

CHECK AGAINST DELIVERY

SPEECH TO THE SELECT STANDING COMMITTEE ON FINANCE & GOVERNMENT SERVICES

September 12, 2024

Michael Harvey Information and Privacy Commissioner/Registrar of Lobbyists

Good morning, Chair, Deputy Chair, and Members of the Committee.

I would first like to acknowledge and respect that I am presenting to you today from the traditional territories of the x̓m̓əθk̓əy̓əm (Musqueam), Sk̓wx̓wú7mesh (Squamish), and səliłwətał (Tsleil-Waututh) Nations. As an Officer of this Legislature, I also acknowledge that I am privileged to work with people across many traditional indigenous territories, covering all regions of our Province.

Assisting me this morning are Deputy Commissioner oline Twiss, A/Deputy Commissioner Tanya Allen, and Dave Van Swieten, Deputy of Shared Services for the four Officers of the Legislature headquartered at 947 Fort Street.

Thank you for granting me time this morning, in what I know is packed agenda, to consider my request for supplemental funding for the Office of the Information and Privacy Commissioner in the 2024/25 fiscal year. As the submission before you outlines, I am requesting supplemental funding for \$410,000 in operating funds for this fiscal, to address the increased costs my office faces relating to judicial reviews and appeals.

I come before you today as I have reviewed our budget in detail and determined that we have exhausted the flexibility within it and cannot absorb these cost pressures in this fiscal without impacting service to the public.

To provide some background, judicial reviews and appeals stem from my offices' decisions involving matters of compliance relating to public bodies or organizations under our *Freedom of Information and Protection of Privacy Act* or *Personal Information Protection Act*. OIPC decisions contain findings or orders, and include public reports initiated by the Commissioner, orders issued by adjudicators, or decisions on complaint files by investigators. These can proceed to the courts when an individual, public body, or organization is not satisfied with a decision made by me, or a delegate, at either the investigative or adjudicative level.

What makes this especially challenging from a budgetary and planning perspective is that the OIPC does not have any control over whether a file proceeds to judicial review – and, once a JR or appeal is filed, the OIPC must respond and participate in the process.

For our discussion this morning, I have separated out the types of files that can proceed to the courts into three different categories. I will speak to each in turn.

The first deals with litigation on commissioner-initiated investigations. These investigations result in a public report, and are conducted when the Commissioner has reasonable grounds to believe there is non-compliance with the law or if it is in the public interest. They serve as an important way to carry out our mandate to hold public bodies and organizations accountable while providing transparency for people living in British Columbia. These reports also provide education so that other public bodies and organizations can learn from real cases about how to follow the law and how my office interprets the law when it comes to matters of access and privacy.

At this time there are two commissioner-initiated investigations that are playing out before the courts, and contributing to the significant legal costs we face. These are complex files, that tackle important issues on the interpretation of our access and privacy laws. They address issues that impact on the access and privacy rights of people living in BC. For example, one Commissioner initiated report could set out a matter of interpretation about a new technology, or a manner of doing business, and can impact multiple sectors of our economy and society.

And, they are hard to forecast because they are one-off cases: there is no trend or rationale that can predict what will end up before the courts.

Without getting into specifics, as the cases that are currently before the courts are resulting in increased costs, I *can* give a brief example of a matter that has been before the courts since 2020. The OIPC investigation report on the LifeLabs breach that this office conducted with our counterpart in Ontario. As you may remember, that 2019 privacy breach affected millions of Canadians, resulted in a class action lawsuit, and involved personal information of patients in BC that used LifeLabs for medical laboratory testing results.

While LifeLabs agreed to the recommendations and orders contained in the report, they appealed the publication of the report in 2020, claiming it contained solicitor-client and litigation-privileged information. In April of this year, the court unanimously upheld our decision, and held that health information custodians cannot evade their responsibilities by categorizing facts about privacy breaches as privileged information. However, LifeLabs appealed the court's decision, and we await a ruling from the Court of Appeal as to whether we are able to ultimately publish the report.

This is just one example of how the costs can add up, especially when many levels of the courts are involved.

Another area where we have seen an increase in costs is for judicial reviews of orders issued by adjudicators. We knew that when we added FTEs to address the backlog at adjudications in 2021 that there would be an eventual uptick in judicial reviews at that level – as the number of orders increased, so too did we expect a proportionate increase in judicial reviews. So far, that has progressed at a rate we anticipated.

While this increase does have an impact on our legal costs, the typical judicial review - over what I would categorize as the meat and potatoes of the files we see - are not yet a significant contributor to the overall unexpected increase we are facing. What we have seen, as I already mentioned a moment ago, is that it is a small number of files that deal with complex issues and judicial interpretations that are incurring the rise in costs.

These files involve parties with big interests that are committed to seeing their case through to the end. They also typically involve a party that is a large institution with the resources to bring their case to the courts in the hopes of getting their desired outcome.

To give you an example, a recent decision by the Supreme Court upheld an OIPC decision that determined PIPA applied to the Grand Forks and Coldstream Congregation of Jehovah's Witnesses. The two congregations appealed the initial order, where two applicants requested access to their own personal information, because the congregations believe PIPA did not apply to them. The congregations also claimed that PIPA was unconstitutional, specifically the provisions that give the applicants and the commissioner access to personal information and records under the control of religious organizations.

So as you can see, a big issue that goes beyond the organization in question, with the court's interpretation providing a path for future decisions.

Finally, we have seen a sharp increase in court costs for judicial reviews appeals of decisions made by our investigations team. An individual is entitled to go to the courts once a decision is made by an OIPC investigator, and this historically has happened on occasion, once or twice a year.

However, in the last couple of years, we have had a handful of people petition the courts and take decisions at first instance to the appeal level, often where the individual has a passionate interest in their position - and wants to pursue the matter as far as they can. These files can have questions of abuse of process or vexatious conduct in the mix, and - particularly when appealed - they are costly for the OIPC to respond to. Still, in the interests of justice, we must respond to these petitions in a manner that upholds the mandate of the Commissioner under FIPPA and PIPA to provide that independent oversight over complaints to the OIPC.

Which brings me to why I am here before you today, to request supplemental funding to address these pressures – and, frankly, why we were unable to predict this increase in the previous budget cycle.

When we initially saw these costs start to rise last year, we were able to manage within our existing budget through recruitment lag. However, both fortunately and unfortunately, we have not experienced any

significant staff turnover this year, which leaves us in a position where we are not able to absorb these unexpected costs.

Should we not receive the funding, I would need to reduce staff. This is because the judicial review and appeal costs are entirely outside the control of our office. The consequence of, for example, reducing contract and auxiliary staff would increase the size of the queue of people waiting for their complaints or requests for review to be heard, a wait time that we have worked very hard to reduce this year. It would be frustrating to erase the progress that we have made in service to the public for the majority of our clients for the sake of a small number of matters before the courts. Further, the scope of the problem is that even if we did reduce contract and auxiliary staff, it would not generate sufficient savings to fill the gap.

With that Chair, I thank you and the Committee for your care and attention to this matter. My team and I would now be pleased to answer any questions you may have.