of rapid technological change.

This document contains the main submissions of my office to the Committee. They reflect the following considerations:

- The need to ensure the Act remains an effective tool for achieving openness and accountability on the part of public bodies and for protecting citizens' privacy.

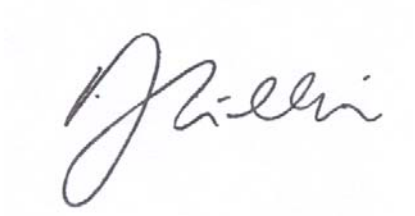
- The Act's administrative provisions should be practical without jeopardizing timely access to information.

- The processes of the Office of the Information and Privacy Commissioner ("OIPC") must, at a time of budget cutbacks, be simple, flexible, fair and cost-efficient.

I am, as always, extremely grateful to my colleagues, in this case for their contributions to these submissions. Celia Francis, Susan Ross, Mary Carlson, Stephen Hartman and Judy Pettersson deserve special mention on this occasion.

Victoria, British Columbia

February 5, 2004



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B. SUBMISSIONS ON ACCESS RIGHTS

The fundamental importance of access to information for government accountability has been discussed above. In considering the following recommendations, the Committee is asked to remember that, since the Act came into force, the exceptions to the right of access have been expanded, not diminished.

The last statutory review of the Act did not result in any amendments to enhance access. Since that review, the Act has twice been amended—once under the present administration and once under the past—in ways that encroach on the right of access. In addition, a surprising decision of the British Columbia Court of Appeal has interpreted s. 13(1) so broadly that it threatens to swallow several of the Act's other exceptions whole and unduly diminish accountability through access to information.

The time has come to refocus the Act in several respects, so that the right of access is improved, not diminished. The Act's goals of openness and accountability must be invigorated and this Committee has the means to start that process.

1. Requiring routine disclosure of information

Section 71 allows public bodies to prescribe categories of records that are available on demand without an access request. It allows public bodies to charge fees for providing such access.

In the spirit of this section, some public bodies—the Workers' Compensation Board is an example—have taken the initiative of providing their clients with access, free of charge, to their own personal information. Where the personal information is subject to exceptions under the Act, the public bodies divert that information to the formal freedom-of-information stream for treatment under the Act. This practice recognizes that individuals have a right of access to their own personal information and that in many cases their information may be released routinely, without an access request.

The OIPC takes every opportunity to encourage and promote such initiatives and believes it would be appropriate to codify this practice in the Act by requiring public bodies to make available, on a routine basis, records containing an individual's own personal information, subject to applicable exceptions under the Act.

Apart from a few initiatives to routinely disclose personal information, however, s. 71 has hardly been used in the past decade. As the Commissioner has been saying to public bodies for years, a comprehensive program of mandatory routine, pro-active disclosure has two advantages over the reactive, request-triggered approach to freedom of information. First, pro-active disclosure without request is consistent with the Act's goals of openness and accountability. Second, routine access can reduce the costs of freedom of information by avoiding the more expensive process of responding to specific, and often repeated, access requests for the same information.

The following discussion recommends a framework for amendments to the Act that would enhance routine disclosure of information in British Columbia, notably at the provincial government level. The framework borrows features from the system of publication schemes under the United Kingdom's *Freedom of Information Act*, which comes into force on January 1, 2005. It also has features of 1996 amendments to the United States federal *Freedom of Information Act*.

Under s. 19 of the UK's *Freedom of Information Act*, each public authority must adopt and publish a 'publication scheme'. The scheme must set out details of the classes of information the authority routinely makes available, how the information can be obtained and what, if any, fees are payable. All publication schemes must be prepared having regard to the public interest "in allowing public access to information held by the authority" and the public interest "in the publication of reasons for decisions made by the authority". All schemes have to be approved by the Information Commissioner, who has published on-line a number of model schemes that were developed in co-operation with various authorities. The UK system has many features that can and should be imported to British Columbia.

Any system of pro-active, routine disclosure must be designed to work effectively in—and to take advantage of—the electronic information environment in which we now live. In 1996, amendments were made to the US federal *Freedom of Information Act* to promote routine electronic disclosure of information. The House of Representatives' report on the amendments had the following still-relevant things to say about freedom of information and electronic information systems[9]:

> Today, the FOIA [*Freedom of Information Act*] faces a new challenge. The volume of Federal agency records created and retained in electronic formats is growing at a rapid pace. Agency records are now created not just on pieces of paper and placed in filing cabinets. Personal computers and digital storage media, such as CD-ROMs (compact disk read-only memory), are becoming more commonplace at Federal agencies. Information technology makes the management of the information collected, stored, and used by the Government more efficient.
>
> When the FOIA was enacted agency records were primarily produced on paper. FOIA's efficient operation requires that its provisions make clear that the form or format of an agency record constitutes no impediment to public accessibility. Furthermore, the information technology currently being used by executive departments and agencies should be used in promoting greater efficiency in responding to FOIA requests. This objective includes using technology to let requestors obtain information in the form most useful to them. Existing technologies for searching electronic records can often review materials more quickly than is possible via a paper review. Harnessing these tools for FOIA can enhance the operation of the Act.
>
> The public is increasingly using networked computers and broadly accessible data networks such as the Internet. Agencies need to fulfill their responsibilities under the FOIA in a manner that keeps pace with these developments. An underlying goal of H.R. 3802 [the Bill to amend the FOIA] is to encourage on-line access to

> Government information available under the FOIA, including requests ordinarily made pursuant to section 552(a)(3). As a result, the public can more directly obtain and use Government information. This can result in fewer FOIA requests, thus enabling FOIA resources to be more efficiently used in responding to complex requests. H.R. 3802, the *Electronic Freedom of Information Amendments Act of 1996*, amends the FOIA to address these considerations and other information access issues prompted by the electronic information phenomenon.

The US *Freedom of Information Act* now requires each federal agency to, in accordance with rules it must publish, make available to the public "copies of all records, regardless of form or format, which have been released to any person" in response to an access request which, "because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records"[10]. For records created after November 1, 1996, the agency must make such records available by "computer telecommunications means" or "other electronic means."[11]

Amendments to our Act are needed to require electronic disclosure of information that has been requested and is likely to be requested again. This is admittedly a reactive approach to routine disclosure, since the obligation to routinely disclose is only triggered after at least one access request is made for records that may be subject to further requests—by contrast, the UK approach is more systematic and pro-active. Still, the 1996 US amendments have resulted in the establishment of a comprehensive network of federal electronic reading rooms for federal government agencies. This can only enhance public access to information and thus the federal government's accountability to its citizens.

Closer to home, the Ontario Information and Privacy Commissioner's office has promoted a voluntary program similar in intent to the UK approach. Its *Routine Disclosure/Active Dissemination (RD/AD) of Government Information* (Practice No. 22)[12] sets out the criteria and procedures to be followed in establishing an RD/AD program. In 1996, the Ontario Information and Privacy Commissioner's office, in conjunction with Ontario's Management Board Secretariat, piloted several such schemes with a variety of public bodies. Reports by participating public bodies have indicated that the initial investment is repaid through a reduction in access request processing costs[13].

The voluntary Ontario experiment is innovative and commendable, but the past decade's lack of uptake under British Columbia's s. 71 indicates that the mandatory approaches to routine dissemination of information taken in the US and the UK should be followed in British Columbia, at least at the provincial government level. Such an approach should, consistent with the 1996 US amendments, be part of the provincial government's move toward electronic service delivery.

Recommendation 1: ***Section 71 should be amended to require public bodies to make available to an individual his or her own personal information free of charge and without an access request, but subject to any access exceptions under the Act.***

Recommendation 2: ***The Act should be amended to require public bodies, at least at the provincial government level, to adopt and implement schemes approved by the OIPC for routine disclosure of information, with disclosure of information under these schemes being by electronic means wherever possible.***

2. Requiring use of access design principles & access impact assessments

For some years, public bodies in British Columbia and across Canada have used privacy impact assessments—ideally at the initial design stage—to assess whether a particular system, program or law complies with privacy legislation. The time has come for public bodies to also consider access to information interests at the design stage of systems, programs and laws. Tom Mitchinson, Assistant Information and Privacy Commissioner for Ontario, has called for the adoption of this kind of assessment, using what he has termed 'access design principles'[14].

Such an approach is needed in British Columbia. In Order 03-16[15], the Commissioner considered a case in which access had been sought to an electronic copy of a public body's database. He said the following about information systems, the right of access to information and technological developments in information systems (at para. 64):

> It is not an option for public bodies to decline to grapple with ensuring that information rights in the Act are as meaningful in relation to large-scale electronic information systems as they are in relation to paper-based record-keeping systems. Access requests like this one test the limits of the usefulness of the Act. This is as it should be. Public bodies must ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the Act. The public has a right to expect that new information technology will enhance, not undermine, information rights under the Act and that public bodies are actively and effectively striving to meet this objective.

This legitimate expectation on the public's part will best be served by requiring the use of common-sense, access design principles.

Recommendation 3: ***Consistent with the existing requirement under s. 69 to perform privacy impact assessments, the Act should be amended to require public bodies to use prescribed access design principles in designing and adopting any information system or program.***

3. The protection for Cabinet confidences should be narrowed

Section 12 of the Act protects certain confidences of the provincial Cabinet. It reads as follows:

> **Cabinet and local public body confidences**
>
> 12(1) The head of a public body must refuse to disclose to an applicant information that 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.
>
> (2) Subsection (1) does not apply to
>
> (a) information in a record that has been in existence for 15 or more years,
> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or
> (c) 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.
>
> (3) The head of a local public body may refuse to disclose to an applicant information that would reveal
>
> (a) a draft of a resolution, bylaw or other legal instrument by which the local public body acts or a draft of a private Bill, or
> (b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.
>
> (4) Subsection (3) does not apply if
>
> (a) the draft of the resolution, bylaw, other legal instrument or private Bill or the subject matter of the deliberations has been considered in a meeting open to the public, or
> (b) the information referred to in that subsection is in a record that has been in existence for 15 or more years.
>
> (5) The Lieutenant Governor in Council by regulation may designate a committee for the purposes of this section.
>
> (6) A committee may be designated under subsection (5) only if

> (a) the Lieutenant Governor in Council considers that
> (i) the deliberations of the committee relate to the deliberations of the Executive Council, and
> (ii) the committee exercises functions of the Executive Council, and
> (b) at least 1/3 of the members of the committee are members of the Executive Council.

The importance for our system of government of generally protecting the confidentiality of Cabinet proceedings and deliberations is beyond question[16]. It may be that the Legislature believed this principle was so important that the s. 12 exception to the public's right of access should be mandatory—as it stands, a public body has no choice under s. 12(1) but to refuse access.

It should, however, be open to the provincial Cabinet to waive the protection of s. 12(1) and release information that could otherwise be withheld under that provision. Cabinet, but not the head of a public body, should be able to do this. There is no constitutional or other legal principle that prevents one Cabinet from viewing or dealing with material of a previous Cabinet or administration in this way.

Such a change would be entirely consistent with the present government's commitment to making the provincial government the most open, accountable and democratic government in Canada. Allowing Cabinet to release material that it could technically withhold would also be consistent with this government's introduction of Cabinet meetings that are open to the public. Last, the government last year obtained an amendment to s. 12 that expands its application to the numerous Cabinet-caucus committees that now exist. The use of such committees potentially expands the scope of Cabinet confidentiality beyond boundaries previously seen. The ability for Cabinet to waive the protection of s. 12 is, in this light, a desirable limitation on that broad exception.

A precedent for such a Cabinet role already exists in s. 16 of the Act. Section 16(1) protects certain information the disclosure of which could reasonably be expected to harm inter-governmental relations or disclose inter-governmental confidences. Section 16(2) provides that the head of a public body must not disclose such material unless, as provided under s. 16(2)(b), Cabinet consents to the disclosure.

Further, the OIPC considers that the 15-year time limit in s. 12(2) is unnecessarily long. The same holds for the s. 12(4) time limit on the protection for local government confidences found in s. 12(3) of the Act. The Act's goal of accountability would be better served if the time limits now found in ss. 12(2) and 12(4) were reduced from 15 to 10 years.

Recommendation 4: Section 12 should be amended by adding a subsection that allows Cabinet to waive the protection of that otherwise mandatory provision.

<u>Recommendation 5:</u> Sections 12(2) and (4) should be amended to reduce the time limit in those provisions to 10 years from 15 years.

4. The advice or recommendations exception must be amended to restore accountability

One of the most frequently invoked exceptions under the Act—at least at the provincial government level—is s. 13(1). This is a discretionary exception that protects advice and recommendations developed by or for a public body or minister, without the need for proof of harm from disclosure of the information. Because there is no need to prove harm from disclosure of information, s. 13(1) is called a class-based exception. As long as the information in question falls within the described class, it can be withheld. By contrast, the majority of the Act's exceptions to the right of access require proof of harm to an identified interest before the information can be withheld. Section 13 therefore is, by design, a generous class exception and, in light of the Court of Appeal decision discussed below, it must be amended if the public's right of access is to have full meaning under the Act.

Section 13 reads as follows:

> **Policy advice, recommendations or draft regulations**
>
> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
> (b) a public opinion poll,
> (c) a statistical survey,
> (d) an appraisal,
> (e) an economic forecast,
> (f) an environmental impact statement or similar information,
> (g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,
> (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,
> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
> (j) a report on the results of field research undertaken before a policy proposal is formulated,
> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
> (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,

> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
>
> (3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

Section 13 was modeled on a very similar provision in Ontario's *Freedom of Information and Protection of Privacy Act*. That Act followed, after a few years of delay, the landmark publication of *Public Government for Private People: the Report of the Commission on Freedom of Information and Individual Privacy*, known as the Williams Commission[17]. The Williams Commission report recognized, as have other commentators, that if a class exception for "advice or recommendations" were too broadly worded or interpreted, the right of access could be swallowed entirely[18]:

> An absolute rule permitting public access to all documents relating to policy formulation and decision-making processes in the various ministries and other institutions of the government would impair the ability of public institutions to discharge their responsibilities in a manner consistent with the public interest. On the other hand, were a freedom of information law to exempt from public access all such materials, it is obvious that the basic objectives of the freedom of information scheme would remain largely unaccomplished. There are very few records maintained by governmental institutions that cannot be said to pertain in some way to a policy formulation or decision-making process.

The Williams Commission report also said the following[19]:

> Although the precise formula for achieving a desirable level of access for deliberative materials has been a contentious issue in many jurisdictions in which freedom of information laws have been adopted or proposed, there is broad general agreement on two points. First, it is accepted that some exemption must be made for documents or portions of documents containing advice or recommendations prepared for the purpose of participation in decision-making processes. Second, there is a general agreement that documents or parts of documents containing essentially factual material should be made available to the public. ...
>
> A second point concerns the status of material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations. Such materials are not exempt from access under the U.S. Act, and it appears to have been the opinion of the federal Canadian government that the reference to "advice and recommendations" in Bill C-15 would not apply to material of this kind.
>
> Similarly, the U.S. provision and the federal Canadian proposals do not consider professional or technical opinions to be "advice and recommendations" in the requisite sense. Clearly, there may be difficult lines to be drawn between

> professional opinions and "advice." Yet, it is relatively easy to distinguish between professional opinions (such as the opinion of a medical researcher that a particular disorder is not caused by contact with certain kinds of environmental pollutants, or the opinion of an engineer that a particular high-level bridge is unsound) and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. Professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. The advice of the public servant recommends that one of the possible range of policy choices be acted on by the government. If the phrase "advice and recommendations" is interpreted in light of the underlying purpose of the exemption, we would anticipate that satisfactory determinations of the appropriate reach of the exemption could be made. We do not think it would add much to the clarity of the proposition to add a limitation that it would not apply to "technical advice and the opinions of experts" or some similar phrase.

In late 2002, the British Columbia Court of Appeal issued an important decision about s. 13, *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner)*[20]. In that case, the Court of Appeal decided that expert medical reports obtained by the College for the purposes of investigating a complaint against a physician were protected, in their entirety, as "advice" under s. 13(1). The experts' opinions concerned whether the physician had improperly performed or attempted to perform a medical procedure involving hypnosis on the access applicant, who had complained to the College about the physician. The College had looked into the matter and decided not to proceed against the physician. Its complaint file was closed.

In the inquiry under the Act, the College relied on s. 13(1), s.14 (solicitor-client privilege) and s. 15(1) (protection for law enforcement processes). The present Commissioner decided[21] that some material which was work product of the College's lawyer was privileged under s. 14, but held that the rest of the records were not protected by s. 13, s. 14 or s. 15. Regarding s. 15(1), the Commissioner accepted that the College's complaints-investigation activities qualified as "law enforcement", but held that the College had not, on the evidence before him, established the necessary reasonable expectation of harm to a law enforcement matter if the medical opinions were disclosed in that case.

The College's challenge of the Commissioner's decision in the Supreme Court of British Columbia failed and the College appealed to the Court of Appeal. The College's case in the Court of Appeal concentrated on its s. 14 claim, which was again dismissed. To the surprise of all, and with the benefit of only sparse argument, the Court of Appeal pronounced a sweepingly broad interpretation of "advice" in s. 13(1). That interpretation says that "advice" includes an opinion that involves exercising judgement and skill to weigh the significance of matters of fact, including expert opinions on matters of fact on which a public body must make a decision for future action.

With some justification, public bodies have taken the Court of Appeal's interpretation of s. 13 to mean that factual information presented to provide background explanations or analysis for consideration in making a decision is now protected from disclosure under s. 13(1). To say the least, this interpretation seriously undermines s. 13(2)(a), which

expressly provides that a public body cannot withhold "factual material" as advice or recommendations under s. 13(1). Indeed, the Court of Appeal's interpretation comes perilously close to ignoring the existence of s. 13(2)(a) altogether.

The Court of Appeal's decision also means that public bodies can simply rely on s. 13(1) to withhold investigative material relating to law enforcement and need no longer meet the harm-based requirements in the law enforcement exception (s. 15). The decision also means that individuals can be denied access to their own previously-available personal information, for no other reason than that it was gathered, compiled or presented for the purpose of generating investigative or briefing material for a public body's consideration in making a decision of some kind, whether trivial or not.

The *College of Physicians* decision is binding on public bodies, the Commissioner and lower courts in this province. It is not binding elsewhere in Canada and has not, as two very recent decisions demonstrate, been followed in Ontario: *Ministry of Northern Development and Mines* v. *Ontario (Assistant Information and Privacy Commissioner)*[22] and *Ministry of Transportation* v. *Ontario (Information and Privacy Adjudicator)*[23].

The analysis of the Ontario Divisional Court in *Ministry of Northern Development and Mines* respecting the Ontario advice and recommendations provision—found in s. 13 of Ontario's Act—is appropriate for the advice and recommendations exception in this province as well. In that case, Dunnet J., on behalf of the three-judge panel, said the following[24]:

> In my view, the Ministry seeks to ascribe to the word "advice" an overly broad meaning tending to eviscerate the fundamental purpose of the statute to provide a right of access to information under the control of institutions, in accordance with the principles that information should be available to the public and exemptions from the right of access should be limited and specific (s. 1(a)(i), (ii) of the Act).
>
> Section 13(2) of the Act lists various types of information, such as factual material, statistical surveys and certain reports, which are not to be protected under section 13(1). They are not intended, as the Ministry would suggest, to limit what would otherwise have been a very broad interpretation of the exemption at section 13(1).
>
> The Ministry submits that the Commissioner has interpreted the words "advice" and "recommendations" to have the same meaning. I disagree with their position. The Commissioner states that the words have similar meanings in the context of section 13(1) of the Act and should be interpreted to mean information that reveals a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy and decision-making. Moreover, in *Fineberg*[25], this court has endorsed as reasonable the interpretation adopted by the Commissioner.
>
> In *Human Rights Commission*[26], this court upheld the Commissioner's interpretation and application of section 13(1). There he found that a memorandum from an investigating human rights officer to her supervisor seeking direction as to how an investigation should be handled and the response to the supervisor did not

qualify under section 13, because neither set out any suggested course of action which could be accepted or rejected during the deliberative process.

CONCLUSION

In *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 61-63, La Forest J. described the importance of access to information legislation to the proper functioning of a democracy:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. ...
>
> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable.

The Commissioner's interpretation of the meaning of section 13(1) followed a long line of previous orders, which held that the terms "advice" and "recommendations" have similar meanings. The Commissioner observed that ordinary dictionary meanings use the words "advice" and "recommendation" to define each another. Further, the legislative history set out in the Williams Commission Report (Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) uses the words "advice" and "recommendations" interchangeably.

The Commissioner also referred to the policy rationale in the Williams Commission Report for including the exemption and the fact that the exemption was not designed to protect analytical discussion of factual material or the assessment of various options relating to a specific factual situation that does not offer specific advice or recommendations.

In view of these findings, there is no need to apply the presumption against tautology. Alternatively, there are ample indicators of legislative meaning to suggest that the presumption is rebutted and the Commissioner's interpretation complies with the legislative text, promotes the legislative purpose, and is reasonable.

The Williams Commission's warning against an over-broad interpretation of the policy advice or recommendations exceptions has been emphasized in this way[27]:

> The difficulty with this exemption is that, construed broadly, policy advice encompasses all information generated by public servants. It has the potential to render a legislated right of access to information meaningless.

The *College of Physicians* decision—which, among other things, failed to interpret s. 13 in light of the explicit accountability objective in s. 2(1) of the Act—has turned these warnings into reality in British Columbia. The accountability and openness promised by s. 2(1) depend on s. 13(1) being amended at the earliest opportunity to clarify that:

- "advice" and "recommendations" are similar and often interchangeably used terms, not sweeping separate concepts[28],
- "advice" or "recommendations" set out suggested actions for acceptance or rejection during a deliberative process,
- the "advice" or "recommendations" exception is not available for the facts upon which advised or recommended action is based,
- the "advice" or "recommendations" exception is not available for factual, investigative or background material, for the assessment or analysis of such material, or for professional or technical opinions.

Further, the BC Freedom of Information and Privacy Association ("FIPA") has suggested to the Committee that the s. 13(1) exception should not be available after the decision or course of action to which advice or recommendations relate has been made or taken. The OIPC agrees that some reduction in the time horizon for the s. 13(1) exception would advance the objectives of the Act without compromising appropriate protection for the deliberative processes of public bodies. This could be accomplished by reducing the 10-year time period in s. 13(2) to five years, as well as by giving serious consideration to FIPA's proposal.

Recommendation 6: ***Section 13(1) should be amended to clarify the following:***

(a) "advice" and "recommendations" are similar and often interchangeably used terms, not sweeping separate concepts,
(b) "advice" or "recommendations" set out suggested actions for acceptance or rejection during a deliberative process,
(c) the "advice" or "recommendations" exception is not available for the facts upon which advised or recommended action is based,
(d) the "advice" or "recommendations" exception is not available for factual, investigative or background material, for the assessment or analysis of such material, or for professional or technical opinions

Recommendation 7: ***Section 13(3) should be amended to reduce the time limit on s. 13(1) from 10 years to five years.***

5. Solicitor-client privilege is well protected

Section 14 of the Act protects solicitor-client privilege. It is well established that s. 14 protects solicitor-client privilege as defined by the courts. One witness has suggested to the Committee that s. 14 should be mandatory where a third party's privilege is in issue.

The protection of s. 14 is discretionary—a public body can waive its privilege protection under the Act, just as it can at common law. If a public body possesses information that is privileged to a third party's benefit, the public body cannot waive that other person's privilege, at common law or under the Act. The courts have made this clear and the Commissioner has also made this clear.

It is therefore not necessary, in the OIPC's view, to amend s. 14 to protect third-party interests.

6. Third-party business information is well protected

Section 21 of the Act protects certain third-party business information supplied to a public body in confidence, where disclosure of that information could reasonably be expected to cause harm of a kind mentioned in that section:

> **Disclosure harmful to business interests of a third party**
>
> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
> (i) trade secrets of a third party, or
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
> (iii) result in undue financial loss or gain to any person or organization, or
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.
>
> (2) The head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.
>
> (3) Subsections (1) and (2) do not apply if
>
> (a) the third party consents to the disclosure, or
>
> (b) the information is in a record that is in the custody or control of the archives of the government of British Columbia or the archives of a public body and that has been in existence for 50 or more years.

Decisions of both the present and previous Commissioner have consistently acknowledged that the intent of this provision is to protect third-party interests. Numerous decisions by the Commissioners and the courts have interpreted the s. 21(1)(b) requirement that information must have been "supplied" to the public body as meaning what it says. Information in a contract that is the outcome of the give and take of contract negotiations between a third party and public body will not ordinarily qualify as having been "supplied" to the public body. Further, even information that results from negotiation will have been "supplied" where disclosure of the negotiated information would reveal underlying third-party information that was actually supplied to the public body. A detailed discussion of British Columbia decisions is found in Order 03-02[29], to which the Committee is referred.

Provisions very similar to s. 21 are found in all Canadian access to information statutes, most of which explicitly require information to have been "supplied" before it qualifies for protection. Such supply requirements have consistently been interpreted in the same manner as in British Columbia, including by the Federal Court of Canada. A full review of decisions from across Canada on the supply requirement is found in Order 03-02, to which the Committee is again referred.

Further, the leading Canadian text on access to government information says the following about the supply requirement in relation to negotiated contracts[30]:

> When a request is made for access to an agreement entered into between a government institution and a third party, the agreement as a whole is unlikely to be protected from disclosure by a commercial information exemption on the federal model if the institution played a significant role in developing its terms. Such protection was, for example, denied where an agreement to which access was requested was the result of negotiations and was based on the essential requirements for an agreement that were set out in the government's request for proposals, a document that was publicly available.
>
> In determining whether particular terms of an agreement were supplied by a third party, the fact that they originated with that party and were not significantly changed through the negotiation process does not necessarily mean that they were supplied by the third party. Rather, the absence of change is but one factor to be considered in making that determination.
>
> Information supplied by a third party would include any information that, if disclosed, would permit an accurate inference to be drawn as to information that was supplied by a third party. Thus, information generated by an institution could qualify for protection from disclosure if it were to carry such an inference.

The policy underlying third-party business information provisions such as s. 21 merits some emphasis. In 1980, before enactment of Ontario's *Freedom of Information and Protection of Privacy Act*, the Williams Commission (mentioned above) addressed the question of third-party business information. The following passage from *Public Government for Private*

People[31] merits quotation in full because it is as relevant and persuasive today as it was 24 years ago:

> The language of the exemptions relating to valuable business information varies from one jurisdiction to the next; nevertheless, there appears to be agreement as to the underlying purpose of such an exemption and on the types of information which should be covered.
>
> It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record. For example, public scrutiny of the effectiveness with which governmental institutions discharge their responsibilities with respect to consumer protection or the protection of the environment requires information about the vigour with which enforcement mechanisms have been deployed against firms who refuse to comply with regulatory standards. The ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy them-selves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations [45]. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity. The strength of this claim is recognized in each of the freedom of information schemes we have examined in that none of these schemes simply exempts all information relating to the activities of business concerns.
>
> Two further propositions are broadly accepted as imposing limits on the general presumption in favour of public access. The first is that disclosure should not extend to what might be referred to as the informational assets of a business firm -- its trade secrets and similar confidential information which, if disclosed, could be exploited by a competitor to the disadvantage of the firm. It is not suggested that business firms have a general "right to privacy." To the extent that information concerning business activity may include information concerning identifiable individuals, the information may fall under another exemption relating to personal privacy. Business firms as such, however, are not accorded an equivalent "privacy" interest in the schemes we have examined. Nor is it suggested that business firms should enjoy a general right of immunity from disclosures which reveal that they have engaged in unlawful or otherwise improper activity. The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information

acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information. In all the freedom of information schemes we have examined, some means for exempting commercially valuable information is included to meet these concerns.

The second proposition limiting presumptions in favour of disclosure holds that it is desirable to permit governmental institutions to give an effective undertaking not to disclose sensitive commercial information where such undertakings are necessary to induce business firms to volunteer information useful to a governmental institution in the proper discharge of its responsibilities. There is, however, some disagreement as to whether an explicit provision for such undertakings ought to be included in a freedom of information law. The U.S. act does not contain explicit reference to this question but, as we have seen, recognition of this interest has been developed in the case law interpreting the act. The commentary accompanying the Australian Minority Report Bill suggests that such a provision should not be included for fear that it would encourage the granting of confidential status in circumstances where it was neither necessary nor appropriate. It is our view, however, that a provision of this kind can be drafted so as to indicate legitimate uses of such undertakings.

How, then, is an exemption relating to sensitive commercial information to be drafted? The principal difficulty in structuring an exemption lies in striking an appropriate balance – one that will not impose impossible burdens of proof either on business firms who wish to assert that disclosure would be harmful, or on those who request access to government information relating to businesses. Essentially, there are three questions to be addressed in designing an exemption relating to commercial information. First, what kind of information is to be subject to the exemption? Second, should express reference be made to the competing public interest in disclosure so as to effect, in some cases, a balancing test under the exemption? Third, how should confidences extended by government be protected?

With respect to the first question, the difficulty is one of identifying the kinds of information that constitute a firm's "informational assets." First, it must be acknowledged that the concept of "trade secrets" is too narrow for the purposes of a freedom of information act exemption. There may be many kinds of information submitted to government which would be of interest to a firm's competitors but which could not be said to be "trade secrets" in the full legal sense. For example, information relating to current levels of inventory, profit margins or pricing strategies may not constitute trade secrets but they might, if disclosed, confer an unfair advantage upon a firm's competitors [46]. Accordingly, we believe that the exemption should refer broadly to commercial information submitted by a business to the government, but should limit the exemption to information which could, if disclosed, reasonably be expected to significantly prejudice the competitive position of the firm in question. We recommend, therefore, a provision drafted in terms such as the following:

> A government institution may refuse to disclose a record containing a trade secret or other financial, commercial, scientific or technical information

> obtained from a person, the disclosure of which could reasonably be expected to prejudice significantly the competitive position, or interfere significantly with the contractual or other negotiations, of a person, group of persons, or organization.
>
> A number of comments should be made with respect to this proposed formulation. First, the exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. Act and the Australian Minority Report Bill, so as to indicate clearly that the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signalling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind. An illustration of this point may be useful. A questionnaire filled in by a corporation would, of course, be exempt from access to the extent that it contained commercially valuable information. A document prepared by a public official containing a compilation of information from such questionnaires would also be exempt to the extent that the original information submitted by the corporation could be deduced from its contents. However, a statistical compilation of the survey results from which one could not ascertain commercially valuable information concerning specific respondents would not be exempt from access.

Section 21 of the Act, like other similar provisions across Canada, balances the public interest in accountability for the spending of taxpayers' money and the public interest in avoiding harm to private business interests. The case law that has developed across the country consistently affirms the appropriateness, and effectiveness, of that balance. The price of doing business with government therefore is a degree of scrutiny not found in purely private business deals. This has been the case across Canada for many years—at the federal level for almost 20 years and in British Columbia for a decade.

No persuasive case has been made that the balance in the statute, or decisions considering it, is not correct. To the contrary, the present level of scrutiny through s. 21 is appropriate and ever more vital as alternative service delivery and public-private partnerships move ahead at all levels of government in British Columbia. In an era of public-private partnerships and private sector delivery of public services, the case for accountability is in fact stronger now than it was a decade or more ago. Long-term contractual commitments on taxpayers' behalf can have significant financial consequences for taxpayers and meaningful, though not unrestricted, scrutiny of such deals must be preserved under the Act.

The previous Special Committee reviewing the Act was asked to recommend changes to s. 21—including by eliminating the supply requirement—but recommended only a minor amendment. In 2002, that amendment, which the OIPC supported, added the words "or about" after the words "information of" in s. 21(1)(a)(ii). This has clarified that

third-party business information need not be owned by a third party to qualify under s. 21(1)—the information can be "about" the third party and still qualify.

No further change to s. 21 should be contemplated at this time. Any further amendments would be a retrograde step and would run counter to the thrust of such provisions in almost all Canadian access laws and would run against the current of decisions under those laws.

7. Personal information of the deceased should be available after 20 years

Schedule 1 of the Act defines personal information as "recorded information about an identifiable individual". This includes individuals who are dead. Section 22 of the Act requires public bodies to refuse to disclose personal information where its disclosure would be an unreasonable invasion of third-party privacy. Public bodies frequently consider requests for access to personal information of individuals who have been dead for many years, perhaps even decades. One of the factors they properly consider in assessing the unreasonable invasion of privacy is the length of time the person has been dead. In the case of individuals who have been dead for a number of decades, it is difficult to understand how disclosure would be an unreasonable invasion of their privacy.

Section 36 of the Act permits the disclosure of personal information for archival or historical purposes where the information is about someone who has been dead for 20 or more years or where the information is in a record that has been in existence for 100 or more years. There is no such time limit in s. 22 of the Act. It would make sense for s. 22(4) to be amended to state that it is not an unreasonable invasion of privacy to disclose the personal information of individuals who have been dead for more than 20 years.

Recommendation 8: ***Section 22(4) of the Act should be amended to state that it is not an unreasonable invasion of third-party privacy to disclose the personal information of an individual who has been dead more than 20 years.***

C. SUBMISSIONS ON PRIVACY PROTECTION

1. Disclosure of personal information for research purposes

Section 35 of the Act addresses the needs of health research and other research in the province. The government recently added s. 35(a.1), which now prohibits, in all cases, disclosure of personal information by a public body for research purposes unless the public body discloses the personal information "on condition that it not be used for the purpose of contacting a person to participate in the research".

The OIPC has always considered s. 35(a.1) to be unnecessary and undesirable—an absolute ban on disclosure of contact information could have a detrimental impact on clinical and other research. Since s. 35(a.1) was enacted, the OIPC has learned of occasions where it has caused difficulties for researchers who wish to contact individuals who may be interested in participating in research. The OIPC believes s. 35(a.1) should be repealed. In the alternative, it should be amended so that a researcher may use contact information to reach prospective research participants only where it is not practicable for the disclosing public body to reach them on behalf of the researcher.

Recommendation 9: Section 35(1)(a.1) should be repealed or, in the alternative, amended to permit disclosure of contact information to a researcher where it is not practicable for the disclosing public body to contact prospective research participants on behalf of the researcher.

2. Accounting for wider privacy considerations in systems design and technological change

A number of submissions have drawn the Committee's attention to the desirability of a public body undertaking a privacy impact assessment ("PIA") when considering new legislation, the design and development of new information systems or the adoption of new information technologies. Section 69 of the Act now requires ministries to conduct PIAs of new enactments, systems, projects or programs to determine if they comply with Part 3 of the Act, as directed by the minister responsible for the Act.

Before s. 69 was amended to require PIAs, the OIPC had for many years supported and promoted their use in determining—at an early design stage—whether new systems, technologies, programs or other activities would comply with the Act's privacy provisions. The OIPC has always said, however, that a PIA must do more than assess compliance with the law. It must not be limited to assessing whether a proposal technically complies with the Act's requirements for collecting, using, disclosing, storing and disposing of personal information. A PIA that only assesses technical compliance fails to account for the wider risks that initiatives can raise for the personal privacy of individuals whose lives and personal information are affected.

Widespread public concern over police video-surveillance, for example, has little if anything to do with a conviction that the activity technically violates any statutory privacy provision. Most objections to surveillance arise, rather, from a conviction that it is not acceptable for the state to place its citizens under constant surveillance when they have done nothing wrong, but are simply going about their daily business. Similar considerations apply to objections to the use of other surveillance technologies—such as those affecting airline passengers and other travellers—and other programs and activities that apply invasive surveillance technologies to the general population.

Setting aside the question of to what extent such activities actually reduce crime or terrorism, the proliferation of surveillance technologies and programs is undeniably eroding our privacy. The Act fails to address the wider implications of surveillance technologies and related initiatives and should be amended to require public bodies to examine the wider societal privacy issues likely to arise out of new activities involving personal information, not just technical compliance with Part 3 of the Act.

The Commissioner has in mind a "privacy charter" for British Columbians similar to that introduced in the Senate in 2000, as a private member's Bill, by Senator Sheila Finestone, P.C. In a speech on February 19, 2001[32], shortly after the introduction of the federal *Personal Information Protection and Electronic Documents Act*, Senator Finestone discussed the purpose of her Bill, the Privacy Rights Charter[33]:

> Let us also not forget that a hallmark of authoritarian societies … is a capacity to collect information about citizens, to monitor their behaviour, often without their knowledge or consent, and to use that surveillance to make them fearful of exercising the rights that attach to a democracy.
>
> …
>
> At the heart of the Privacy Rights Charter, in its preamble, is the recognition of privacy as a basic human right and a fundamental value. It is a defining difference between an authoritarian state and one built on democratic principles.
>
> It reflects Canada's commitment as a signatory to international human rights instruments to honour and promote privacy. It acknowledges privacy as an interest in the public good, one that is essential to the preservation of democracy and the exercise of many of the rights and freedoms guaranteed by Canada's *Charter of Rights and Freedoms*.
>
> This Charter seeks to give effect to several principles:
>
> - first, that privacy is essential to an individual's dignity, integrity, autonomy and freedom, and to the full and meaningful exercise of human rights and freedoms;
>
> - second, that there is a legal right to privacy; and,
>
> - third, that an infringement of the right to privacy, to be lawful, must be reasonable and justifiable.

> The Charter will apply to all persons and matters coming within the legislative authority of Parliament. It states explicitly that every individual has a right to privacy. This right includes, but is not limited to, physical privacy, freedom from surveillance, freedom from monitoring and interception of private communications, and freedom from the collection, use, and disclosure of personal information.
>
> The Privacy Rights Charter therefore goes much beyond the regulation and collection of personal information. It deals with all forms of privacy infringement.

Privacy laws such as the Act have not been designed to require consideration of this broader societal perspective on a case-by-case, program-by-program, basis. It is time such laws did so, and therefore time for the Act to be amended accordingly.

Recommendation 10: ***The Act should be amended to require public bodies to consider, as part of any assessment respecting the privacy impact of a law, policy, program or technology under consideration, with that assessment being conducted according to a privacy charter incorporated in the Act or enacted as a free-standing statute. Where the privacy impacts cannot be minimized to an acceptable level, the proposal should be abandoned.***

D. SUBMISSIONS ON THE SCOPE OF THE ACT

1. Municipal police forces must not be exempt from access and privacy legislation

The BC Association of Municipal Chiefs of Police has recommended to the Committee that police forces in this province be exempted from the Act. The primary thrust of their argument is that access to information laws interfere with their ability to conduct police investigations.

As indicated in the Commissioner's January 27, 2004 letter to the Committee, the Committee should reject any suggestion that municipal police forces should be excluded from the Act's coverage.

The claim that access to information laws hinder law enforcement activities is unsubstantiated. Under s. 15 of the Act, records generated by law enforcement agencies enjoy substantial protection from disclosure.

The tension between openness and accountability and policing activities is longstanding. The Act appropriately balances those competing interests and there should be no change.

2. Ensuring alternative service delivery does not affect access rights

Section 3(1) states that the Act only applies to records "in the custody or under the control of a public body". Recent changes to Part 3 of the Act were designed to clarify that personal information collected, used and disclosed on behalf of public bodies by contractors acting for public bodies are under the control of the public bodies. These changes only relate, however, to the Act's privacy protection rules, not the access rights found in Part 2 of the Act.

At a time when the provincial government is outsourcing services and functions to the private sector, the public's right of access—and the accountability it secures—should not be diminished because records move beyond the control of public bodies and into private sector hands[34]. This risk exists whether or not a public body intends records to leave its control. There can be confusion in the minds of public bodies and contractors alike as to which party has control of records that contractors create, compile or take custody of in the course of carrying out their contractual duties. When the issue of control over records is not clear, public body and OIPC resources are needlessly expended trying to resolve the issue.

Because it is important that accountability respecting the provision of public services is not eroded through alternative service delivery, s. 3 should be amended to confirm that records created by, or in the custody of, an external service-provider in the course of carrying out contractual duties for a public body are in the public body's control and therefore subject to the right of access. This would streamline and clarify request and review processes under the Act, while lowering compliance costs.

<u>Recommendation 11</u> – Section 3 should be amended to clarify that records, including personal information, created by or in the custody of a service-provider under contract to a public body are under the control of the public body for which the contractor is providing services.

3. Records available for public purchase

Section 3 of the Act provides that it does not apply to certain officials or bodies. It also provides that the Act does not apply to certain kinds of records. The OIPC believes that the Act should not cover records available for purchase by the public. At present, this situation is deal with by s. 20(1)(a) of the Act, which reads as follows:

> 20(1) The head of a public body may refuse to disclose to an applicant information
>
> (a) that is available for purchase by the public, or
>
> (b) that, within 60 days after the applicant's request is received, is to be published or released to the public.

Section 2(2) of the Act provides that the Act does not replace other procedures or processes for access to information. This means that the Act is intended to be an avenue of last resort for obtaining access to records that are not otherwise available to the public. If information or records are available for purchase, this suggests that such material should be available without the need for a request under the Act.

It is anomalous for the Act, on the one hand, to encourage use of the Act as a last resort and, on the other hand, to provide an exception to the right of access in cases where information or records are available for purchase by the public. It would be more straightforward, and consistent with the policy expressed in s. 2(2), for the Act not to apply at all to material available for public purchase.

At the same time, the Commissioner has for some time been concerned that a policy should exist—and it should be explicitly mandated in a new section of the Act—to facilitate meaningful access by individuals and groups to information that is available for purchase. Government policy trends have for some years been to commercialize information resources, by selling to the public information generated at taxpayers' expense.

An example of this arose in Order No. 91-1996[35], which involved an attempt by an environmental group to gain access to certain land use mapping data of the then Ministry of Environment, Lands and Parks. A number of parties intervened in the case, many of them arguing for equitable access to such information.

The previous Commissioner ruled that, because the data were available for purchase by the public, the Ministry was entitled to refuse access under s. 20(1)(a). He also said the following, however, about access to information in such cases (at pp. 14-15):

> I am concerned that to date no one seems to have pointed out the cost to society of not using TRIM [mapping] data to the fullest advantage in the making of public policy with input from all affected and interested parties. The Treasury Board has mandated cost recovery, a view that no taxpayer can fail to applaud. But is such cost recovery, at current pricing levels, truly feasible from public-interest organizations of every persuasion involved in some of the most important issues facing this province in this decade?
>
> One of the fundamental goals of the Act is to promote more accountability of government to the public by encouraging greater openness with respect to information held by government. In this sense, it is inconsistent with the Act for an organization such as WCWC not to be able to obtain access to the data in dispute. WCWC is self-described on its letterhead as "achieving wilderness preservation through public education and scientific research." The use of the latter term at least implies a public-interested goal. TRIM data are a public good, and it is arguable that the government should promote their use in the public interest.
>
> …
>
> The entrenched positions of the various parties in this inquiry are counter to the imperative to find a solution in the public interest. It is not in the best interests of this province for WCWC, or public interest groups with widely divergent goals, not to have access to TRIM data from the Ministry, and it is not in the best interests of the Ministry to completely forego cost recovery as mandated by the Ministry of Finance and the Treasury Board. As is often the case, a solution likely lies somewhere in the middle.

These observations remain pertinent and pressing eight years later. The present Commissioner raised the issue of meaningful public interest access to information available for purchase with the Minister of Sustainable Resource Management in 2003 and the issue exists elsewhere in government. The Act should be amended to allow Cabinet to prescribe, by regulation, a government-wide policy on access to published information by public interest groups.

Recommendation 12: ***Section 20(1)(a) should be repealed and s. 3(1) amended to state that the Act does not apply to records available for purchase by the public.***

Recommendation 13: ***The Act should be amended to allow Cabinet to prescribe, by regulation, a government-wide policy on access to published information by public interest groups.***

E. SUBMISSIONS ON ADMINISTERING ACCESS REQUESTS

1. Extending the power of the Commissioner to grant extensions

A number of amendments have been made in the past two years to Division 1 of Part 2 of the Act, which is entitled "Access Rights and How to Exercise Them". The OIPC considers that a further amendment is desirable to s. 10. Section 10(1) of the Act reads as follows:

> **Extending the time limit for responding**
>
> 10(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if
>
> (a) the applicant does not give enough detail to enable the public body to identify a requested record,
>
> (b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body, or
>
> (c) more time is needed to consult with a third party or other public body before the head can decide whether or not to give the applicant access to a requested record,

A notable number of the public body extension requests the OIPC receives do not qualify under one of the three grounds now set out in s. 10(1). For example, where a public body's operations are suspended or curtailed due to events such as a strike, or catastrophic events such as a forest fire, such that it cannot meet the Act's timelines for responding, the OIPC cannot at present extend the time for responding, even though it would be fair and reasonable to do so.

***Recommendation 14*: Section 10 should be amended to give the Commissioner the authority to extend the time for responding to an access request where the Commissioner considers it fair and reasonable to do so. The amendment should not authorize the head of a public body to extend the response time on this ground.**

2. Allowing public bodies to transfer access requests to another jurisdiction

Section 11 of the Act allows a public body to transfer an access request to another "public body" covered by the Act. It does not allow a request to be transferred to an organization covered by another access to information law—only a "public body" covered by the Act can receive a transfer.

The OIPC considers that the power to transfer requests should be expanded. One commonly encountered situation illustrates why this is desirable. Local governments often receive access requests for records that are in the custody or control of the local detachment of the RCMP, which provides municipal policing services under contract. The RCMP is subject to the federal *Access to Information Act* and the federal *Privacy Act*, but it is not a "public body" under the British Columbia access law. This means the local government cannot transfer the access request to the RCMP, which is very often in the best position to respond to the request under the federal access or privacy laws. A local government should be able to transfer an access request in such a case.

Further, there may be cases in which a public body in British Columbia has custody of records created by an institution in another Canadian jurisdiction. The policy behind s. 11 is to enable transfer of a request to the public body that created the record or that has a better understanding of the facts relevant to the record and the request for disclosure. These considerations can equally apply, for example, where a provincial government ministry possesses a copy of a federal government record. As the Act now reads, the provincial ministry cannot transfer an access request for such a record to the federal government.

***Recommendation 15:** Section 11 should be amended to authorize a public body to transfer an access request to any public sector entity that is subject to a federal, provincial or territorial access to information statute.*

3. Fees must not be a barrier to accessing information

On fees generally, the right of access to information is not a service to consumers. That right is, as s. 2(1) affirms, a right of the public that exists for accountability reasons. Although that public right is exercised in each instance by a single applicant, it exists for reasons fundamental to accountability in our democratic system of government. The present approach to fees under the Act is already a user-pay approach. Consistent with the above submission about equitable access to information that is available for purchase, the OIPC strongly opposes any increase in the cost burden on access applicants.

***Recommendation 16:** There should be no change in the cost-burden on access applicants, as the fee schedule and provisions in the Act reflect an appropriate user-pay approach.*

4. Terms related to the imposition of fees must be clarified

Section 75(1)(b) of the Act provides that public bodies can charge fees for preparing records for disclosure. In the OIPC's experience, this section is subject to confusion and lack of clarity as to its meaning. The OIPC believes that it would be useful for the Act to define the phrase "preparing the record for disclosure" or to better express its intent.

Recommendation 17: ***Section 75(1)(b) of the Act should be amended to define or otherwise clarify what is permitted when charging a fee for "preparing the record for disclosure".***

5. The fee schedule should be amended

The fee schedule that forms part of the FOI Regulation was drawn from fee provisions under the federal *Access to Information Act* and thus dates back to the early 1980s. The fee schedule does not reflect the subsequent (almost invariably downward) changes in computer costs since that time and also does not reflect the introduction of new media, such as CDs and DVDs. The fee schedule should be amended to reflect these cost decreases and new storage media.

Other fees in the schedule—notably the $0.25 per page photocopying cost and the hourly fee that public bodies can charge for services—remain realistic and competitive and should not be increased.

Recommendation 18: ***The Act's Schedule of Fees should be amended to reflect use of electronic media such as CDs and DVDs and to reflect decreases, since the Schedule was create a decade ago, in the costs of providing access to information in electronic form.***

6. The regulation concerning who may act for others should be updated

Section 3 of the FOI Regulation prescribes who may act for minors, for individuals with committees and for deceased individuals. It does not recognize that individuals may have other types of legitimate representatives, such as those with power of attorney or representatives under the *Representation Agreement Act*. It also does not rank nearest relatives in order of priority and does not define "spouse".

By contrast, ss. 1-4 of the *Personal Information Protection Act Regulation* provide a comprehensive guide to determining who the nearest relative is, who may act for minors and other types of representatives who may act for individuals.

Section 3 of the FOI Regulation should be updated to bring it into line with ss. 1 to 4 of the *Personal Information Protection Act Regulations*. This would both update s. 3 of the FOI Regulation to reflect current policy and reduce potential confusion over inconsistent rules between public bodies and organizations over who may act for others. Similar submissions have already been made to the Committee on this point.

<u>Recommendation 19</u> Section 3 of the FOI Regulation should be amended to make it consistent with ss. 1 to 4 of the Personal Information Protection Act Regulations.

F. SUBMISSIONS ON OIPC POWERS & PROCESSES

1. The OIPC needs statistical information to monitor compliance

Section 42 of the Act sets out the Commissioner's general powers to monitor how the Act is administered in order to ensure that its purposes are achieved. While the section gives the Commissioner the authority to conduct investigations and audits to ensure compliance with the Act, it does not explicitly give the Commissioner the authority to require public bodies to produce statistical and other information on their administration of freedom of information requests, including their compliance with timelines set out in the Act.

While many public bodies have no difficulties with the Act's timelines, there have been increasing complaints from applicants about delays by some public bodies in responses to freedom of information requests. There have also been suggestions that public bodies deliberately delay responses to requests for what is considered to be "sensitive" information. The OIPC considers that an explicit power to require public bodies to submit relevant statistics would be a useful tool for monitoring public bodies' compliance with the Act. Such a provision already exists in s. 34 of Ontario's *Freedom of Information and Protection of Privacy Act*.

Recommendation 20 – Section 42 should be amended to explicitly give the Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom of information requests, in a form and manner that the Commissioner considers appropriate.

2. The OIPC should be able to require complainants to first try other ways to resolve their disputes

As part of dealing with budget cutbacks, the OIPC has been referring complainants to public bodies to attempt to resolve privacy and access complaints. If the complainant is unable to resolve the privacy or access complaint with the public body, the complainant may return to the OIPC, which then considers if the matter warrants further review by OIPC staff. This approach has been working well.

Under the recently-enacted *Personal Information Protection Act* ("PIPA"), the Commissioner has the express power to require an applicant to first attempt to resolve the applicant's complaint or review with an organization and the OIPC has structured its policies to reflect this. PIPA recognizes that organizations and applicants are often in the best position to resolve a matter quickly and informally, ensuring that it does not become a major issue.

Many reviews under the Act involve minor matters, such as misunderstandings over interpretation of an access request or over the type and amount of information the public body has severed. Such cases may be easy to resolve, but still require time and effort by OIPC staff and public bodies. It would also be appropriate in many cases to be able to

refer access applicants to public bodies to attempt to resolve their requests for review before the OIPC becomes involved. Applicants could return to the OIPC for further review in cases where they are unable to resolve the issue with the public body.

Such a provision would help the OIPC make better use of its diminished resources and also streamline its processes. It would also enable public bodies to resolve such issues directly with applicants and more quickly and informally.

A related amendment to s. 56 is also necessary.

***Recommendation 21** – Section 42 should be amended to give the Commissioner the explicit authority to require applicants to attempt to resolve complaints and requests for review with public bodies in a manner that the Commissioner directs. The wording should be similar to that of s. 38(4) of the Personal Information Protection Act.*

***Recommendation 22** – Section 56 should be amended to provide that the 90-day period it sets out does not include any time taken for an OIPC referral back to the public body. The wording should be similar to s. 50(9) of the Personal Information Protection Act.*

3. Commenting on draft legislation that affects privacy

Section 42 gives the Commissioner the power to comment on information and privacy implications of proposed legislation. Some public bodies take the initiative to submit draft legislation to the OIPC before a Bill is tabled in the Legislature. This enables the OIPC to provide meaningful comments to public body staff on information and privacy issues arising from the legislation. It also allows public bodies to amend a Bill to reflect discussions with the OIPC before the Bill is introduced.

However, public bodies sometimes introduce legislation without having first submitted it to the OIPC for comments. In many of these cases, this is the first time that the OIPC becomes aware of new legislation, which may have an impact on information and privacy. It may then be too late to effect any meaningful changes in the legislation.

In order for the OIPC to effectively and meaningfully exercise its authority to comment on proposed legislation, it would be appropriate to require public bodies to submit draft legislation to the OIPC for review of its information and privacy implications before its introduction in the Legislature.

***Recommendation 23** – Section 42 should be amended to require public bodies to provide draft legislation to the Commissioner before its introduction in the Legislature, so that the Commissioner may comment on implications for access to information or protection of privacy of that draft legislation.*

4. Amendments to the powers to compel evidence

Section 44(1) gives the Commissioner powers of compulsion for "an investigation under section 42 and an inquiry under section 56". The wording of s. 44(1) leaves doubt about whether the Commissioner can also exercise powers of compulsion for investigations into matters under review (referred to in s. 55) or audits (referred to in s. 42(1)(a) and s. 47). The section heading for s. 44, "Powers in conducting investigations, audits and inquiries", suggests wider application, but the interpretive weight to be given to headings is limited by s. 11 of the *Interpretation Act*, which says such headings are not part of legislation.

Powers of compulsion are necessary at the review stage because this is when OIPC Portfolio Officers investigate issues such as adequate search for records, security of personal information, custody or control of records and the proper application of disclosure exceptions to disputed records. The Commissioner should also be able to compel information in connection with audits under the Act.

Sections 44(1) and (2) distinguish between powers incorporated by reference to ss. 15 and 16 of the *Inquiry Act* and powers "to require any record to be produced to the Commissioner" and to "examine any information in a record, including personal information". Sections 15 and 16 of the *Inquiry Act* are powers to summons and to enforce summons in the same manner as the Supreme Court. The Administrative Justice Project of the Ministry of Attorney General has justly criticized this *Inquiry Act* mechanism as inefficient and burdensome[36]:

> An express power to order the pre-production of documents or pre-hearing examination of witnesses (as well as production and attendance during the hearing) is a much more effective and expeditious means for requiring parties to exchange documentation prior to the commencement of a hearing.
>
> Administrative tribunals and parties should have a mechanism for enforcing tribunal orders that require persons to produce documents or other things or attend a hearing and answer questions.

The Commissioner's power in s. 44(2) to require the production and examination of records is simple and it applies to public bodies and others. However, it does not include power to compel witnesses and it is desirable for it to do so.

Further, there is at present no mechanism in the Act for enforcing the Commissioner's authority under s. 44(2) to compel production of records.

Recommendation 24: ***Sections 44(1) and (2) should be amended to eliminate incorporation of powers by reference to the Inquiry Act and to provide express powers, applicable to public bodies and others, for the Commissioner to:***

(a) order the production of records or things;
(b) order the attendance of individuals and their oral or electronic examination on oath, affirmation or in any other manner, in connection with any investigation, audit or inquiry under the Act, and
(c) be able to file and enforce Commissioner's orders as orders of the Supreme Court of British Columbia.

5. Clearing up definitional issues concerning complaints & reviews

In 2001, the government pledged to reduce the burden of regulation in all fields and directed regulatory agencies to cut unnecessary red tape and regulation that is obsolete, redundant, wasteful or confusing.

Complaints of non-compliance with the Act can be made to the Commissioner under s. 42 and the Commissioner also may investigate and order compliance under s. 58. Section 52 permits persons who have requested access to records or the correction of their personal information to request a review by the Commissioner, which may lead to investigation, mediation, inquiry and an order under s. 58. A request for review under s. 52 may include any matter that could be the subject of a complaint under s. 42.

In the spirit of moving away from process-driven regulation and towards more effective results-focussed regulation, the process distinctions between complaints and requests for review under the Act should be eliminated. A unified process would be less confusing to users. It would also allow the Commissioner's office to operate more efficiently and without the distraction of technical distinctions.

Recommendation 25: ***The Act should be amended to combine the complaint process and the review and inquiry process into a unitary process for the Commissioner to investigate, review, mediate, inquire into and make orders about complaints respecting decisions under the Act or other allegations of non-compliance with the Act.***

6. OIPC staff need explicit protection from testimonial compulsion

Section 47 restricts the Commissioner and those acting for or under the direction of the Commissioner from disclosing information obtained in the performance of duties, powers and functions under the Act. It does not, however, provide protection from being compelled to testify about the same information.

The Administrative Justice Project last year published a draft provision for such protection from compulsion[37]:

> (1) A tribunal member or person acting on behalf of or under the direction of a tribunal member is not, in a civil proceeding to which the member is not a party, required to testify or produce evidence about records or information obtained in the discharge of duties under this Act.
>
> (2) Notwithstanding subsection (1), a tribunal may be required by the court to produce a record of a proceeding that is the subject of an application for judicial review.

A precedent for such a provision exists in s. 55(2) of Ontario's *Freedom of Information and Protection of Privacy Act*:

> (2) The Commissioner or any person acting on behalf or under the direction of the Commissioner is not compellable to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise or performance of a power, duty or function under this or any other Act.

Such a protection would further assure public bodies, applicants and third parties that information they communicate to the OIPC in connection with a dispute cannot be compelled to be disclosed through testimony in other proceedings. This assurance will enhance the OIPC's ability to perform its statutory functions.

Recommendation 26: ***The Act should be amended to give protection from testimonial compulsion to the Commissioner and those acting for or under the direction of the Commissioner.***

7. Ninety-day mediation period

The current wording of the Act requires that an inquiry into a matter under review be completed within 90 business days after the OIPC receives the request for review. The OIPC recognizes that time limits are helpful in encouraging settlement between the parties to a review under the Act. However, given the realities of other work pressures, and diminished OIPC resources, it is frequently impossible for the parties to negotiate a settlement of the issues within the 90-days. The simple addition of a few days or weeks to the time for mediation has frequently meant a successful settlement of the issues in dispute.

OIPC staff spend considerable time and resources negotiating and arranging extensions of mediation timelines, simply to deal with the 90-day time limit. It would streamline OIPC procedures and facilitate mediation if the OIPC could extend the 90-day time limit under the Act. This would also make the Act consistent with PIPA, which gives the Commissioner the power to extend the 90-day time limit for reviews under that legislation.

Recommendation 27: ***Section 56(6) should be amended to give the Commissioner the ability to extend the 90-day time limit. The wording should be similar to that in s. 50(8) of the Personal Information Protection Act.***

8. The Commissioner's order making powers should be clarified

The Commissioner should have authority to order compliance with the Act when a public body has neglected or refused to apply s. 4(2), the severing provision. Section 4(2) requires a public body to reasonably sever excepted information from requested records. A public body may neglect or refuse to apply s. 4(2) where there are many records. The present wording of ss. 58(2) and (3) makes it problematic for the Commissioner to order compliance with s. 4(2).

Section 58(2) requires that, if an inquiry is into a decision to refuse access, the Commissioner must make an order under that subsection. The British Columbia Supreme Court has interpreted this as requiring the Commissioner, not the public body, to apply s. 4(2) and sever the disputed records[38]. Section 58(2) does not permit the Commissioner to order or direct the public body to apply s. 4(2), even when the records are voluminous and the public body has neglected or refused to put its mind to the requirement to sever.

Section 58(3)(a) does empower the Commissioner to order a public body to perform a duty imposed by the Act but only if the inquiry is into a matter other than under s. 58(2). Since a review of an access decision is a s. 58(2) matter, the s. 58(3) power to order performance of a duty does not apply to the requirement in s. 4(2) to reasonably sever excepted information and give access to the remainder.

Recommendation 28: ***Sections 58(2) and (3) should be amended to permit the Commissioner to order a public body to perform the s. 4(2) duty to sever excepted information and disclose the remainder of requested records.***

9. Enforcement of Commissioner's orders

The Act has no mechanism for enforcing orders. When a public body does not comply at all or in a timely way with an order of the Commissioner, but does not apply for judicial review of the order, there is no simple or inexpensive way for the Commissioner or anyone else to enforce the order.

To ensure the efficacy of the Commissioner's order-making authority, the Act would benefit from a mechanism that makes orders of the Commissioner enforceable as orders of the Supreme Court. The Administrative Justice Project has published such a draft provision for tribunals:[39]:

> (1) The tribunal, the party in whose favour a tribunal order is made, or a person designated in the order, may file a certified copy of the order with the Supreme Court.
>
> (2) An order filed under subsection (1) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

> (3) A party filing an order under subsection (1) shall give notice of the filing to the tribunal within 10 days of filing.

The Administrative Justice Project has also commented on the importance of a clear and simple mechanism for enforcing administrative tribunals' orders[40]:

> Many tribunals make orders requiring the payment of money or orders directing, limiting or prohibiting a party from doing something. Just as an administrative tribunal needs to be able to enforce orders made by it during the course of proceedings, the tribunal itself, as well as the parties appearing before the tribunal, needs to be provided with a clear mechanism for enforcing these types of orders should the need to do so arise. The simplest mechanism is to treat a tribunal's order as an order of the court and thus enforceable as such.

Recommendation 29: ***The Act should be amended to provide a mechanism for the enforcement of the Commissioner's orders as orders of the Supreme Court of British Columbia.***

10. Stay of an order pending judicial review

Section 59(2) requires a public body to comply with an order of the Commissioner within 30 days of delivery of the order. If an application for judicial review of the order is brought within the 30 days, it imposes an automatic stay of the Commissioner's order unless the Court orders otherwise. Section 59(2) makes it unnecessary for a petitioner for judicial review to make an interim motion to the Court for a stay of the Commissioner's order pending the disposition of the judicial review.

Although judicial review is intended to be a summary process, a relatively simple judicial review of a Commissioner's order frequently engages, at the Supreme Court level alone, significant time (often one to two years) and expense for participating parties, including the OIPC.

Most judicial review applications are brought by public bodies or third parties, not by applicants for access. It is also common for applicants for access not to be represented by lawyers in relation to the Commissioner's processes under the Act or on judicial review proceedings against a Commissioner's order, usually brought by public bodies or third parties.

The purpose of s. 59(2) is to give breathing space for a judicial review proceeding to be brought on for hearing, not to facilitate process delay or to frustrate rights under the Act. However, because the s. 59(2) automatic stay is not time-limited, a petitioner that neglects or refuses to proceed, expeditiously or at all, with the judicial review can easily abuse the stay. This has become a problem for judicial reviews brought by third parties. This problem is also an unconstructive drain on the resources of the OIPC which, for third-party-initiated judicial reviews, is often the only represented respondent.

<u>Recommendation 30</u>: Section 59(2) should be amended and a new s. 59(3) added to inhibit abuse of the judicial review process by time-limiting the automatic stay of the Commissioner's order as follows:

> ***(2) If an application for judicial review is brought before the end of the period referred to in subsection (1), the order of the Commissioner is stayed for 60 days from the date the application is brought.***
>
> ***(3) A court may abridge or extend, or impose conditions on, a stay of the order of the Commissioner under subsection (2).***

11. Commissioner's role in judicial review proceedings

Most applications to the court for judicial review of a Commissioner's decision are made by public bodies or third parties, not access applicants. The Ministry of Attorney General provides lawyers to represent public bodies associated with central government. Other public bodies and third parties are represented by their own lawyers.

The Ministry of Attorney General does not represent the Commissioner or defend the Commissioner's decisions. The Ministry of Attorney General is also not in a position to speak to the public interest in the administration of the Act that extends beyond the interests of public bodies represented by the Ministry.

Few access applicants apply for judicial review and they often do not participate in the judicial reviews brought by public bodies or third parties. Those few access applicants who do participate in judicial review applications brought by others are often not represented by a lawyer, likely due to the cost of hiring one.

Although the Commissioner usually participates in judicial reviews, the Act is silent about his role. Section 15 of the *Judicial Review Procedure Act* requires the Commissioner to be notified of a judicial review proceeding, and the Commissioner has the option to be a party, but the courts have not interpreted this requirement to define the decision-maker's role on judicial review[41].

The Commissioner is the only disinterested party who can knowledgeably address the disputed records in light of the Act's right of access and its exceptions to that right. The Commissioner is also often the only participant who addresses the perspectives of un-represented parties or the wider public interest in the Act's administration.

The Commissioner is nonetheless repeatedly called on by other parties to explain and defend the right and scope of his participation on judicial review, an exercise that contributes to the complexity, length and expense of judicial reviews of the Commissioner's decisions.

Other jurisdictions are heading in the direction of giving full party status on judicial review for the information and privacy commissioner[42]. The time has come for the Act to expressly confirm the Commissioner's right to participate on judicial review as a full party respondent. In 2003, a similar provision was enacted in the *Securities Act* in response to a decision of the Court of Appeal on the question of the role of the British Columbia Securities Commission on judicial review[43].

Recommendation 31: ***The Act should be amended to expressly provide that the Commissioner is a full party respondent to applications for judicial review.***

12. Standard of review in the courts

Section 2(1)(e) of the Act reflects the legislative policy that access and privacy decisions are to be reviewed independently of government by the Commissioner, who has an ongoing and specialized mandate to oversee the administration of the Act. The Commissioner's decisions can then be reviewed, on a limited basis, by the Courts, but they do not have regular or contextual experience with the Act's administration, interpretation or application.

A major factor in the complexity, length and expense of judicial reviews of the Commissioner's decisions is that there is extensive argument, in each case, about the Commissioner's expertise relative to the Court and whether the Court must respect the that expertise or can simply substitute judicial opinion for the Commissioner's conclusions.

The Commissioner's mandate has all the classic hallmarks of expertise, relative to the courts:

- The Commissioner is responsible for the regulation of a particular field
- The Commissioner has oversight functions respecting the ongoing interpretation of the Act and the development of policy and precedent in that regard
- The interpretation of the Act is best understood in the context of informational access and privacy management
- The interpretation and application of the Act involves taking into account and balancing different and competing interests
- The Commissioner's office is permanent, as opposed to *ad hoc*
- The Commissioner adjudicates public rights.

The Supreme Court of Canada has held that decisions of the similarly-situated Quebec access to information commission deserve deference and, as regards the Commissioner, the hallmarks of expertise are also present and should be affirmed in the Act.

Recommendation 32: ***Simplify and lend consistency to judicial reviews by amending the Act to add a privative clause, such as is found in the Labour Relations Code, concerning the finality and exclusivity of the Commissioner's authority under the Act.***

END NOTES

[1] *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403.
[2] 5 U.S.C. § 552.
[3] *N.L.R.B.* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, at p. 242 (1978).
[4] Report on Electronic Freedom of Information Amendments of 1996 (House of Representatives Report 104-795), at p. 8. http://www.epic.org/open_gov/efoia_report.html.
[5] Alan F. Westin, *Privacy and Freedom* (1970), at pp. 349-50.
[6] *Dagg*, above, at paragraph 65**.**
[7] *R.* v. *Dyment*, [1988] 2 S.C.R. 417, at p. 429-430.
[8] *(www.bcliberals.com/files/bcliberals_platform.pdf) BC Liberal platform "A New Era or British Columbia"*
[9] Report on Electronic Freedom of Information Amendments of 1996, above, at p. 12.
[10] 5 .U.S.C. § 552(a)(2)(D).
[11] 5 .U.S.C. § 552(a)(2)(D).
[12] http://www.ipc.on.ca/scripts/index_.asp?action=31&P_ID=11085&N_ID=1&PT_ID=11031&U_ID=0.
[13] http://www.ipc.on.ca/scripts/index_.asp?action=31&N_ID=1&U_ID=0&P_ID=11445.
[14] Tom Mitchinson, speech to the Saskatchewan Institute of Public Policy (2003).
[15] Order 03-16. http://www.oipc.bc.ca/orders/Order03-16.pdf
[16] See, for example, *Carey* v. *Ontario* [1986] 2 S.C.R. 637.
[17] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980* (Toronto: Queen's Printer, 1980).
[18] *Public Government for Private People*, vol. 2, p. 288.
[19] *Public Government for Private People*, vol. 2, pp. 292-293.
[20] (2002), 9 B.C.L.R. (4th) 1, [2002] B.C.J. No. 2779 (C.A.); (leave to appeal denied [2003] S.C.C.A. No. 83).
[21] Order 00-08. http://www.oipc.bc.ca/orders/Order00-08.html.
[22] [2004] O.J. No. 163 (Div. Ct.).
[23] [2004] O.J. No 224 (Div. Ct.).
[24] *Ministry of Northern Development and Mines*, above, at paras. 62-69.
[25] *Ontario (Ministry of Consumer and Commercial Relations)* v. *Fineberg*, Unreported (21 December 1995), Toronto Doc. 220/93 (Div. Ct.); leave to appeal to C.A. refused, [1996] O.J. No. 1838.
[26] *Ontario (Human Rights Commission)* v. *Ontario (Information and Privacy Commissioner)* (25 March 1994), [unreported].
[27] R.B. Botterell, "Access to Information: A Comparative Analysis of the Policy Advice Exemption", 5 C.J.A.L.P. 179, at P. 180.
[28] One example of the courts treating the words "advice" and "recommendations" interchangeably is *Thomson* v. *Canada (Deputy Minister of Agriculture)* (1992), 89 D.L.R. (4th) 218 (S.C.C.). In *College of Physicians and Surgeons*, the Court of Appeal cited *Thomson* on another point, but did not mention that the Supreme Court of Canada in that case treated the word "recommendation" as meaning "advice". At pp. 242-243, Cory J., for the majority, said that "'[r]ecommendations' ordinarily means the offering of advice". Further, there is ample authority for the proposition that legislation may sometimes contain words that have the same or overlapping meanings. See R. Sullivan, *Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworth's, 2002), at p. 173. See, also, *R.* v. *Goulis* (1981), 33 O.R. (2d) 55, at p. 61 (Ont. C.A.). Drafters with knowledge of the legislature's objective will use apparent repetition in a statute's wording to avoid potential misunderstanding or problems with its administration (or, where applicable, to preserve parallelism between two language versions). Where there is reason to believe words are deliberately included in the legislation, any presumption against tautology—mentioned by the Court of Appeal in *College of Physicians and Surgeons*, is rebutted. See R. Sullivan, *Driedger on the Construction of Statutes*, at p. 162.
[29] Order 03-02. http://www.oipc.bc.ca/orders/Order03-02.pdf.
[30] C. H. McNairn & C. Woodbury, *Government Information: Access & Privacy* (Toronto: Carswell, 1992, updated), at p. 4-5.
[31] *Public Government for Private* People, vol. 2, ch. 14, at pp. 312-314.

[32] "Privacy and Human Rights – Beyond Bill C-6", Address by the Hon. Sheila Finestone, P.C. to the conference, "Privacy in the New Environments" (Riley Information Services, Ottawa, February 19, 2001): http://rileyis.indelta.com/seminars/ppt/feb2001/FinestoneFeb01.htm.

[33] Privacy Rights Charter (Bill S-21), Senate of Canada, 1st Session, 37th Parliament, http://www.parl.gc.ca/37/1/parlbus/chambus/senate/bills/public/pdf/s-21_1.pdf.

[34]For a discussion of the impact of government re-structuring and alternative service delivery on access and accountability, see A. Roberts, "Structural Pluralism and the Right To Information" (2001), 51 U. of Tor. L.J. 243.

[35] http://www.oipc.bc.ca/orders/Order91.html.

[36] Ministry of Attorney General (Administrative Justice Project), *Model Statutory Powers Provisions for Administrative Tribunals* (August 2003), p. 70. (http://www.gov.bc.ca/ajp/down/ajo_aug25_03.pdf).

[37] *Model Statutory Powers Provisions for Administrative Tribunals*, p. 86.

[38] *Aquasource Ltd.* v. *British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 2147.

[39] *Model Statutory Powers Provisions for Administrative Tribunals*, p. 86.

[40] *Model Statutory Powers Provisions for Administrative Tribunals*, p. 86.

[41] *British Columbia (Securities Commission)* v. *Pacific International Securities Inc.*, [2002] B.C.J. No. 1480 (C.A.).

[42] *Ontario (Children's Lawyer)* v. *Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 3522 (Div. Ct.), especially at paras. 49-52.

[43] *Pacific International Securities Inc.*, above.