



BC FREEDOM OF
INFORMATION
AND PRIVACY
ASSOCIATION

Proactive and reactive disclosure of government-held information in British Columbia

**FIPA response to an investigation
by the Information and Privacy Commissioner
into proactive disclosure by public bodies**

March 9, 2011

BC Freedom of Information and Privacy Association

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and public education



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FIPA response to An investigation by the Information and Privacy Commissioner into proactive disclosure by public bodies

The Office of the Information and Privacy Commissioner is conducting an investigation into the practice of proactive disclosure of information by public bodies. This Office generally promotes proactive disclosure because it enhances openness and transparency in the public sector and is an efficient and cost-effective means to provide individuals with access to information. However, concerns have arisen about how the practice of proactive disclosure is being conducted by some public bodies in British Columbia. As a result of this investigation, we wish to, among other things, make recommendations to public bodies on best practices for proactive disclosure.

Proactive disclosure of information is where public bodies make their records publicly available without waiting for requests from individuals. An example of proactive disclosure is the publication of salaries of senior executive on agency websites.

The investigation will include consideration of the practice of proactive disclosure of information and records in a general sense, with the exception of open data initiatives. We wish to identify the hallmarks of a model proactive disclosure policy as to how, when and what information is disclosed.

We will also consider the specific practice of the proactive disclosure of responses to access requests and, in particular, the following matters:

- Whether public bodies should proactively disclose responses to access requests
- Whether there are time sensitivities that need to be taken into account in the proactive disclosure of responses to access requests
- Whether public bodies should notify others when responses to access requests are made available to the public
- Whether there are time sensitivities in the length of time responses to access requests are posted on a website
- Whether names of applicants and/or the identity of applicant type should also be proactively disclosed
- Whether public bodies should charge fees in the usual way

Interested parties are invited to comment on the above matters by responding to the following consultation questions.

Consultation Questions

Preliminary remarks re definition of terms:

Before responding to the questionnaire, we wish to object to the description of what has been proposed by the BC government, and implemented by BC Ferries as proactive disclosure.

It is not proactive, it reactive. It responds to a request for information under the Act by posting the request itself, along with the name of the requester or organization. If, and only if the requester is successful in requiring the public body to release information under the Act, then information from the public body is posted on the internet.

Ontario commissioner Ann Cavoukian's first principle of Access by Design is that it must be proactive not reactive.

We will use the term simultaneous release, or reactive disclosure in our responses, except where questions actually deal with the process of a public body releasing information of its own accord, without a request to do so from outside.

Proactive disclosure

1. What, in your view, are the essential elements of a robust proactive disclosure practice?

Both OIPC and FIPA have recommended proactive disclosure as the primary method of release of information, and the Special Committees reviewing the Freedom of Information and Protection of Privacy Act have followed up on those recommendations.

There must be a duty to make information available, enshrined in law, and there must be consequences for public bodies and officials who fail to carry out that duty.

A World Bank Institute Working Paper entitled *Proactive Transparency: The future of the right to information? A review of standards, challenges, and opportunities* sets out the following guiding principles for proactive disclosure regimes:

1. **Available:** Public information should be proactively disclosed through multiple communication channels to ensure that it reaches relevant sectors of the population. Hence, proactive disclosure should make full use of, but not be limited to, the Internet. Information should also be actively disseminated by other means, including notice boards, leaflets, public libraries, mobile phones, radio, and TV, and at public meetings where appropriate.
2. **Findable:** Information proactively disclosed on the Internet, or using other formats and communications channels, should be organized so that it is easy to find. User's information needs should be a primary consideration when determining where to publish information, including whether to opt for departmental, central, or sectoral web portals.
3. **Relevant:** Relevance has two dimensions: that the information itself is of value (the classes of information) and that it is organized in ways meaningful to the end user

(logic of presentation). Consultations with stakeholders—including civil society, businesses, and members of the public—are recommended to arrive at solutions which make sense to potential users, such as organization by type of service, by policy issue, by life events, or by thematic areas. The goal should be that citizens can quickly and easily locate the information that corresponds to their needs.

4. **Comprehensible:** Core information from public bodies should be disclosed in full, and information of particular public interest should be made available in a way which is comprehensible for members of the general public. This principle requires that information be presented clearly in the major languages of user communities. At a minimum, information should be available in all the official languages of the state or region; where there are significant numbers of speakers of other languages, information should also be prepared and disclosed in those languages.

5. **Low cost or free:** Proactively disclosed information should be available free of charge if made available electronically, and core classes of information (laws, the budget, annual reports, forms for accessing services) should never be charged for even if provided in hard copy or other formats (for example, in Braille). Charges for copies or postage for other proactively disclosed information may be levied but must be reasonable and according to pre-established fees.

6. **Up to date:** Information is of little value if it is not timely and correct. Proactively disclosed information should be regularly updated and all electronic or hard copies should make clear when the information was released or updated. Information should be created and stored in ways that anticipate disclosure and therefore the design of information platforms should take into account the need to sever information that can be subject to legitimate exceptions.

2. Are there any particular types of data that should be proactively disclosed?

From the same publication, these are categories of information which have been identified around the world as the most appropriate or necessary for proactive release:

- **Operational information:** Strategy and plans, policies, activities, procedures, reports, and evaluations—including the facts and other documents and data being used as a basis for formulating them.
- **Decisions and acts:** Decisions and formal acts, particularly those that directly affect the public—including the data and documents used as the basis for these decisions and acts.
- **Public services information:** Descriptions of services offered to the public, guidance, booklets and leaflets, copies of forms, information on fees and deadlines.
- **Budget information:** Projected budget, actual income and expenditure (including salary information) and other financial information and audit reports.
- **Open meetings information:** Information on meetings, including which are open meetings and how to attend these meetings.
- **Decision-making & public participation:** Information on decision-making procedures including mechanisms for consultations and public participation in decision-making.⁸⁸

- **Subsidies information:** Information on the beneficiaries of subsidies, the objectives, amounts, and implementation.
- **Public procurement information:** Detailed information on public procurement processes, criteria, and outcomes of decision-making on tender applications; copies of contracts, and reports on completion of contracts.
- **Lists, registers, databases:** Information on the lists, registers, and databases held by the public body. Information about whether these lists, registers, and databases are available online and/or for on-site access by members of the public.
- **Information about information held:** An index or register of documents/information held including details of information held in databases.
- **Publications information:** Information on publications issued, including whether publications are free of charge or the price if they must be purchased.
- **Information about the right to information:** Information on the right of access to information and how to request information, including contact information for the responsible person in each public body.

Section 70 of FIPPA sets out a requirement that policy manuals be released without request, and s.71 allows a public body to prescribe records which can be made available to the public on demand without a request under the Act. It is not clear to what extent there has been either compliance with s.70 or any initiative taken under s.71 by public bodies to make information more accessible.

3. Are there any particular types of data that should not be proactively disclosed?

See FIPPA exceptions, esp s.22 (Personal privacy)

4. What, in your view, are the thorny issues that must be addressed in the practice of proactive disclosure?

See below.

5. What are the time sensitivities involved in the proactive disclosure of data?

In terms of proactive disclosure, the primary sensitivity would be ensuring that the information being made available is accurate and up to date. For reactive disclosure, particularly of records obtained through FOI requests, see below.

6. Are you aware of proactive disclosure practices of public bodies in BC or in other jurisdictions that are good models for us to consider?

City of Toronto CIO Dave Wallace testified before the Parliamentary ATI, Ethics and Privacy Committee on February 2, 2011, that as a result of proactive disclosure of information, FOI requests to the City dropped by 50 percent, and those that continued to come in were more focused on information that was not released proactively.

7. Are you aware of particularly poor practices or lessons learned elsewhere?

BC Ferries has implemented a system which contains no elements of proactive disclosure, but which is used to harass and discriminate against requesters under FIPPA, particularly those in the media or who have a time sensitive use for the information.

VANOC also used informal release of material received by the CBC through ATI to pre-empt their story. They released the information to CTV and the Globe and Mail to try to reduce the impact of a potentially negative story obtained through ATI.

<http://communities.canada.com/vancouver/sun/blogs/civiclee/archive/2011/02/07/vanoc-leaks-cbc-documents-to-globe-and-ctv-to-shape-criticism.aspx>

This is an example of an organization informally doing what BC Ferries has turned into a system, which is to actively discourage the interest of the requester by releasing information at a time most in the interest of the organization, and least favourable to the requester.

Proactive disclosure of responses to access requests

Public interest in access to information

1. In your view, does the proactive disclosure of responses to access requests serve the public interest in access to information?

The disclosure of responses to access requests is not proactive, it is reactive. That said, it is useful if it makes information available to more people who do not have to go through the process of filing a request for that information because it is already available. This can make the FOI system more efficient because fewer redundant requests are received, and it can therefore also reduce the cost to public bodies because fewer redundant requests must be processed.

2. In your view, does the proactive disclosure of responses to access requests contravene any provisions of the *Freedom of Information and Protection of Privacy Act*? If so, what sections and why?

FIPA considers this policy to be a pre-emption of the rights of requesters and highly destructive to the purposes and proper functioning of the *Act*. If it is allowed to continue, it is easily foreseeable that other public bodies will bring in similar systems. The government of BC has already indicated that it is ready to implement a similar system but is waiting for the result of this inquiry. If this is allowed to happen, there will be fewer requests, less scrutiny of public bodies, less information reaching the public, and ultimately, less accountable public bodies.

The net effect of this policy is to undermine the individual requester's rights under the *Act* and to violate the legal duty to assist the requester.

Right of access is individual

The wording of s.4 of the *Act* makes it clear that the right of access is that of the individual requester.

4 (1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body

We respectfully suggest that the FOI requester's right of access takes precedence over a public body's general desire to selectively release information to the public. If that was the intention of the public body, s. 20 provides them with the discretion of not answering the request but publishing the requested records within 60 days. In such cases, fees are not usually charged and the information receives general release. That is not what BC Ferries intends to do. They will charge requesters fees, then post the records to their website either before or at the same time as the person who paid the fees. They have also stated that they intend to make maximum use of fees to defray the cost of providing access.

The duty to assist requesters

The duty to assist requesters is set out in s.6 of the Act.

6 (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

In Order 00-32, Commissioner Loukidelis had this to say about the standard expected of a public body in fulfilling their duty under s.6:

Although the Act does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. (emphasis added)

Although this was in the context of the requirement to carry out an adequate search for documents, we respectfully suggest that the test "what a fair and rational person would expect to be done or consider acceptable" should be applied to all aspects of the duty to assist. We respectfully suggest that the declared policy of BC Ferries does not meet that test.

A fair and rational person would expect that the public body would act to ensure that the requester upon whose initiative the records are being released; who may have invested significant time and financial resources in obtaining them, and who has a definite interest and purpose in obtaining them would be the first to receive the documents. Not only is that not the case here; BCFerries states it will do the *opposite*, ensuring that records will be posted at the same time or even before the requester receives them.

A fair and rational person would not expect a public body to issue news releases drawing attention to every posting of records released under FIPPA. This is further evidence that the intention of BC Ferries is not to create transparency or openness, but to prejudice the position of the requester vis-a-vis the rest of the world.

A fair and rational person would not expect a public body to charge fees to a requester whose records will be publicized by the public body at the same time or even before the fee-paying requester receives those records.

For all these reasons, we suggest that this policy is a violation of the public body's duty under s.6 of the Act.

In addition, if there is a duty to assist requesters, there must be a commensurate duty not to disadvantage the requester. The system designed and implemented by BC Ferries disadvantages requesters, particular those in the media, by making their requests public

before they are responded to, and after the records have been released, by putting the requester in a worse position than the rest of the world – perhaps even parties with competing interests.

Section.17(2) of FIPPA also shows that its legislative drafters put their minds to situations where there may be competing interests over a body of information. In this instance, they give a public body the discretion to refuse to release to a requester information that could give the requester an advantage over a researcher already engaged in study.

(2) The head of a public body may refuse to disclose under subsection (1) research information if the disclosure could reasonably be expected to deprive the researcher of priority of publication.

Orders made under this subsection also provide guidelines for how a public body can show that the subsection is engaged.

In Order 00-36 a two part test is set out:

First, a public body "must establish" that the requested information is "research information".

Second, it must that "there is a reasonable expectation that disclosure of that information could deprive a specific researcher, who is connected in some rational way with the research information, of priority of publication of the research information itself or, in my view, of the results of research that uses the research information or proceeds from it."

The standard of proof is similar to that in other harm-based exceptions, that "the quality and cogency of the evidence the public body provides to support non-disclosure under s. 17(2) must be commensurate with a reasonable person's expectation that disclosure of the requested information could deprive a researcher of priority of publication."

As for the source of the information about possible damage to priority of publication, Order F07-06 has this to say at paragraph 54:

...the individual researcher whose priority of publication is allegedly jeopardized is best placed to demonstrate in an inquiry whether his or her priority of publication is in fact threatened within the meaning of s. 17(2) and so, as a practical matter, the best evidence may well come from that individual.

It seems that this approach could be applied to the situation in the BC Ferries case. The best evidence would come from the requester as to whether or not general posting of the information requested would damage their intended use of that information by costing them 'priority of publication'. If the public body automatically posts all records released to its website, requesters should have the ability to request a delay before such posting is carried out, and provide evidence that their interests in requesting the records would be harmed by such automatic release to the general public.

It would then be up to the public body to decide whether or not to delay posting of the records, and for how long. The requester would have the opportunity to make a complaint to OIPC if they were dissatisfied with the response, based on violation by the public body of the duty to assist.

Of course the BC Ferries case goes far beyond simple posting to a website. A news release is sent out; the requesting organizations are named and their requests posted as soon as received; and the information is removed from the website after 90 days. This is clear evidence that the intention of BC Ferries is to harm requesters and reduce the number of requests received, not to improve transparency.

3. If you are of the view that proactive disclosure of responses to access requests discourages individuals from making access requests, please provide us with evidence of that.

We have received information anecdotally from various requesters that although they will not stop sending in FOI requests, a process such as that implemented by BC Ferries would make it difficult to justify spending money on fees or time in battling the bureaucracy to get information released, since very little of the benefit would accrue to the requester. This is especially true of media requesters, and we have asked a number of them to file their own responses to this consultation so the OIPC can have first person evidence of this phenomenon. .

4. Are there time sensitivities that should be taken into account in publishing responses to access requests? In particular, do you have any concerns with respect to simultaneous disclosure to the applicant and to the public?

There does not seem to be any reason to post information simultaneously with its release to the requester. There is a general public interest in viewing government information, but it is not time-sensitive. If the information were made publicly available a day, week or month after it was received by the requester, it does not appear that there would be any prejudice to the public or any individual member of the public.

Simultaneous release could have a potential detrimental effect on a requester however, and if simultaneous release were to be implemented as a matter of policy, it would have the effect of reducing the willingness of requesters with timeliness considerations, such as the media, to continue to file requests. This would diminish the public's access to information about government, and reduce their ability to hold government to account – all counter to the stated purposes of the FIPPA.

One of the criteria for the waiver of fees in the public interest is the ability to disseminate the information requested, and the establishment of a system which undermines the work of the very requesters who are best able to disseminate the information seems contrary to the public interest.

5. Should public bodies notify others when responses to access requests are made available to the public? What are the time sensitivities?

There is no obvious reason for a public body to advise particular individuals or groups beyond the requester that they have made information obtained through FOI available on their website beyond noting it on the website itself. If someone is interested in the information, but not sufficiently interested to file their own request, it seems adequate that the material released or a summary of it be posted to the public body's website, with information on when it was updated and how individuals can go about retrieving that information.

In the case of BC Ferries and some other public bodies, the form of notice is to the news media by news release. In some cases, such as VPD system or the system mooted by the RCMP, only media requests were given such special attention. This is a strong indication that the aim of these simultaneous release schemes is to create the maximum inconvenience for media requesters, not to improve transparency.

6. How should responses be made publicly available? If they are posted on the website are there time sensitivities as to when they are posted and for how long?

Content of requests should be available through the public body's website. The records should be posted through regular updates (eg monthly) to allow ease of review by the public (only having to check once a month instead of daily or hourly). This would hopefully allow the requester to have a reasonable period of time to review the materials requested before it becomes available to the world at large, including industry competitors.

If one of the rationales for posting FOI responses is to reduce the number of redundant requests, it seems contradictory to take down that information so that individuals would have to file FOI requests for information already released. This is particularly true in the case of BC Ferries, which leaves information up for a maximum of 90 days.

7. Should the names of applicants and/or the identity of applicant types be publicly disclosed?

No. There is no public interest in posting the identities of applicants for information, in fact this practice amounts to a public body releasing information about individuals they would not have but for the FOI request. It seems perverse that the first information released as a result of a request for information from a public body would be information given to the public body by the requester. The anonymity of requesters, even within the public body has been long respected, and identifying requesters flies in the face of that practice. There would be no problem in releasing statistics as to the categories of requesters, as is currently provided by the CIO's office and the OIPC in the annual report card on delay.

8. When public bodies are engaged in proactive disclosure, should they charge fees to applicants in the usual way?

The point of proactive disclosure is that government pushes information out, without the need for individuals to submit requests or pay fees.

If reactive simultaneous disclosure is what is being practiced by a public body, an analogy can be drawn to s.20 of the Act, which provides for an FOI request to be in abeyance if the public body states that it will be making the requested information public within 60 days. No fees are paid, unless the FOI process resumes because the public body changes its mind about disclosing the information in question.

It seems absurd that the Act specifically sets out a procedure for disclosure of requested information by a public body which does not involve fees or any other action by a requester, but that public bodies would also be able to choose to charge fees for information which it plans to publish to the world. In these situations, it seems that requiring a public body to follow s.20 would make more sense if it is the stated policy of the public body to release the requested information.

The drafters of the legislation could not have foreseen the technological developments which now make simultaneous release possible, but the nearest equivalent shows that they did not intend a requester to bear any burden where the public body was to publish the requested information to the world.

We urge you to follow the practice already set out by the legislature in section 20 and prevent public bodies intending to post the requested records from charging fees.

Public interest in access to information by media

1. What is the public interest in access to information by media?

The Supreme Court of Canada has repeatedly affirmed the importance of the media in a free and democratic society. They have done this in the context of search Warrants *Lessard v New Brunswick*, confidential sources *National Post v R*, 2010 1 SCR 477 and creation of the 'public interest journalism' defence to claims of defamation *Grant v Torstar Corp.* 2009 SCR 61,

The Supreme Court of Canada has recognized the necessity, in the public interest and regarding s.2(b) Charter rights of freedom of expression of balancing the rights of the media to report and reveal information in a balance with other societal interests such as the right to privacy, the proper functioning of law enforcement and protection of reputation. It logically follows that there is a public interest in the media having access to information uninhibited by legerdemain by public bodies.

At your request, we are prepared to provide a very long list of stories which served the public interest by making information obtained through FOI public. These stories would likely not have appeared if FOI was not available to the media.

2. What are the advantages and disadvantages to media of proactive disclosure of responses to access requests?

The advantage of simultaneous release is to media organizations that have the ability to immediately diffuse the information across a number of platforms, especially those with large staffs for journalists able to handle the incoming information, or to troll websites looking for newly released information. These media organizations would also have the advantage of obtaining the same information as the original requester at reduced or no cost, as the effort and time would be incurred by the requester.

Those most severely disadvantaged would be small media organizations and freelancers. Small media do not have the ability to constantly troll for information, or to deal with it quickly if it is simultaneously released by a public body. Freelancers generally work on spec, meaning they approach a media organization with a story idea which the media organization hopefully expresses an interest in buying. If the story idea is based on a FOI request response, the freelance reporter would have to receive the information, craft a story, submit it for publication and then hopefully receive payment. This would not be possible if simultaneous release becomes the norm, as no media outlet would have an incentive to buy what would now be available for free, especially if their competitors would also have that same material.

As a result, requests from freelancers and small media would dry up and economic harm would likely result to the small media outlets and freelance writers, leaving only large

corporate media as FOI requesters. The most highly rewarded would be those living parasitically on the requests and work of others, as they would receive the same information at no cost or effort.

Ultimately, the losers would be the public, because much of the incentive for media FOI requests would disappear, and so would the sought-after information being released by these public bodies.

3. If you are of the view that journalists are disadvantaged by proactive disclosure of responses to access requests, please provide evidence of that.

In January 2009, FIPA wrote to your office about some disturbing information with the 'compliance' of the Vancouver Police Department with Order 08-20.

An excerpt is reproduced below for your convenience.

The Order required the Vancouver Police Board to release to a journalist/requester a copy of the target placed on the desk of the then-City Manager by then-Vancouver Police Chief Jamie Graham. The Order gave the public body 30 days to comply, or up to January 30, 2009.

What apparently occurred was that the Police Board held a meeting on January 21, 2009 to decide whether or not to seek judicial review of the Order. After deciding against seeking judicial review, the Board apparently provided the target to the Vancouver Police Department in order to place an image of it on the VPD website. [This may have been done according to Board policy in such cases, although no such policy appears in the Board's Policy and Procedure manual.] See <http://vancouver.ca/police/policeboard/Manual/Ch7RecordsMgtAccessInfo.pdf>

The applicant journalist was never informed by the VPD or the Board that the image had been placed on the VPD website. The journalist received a letter with an 8 1/2 x 11 copy of the target on Friday, January 23.

Coincidentally (or not) two competitor media outlets ran pictures of the target, in their Friday January 23 editions, before the applicant journalist received his letter from the public body. The images were apparently obtained from the VPD website.

This raises a number of questions about what happened in this case in particular, and also raises a number of questions about how the conduct and practices of the public body affect the proper functioning of the FOI regime generally. In either case, we believe it is vital that your office conduct a review of the circumstances of this case and the actions of the public body.

We pointed out that this type of practice could result in fewer requests being made by the media. OIPC declined to conduct an investigation in that case. What we have seen in the BC Ferries case is a quasi-public body taking this approach and implementing it in a systematic way while hiding behind claims of transparency and accountability.

Comparative information

1. Are you aware of good models of proactive disclosure of responses to access requests practices of public bodies in BC or in other jurisdictions?

The federal Information commissioner puts up summaries of ATI requests where information has been released. A person reviewing the OIC site can click on the summary and a pop up allows an immediate request for an electronic or print copy to be provided of whatever information had been released under that request. No press release is issued. The Department of National Defense apparently provides requesters with a ten day period of exclusive access to documents released.

Mexico has a much more open system with much more proactive disclosure. Section 7 of the Mexican FOI law requires agencies to “publish in a routine and accessible manner all information concerning their daily functions, budgets, operations, staff, salaries, internal reports, and the awarding of contracts and concessions.” FOI requests which are not fully responded to within the mandated time are considered to have been positive, and are required to be released to the requester. Apparently Colombia and Austria have similar legal requirements for information to be disclosed if a public body fails to respond adequately to a request. It is important to note that legal duties to proactively release information are generally contained within the FOI statute as a subset of the overall right to access to information.

2. Are you aware of particularly poor practices or lessons learned elsewhere?

Not as bad as BC Ferries.

*** * ***

Please forward your responses to Helen Morrison, Senior Policy Analyst by fax or e-mail by Friday, March 11, 2011.

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