

October 20, 2021

Minister Lisa Beare
Minister of Citizens' Services
PO Box 9068 Stn Prov Govt
Victoria BC V8W 9E2

Dear Minister Beare:

RE: Bill 22 - Freedom of Information and Protection of Privacy Act amendments

I write regarding the proposed amendments to the *Freedom of Information and Protection of Privacy Act* (FIPPA), several of which are of deep concern, while others are very welcome, and I would be happy to discuss my views with you before Third Reading of Bill 22.

Starting with positive aspects of the proposals, I welcome the new requirements relating to privacy impact assessments, the new privacy breach notification rules, and the duty for public bodies to have privacy management programs. The inclusion of snooping offences is also a positive step. These and other constructive changes to FIPPA, discussed below, represent the most extensive amendments since 2011. They will help ensure British Columbia keeps pace with other jurisdictions across Canada and globally.

As discussed below, however, other proposals would be a step backward for British Columbia.

Absence of information about key regulations

An overriding concern with Bill 22 is the unknown impact of key amendments because their substance will only be filled in through regulations, *about which we know nothing*. This is of greatest concern in relation to the proposed repeal of the data residency requirements in Part 3 of FIPPA, discussed below. It is crucial for government to disclose now what it intends to do to protect the personal privacy of British Columbians whose personal information may be exported outside Canada.

On this point, I note that it is quite routine for governments to disclose draft regulations for public consultation and legislative scrutiny. For example, the federal government published draft regulations under *Canada's Anti-Spam Law*, giving legislators, regulators, and stakeholders ample opportunity to comment on them. There is no legal or constitutional impediment to doing so here, and I urge you to publish any draft regulations, or details of regulations, for public comment. The issues at stake—particularly respecting the data residency amendments—are too important, and meaningful debate depends on everyone knowing what is intended.

At the very least, it is imperative that my office be consulted on the draft regulations, as soon as they are available, as their content will provide the crucial legal substance on data residency protections and other important matters.

Data linking

I support the proposed improvements to the provisions dealing with data-linking initiatives, which had previously failed to capture many types of data-linking. The new definition of data-linking and related concepts would, in my view, capture the types of programs anticipated in 2011, when the data-linking provisions were enacted.

However, Bill 22 leaves the details of how data-linking activities are to be conducted to regulations, about which we have no details. These regulations must include rules and requirements for data-linking programs that bring transparency to these activities and include protections that are common in other provinces. I urge the government to publish draft regulations at the earliest opportunity, or to provide details of what is intended, and to consult meaningfully with my office about the regulations.

Data residency

I agree that a new approach to data residency that more closely aligns our privacy laws with other Canadian jurisdictions and the EU's GDPR is necessary. However, as you are aware, I am deeply concerned about how government proposes to do this. The proposed amendments remove the data residency requirement altogether, leaving any protections to regulations, about which we know nothing.

With respect, it is not enough for the government to say that guardrails will be put in place in regulations at a later date. As s. 33.1 currently reads, if the government chooses to not pass a regulation there will be **no** protections at all for personal information disclosed outside of Canada. Further, unlike the development of other regulations, such as those regarding data-linking (s. 76(2.1)), government is not required to consult me—or anyone else—on the development of data residency regulations (s. 76.1).

Without real assurances that meaningful protections will be put in place, this proposal represents a step backwards by British Columbia at a time when other jurisdictions are modernizing their data residency requirements, as Quebec did with its recently enacted Bill 64. Again, I am not opposed to a modernization of data residency, but our personal information needs to be protected with appropriate, and known, safeguards.

Among other things, the regulations should require public bodies to conduct privacy impact assessments before deciding whether to export personal information. These assessments should include considerations such as the sensitivity of personal information, the purpose of the disclosure, the contractual or other measures in place to provide real protections, and the legal framework of the foreign jurisdiction involved. Another possible factor, which seems eminently

reasonable and was recommended to the last Special Committee by major stakeholders, was to require public bodies to assess whether there is a reasonable alternative in Canada to a proposed export of personal information.

Proposed privacy breach notification rules

As noted earlier, I support the introduction of privacy breach notification requirements. These are important protections for British Columbians. I note, however, that proposed s. 36.3(3) would not enable a public body to hold off on notifying affected individuals where disclosure of the breach could compromise a criminal investigation. I believe that such an exception should be added to s. 36.3(3), which would be consistent with similar provisions elsewhere.

Disclosure harmful to interests of an Indigenous people

I welcome the addition of s. 18.1, which would require public bodies to refuse to disclose information that could affect a range of specific rights and interests of Indigenous peoples. I also welcome the addition of s. 18.1 to s. 23, which would require public bodies to consult Indigenous people about possible disclosure of information in appropriate cases.

Subsidiary corporations

I was encouraged to see changes enabling the addition of subsidiary corporations and other entities as public bodies. I am concerned, however, that this would be achieved by the Minister, using a discretionary order-making power to add an entity if the Minister concludes it is in the public interest. There are no criteria governing when this should be done. The recent concern about InBC investment corporation not being made subject to FIPPA—as it clearly ought to be—is an example of why this change does not go far enough.¹ At the very least, I call on the government to ensure that it consults with my office about entities that could be covered.

Removal of the Office of the Premier as a public body

I am very concerned that Bill 22 would remove the Office of the Premier as a public body under Schedule 2 of FIPPA. My understanding is that the government believes this designation is not necessary, on the basis that the Premier, a first minister, is a minister and therefore his office is a ministry, and is therefore covered by the Schedule 1 definition of “public body”.

This is not, with respect, clear in law or constitutional convention, and this change would introduce, at the very least, uncertainty in the application of the law. Moreover, I am not aware of any harm flowing from retaining this designation, which obviously begs the question as to why the change is being made when the outcome is, again, not as clear as I am told government believes it is.

¹ For more information see my May 19, 2021 letter on this issue: <https://www.oipc.bc.ca/public-comments/3540>

The Office of the Premier lies at the heart of provincial governance. I call on the government to delete this proposal from Bill 22, for greater certainty that FIPPA's transparency and accountability provisions will continue to apply, as they have for decades, to the Office of the Premier.

Addition of a new public body

By contrast, I support the amendment to designate the BC Association of Chiefs of Police and the BC Association of Municipal Chiefs of Police as public bodies under Schedule 2 of the Act. This is a longstanding recommendation from my office and is a welcome enhancement.

Fines for destruction of records

The Bill will make it an offence for a person to wilfully conceal, destroy or alter any record to avoid complying with a request for access. This is a step in the right direction, but it does not go far enough. The inappropriate destruction of records should be penalized anytime, not only when there is an access to records request in play. This should include oversight over destruction of records other than in accordance with approved disposal schedules, as is the case under Alberta's *Freedom of Information and Protection of Privacy Act*

Snooping offences

I welcome the creation, in a new s. 65.4, of several privacy-related offences, offences intended to deter the unauthorized collection, use or disclosure of personal information. Such offences—commonly known as “snooping offences”—do occur and must be deterred and punished appropriately. I am concerned, however, that the offences would not include the “viewing of”, or mere “access to”, personal information. The government may believe that this kind of intrusion is covered by the offence of collecting personal information, but I am concerned that this is not as clear as it should be, i.e., it is not entirely free from doubt that an individual's mere observation of personal information is a collection of that information.

On this point, Bill 22 would remove from s. 30 the duty of public bodies to implement reasonable security measures to guard against unauthorized “access” to personal information, perhaps for the reasons just outlined, and this is also of concern. I ask that this change to s. 30 not be made, and that s. 65.4 create the offence of “accessing” personal information contrary to Part 3.

New exclusions of records from FIPPA

Another significant concern is that the right of access under FIPPA would no longer apply to certain electronic records, a change that would in turn limit public bodies' duty to create records from electronic records.

A new s. 3(3) would provide that Part 2 of the Act—FIPPA’s access to information provisions—no longer applies to either of the following records:

- a record that does not relate to the business of the public body;
- a record of metadata that
 - (i) is generated by an electronic system, and
 - (ii) describes an individual’s interaction with the electronic system;
- an electronic record that has been lawfully deleted by an employee of a public body and can no longer be accessed by the employee.

The first of these exclusions from Part 2 is of concern because it is both potentially very broad and ambiguous. While this might not exclude all third-party information from Part 2, I am concerned that this provision will be used to reject access requests where they touch on a record that contains third-party information. Setting aside the issue of what the phrase “relate to” means, I am concerned that the concept of the “business of” a public body is both over broad and unclear, and how it is far from clear how that would be determined case by case. With respect, no persuasive case can be made for this exclusion for the public’s right of access, which would be out of step with Canadian access to information laws.

I am also deeply concerned that excluding a record of metadata will hinder the interests of transparency and accountability. Metadata associated with a record can, for example, enable useful analysis of how particular records have evolved over time. This can significantly enhance public understanding of who is responsible for a record, and for its evolution. The proposed exclusion of such information from the right of access is worrisome.

Application fees for access requests

Bill 22 would authorize the government to impose application fees for access to information requests, fees that could be charged by all types of public bodies. This would be a significant step in the wrong direction. Application fees pose a real barrier for many who seek information that should be readily available to the public. I am unable to understand how this amendment improves accountability and transparency when it comes to public bodies that operate in a free and democratic society. Nor is it necessary, since FIPPA already authorizes public bodies to charge access fees, to help defray the costs of responding to requests.

We are living in a time when people are seeking more answers, and greater accountability, from public bodies and their governments, amplifying the significant role that freedom of information plays in allowing people to get information about what their governments are doing, and the decisions that affect them. To add another barrier of access at a time when transparency is critical is deeply troubling.

Further, I am troubled that there would be no ability for my office to waive an application fee if it is in the public interest.

Authorizing public bodies to disregard access requests

The amendments expand the grounds on which public bodies can ask my office for permission to disregard access to information requests. Limiting or blocking a right provided by a statute is a serious matter, but there are occasions when it is necessary, as many of this office's decisions under s. 43 affirm.

Each year, my office receives approximately ten such requests and approximately half of those are partially or fully granted. The Bill proposes a troubling new criterion under which I could be asked to authorize a public body to disregard a request where responding to the request would unreasonably interfere with the operations of the public body because the request is "excessively broad." This criterion is only found in one other province.

The narrowing of a request can already be done through consultation with the applicant or through a fee estimate, and I believe that adding this new ground unnecessarily encroaches on the public's right of access.

Error in s. 36 of Bill 22

Section 36 of Bill 22 proposes a change to s. 61(2) of the Act to add "audit" and remove "review" for consistency. However, in this instance the powers and protections relate to an external adjudicator designated under s. 60 which do not include to conduct an audit. This may unintentionally remove protections for an external adjudicator making a determination under s. 60(b). Therefore, the term "review" should not be removed.

Finally, I believe there are a number of missed opportunities that deserve mention.

Restoring the s. 13 protection for "advice or recommendations" to its original intent

The exception to access provided for in s. 13(1) of the Act has been eroded by successive, overly broad, judicial interpretations. Despite the clear intention of the Legislature, in s. 13(2)(a), that the protection for "advice or recommendations" does not extend to "factual material" underpinning policy advice or recommendations, the courts have effectively curtailed the public's right to access "factual information"—how this differs from "factual material" is not at all evident—that formed the basis for advice or recommendations.

For years, there have been repeated calls for reform by Special Committees of the Legislative Assembly to review FIPPA, by my office, and by many others, to return s. 13(1) to its original intent. Doing so would in no way impair the ability of public servants to continue to formulate frank advice or recommendations in confidence, which is what the Legislature intended to enable, and no more. It is well past time to make this change and I call on the government to do so in Bill 22.

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

As just suggested, FIPPA provides for periodic review of the statute by an all-party Special Committee of the Legislative Assembly. Several of these have been concluded and many, many useful and important recommendations have been made by these Special Committees, the latest of which has been appointed. It is not at all clear why government has chosen to move forward with amendments ahead of the Special Committee's legislated work to review the Act. The work of the Special Committee is essential, as it is able to pull information and consultations from a variety of sources, encouraging fulsome public dialogue about proposed amendments. I have to question how meaningful the first substantive amendments to the Act in over a decade can be when there is no time for all stakeholders to provide dialogue. To move forward with these amendments, in a year that the Special Committee is tasked to do this work, is baffling.

As I conclude, I believe it is important to reinforce that the purpose of my office, which guides the work we do, is to protect and advance the access and privacy rights of British Columbians, and to serve the public and the public interest. I have reviewed this proposed Bill through that lens.

In the spirit of transparency, and because this letter relates to a Bill now before the Legislative Assembly, this letter will be made publicly available, consistent with my office's longstanding practice.

Sincerely,

ORIGINAL SIGNED BY

Michael McEvoy,
Information and Privacy Commissioner
for British Columbia

pc: Honourable Bruce Banman, MLA
Opposition Critic for Citizens' Services

Honourable Sonia Furstenau, MLA
Leader of the Third Party