FIPA

BC FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

July 2, 2002

The Honourable Sandy Santori
Minister of Management Services
Parliament Buildings
Victoria, BC V8V 1X4

Dear Mr. Santori:

Re: Reform of BC's *Freedom of Information and Protection of Privacy Act*

We are writing to give you the comments of the BC Freedom of Information and Privacy Association (FIPA) on the ongoing process of reform of the *Freedom of Information and Protection of Privacy Act* ("FOIPP Act"). We understand that this process is at its mid-point and that we should expect additional amendments to the Act this fall. We wish to maintain the excellent level of communication we have enjoyed with you and your staff to date, so we are taking this opportunity to submit our thoughts and recommendations to you for consideration this fall.

First, we would like to thank you for including FIPA in the consultation process that led to Bill 7, the *Freedom of Information and Protection of Privacy Amendment Act* ("Amendment Act") this spring. Our representatives were very satisfied with the quality of the process and its outcome. We would particularly like to commend Lois Fraser, Chris Norman and Sharon Plater of the Corporate Privacy and Information Access Branch for the frankness of the discussions, the understanding with which they received our views, and their flexibility in accepting suggestions they felt improved the Bill. We are happy to see that our input had a major, and we think a positive, impact on the final Bill.

This submission will cover a variety of bases: first, we will present our comments on the Amendment Act as passed; second, our recommendations for additional amendments this fall; and third, our suggestions for action on other issues affecting freedom of information and privacy that we hope will be on the agenda this fall. We have tried to keep our recommendations to a minimum, since we know that wholesale and detailed re-examination of the FOIPP Act is not contemplated at this time.

I. Comments on the *Freedom of Information and Protection of Privacy Amendment Act, 2002* ("Amendment Act")

As mentioned above, FIPA is pleased with the consultation process that contributed to the Amendment Act and also with the final result of the consultations to date. We feel it is a credit to the government that the Minister and his officials were willing to reconsider the

proposed amendments to which we had strong objections, and made no amendments that seriously weaken the FOIPP Act.

We are particularly pleased that the government mandated Personal Information Directories and Privacy Impact Assessments for all public bodies, and resisted the temptation to impose fee increases for FOI requests. These actions demonstrate not only an ongoing commitment to the principles of the Act, but also a willingness to break new ground.

However, FIPA does have concerns about some of the amendments that were passed, and we would be remiss if we failed to share these concerns with the government. We will deal with them below in the order in which they appear in the Amendment Act.

1. Section 27, "How personal information is to be collected"

The amendment of section 27(1) to allow personal information to be collected from someone other than the concerned individual is sensible and appropriate to the extent that it applies to individuals who are unconscious or otherwise unable to communicate. If the section as it previously existed was an impediment to the collection of information in such circumstances, then the amendment is a necessary and desirable improvement.

Unfortunately, section 27(1.a)(1) goes further than this, and we think that the result may be unintended. The amendment will also permit the collection of information about individuals who have chosen not to disclose that information, as long as the information is necessary for the medical treatment of the individual. This could interefere with the right of a competent individual not to disclose information, which we consider is an unreasonable invasion of privacy. Note that the medical treatment itself need not be necessary; it is the information which must be necessary for the medical treatment, whether that medical treatment is necessary or unnecessary.

We recommend that this amendment be modified to preserve the right of competent individuals to prevent the disclosure of sensitive personal information against their wishes.

2. Section 33, "Disclosure of personal information"

Arguably, the revised wording of section 33(d) and (d.1) permit greater disclosure of personal information than the wording of the previous section 33(d). The older wording permitted disclosure of personal information only for the purpose of "complying" with a statute or similar document. To "comply" is to yield or accept and suggests that disclosure of personal information would only be permitted where required by an enactment or similar instrument. Under the new wording of section 33(d.1)(1), disclosure can be made when an instrument "authorizes" or requires its disclosure. This would seem to ease the requirements for disclosure of personal information.

But our concern is even stronger over the addition of the new section (f.1.), which permits disclosure of personal information as follows:

> (f.1) to an officer or employee of a public body or to a minister, if the information is necessary for the delivery of a common or integrated program or activity and for the performance of the duties of the officer or employee or minister to whom the information is disclosed,

In our view, this sets far too low a standard for information-sharing between government departments in the absence of the consent of the individual concerned. Further, it is our view that section 33 (f) of the FOIPP Act, of which (f.1) is an extrapolation, also sets too low a standard. These subsections would (as an example) permit the disclosure of an individual's sensitive personal health information to an officer, employee or minister of government for performance of "duties" where these duties may not be defined or specified in legislation, and where the purpose may be for another than originally intended. We respectfully submit that this standard of disclosure falls far below what is now viewed as acceptable privacy practice.

We recommend that, in its continuing review of the FOIPP Act, the government re-examine the standards of privacy protection afforded by sections 27 and 33 of the Act and bring them up to the standards of informed consent exemplified by the Canadian Standards Association's *Model Code for the Protection of Personal Information* and the federal *Personal Information Protection and Electronic Documents Act* ("PIPED Act").

3. Section 43, "Power to authorize a public body to disregard requests"

FIPA objects to the broadening of the commissioner's power to allow public bodies to disregard requests. We do so on several grounds:

First, the power to designate requests as "frivolous or vexatious" introduces subjective criteria to a decision about a citizen's fundamental right of access to information; therefore it is highly subject to abuse. This is the reason that the language "frivolous or vexatious" was considered and rejected when B.C.'s FOIPP Act was being developed, and it is also the reason that the Special Committee to Review the Freedom of Information and Protection of Privacy Act ("Special Committee") agreed that section 43 should not be changed[1].

In particular, FIPA opposes the option to deny access by individuals to information about themselves on the basis that requests are frivolous or vexatious. The potential for unjust restriction is great, and the elimination of this right may deny effective recourse to citizens who require their personal information to obtain that recourse. The potential for abuse is heightened by the government's recent cutbacks to ministry budgets. The less the resources available for responding to FOI requests, the greater the likelihood that requests will be found to be burdensome.

FIPA also objects to the addition of section 29, "Right to request correction of personal information", as a section regarding which requests may be disregarded as frivolous, vexations or unreasonably interfering with the operation of a public body. This addition may well be a reflection of the lengths to which some people have gone to seek to have their personal information corrected. The frustration that people feel when they believe that erroneous information about them is contained in government files — and the extreme injury that incorrect information in an important file can bring about — has certainly led to persistent requests in the past for correction of that information. Whether or not this is appropriate

[1] "The Committee observed that the current test — repetitious and systematic — evaluates the effect of a request on a public body. The proposed test -- frivolous or vexatious -- would require public bodies to evaluate the intent of the request. It was noted that inquiring into intent would debase the principle of the right to information embodied by the FIPPA. On that basis, the Committee agreed that section 43 should remain unchanged." — *Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act,* pp. 32-33.

perseverance in the face of government recalcitrance or unreasonable interference with government operations is a matter to be determined on a case-by-case basis.

We think that the problems with section 43 could be minimized by amending it so that:

- the section may not be applied to a request by an individual for their own personal information, and
- a public body wishing to invoke section 43 must demonstrate that at least two of the three tests in the present section are met.

Therefore, we recommend that section 43 be amended as follows:

> 43 (1) If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 that
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> (a) are frivolous or vexatious, or
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> (b) are repetitious or systematic, and
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> (c) would unreasonably interfere with the operations of the public body.
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> (2) Section 43 (1) may not be applied to a request by an individual for access to their personal information.

4. Section 56, Inquiry by Commissioner

In the amended version of section 56, it is no longer the case that the commissioner "must" conduct an inquiry; instead, the commissioner "may" conduct an inquiry. Presumably, the amendment is intended to allow the commissioner to dismiss a request for a review without conducting the review or referring the matter to mediation. It is difficult to imagine a situation in which this would be appropriate.

The *Act* already allowed the commissioner to restrict the submissions in a review to being made in writing rather than orally; the amendment must allow the commissioner to dismiss the request for a review without receiving any representations at all. This seems extraordinary. We question how a commissioner could accord procedural fairness to a party seeking a review without conducting at least some minimal level of inquiry.

We understand that this section was amended to deal with cases where, for example, the issue before the commissioner has been decided in numerous previous cases. To deal with the problem, FIPA would rather see a summary inquiry process introduced with the requirement for a written disposition. In this way, the commissioner can deal with these matters efficiently, but still have to make an order which would be subject to review by the courts.

5. Section 69, "Personal information directory"

FIPA wishes to commend the government in the highest terms for introducing the Personal Information Directory program into the FOIPP Act. This program greatly increases the openness and accountability of government information practices by providing information about the personal information banks that each public body holds, and the information-sharing agreements into which they enter. It also mandates privacy impact assessments for information-sharing agreements to ensure that they comply with the Act. This program is a huge step forward for transparency in the government's personal information practices and sets a standard for BC that is sure to be a benchmark for other Canadian jurisdictions.

There is a minor downside to the amendment of section 69 and the consequential repeal of section 72: the elimination of the requirement to produce a comprehensive Directory of Records describing the mandate and function of each public body and the records containing both personal and general information in its custody or control. However, it is well known that the former Directory of Records was not a useful tool for information requesters, was not kept current and in fact was very seldom used.

Though the Directory of records will be little missed, FIPA sees the need for the publication of some form of public guide to government bodies as a general aid to citizens who wish to understand government and the types of general records they keep. We urge the government to consider creating a resource of this type.

6. Section 76, "Power to make regulations"

The Special Committee recommended "...that public bodies and local public bodies be brought into Schedules 2 or 3 of the FIPPA, respectively, as they are established..." FIPA regrets that this recommendation was not fully implemented in the Amendment Act.

The repeal of section 76 (3) and (4) and their replacement by section 75 (1) shifts the power to add new bodies to the schedules of those covered by the FOIPP Act from the Lieutenant Governor in Council to the Minister responsible for the Act. This is certainly an improvement, although it falls short of what FIPA has advocated, which is the automatic inclusion of all new public bodies under the Act.

In our opinion, it would be more in the spirit of the Act if inclusion were the "default setting" and a special case had to be made to the Minister for excluding any new public body. We recommend that the government consider making inclusion automatic in the near future.

II. Unfinished Business: Recommendations of the Special Committee to Review the Freedom of Information and Protection of Privacy Act ("Special Committee")

The Special Committee made a number of positive recommendations which were not included in the first round of amendments to the FOIPP Act. We would like to draw attention to a few of these and urge that they be implemented this fall.

1. Recommendation #1 - Routine release of information

The Special Committee agreed that the spirit of the FOIPP Act is to encourage the routine release of information, and recommended that a statement be added to the Act to emphasize "...that in the interest of supporting a free and democratic society and accountable and responsible government, the Act should support open and ready access to government information."

We think that the addition of such an affirmative statement would be a very positive move. It would send a powerful message to officials and reinforce the government's pledge to be "the most open, accessible and democratic government in Canada." It would help foster what the original framers of the Act intended and the Special Committee supported: a culture of openness in government which embraces the widest possible access to government information.

Of course, such a statement should be backed up by sincere initiatives to encourage routine access to information and real mechanisms for achieving it. The routine release of information under the new Personal Information Directory program is an excellent example. We anxiously await more such initiatives.

2. Recommendation #3 - Time limit for responding

The Special Committee agreed that public bodies should be encouraged to complete information requests in a timely manner. It recommended "That public bodies comply with time lines under section 7 of the Act, and that in the event of non-compliance with time lines, fees for requests that are not fulfilled within the prescribed time be waived."

We think this recommendation is even more relevant today than it was in July 1999. The Information and Privacy Commissioner has repeatedly pointed out that delay in responding to access requests is the greatest single problem in FOI administration.

The Amendment Act, on the other hand, made many changes to the FOIPP Act that made time lines more generous for public bodies and compliance easier. Extensions of time limits, delays in the commencement of time limits, and changes to the calculation of time will all combine to produce much slower responses to access requests than have previously been the case. Given that delays were a problem even under the previous version of the Act, this is a disappointment.

We urge the government to implement the Committee's recommendation that fees be waived in cases of excessive delay in order to provide some balance between the needs of the bureaucracy and the rights of the public to timely access to information.

3. Recommendations #10 and #11 - General powers of the Information and Privacy Commissioner

The Special Committee recommended "That section 42(1)(f) of the FIPPA be amended to enable the Information and Privacy Commissioner to comment on the implications for access to information or for protection of privacy of existing legislative schemes or programs of public bodies." and "That public bodies incorporate consultation with the Information and Privacy Commissioner in their policy development processes."

These should be relatively easy recommendations to implement. They will help to foster sound policy development and shed valuable light on the information practices of government. We hope they will be part of this fall's amendments.

4. Recommendation on section 14, the exception for matters of solicitor-client privilege

There has been a great deal of controversy over the years about section 14 of the FOIPP Act, which is the exception entitled "Legal Advice". The original intent of this exception was to protect exactly what the title states: legal advice received by the crown. However, before the Act was passed, officials in the ministry of Attorney General persuaded the government to change the wording of the section to embrace "...information subject to solicitor-client privilege."

FIPA considers this elaboration of section 14's original intent a serious mistake. The change has allowed a great deal more information to be excluded from public release than was originally intended — and more than the purpose and spirit of the Act would seem to allow.

The Special Committee was quite aware of the issues surrounding section 14 and shared our view to a great extent. In its report to the Legislature, the Committee had this to say:

> The Committee noted that courts have interpreted the solicitor-client exemption of the FIPPA extremely broadly. Members debated the rationale for keeping such documents permanently exempt from disclosure. It was also considered that solicitor-client privilege, in terms of legal advice to public bodies in their policy-making role, was not intended to be protected to the same degree as solicitor-client privilege in law enforcement matters by the FIPPA. It was noted that solicitor-client privilege can be waived, and that if government is the client in cases of legal advice, government has the option of waiving its right to exemption under the FIPPA.
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> The Committee agreed to recommend that this issue should continue to be examined, with a view to public bodies' gradual adoption of the latter practice.

Another unintended consequence of the change of section 14's wording was that courts have ruled that entire documents may be withheld from a requester if they contain some information that is entitled to solicitor-client privilege. This contradicts the general rule of the FOIPP Act, which requires only that privileged information within a document be severed; the remainder of the document must be released unless other exceptions apply. The Special Committee clearly understood this and stated:

> The Committee also agreed that it is in keeping with the spirit of the Act that documents containing legal advice on policy issues be subject to severing procedures.

FIPA urges the government to re-examine section 14 and find appropriate ways to narrow the exception. It should at least be clarified that documents must be released after information subject to solicitor-client privilege and other applicable exceptions is severed, and that legal advice should be released when release will not harm the interests of government, or a reasonable period of time has passed.

III. Commitments of the Liberal Caucus

In April 2001, FIPA received a letter from Premier Gordon Campbell (then the Leader of the Opposition) with responses to a series of policy questions posed by FIPA. These responses laid out the positions and commitments of the Liberal Caucus on a variety of issues related to FOI and privacy. Because they relate directly to the review of the FOIPP Act and are not dealt with elsewhere, we would like to restate two of these here:

1. Application of the FOIPP Act to the Legislative Assembly

We asked the Liberal Caucus the question, "Do you favour including the Legislature itself (eg. Clerks and MLAs' offices) in the coverage of the FOIPP Act?"

The response of the Caucus was, "We will undertake a review of the issue whether, consistent with the principles of parliamentary privilege, the administrative operations of the Legislative Assembly can be made subject to disclosure under the FOIPP Act in order to ensure that the Legislative Assembly is accountable to taxpayers, and to thereby enhance public confidence in the institution of parliament."

FIPA strongly supports this objective, and the Information and Privacy Commissioner's rational for extending the Act to the Legislative Assembly — namely, accountability for the use of public funds and privacy protection for individuals. We urge the government to undertake a review of this issue as part of the FOIPP Act review this fall.

2. Penalties for destruction of documents

FIPA asked the Liberal Caucus the question, "Ottawa recently passed a law to penalize the improper shredding and alteration of records by officials in the federal government. Would you advocate the same for the provincial government?"

The response of the Caucus was, "We would welcome a public discussion concerning the desirability of introducing similar legislation in British Columbia."

We urge the government to place this issue on the agenda for the fall as well. Both the federal government and the government of Alberta have seen fit to introduce penalties for improper and deliberate destruction of documents, and there is no less need for such a preventive measure in B.C.

Section 67 (1) was added to Canada's *Access to Information Act* in 1999 following records-destruction scandals involving the Department of National Defence and the Canadian Blood Committee. It includes fines of up to $10,000 and jail terms of up to two years for anyone who tries to deny the right of access to information by destroying, falsifying or concealing records, or counselling another to do the same.

Alberta's "Offences and Penalties" are found in section 86 of its *Freedom of Information and Protection of Privacy Act.* The section stipulates that a person who discloses personal information, destroys records for the purpose of blocking a freedom of information request, obstructs or misleads the commissioner, or disobeys one of his or her orders, may be fined up to $10,000.

FIPA strongly advocates that a similar section be incorporated into the FOIPP Act to penalize any public body that deliberately destroys documents against the authority of the FOIPP Act and the Document Disposal Act.

IV. Additional Recommendations of FIPA

1. Division 4, "Public Interest Paramount", Section 25

Section 25(1) is meant to compel the release of information when it is about a significant harm to health, safety or the environment, or its release is clearly in the public interest. This imperative, known as the "Public Interest Override", is the very heart of freedom of

information legislation, and the Act affirmed that by adding section 25(2), stating that 25(1) "...applies despite any other provision of this Act."

Section 25 makes a bold statement, but of all the provisions that freedom of information advocates fought for in the early 1990s, it has been the biggest failure in implementation. The Public Interest Override should be the strongest and most compelling section of the Act. It has turned out to be the weakest and least invoked. More than any other flaw in the act, this cries out for a remedy.

Subsequent interpretations of section 25 by B.C.'s first Information and Privacy Commissioner helped ensure that section 25 became virtually a dead letter. The commissioner concluded (erroneously in our opinion) that the section can only be invoked by a public body and that he has no power under it to order disclosure, regardless of the nature of the information.

FIPA believes that an effective public interest provision is the cornerstone of access and privacy regimes. To restore the intent of section 25, we make the following recommendations:

i) The Information and Privacy Commissioner should be given the power to prescribe guidelines to be applied by public bodies in deciding whether section 25 is triggered in any case.

ii) Section 25(2) should be amended to make it clear that an exception from disclosure does not apply where there is a clear public interest in public disclosure.

iii) The commissioner should explicitly be given the power to apply this section and override decisions of public bodies to deny access.

iv) A provision similar to section 77(1) of the Alberta *Freedom of Information and Protection of Privacy Act* should be added to B.C.'s Act. Alberta's section 77(1) allows a government employee to disclose records to the commissioner when the release of the records is clearly in the public interest and the public interest override is not being applied as required. It also provides legal protection for the employee.

2. Section 15, the exception for "Disclosure harmful to law enforcement"

FIPA agrees with the Information and Privacy Commissioner that the current definition of law enforcement is far too broad. Under the current section 15, any proceedings or investigations that lead or could lead to a penalty or sanction being imposed qualify as law enforcement. Thus internal ministry harassment investigations and internal auditing functions qualify as law enforcement. As the commissioner states, "The current definition is so expansive as to allow public bodies to protect almost any activity."

We believe the section must be limited, along the lines of Section 16 of the Federal *Access to Information Act*, to proceedings or investigations which could result in penal sanctions. We recommend that the definition of law enforcement be amended to apply in proceedings which lead or could lead to "an offence under an enactment of B.C. or Canada" and "that relate to an investigation in regard to imminent criminal charges."

V. Other Considerations Vital to Freedom of Information and Privacy in British Columbia

1. Review of statutory exemptions from the FOIPP Act

FIPA and the B.C. Civil Liberties Association have urged the government to conduct a rigorous review of all the statutory exemptions that have been passed over the last decade that exclude records from the ambit of the FOIPP Act. We were delighted to receive the Minister's assurance in his letter of December 10, 2001, that this review will be part of the legislative review of the Act.

Suffice it to say that both groups see statutory overrides as one of the greatest threats to FOI and privacy rights. Experience with the federal *Access to Information Act* in particular demonstrates how the cumulative exemption or non-inclusion of public bodies and categories of public records can amount to the "creeping repeal" of an access act.

2. Whistleblower protection

Section 77(1) of Alberta's *Freedom of Information and Protection of Privacy Act* provides an excellent model for facilitating disclosure of vital information to the commissioner and protecting employees who disclose information from adverse employment action. However, it is our view that wider protection for whistleblowers should be considered in B.C. We note that the Special Committee expressed the same view. On page 40 of its report, it stated:

> The Committee agreed that the province would benefit from general "whistle-blower" protection, and that the protection of information and privacy administrators could be covered under general legislation.
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> Suggestion: That a separate Act be considered for general "whistle-blower" protection.

We urge the government to begin a process of public consultation on the topic of whistle-blower legislation when it introduces amendments to the FOIPP Act in the spring of 2003.

3. Cuts to the Budget of the Information and Privacy Commissioner

Our final comments are also the most important we will offer here, and we hope the Minister, his advisers and the government will treat them accordingly. We have reserved our last words for an action of government that looms over all others in its importance to the future of freedom and privacy rights in B.C.: the cuts which have been ordered to the budget of the Information and Privacy Commissioner's office.

The Select Standing Committee on Finance and Corporate Services has ordered a cumulative cut of 35 per cent from the commissioner's budget over three years. As a group that has studied FOI and privacy regimes for more than 12 years, we must advise the Minister that a cut of this magnitude will virtually destroy the functionality of the FOIPP Act in this province. In the process, it will eclipse all the government's good intentions regarding the improvement of the Act and its administration.

A crisis in the FOI system can only have a major negative impact on a government that has made openness and accountability one of its major themes.

In its letter to FIPA of April 2001, the Liberal Caucus stated that, "Our commitment to open government means providing a stable funding base for the Information and Privacy Commissioner's office to ensure that the office has the resources it needs to discharge its statutory mandate." The planned cuts to the commissioner's funding will in fact deny the office a stable funding base and ensure that it cannot meet its statutory obligations. The pittance that would be saved is surely not worth the negative consequences that would ensue.

FIPA urges the government in the strongest terms to rescind the planned budget cuts and ensure that B.C. continues to have a functioning FOI system in the future.

This concludes the comments and recommendations of FIPA regarding the review of the *Freedom of Information and Protection of Privacy Act.* Once again, we would like to thank the government for undertaking the consultation process and inviting our organization to participate.

Yours sincerely,

Gerald Fahey
President

cc: Premier Gordon Campbell
Geoff Plant, Attorney General
David Loukidelis, Information & Privacy Commissioner
Chris Norman, Director, Corporate Privacy and Information Access Branch