Submission to :
The Third Special Committee to Review the *Freedom of Information and Protection of Privacy Act*

Access Denied:
Abuses and Failures under the *Freedom of Information and Protection of Privacy Act*

"Secrecy, being an instrument of conspiracy, ought never to be the system of a regular government."
- Jeremy Bentham

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> *"The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry."*
>
> – Gerard LaForest, Supreme Court of Canada Justice, in Dagg vs. Canada (1997)

Introduction

Access to government records is crucial for a healthy democracy. Yet despite this truism, the governments of British Columbia continue to vigorously fight the release of information. Excessive delays, high fee estimates, and over zealous censoring of released documents, among many other issues have caused a significant decline in use of the *Freedom of Information and Protection of Privacy Act* (the Act)[1]. Public interest groups are skeptical about using the Act and question whether it is even worth making submissions to this Committee. Since its inception, the governments of British Columbia have rendered the Act an impotent shell of what it can and should be.

As will be seen below, the government's own data reveal that response times for requests have not improved. Hundreds of requests every year take more than an average of 170 days to resolve; that works out to just under half a year. For legislation whose base line for responses[2] to requests is 30 days, 170 days is not remotely acceptable. Public interest groups, media, and political parties continue to be discriminated against, and their request are met within the legal response time just over 50 percent of the time. 47 percent of responses by public bodies to these three groups are illegally slow.

Fees appear to be used to stonewall access to information and in at least one case, apparently used to retaliate for an appeal allowed under the Act. The Sierra Legal Defence Fund appealed a fee estimate of $ 24,000. In response, the Ministry increased its fee estimate to $173,000. Further fee barriers are evident in the electronic access regulations. The fee structure established in the Act's regulations allows public bodies to charge nearly $1000 dollars an hour for mainframe access. This charge does not include the $30 per hour charge for creating a program to produce the records stored by government.

It is made abundantly clear that the Act has been seriously undermined in many ways and desperately needs to be reformed and strengthened. In this digital era, there is no excuse for an open and accountable government to so thoroughly undermine access to information.

1 *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165.
2 The response requirements are stated in s. 8.

Part One: Legal and Illegal Delays in Accessing Information

Part One is broken down into three sections. Section One lists and explains the time extensions that are provided for under the Act. Section Two uses data from the Corporate Requests Tracking System (CRTS)[3] to illustrate the very troubling trends that are occurring because of how public bodies are applying the legislation. Section Three provides recommendations for strengthening the legislation and ensuring that the Act remains a useful tool for citizens to participate in governance.

Section One: Delays Under the Act

A) Introduction

The Act provides time frame criteria that public bodies are required to meet. Initially, under s. 7, public bodies have 30 working days[4] to respond to FOI requests. However, there are a plethora of exceptions to the 30 working day time limit. For example:

- A public body can ask for an extension under s. 10.
- If the body determines that a fee is necessary for production of the records, the 30 working day time frame does not include any time between the delivery of the fee estimate and any of: the paying of the fee, the paying of a deposit, or the waiver of the fee. See s. 7(4).
- If a public body refuses to waive a fee, an applicant can seek review of the decision under s. 52(1). If they do, the 30 working day time frame does not include the time necessary for the commissioner to decide the issue. See s. 7(5).
- The public body can ask the commissioner to disregard a frivolous or vexatious request under s. 43. In this case, the 30 working day limit does not include the time between the application for disregarding the request and the day of the commissioner's decision. See s. 7(3).

B) Section 10 Delays

Subsection 10(1) allows the head of a public body to extend the response time by up to 30 working days if the request would "unreasonably interfere with the operations of the public body" or time is needed to consult with a third party These are vague guidelines and exercisable at the discretion of the head of the public body. The applicant does have the right to complain about a s. 10(1) extension under ss. 42(2)(b) or 60(1)(a).

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3 The CRTS is a government data register that compiles data about the use of the Act.

4 In April of 2002, the Act was amended to change a calendar day into a working day. The result is that the 30 day time limit was extended by two days a week (weekends and holidays). http://www.gov.bc.ca/citz/iao/foi/crts_statistics/criteria.html. Accessed January 30th 2010.

Subsection 10(2) allows the head of the public body, with the consent of the commissioner, to extend the time for response. The commissioner has very broad discretion to grant extensions: "if the commissioner otherwise considers that it is fair and reasonable to do so, as the commissioner considers appropriate."

C) Section 11 Delays

Under s. 11, the head of a public body may transfer a request anytime within 20 working days of receiving the request. If transferred, the new public body has a full 30 working days to respond. This is 50 working days, or up to two and a half months before an applicant gets a response to their application.

D) Section 20 Delays

Under s. 20, the head of a public body can refuse to disclose information if they plan to release the information to the public within 60 days of receiving the applicant's request. The public body can change its mind after 59 days, and the application is started anew, as though no time had elapsed. The only saving grace of this section is that the head of the public body cannot do this more than once.

E) Section 23 Delays

If the information could jeopardize the interests of a third party, under s. 23, the head of the public body has another 30 days to decide whether to give the applicant access to the records. Under this section, the third party can appeal the release of the information within 20 days of receiving notice of intent to disclose.

Egregious Examples: The Ministry of Labour and the IBM Contract Cases

Two cases vividly illustrate how public bodies can delay access to records. The Ministry of Labour request described below was initiated in 2006 and the documents were finally released in 2009. In the IBM case, the initial request was launched in 2004, and a heavily censored version of the requested information was finally provided in January of 2010.

The Ministry of Labour fought hard against the release of employment standards enforcement records.[5] A request was filed in July of 2006. The first thing the ministry did was give itself a 30 working day extension. Two months later, the researcher was given a fee estimate of $4,200 and told he would not only have to pay this fee, but also agree to pay any

5 http://www.policyalternatives.ca/publications/commentary/ministry-labours-fight-hide-employment-standards-violations-makes-mockery-fr. Accessed January 19th 2009.

additional costs incurred by the Ministry. Unable to afford this, the researcher asked the Minister for a fee waiver because of the public interest in the information. The Minister refused the waiver, noting that there was no pressing or urgent need for disclosure of the information. In November 2006, the researcher asked the commissioner to review the minister's decision. Ten months later, in September 2007, the commissioner decided that a formal inquiry was warranted. In July 2009, 15 months after the inquiry, the commissioner ruled in favour of the researcher. The documents were supposed to be released by August 5th, but the Ministry asked the Commissioner to reconsider the decision. After a media story about the Ministry's conduct, the Ministry changed its mind and released the documents.

The dispute around the IBM contract with the BC government pertains to "the nuts and bolts of the unprecedented contracting out of core services to large corporations that occurred during the Liberals' first term."[6] The Freedom of Information and Privacy Association (FIPA) made an FOI request for the contract in December 2004. FIPA applied to view the more than 600-page contract signed with IBM -- one of four hefty, long-term deals cut with private firms worth well above $1 billion.[7] In April 2005, IBM complained about the potential release and the government then refused to release records . In July 2008, the commissioner demanded the documents be handed over. The government appealed to the courts, and in December 2009, the British Columbia Supreme Court also ordered release of the contract (not in its entirety). A heavily censored version of the contract was released on January 11 2010. More fighting will be required to gain access to the full contract.

These two cases depict a grim picture for access to information. The data below suggests that cases like these are not anomalies. It is the problem cases like these that need to be addressed by the legislation. Access to banal information is less important than accessing information that government may want to conceal. These two cases illustrate how the government effectively undermines the idea of having an open and accountable government. The Act needs to be amended to fix these delay issues. Taking these two examples into account, and the delay trends articulated below, it is understandable why people are skeptical of the Act's capacity to force the release of government records.

Section Two: Response Times Trends

A) Introduction

The following analysis exposes the failure of the Act to provide people with timely access to requested information. The governments of British Columbia have, and continue, to

6 http://www.vancouversun.com/Liberals+must+divulge+contents+lucrative+contract+awarded/2328989/story.html. Accessed January 19, 2009.

7 Ibid.

stonewall and delay access to information. There has been no improvement in the access times from government to government. In addition, there has been a substantial decline in use of the Act; likely a result of the government's consistent ability to delay the release of documents. (Note: The data presented below focus on General requests because they involve fewer personal information issues and are most pertinent to public interest groups.[8])

B) Response Times 2004-2009

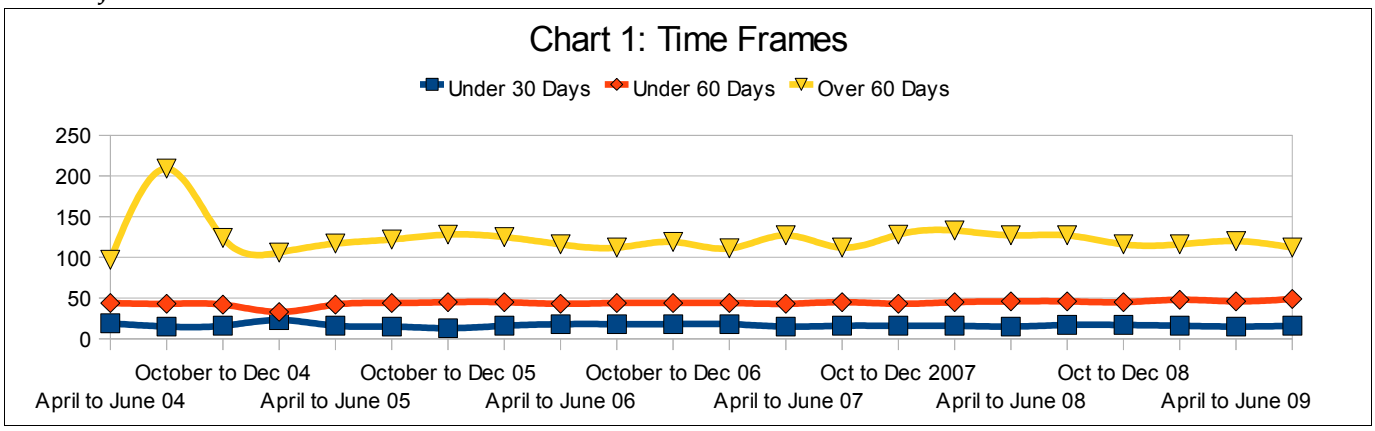
The length of time required to receive a response from an FOI request can be staggering. The data below break down the CRTS data on General requests for the years 2004-2008. There are three time frame categories used: Timely (Under 30 days), Delayed (Under 60 days), and Seriously delayed (Over 60 days). As can be seen, in every year, the average response time for seriously delayed files was close to half a year.

- **In 2004**, there were a total of 1,951 General requests.
  - Timely: 939 were resolved in a 19 working day average (WDA);
  - Delayed: 682 were resolved in a 38 WDA; and
  - Seriously Delayed: 330 were resolved in a138 WDA (193 calendar days).[9]
- **In 2005**, there were a total of 1,498 General requests.
  - Timely: 771 were resolved in a 15 WDA;
  - Delayed: 436 were resolved in a 44 WDA; and
  - Seriously Delayed: 291 were resolved in a 123 WDA (172 calendar days).
- **In 2006**, there were a total of 2,045 General Requests.
  - Timely: 912 were resolved in an 18 WDA;
  - Delayed: 538 were resolved in a 44 WDA; and
  - Seriously Delayed: 595 were resolved in a 115 WDA (161 calendar days).
- **In 2007**, there were a total of 1,751 General requests.
  - Timely: 828 were resolved in a 16 WDA;
  - Delayed: 485 were resolved in a 44 WDA; and
  - Seriously Delayed: 438 were resolved in a 127 WDA (179 calendar days).
- **In 2008**, there were a total of 1,834 General requests.
  - Timely: 964 were resolved in a 16 WDA;
  - Delayed: 408 were resolved in a 46 WDA; and
  - Seriously Delayed: 462 were resolved in a 122 WDA (171 calendar days).

8 All data are taken form the CRTS. All data in that system has been averaged, so it is impossible to see the true individual time it takes to access information. The closest values are those that distinguish between under 30 days, under 60 days, and over 60 days response times. However, these data only include files that have been closed. Files opened but not closed are not included in the data and it is often that the extremely delayed cases like the IBM contract case that need to be highlighted, not hidden from reporting.

9 The calendar day figures were determined by taking the WDA and multiplying by 7, then dividing by 5. Also, the CRTS data contains small discrepancies between data sets: See Appendix 6 for details.

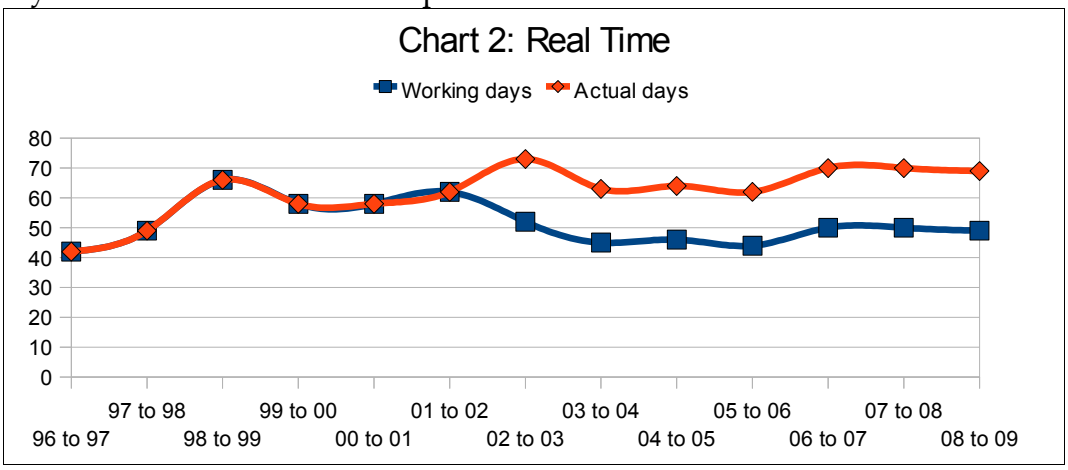
The Time Frames Chart[10] below depicts the time frame for closing FOI requests by the government tracking system (the CRTS). The number on the left is the average number of working days used before the file was closed. This graph shows the trend from April 2004 until June 2009.



These data show that between 2004 and 2009 there has been a consistent failure by the government to provide information in a timely manner. There has been no improvement in response time in the last five years. These data show that between 2004 and 2009, 3,475 Timely requests took a 16.8 working day average (WDA). The 2,549 Delayed requests took a 43 WDA. The 2,119 Seriously delayed requests took a 125 WDA, or an average of 175 calendar days.

C) Long Term Trends: Response Times 1996-2009

The Real Time Chart[11] below depicts both the working day average and calendar day average for FOI responses between 1996 and 2008. In 2002, the government amended the Act to change the definition of a day from a calendar day to a business or working day. The data show clearly a continual increase in response time from 1996 to 2008.



10 Chart 1: Time Frames data available in Appendix 1.
11 Chart 2: Real Time data are available in Appendix 2.

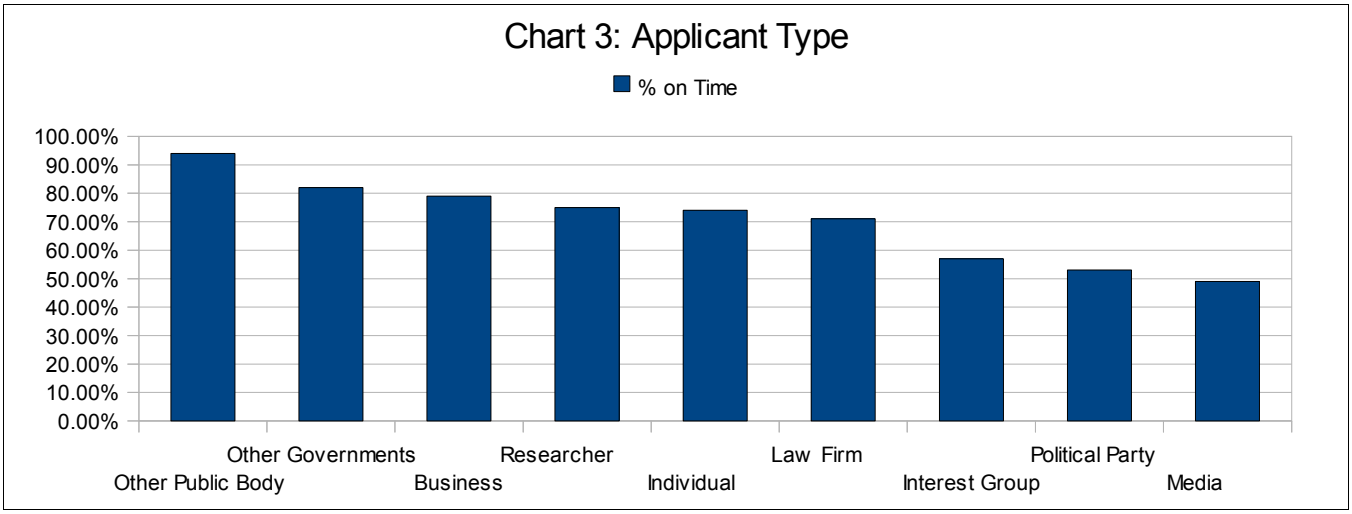
Between 1998 and 2008 the ten year averages for closing General requests for each category were the following number of average working days:

- **Timely**: 16 working days or three calendar weeks;
- **Delayed**: 43 working days or 2 calendar months; and
- **Seriously Delayed**: 134 working days or 6 calendar months.

The staggering amount of time required to close both categories of delayed files sheds some light on the serious decline in use of FOI requests. Combined with the use of fees as a deterrent, it is abundantly clear why citizens are giving up on accessing government records.

D) Targeted Delays:

In the 2008 CRTS based *Timeliness Report*,[12] the OIPC shows clearly that requests by political parties, interest groups, and the media are responded to significantly late, often illegally late.[13] They are illegal because they even exceed all authorized extensions. The Applicant Type chart[14] below shows response times by applicant type. The percentage figure is the percentage or requests closed in a legal time frame. This time frame includes all extensions and holds available under the Act.[15]



As can be seen, political party, Interest groups, and the media have their requests processed legally only 53 percent of the time! It is clear from the data that three groups are being discriminated against and are dealing with a government that operates illegally with almost half of their requests.

12 *Timeliness of Government's Access to Information Responses: Report for Calendar Year 2008* (*Timeliness Report*). OIPC February 2009.

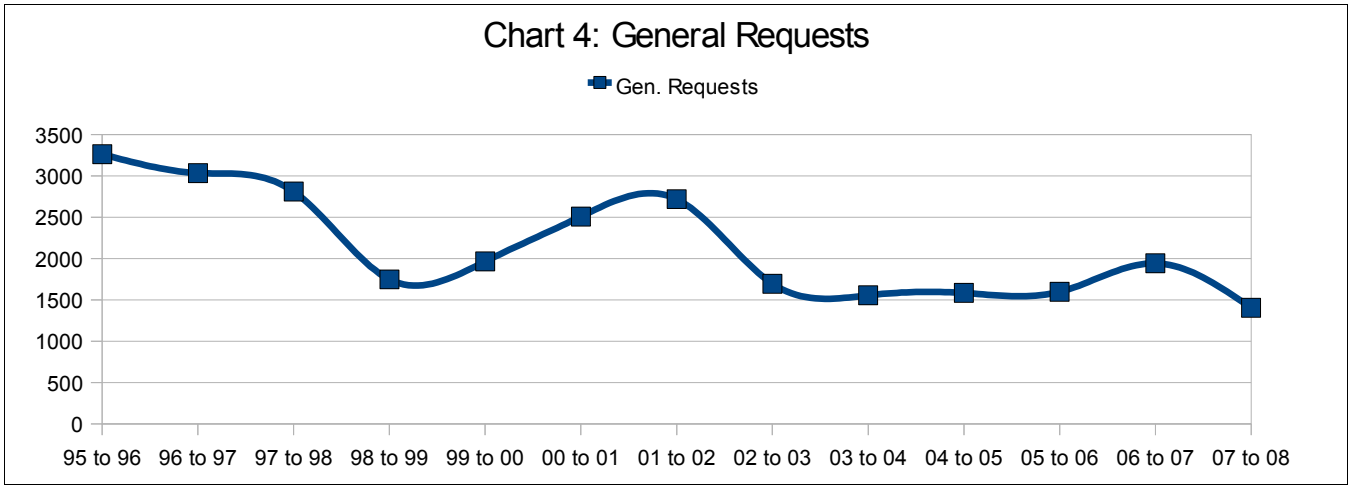
13 Some quick facts on the illegality of government response for 2008 based on the *Timeliness Report*: Overall, responses were illegally slow 29 percent of the time; of 22 ministries, the office of the Premier, the worst performer, only closed 31 percent of its files in a legal time frame.

14 Chart 3: Applicant Type data available in Appendix 3.

15 *Timeliness Report* page 6.

E) Requests 1996-2008

Looking at long term trends in the graph below, it is clear that the number of General requests has decreased significantly since 1996. This is likely in part because of the excessive time required to access records. The General Requests Chart[16] below shows the number of General requests made to the government of British Columbia on an annual basis from 1996 though to the end of 2007.



These data show a very troubling trend: people are using FOI requests less frequently now than before. The likely reason for the declining use is the inexcusably long periods of time required to get access to government files and the costs of access. My two examples from earlier (the BC Ministry of Labour and the BC government's IBM contract) illustrate clearly the problem with access time under the Act. In the first case, a researcher submitted an FOI request in July of 2006 and the information has yet to be released. In the second case, it took from 2005 until December of 2009 to get access to some of the files. The rest are still being fought over.

Section Three: Recommendations Regarding Delays

There are a variety of changes that should be made to the Act to address the inexcusably long response times.

1 Penalties should be imposed on the heads of public bodies that fail to meet the legislated time lines for release. A possibly penalty would be to have any failure to meet the legislated time frames be included in job performance evaluations. Another possibility would be administrative monetary penalties for delays. The penalties could go first towards any fee payment imposed on the applicant, and any remainder being put in an account to help fund the OIPC.

2 Institute a "but-if" clause. Any time there is a proposed time frame extension beyond the

16 Chart 4: General Requests data available in Appendix 4.

initial 30 days, the public body could be subject to a "but if" clause: For example, the 30 day time limit would not apply if the fee waiver is denied by the commissioner, **but if** the commissioner agrees to waive the fee, then the time it took to get the commissioner's decision would be included in the 30 working day limit. This would provide incentive for public bodies to give defensible fee estimates, and waive fees when it is appropriate.

3 If the applicant seeks review of the public body's decision under s. 52(1), the 30 working day limit is currently put on hold. Again, the but if clause would be a valuable incentive to ensure good faith actions on the part of public bodies.

4 The discretionary 30-day extension allowable under s.10(1) should be removed. The head of the public body ought to prove to the commissioner that the request will create an unreasonable interference. Recommendation 7[17] by the Committee substantially reaffirms this. They recommended: "Amend section 10(1) to give the Commissioner the authority to grant extensions for rare or unexpected events where the Commissioner considers it fair and reasonable to do so. "

5 The extension allowed under s.10(2) (requiring the commissioner's consent) should stipulate a maximum allowable extension time. Perhaps this time could be based on the quantity of information requested: e.g. a one day extension for every 250 pages over an initial threshold of 3,000 pages. (In the regular 30 day time frame, one employee would only have to review 100 pages per day).

6 If the public body does not meet its legislated time requirements, the commissioner should be given the power to compel full and immediate disclosure of all documents that are not *prima facie* protected by an exception under the Act.

7 The issue of fees and waiver should not delay release of documents. Regardless of whether a fee is demanded or a waiver requested, the documents should be released within the regular time frame requirements. Allowing the clock to stop during this process promotes a culture of high fee estimates. If the documents are released and a waiver is ultimately denied, the government agency can then go about getting its costs recuperated from the individual or group. As such, subs. 7(5) should be repealed.

7.1 Alternatively, implement a "but-if" system similar to the one in Recommendation 2.

8 Reduce the amount of time allowed to transfer a file from 20 days to one working week (five days).

9 Reduce the amount of time allowed for a new public body to respond.

10 Change working day back to calendar day. This arbitrary change should be reversed to reflect the original intent of the legislation.

11 Streamline the appeal processes:

11.1 All appeals should be heard at once. Public bodies should only be given one opportunity to be heard by the Commissioner and should be required to raise ALL issues. A public body should not be allowed to delay releasing information by

17 Enhancing the Province's Public Sector Access and Privacy Law. Report May 2004 (the *Committee Report*). Special Committee to Review the Freedom of Information and Protection of Privacy Act. (the Committee). Page 16.

appealing to the commissioner one issue at a time.

11.2 Give applicants access to legal help for reviews to the Commissioner. This would make the commissioner's job easier and create a less intimidating appeals process for individuals. There are precedents. The Ministry of Labour used to provide legal assistance for worker's compensation applicants. They also provided assistance to workers seeking unpaid wages.

11.3 Amend the Act to combine the complaint process and the review and inquiry process — referred to in sections 42(2) and 52(1) respectively — into a unitary process for the Commissioner to investigate, mediate, inquire into and make orders about complaints respecting decisions under the Act or other allegations of non-compliance with the Act.[18] This was recommended by the 2004 Committee.

12 Ensuring that government documents are stored electronically would greatly reduce access time, retrieval and search times, and costs associated with copying material etc.

12.1 As the previous reform committee stated in its report:

> Improvements in their electronic records management systems have also dramatically reduced the time it takes to locate and retrieve records. This has reduced or even eliminated the fees that public bodies are authorized to charge for this service. On the other hand, as so many more records are available now than in the past, the costs involved in reviewing and severing excepted information from records before supplying them to the public have risen. [19]

Thus, while the costs of reviewing and severing files has increased with the use electronic information, the external costs associated with FOI fees has decreased. (Fee estimates do not include the costs of severing information nor the first three hours spent locating and retrieving a record (s. 75(2)).

13 Amend s. 20 to ensure that it is not being used to delay reasonable access to information.

14 "Amend section 59(2) and add a new section 59(3) to inhibit abuse of the judicial review process by time-limiting the automatic stay of the Commissioner's order:

2) If an application for judicial review is brought before the end of the period referred to in subsection (1), the order of the Commissioner is stayed for 60 days from the date the application is brought.
3) A court may abridge or extend, or impose conditions on, a stay of the order of the Commissioner under subsection (2). "[20]

15 Legislate a Routinely Releasable Document system. This recommendation is dealt with in more detail below. The OIPC states in its *Timeliness Report* that key to ensuring timely access is that "The public body actively and regularly publishes, without formal access requests, records of interest to the public. This is known as routine release or pro-active

18 *Committee Report* page 29.
19 *Committee Report* page 5.
20 *Committee Report* page 32.

release of records. "[21]

16 Eliminate all sensitivity ratings. These ratings merely delay access and allow public bodies to treat differentially different applicants. This recommendation is also stated by the Office of the Information and Privacy Commissioner (OIPC) in the *Timeliness Report*, at pages 20-21.

21 *Timeliness Report* page 19.

Part Two: Fees and Waivers

The federal taskforce on access to information stated succinctly the goals of a fee schedule in an access to information act:

> *The objective of the fee schedule appears to be a well-functioning and sustainable access system with the best combination of encouraging accessibility and encouraging focused requests. It is also vitally important that the fee schedule be accepted as reasonable by the public and the administration of fees be as simple as possible, otherwise it will only encumber the system with complex fee estimates, delays, and complaints.*[22]

Section One: Fees

Public bodies sometimes appear to be using high fee estimates to stonewall access to records. There needs to a mandatory framework put in place to prevent public bodies from denying information through exorbitant fee estimates. While the regulations establish a framework for fee assessments, it appears that the assessment process can easily be manipulated to create unpayable estimates.

Below are some examples of high estimates, and even seeming manipulation of fee estimates to retaliate for a waiver appeal:[23]

1) On June 29, 2004, the Sierra Legal Defense Fund requested information about the a forest development plan. The Ministry of Forests provided a fee estimate of $4,020 and demanded a deposit of $2,010. The client could neither afford the fee nor wait for a fee waiver, so the matter was not pursued.
2) In the fall of 2001, the Dogwood Initiative sought documents related to logging on First Nations territories. Despite the existence of a digital database, the Ministry of Forests demanded up to $9,000 to proceed.
3) On August 3, 2004, the T. Buck Suzuki Environmental Association submitted three FOI requests for data pertaining to sea lice infestations. The Information, Privacy and Records Branch provided a fee estimate of $19,470. The Branch denied a public interest fee waiver request.
4) On March 23, 2004, the Sierra Legal Defence Fund was given a fee estimate of $24,600 for search time and reproduction expenses related to a request for non-compliance records under the Waste Management Act. The Ministry requested a deposit of $12,030.
    1. After disputing the $24,600 fee estimate, the government's fee estimate shot up to

22 Report 23 Access to Information Review Taskforce. "*Issues and Options Regarding Fees Under The Access To Information Act*."

23 Unless otherwise noted, these cases are taken from a letter by the Environmental Law Clinic University of Victoria, Dated June 20, 2005.

$172,947![24]

While these fee estimates are certainly above average, they demonstrate that fees have the potential to be used as a stonewalling tactic. Of the four fee estimates given, three are from the same year. Apparent stonewalling is most forcefully captured in the fee estimate change from $24,000 to $173,000 when the Sierra Legal Defense Fund challenged the fee estimate. The FOIPPA Report Card that the Ministry of the Environment agreed to create in 2008[25] was supposed to detail its fee estimates and waivers granted. However, the only Report Card I could find was the OIPC's *Timeliness Report*, and it did not detail fee estimates or waivers.

A solution to the the problem of public bodies using fees to stonewall access is to ensure that the inability to pay fees is not a ground for withholding information. Information should only be withheld if the request falls within a listed exception to release or is frivolous or vexatious.

Another possible method might be to limit the amount of money an entity can be forced to pay based on a worth assessment. The more money a business or person has, the more of a given fee they should have to pay (perhaps 1 percent of annual income). For example, with a $173,000 fee estimate, a person who earns $50,000 a year would pay $500 maximum. On the other hand, a large corporation that earns $5,000,000 would be expected to pay up to $50,000,00 worth of any fee estimate. This would balance the purpose of the Act with fiscal considerations. Obviously, any FOI requester could also work with the public body to narrow the scope of their request. While this solution is complex, it is truly equitable.

Section Two: Electronic Access and Fees

With the technology explosion resulting from internet development, the Act needs to be amended to promote access to information through digital media. As the last Legislative Committee studying this issue stated: "A new section 2(3) should be added, stating that the Act recognizes that new information technology can play an important role in achieving the purposes outlined in subsection (1), particularly with respect to promoting a culture of openness and informal access to information and by enhancing privacy protection. "[26] [Emphasis added.]

With the explosion of digital media, access to digital records has become a major aspect of freedom of information legislation. Currently, the *Freedom of Information and Protection of Privacy Regulation* s. 1 allows public bodies to charge $16.50 per minute for use of the central mainframe and all locally attached devices. If this includes printers, then you could be double

24 http://www.ecojustice.ca/media-centre/press-releases/battle-over-expensive-bc-pollution-data-heats-up/?searchterm=fee%20estimate. Accessed January 20th 2010.

25 OIPC Investigative Report F08-01. Document URL: http://www.oipc.bc.ca/orders/investigation_reports/InvestigationReportF08-01.pdf

26 Taken from the *Committee Report* page 11.

charged for printing and then copying the file. The $16.50 per minute charged for mainframe access works out to $990 per hour! The regulation should clarify that if a document is being printed from a database, there can be no copying fee. Furthermore, the s. 1(c) allows public bodies to charge an extra "$7.50 per 1/4 hour for developing a computer program to produce the record." This charge is rather odd. A public body cannot charge an information requester for the costs of organizing government files in a useable form, yet they are allowed to charge for the cost of building a data access system that they are almost certainly already using. This fee should be removed from the regulation to help reduce the artificial costs of data retrieval.

Section Three: Public Interest Exemption

The purpose of a public interest fee exemption is to ensure that matters of interest to the public are more easily disclosed. Subsection 75(5) of the Act allows the head of a public body to waive fees if the information being sought is in the public interest. This ensures that non-profit organizations and concerned citizens can access and disseminate information important to the public.

Subsection 75(5) of the Act allows the head of a public body to waive any fees associated with a request in certain circumstances. It states:

> *If the head of a public body receives an applicant's written request to be excused from paying all or part of the fees for services, the head may excuse the applicant if, in the head's opinion,*
>
> *(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or*
>
> *(b) the record relates to a matter of public interest, including the environment or public health or safety.*

Subsection 75(5) needs to be amended to better ensure that matters of public interest are brought to light and that citizens have attainable access to such government records. As is mentioned throughout the literature, access to government records is crucial for maintaining democratic governance. Without access to records, it is difficult, if not impossible, for the public to engage meaningfully with government.

The discretionary "may" needs to be changed to "shall." The rich and poor alike must be able to access government information. It is essential that non-profit organizations, the poor, and others seeking information that relates to a matter of public interest be given access to the records. If an individual or group cannot afford the fee estimate, they should still be given access to the records. Access to records must not be denied because an applicant cannot afford the request fees. Giving the head of a public body the right to require a fee payment despite the inability of an applicant to afford it offends the ideas of equality and democratic participation.

What constitutes a matter of public interest needs to be demarcated within the legislation. For example, the US *Freedom of Information Act* requires information be posted if two or more people have requested it. Perhaps a similar structure could be established under the Act: Where two or more people request information, it must be released, subject to the exceptions under the Act. If demarcating "public interest" is otherwise infeasible, then the US system would ensure that important records are disclosed.

Alternatively, creating a reverse onus would preserve the intent of the section. A reverse onus would hold that the head of a public body must release requested information for free unless they can show that the release of the information is not in the public interest. Again, this would be consistent with the purpose of the Act: to make public bodies more accountable by giving the public a right of access. Access to information is not an exception to non-access, it is a **right of access** subject to "limited exceptions."

The problem with the current system can be highlighted by example. The Shawnigan Lake Watershed Watch group was told that their issue did not concern enough of the total population of British Columbia to warrant a public interest waiver. The request surrounded a proposal to sell Crown forest land to allow for massive suburban development (over 4,000 housing units and a mall and golf course). The government said that the 8,500 people who drew their drinking water from the lake were an insufficient number to qualify for a public interest waiver. In a letter dated April 13, 2004:

> *The public associated with the 'public interest' reason for waiving otherwise payable fees under the Act is the public of British Columbia generally or, at the least, a significant subset of that public. While I have no doubt that the issue involved is of considerable interest to the members of the Shawnigan Lake community, that is a rather small community and not one which could, I think be accurately characterized as the public of British Columbia generally or a significant subset of that public.*[27]

This contrasts sharply with a previous decision of the Commissioner that held that the drinking water of forty individuals was sufficient to constitute the public.[28] The OIPC eventually required the Ministry of Agriculture and Lands to waive the fee because the group could not afford to pay the fee. Further, the OIPC ordered a partial fee waiver based on the public interest grounds under s. 75(5).[29]

Utilizing fees to inhibit access to public body records is contrary to the purpose of the Act. To ensure that public bodies comply with the purpose of the Act, s. 6, and the underlying values behind the s. 75(5) waivers, s. 75(5) needs to be amended. The amendments suggested below

27 Environmental Law Centre, University of Victoria. Submission to the Information Commissioner. IPC file # F04-21455. Page 5.
28 OIPC Order 01-35.
29 OIPC Order F05-36

properly balance the need for access to documents and the desire to deter frivolous requests and maintain a user pays approach. It is of fundamental importance is that public bodies cannot deny access to records through the use of fees.

Section Four: Recommendations

The Commissioner's two step test for public interest determinations, as articulated in Order 332-1999, should, with some modification, be incorporated into s. 75(5).

1) The modified s. 75(5) should read as follows:

75(5.1) If the head of a public body receives an applicant's written request to be excused from paying all or part of the fees for services, the head shall excuse the applicant if, in the head's opinion:

75(5.1)(a) the applicant cannot afford the payment

75(5.1)(b) for any other reason, it is fair to excuse payment, or

75(5.1)(c) the record relates to a matter of public interest, including the environment or public health or safety.

75(5.2) In determining the public interest, the following factors shall be considered:

75(5.2)(a) Has the subject of the records been a matter of recent public debate?;

75(5.2)(b) Will the release of the records create public debate?;

75(5.2)(c) Without limiting the analysis, does the subject of the records relate directly to the environment, public health or safety?;

75(5.2)(d)Could dissemination or use of the information in the records reasonably be expected to yield a public benefit by:

75(5.2)(d.1) disclosing an environmental concern or a public health or safety concern?;

75(5.2)(d.2) contributing to the development or public understanding of, or debate on, an important environmental or public health or safety issue?; or

75(5.2)(d.3) contributing to public understanding of, or debate on, an important policy, law, program or service?;

75(5.2)(e) Do the records disclose how the public body is allocating financial or other resources?

75(5.3) If the head of a public body, as a result of the analysis outlined in paragraph 2, decides the records relate to a matter of public interest, the head must still decide whether the applicant should be excused from paying all or part of the estimated fee. In making this decision, the head should focus on who the applicant is and on the purpose for which the applicant made the request. The head of the public body shall consider whether the applicant's primary purpose for making the request to use or disseminate the information in a way that can

reasonably be expected to benefit the public or is the primary purpose to serve a private interest?

2) Alternatively, a reverse onus provision could be implemented. It would require the public bodies release documents for free unless they can prove that the release will not be in the public interest.
3) Another fee option is to maintain the current fee system but implement a maximum payment requirement based on a monetary assessment. Those organizations seeking to pay less than the estimate, who are not otherwise excepted, can provide proof of annual income and pay a percentage of that value.

Part Three: Routinely Releasable Documents

There needs to be a better system in place for routinely releasable documents, including publication requirements where appropriate. Despite s. 71, the relationship between the Act and routinely releasable documents is a complete grey area. It seems that public bodies now require formal requests for information that used to be routinely releasable. For example, journalist Stanley Tromp was denied access to many of the submissions made to the government in a 2005 review of the FOI legislation. This is despite being provided similar records from the 1999 and 2004 Committee reports.[30] This area of disclosure needs to be clarified to ensure that formal access requests are necessary only in limited circumstances. Most information should be accessible without a formal request. By legislating a Routinely Releasable Documents System, the costs associated with administering the Act and the number of requests under the Act would almost certainly decline.

Necessary policy changes to ensure that routinely releasable information is released without a formal request have not occurred and routinely releasable documents, if accessible, are very well hidden. Section 6 of the Act states, "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." While well intentioned, it is apparent that public bodies do not take this section or s. 71 to be onerous requirements. According to the OIPC, this section has hardly been used in the last decade.[31] The duty to assist can be made more forceful by adopting provisions similar to those freedom of information legislation found in the UK and US.

The U.K. *Freedom of Information Act* "requires each public body to adopt and publish a publication scheme. The scheme must set out details of the types of information the authority makes available as a matter of course to the public, how the information can be obtained and must supply details of any fees for providing the information."[32]

The US *Freedom of Information Act* establishes four categories of reading room records available for public inspection and copying.[33] An important and administratively efficient aspect of the the USA Act is the requirement that any records disclosed in response to an FOI request that are likely to be subject to another FOI request, must be made available.

Subsection 13(1) provides that the head of a public body can refuse to disclose "information that would reveal advice or recommendations developed by or for a public body or a

30 http://thetyee.ca/Mediacheck/2007/05/10/FOI3/

31 *Submission of the Information and Privacy Commisioner to the Special Committee to Review the Freedom of Information and Protection of Privacy Act*. February 5 2004. Page 8.

32 *Committee Report* page 14.

33 *Committee Report* page 14.

minister." Technically, this exception is limited by s. 13(2). Subsection 13(2) is a list of information that must not be withheld despite s. 13(1). These sections are dealt with in detail below. For the purposes of creating a routinely releasable documents system, the s. 13(2) list could be included in any such system. This will streamline access to data and reduce the number of formal requests made. Alternatively, s. 13(2) could be strengthened by mandating that if a request is made for the contained items, then the request will be complied with forthwith.

Subsection 13(3) states that s. 13(1) does not apply to information that has been in existence for 10 or more years. Governments are elected for four year spans in British Columbia. Subsection 13(3) denies access to vital information surrounding how government chose any given course of action. Such information should not be withheld from the public for more than one term of office. To properly balance the need for candid government communication and the fact that we live in a democracy, s. 13(3) should reduce the exception from 10 years to five. Such a reduction will allow government to operate its term of office without undue fear while ensuring that they are accountable for their decisions.

Recommendations:

1) Section 6 of the Act should include the following:

> 6(3) The head of a public body **shall** make readily available to the public copies of all records, regardless of form or format, which have been released to any person under this Act and which, because of the nature of their subject matter, the public body determines have become or are likely to become the subject of subsequent requests for substantially the same records.

This is similar to the US *Freedom of Information Act* s. 2(d).

2) The Act should be made more proactive and forceful by requiring all public bodies to create and maintain a routinely releasable document scheme. It should be similar to the UK scheme. Section 19 of the UK *Freedom of Information Act* states:

1) It shall be the duty of every public authority:
    1. To adopt and maintain a scheme which relates to the publication of information by the authority and is approved by the Commissioner (in this Act referred to as a "publication scheme");
    2. to publish information in accordance with its publication scheme; and
    3. from time to time to review its publication scheme.
2) A publication scheme must:
    1. specify classes of information which the public authority publishes or intends to publish;
    2. specify the manner in which information of each class is, or is intended to be, published; and

    3. specify whether the material is, or is intended to be, available to the public free of charge or on payment.
3) Amend s. 13(2) to either require the routine release of the records and information excepted from s. 13(1), or ensure that the information sought under s. 13(2) is immediately releasable on request.
4) Amend s. 13(3) to reduce the time limit from 10 years to five years.
5) Routinely releasable documents should be provided at a minimal cost. A fee structure should be implemented to ensure costs for accessing routinely releasable documents are reasonable, simple, and clear.

Amendments need to be formulated in mandatory language. Public bodies have a track record of sometimes exercising their discretion to the detriment of public interest groups. Removing the discretion will ensure that the purpose of the Act is better achieved and government is made more open and accountable.

Part Four: Section 13(1) Hiding Everything

In 2002, based on standard statutory interpretation, the British Columbia Court of Appeal (BCCA) ruled that the words "advice" and "recommendation" contained in s. 13(1) must have different meanings. In order to provide different meanings, the court held that expert medical reports used to decide an issue were protected by the s. 13(1) exclusion from release. Allowing public bodies to withhold expert opinion on matters of fact seems contrary to s. 3(2) which specifically excludes facts from non-disclosure under s. 13(1). The 2004 Committee and FIPA recommended that s. 13(1) be clarified to redress the BCCA's decision.

Section 13(1) has not been amended to fix the damage the BCCA did in interpreting "advice" and "recommendation." Quoting from the 2004 committee:

> *...the Court of Appeal's decision is binding on all public bodies, the Commissioner and lower courts in the province. The Commissioner also reported that with some justification, public bodies have taken the court's broad interpretation of section 13(1) to mean that factual information presented to provide background explanations or analysis for consideration in making a decision is now protected from disclosure to an applicant. In the Commissioner's opinion, this interpretation seriously undermines section 13(2)(a), which expressly provides that a public body cannot withhold "any factual material" as advice or recommendations under section 13(1).* [34] [Emphasis added]

The BCCA held that "expert medical reports obtained by the College [of Physicians] for the purpose of investigating a complaint against a physician were protected, in their entirety, as "advice" under s.13(1)".[35] The Court of Appeal held that, "[i]f the Legislature did not intend the opinions of experts, obtained to provide background explanations or analysis necessary to the deliberative process of a public body, to be included in the meaning of "advice" for the purposes of s. 13, it could have explicitly excluded them."[36] This is despite the fact that s. 13(2) explicitly excludes (a) any factual material; (b) appraisals; (f) environmental impact statements and similar information; and (k) the report of any body making recommendations to a public body.

In *A Prescription for "Dr. Doe"* FIPA articulates some of the potential consequences of this decision. They enumerate at page 16:

- Injured motorists seeking copies of opinions of traffic analysts who have examined their motor vehicle accident sites could be denied access to those opinions;
- Injured workers applying for Workers' Compensation might now be unable to obtain copies of opinions concerning the level of post-injury pain that they are experiencing;

34 *Committee Report* page 19.
35 *Committee Report* page 19.
36 *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, at 111.

- Assessments of individual students developed by or for educational institutions could now be withheld from those students and their parents;
- Opinions on whether a bidding process was properly followed could be kept secret;
- Program evaluations containing opinions as to whether or not government programs are achieving desired results can now be kept secret.

Thus as the last committee forcefully stated: "...individuals can be denied access to their own previously available information, for no other reason than that it was gathered, compiled or presented for the purpose of generating investigative or briefing material for a public body's consideration in making a decision."[37] Considering that the Court of Appeal's decision is binding on all lower courts, all public bodies, and the commissioner, it is imperative that s. 13(1) be corrected.

Recommendations:

1) Subsection 13(1) should be amended to state:
    - "The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister <u>that recommends a decision or course of action by the public body, minister or government</u>."[38] Further, s. 13(2) should be amended to include s. 13(2)(a)(i) which will state "an expert opinion, unless it recommends a decision or course of action".[39]

2) A s. 13(4) should also be added. It should state :
    - "Subsection (1) does not apply to information in a record that was created to provide recommendations <u>or advice about a decision or course of action after that decision has been made or course of action undertaken</u>."[40]

    This will ensure that once a decision is made, the government cannot conceal the basis on which the decision was made. Citizens have the right to know on what basis a public body has made a decision. This modification will ensure that the public has access to the information and can meaningfully engage with government.

37 *Committee Report* page 19.
38 FIPA, *A prescription for "Dr. Doe"* page 19.
39 Ibid.
40 Ibid.

Part Five: Conclusion

There are two section of the Act that highlight the purpose and values underlying the Act Section 2(1) states:

2.1) The purposes of the Act are to make public bodies more accountable to the public and to protect personal privacy by:

(a) Giving the public a right of access to records,

(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,

(c) specifying limited exceptions to the rights of access,

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act.

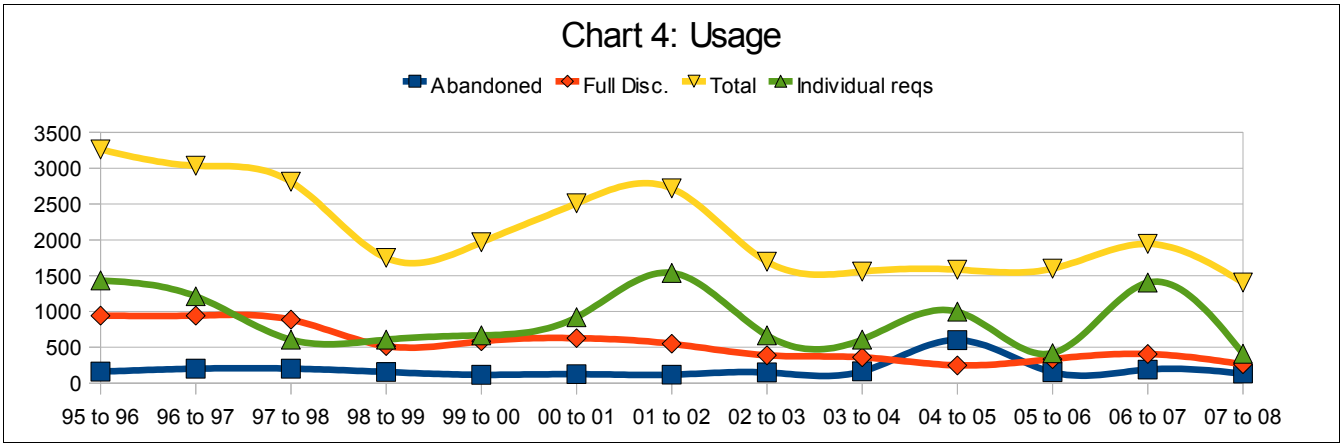
And Section 6(1) states:

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.

These two sections establish the possibility of an excellent access to information act and provide a legislated requirement for open and accountable government. Despite the claims articulated by the Act, governments have been reticent about releasing information. The use of legal and illegal delays, fee estimates, and interpretations of the Act that favour non-disclosure has rendered these two sections ineffective. The promise inherent in those sections has not been honoured. No public interest group that I talked to believed that public bodies consistently "make every reasonable effort to assist applicants". Citizens' inability to access records has led to skepticism and cynicism about the Act.

The chart below reaffirms the declining use of FOI requests and provides other indicators relevant to understanding the frustration people have when attempting to access public body records. Of particular note is the decrease in use compared to the stability in the number of abandoned requests. This shows that over time, on a per capita basis, more and more requestors are abandoning their requests. As can be seen from Chart 5: Usage,[41] the long delays coupled with high fees for access have led to a marked decline in use of the Act.

41 Chart 5 Data Available in Appendix 5.



From 1995 to 2008, the percentage of individual users has decreased from 43 percent to 29 percent.[42] The combination of data strongly indicate that public bodies are successfully discouraging people, and especially individuals, from requesting government information. The inability of individuals to access government records is contrary to our sense of democracy and accountable governance. If only rich and powerful groups in society can access government information, then how are non-profit organizations and the majority of people supposed to participate meaningfully in our democratic governance?

There are many other issues that I have not had time to address. Hopefully other groups will bring them to your attention in more detail. I mention here a few other issues that need to be remedied. First, the Office of the Information and Privacy Commissioner (OIPC) read "urgency" into s. 25 of the Act. The Act does not say anywhere that documents releasable under s. 25 require an "urgency" component. By reading "urgency" into the clause, the OIPC has rendered the clause toothless. Take for example "risk of significant harm to...the health of people". If urgency is read in here, then, for example, there would be no requirement for the government to release information it has about long term carcinogenicity of a substance used in house paints. There also needs to be amendments to the Act to ensure that the "shadow government" is subject to FOI requests. Government should not be able to hide information behind Crown Corporations like B.C. Ferries (which destroyed documents after the Queen of the North sinking)[43], gmail accounts, (the green energy taskforce used gmail accounts, a very odd decision)[44], or other quasi-governmental organizations.

42 43% 40% 22% 35% 34% 37% 57% 39% 39% 63% 26% 72% 29%

43 http://www.bcndp.ca/newsroom/time-shine-light-bc-ferries-restore-public-confidence. Accessed January 29th 2010.

44 http://www.bcndp.ca/newsroom/bc-liberal-secrecy-undermining-energy-policy-development-says-ndp. Accessed January 29th 2010.

Appendix 1 – Chart 1: Time Frames Data

Quarter:	Under 30 Days	Under 60 Days	Over 60 Days
April to June 04	19	44	97
July to Sept 04	15	43	209
October to Dec 04	16	42	124
Jan to March 05	23	33	106
April to June 05	16	42	117
July to Sept 05	15	44	122
October to Dec 05	13	45	128
Jan to March 06	16	45	125
April to June 06	18	43	116
July to Sept 06	18	44	112
October to Dec 06	18	44	119
Jan to March 07	18	44	111
April to June 07	15	43	127
July to Sept 2007	16	45	112
Oct to Dec 2007	16	43	128
Jan to march 08	16	45	133
April to June 08	15	46	127
July to Sept. 08	17	46	127
Oct to Dec 08	17	45	116
Jan to March 09	16	48	116
April to June 09	15	46	120
July to Sept 09	16	49	112

Appendix 2 – Chart 2: Real Time Data

Year	Working days	Actual days
96 to 97	42	42
97 to 98	49	49
98 to 99	66	66
99 to 00	58	58
00 to 01	58	58
01 to 02	62	62
02 to 03	52	73
03 to 04	45	63
04 to 05	46	64
05 to 06	44	62
06 to 07	50	70
07 to 08	50	70
08 to 09	49	69

The data were derived by taking the average working day figure from 2002 onwards and multiplying by 7, then dividing by 5.

Appendix 3 – Chart 3: Delayed by Applicant Type

All Public Bodies Combined – Breakdown by Applicant Type			
Applicant Type	Number of Requests Closed	% on Time	Average Number of Business Days
Media	410	49	40
Political Party	273	53	64
Interest Group	210	57	38
Law Firm	1491	71	36
Individual	3123	74	33
Researcher	24	75	28
Business	178	79	36
Other Governments	38	82	44
Other Public Body	252	94	23

Appendix 4 – Chart 4: General Requests Data

Year	Gen. Requests
95 to 96	3263
96 to 97	3035
97 to 98	2811
98 to 99	1748
99 to 00	1965
00 to 01	2509
01 to 02	2719
02 to 03	1696
03 to 04	1556
04 to 05	1584
05 to 06	1598
06 to 07	1943
07 to 08	1403

Appendix 5 – Chart 5: Usage

Year	Abandoned	Full Disclosure	Total Requests	Individual requests	% of total
95 to 96	159	942	3263	1433	43
96 to 97	201	942	3035	1212	40
97 to 98	202	885	2811	606	22
98 to 99	155	517	1748	606	35
99 to 00	116	583	1965	666	34
00 to 01	125	627	2509	919	37
01 to 02	118	549	2719	1539	57
02 to 03	148	388	1696	666	39
03 to 04	163	360	1556	607	39
04 to 05	600	248	1584	997	63
05 to 06	151	335	1598	417	26
06 to 07	188	406	1943	1403	72
07 to 08	132	263	1403	410	29

Appendix 6 - Data Discrepancies

Looking at the different 10 year trends, different numbers also show up. The discrepancies are not generally large, but they are present. Yellow Highlight: The only data that remain constant. The changes in numbers cannot reflect the closing of files because the numbers sometimes go down.

	96/06	97/07	98/08	99/09
1996-1997	3041			
1997-1998	2802	2713		
1998-1999	1854	1771	1771	
1999-2000	1882	1819	1819	1858
2000-2001	2457	2411	2411	2424
2001-2002	2816	2741	2741	2779
2002-2003	1759	1702	1702	1884
2003-2004	1499	1440	1440	1567
2004-2005	1951	1929	1958	2063
2005-2006	1498	1477	1530	1626
2006-2007		2013	2010	2083
2007-2008			1763	1851
2008-2009				1834

Appendix 7 – Summary of Recommendations

1) Penalties should be imposed on the heads of public bodies that fail to meet the legislated time lines for release.
2) Institute a "but-if clause" for time frame extensions pertaining to issues that require the commissioner to intervene.
3) Amend s.10(1) to require the commissioner's approval for an extension.
4) There should be a maximum extension allowed under s. 10(2).
5) Commissioner should be given the power to compel full and immediate disclosure from public bodies that do not meet their time limits.
6) Subsection 7(5) should be repealed.
7) Amend s. 11 to reduce the time allowed for transfers from 20 days to one working week.
    1. Or amend s. 11 to reduce the time allowed for the new public body to respond after the transfer.
8) Change the meaning of day back to a calendar day.
9) Streamline the appeals processes.
10) Change the meaning of day back to a calendar day
11) Streamline the appeals processes.
    1. Require all appeals to be heard at once.
    2. Give applicants help throughout process.
    3. Combine the complaints process (s. 42(2)) and the review and inquiry process (s. 52(1)).
12) Improve electronic records management. See also Recommendation 18.
13) Amend s. 20 to ensure it cannot be abused.
14) Amend s. 59(2) to time limit the stay of the commissioner's to 60 days.
15) Add a new s. 59(3) to allow courts to extend of impose conditions on the new s. 59(2).
16) Modify s. 75(5) to clarify "the public interest".
    1. Alternatively impose a reverse onus on the public body seeking to impose a fee.
    2. Alternatively, maintain the current fee structure but impose a maximum amount payable based on a monetary assessment.
17) Ensure that if two or more people request a record that is released; it is then released to the public, no longer requiring a request.
18) Amend section 75(5) to ensure public bodies accept waiver request with the submission of the application for records.
19) Amend s. 6 to require routine release of certain documents.

20) Add sections to the Act to impose a routinely releasable document structure on public bodies.
21) Amend s. 13(2) to require the routine release of the records exempted from exclusion under s. 13(1).
    1. Alternatively, ensure that information covered by s. 13(2) is immediately releasable.
22) Amend s. 13(3) to reduce the time limit from 10 years to 5 years.
23) Impose a clear, simple, and just fee structure for routinely releasable documents.
24) Amend s. 13(1) to clarify the advice/recommendation requirement.
25) Amend s. 13(2) to clarify that expert opinions are releasable unless they recommend a decision or course of action.
26) Add s. 13(4) to exclude from 13(1) information that has been acted upon.