



BY FAX

April 4, 2008

Hon. Barry Penner
Minister of Environment
Parliament Buildings
Victoria BC V8V 1X4

Dear Minister:

Bill 18—Greenhouse Gas Reduction (Cap and Trade) Act—OIPC File No. F08-34407

This letter comments on the access to information implications of Bill 18. In a separate letter today to the Minister of Energy, Mines and Petroleum Resources, I have expressed concerns about Bill 16 (Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act) similar to those set out below.

Section 36 of the Bill would override the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) and deem certain information to have been supplied in confidence to the government for the purposes of s. 21 of FIPPA. Section 21 of FIPPA protects certain third-party information the disclosure of which could reasonably be expected to harm the third party’s interests as set out in that section. Copies of s. 36 of Bill 18 and s. 21 of FIPPA are appended for ease of reference.

Key goals of FIPPA, expressly stated in s. 2(1), are to make public bodies more open and accountable to the public. The importance of these goals is reflected by the fact that FIPPA’s provisions override every other enactment, unless the other enactment expressly overrides FIPPA. Only a relatively small number of these overrides have been enacted in the seventeen years since FIPPA came into force. Bill 18 would unnecessarily add to that number and this is a matter of significant concern considering the importance of environmental protection measures relating to climate change and the need for openness and accountability in the monitoring and enforcement of such measures.

Section 36 of Bill 18 would be at odds with the policy choices reflected in FIPPA, and with the provisions of s. 21 of FIPPA, in these ways:

1. It would deem information to have been “supplied”, even where the information has been generated by government officials through inspection, thus effectively eliminating the requirement, in the circumstances of a given case, to prove supply of information under s. 21(1)(b).
2. It would deem information to have been supplied “in confidence”, thus effectively eliminating the requirement, in the circumstances of a given case, to prove confidentiality under s. 21(1)(b).

3. Section 22(1)(a) would protect “information with respect to a trade secret”, not simply a “trade secret”, thus broadening the scope of protection that may be available under s. 21(1) of FIPPA.ⁱ

Certain aspects of s. 36 must be acknowledged. First, Bill 18’s provisions would apply only to information of kinds now generally covered by s. 21(1)(a) of FIPPA. Second, certain kinds of information set out in s. 36(2) of Bill 18 would not be subject to the deeming provisions of Bill 18. Third, the third-party harm test set out in s. 21(1)(c) of FIPPA would still apply to requests for access to information mentioned in s. 36.

Section 36 of the *Liquor Distribution Act* contains a deeming provision that bears some resemblance to s. 36 of Bill 18, but that unique provision is not a precedent to be followed. Given the fundamental importance of FIPPA’s accountability and openness goals, statutory provisions overriding or deeming matters otherwise addressed under FIPPA ought to be avoided. I am aware of no credible reason why the kinds of third-party information addressed in s. 36 merit the all but unprecedented protection the section contemplates. Section 36 would represent a significant encroachment on the overriding FIPPA policy of accountability through access to information—a particularly important consideration in relation to climate change measures and their enforcement—and urge you to withdraw these changes

Consistent with our longstanding practice when commenting on a Bill tabled in the Legislative Assembly, I am sending a copy of this letter to the Opposition critic for your Ministry. This letter will also be posted on our website.

Yours sincerely,

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

cc: Shane Simpson, MLA
Opposition Critic for Environment

Joan Hesketh
Deputy Minister
Ministry of Environment

APPENDIX

Bill 18—Greenhouse Gas Reduction (Cap and Trade) Act

Confidentiality

36 (1) Subject to subsection (2), for the purposes of section 21 (1) (b) of the *Freedom of Information and Protection of Privacy Act*, information that is in the custody or under the control of the government and that was obtained under this Act

(a) from the operator of a regulated operation or reporting operation,

(b) from the proponent of a proposed or accepted emission reduction project, or

(c) in the course of an inspection authorized under section 43 [*regulations in relation to inspections*],

whether or not the information was supplied to the government, is deemed to have been supplied to the government implicitly or explicitly in confidence, if it is

(d) information with respect to a trade secret, within the meaning of the *Freedom of Information and Protection of Privacy Act*, of the operator or proponent or of another person, or

(e) commercial, financial, labour relations, scientific or technical information of the operator or proponent or of another person.

(2) Subsection (1) does not apply to

(a) determinations of greenhouse gas emissions attributable to a regulated operation or reporting operation, including determinations of emissions by major source category, or

(b) information that is required or authorized to be published under this Act.

Freedom of Information and Protection of Privacy Act

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.

ⁱ The reference to “information respecting a trade secret” is in my view over-broad and the provision instead should be aligned with s. 21(1)(a)(i) of FIPPA, which refers to “trade secrets of a third party”. Similarly, reference in the deeming provision to “commercial, financial, labour relations, scientific or technical information” should be aligned with s. 21(1)(a)(ii) of FIPPA, which refers to such information “of or about” a third party.