SPEAKING NOTES

FOR PRESENTATION BY ROBERT H. BOTTERELL

TO

THE SPECIAL COMMITTEE TO REVIEW THE

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

FEBRUARY 2ND, 2010

1. Good Afternoon Ladies and Gentlemen.

2. Thank you for the opportunity to make a presentation to this Special Committee. As one of the architects of the Act, a lawyer who has represented both public bodies and applicants on information and privacy issues over the years, and one who has had the privilege of drafting freedom of information and privacy protection legislation for the Nisga'a First Nation, I would like to offer my perspective on the important work of this Committee.

3. It's a rare event in BC Politics, and its hard to believe that it occurred 18 years ago, but in 1992 your NDP and Liberal predecessors, as Harry Lali can attest, set aside their political differences and unanimously passed what was then the most open freedom of information legislation in Canada.

4. On that day your predecessors promised the citizens of BC that we would have the most open and accountable jurisdiction in Canada. This meant that access to government information would be timely because access delayed is access denied. Fees would not be a barrier to access. Exemptions to access would be narrow and specific. The amount of information you received would not depend on who you are and why you want the information. And there would be an independent Commissioner free from judicial and political

interference to ensure this happened. In short, there would be a new culture of government openness within government.

5. This promise of openness was made not only to the citizens of this province, but also to those whom we rely on to hold government accountable – the media, opposition parties, non-governmental organizations, and public minded citizens.

6. On that day, the Legislature entrusted this special all-party Committee, and previous ones like it, with the responsibility of periodically reviewing the operation of the Act and recommending changes to ensure the promise of openness was kept.

7. Provision was also made for establishment of a consultative committee of stakeholders to advise the Minister. This committee was intended to supplement the advice received from public servants inside government. Unfortunately, this consultative committee has never been convened.

8. So it is all up to you. And from what I have read, you are well equipped for the task ahead. You have a great diversity of backgrounds, a strong commitment to public service, the wisdom that comes with the years, and the resolve to do what is right, which is not always what is popular.

9. Let me now take you back to the early days of this Act, canvass what has happened since the Act was passed, and outline the task ahead for this committee. My primary focus will be on the freedom of information aspects of the Act. The privacy provisions of this Act do not attract as much attention.

10. In the fall of 1991, the NDP had just been elected, at least in part, on the basis of a promise to bring in the most open freedom of information legislation in Canada.

11. There was a great deal of fear about freedom of information and protection of privacy. Public servants feared they would have to operate in a fishbowl. Treasury Board feared that freedom of information would be prohibitively expensive. Cabinet members feared that the NDP government would lose control of its political agenda. Non-government organizations like FIPA and the media feared the legislation would have too many loopholes and would be ignored.

12. To address these fears, former Attorney General Colin Gabelmann and MLA Barry Jones, a long time advocate for such legislation, opted for a very open, inclusive, and transparent legislative process, both before and after the legislation was introduced. I led extensive consultations inside and outside government. All submissions were made publicly available. Lawyer Murray Rankin provided advice on the Act. I even participated, along with others, in a televised debate on freedom of information with a coalition of media organizations. We looked to precedents in other jurisdictions such as Ontario to find workable, predictable provisions that had stood the test of time.

13. Full openness and transparency was critical to achieving a broad based consensus on what the legislation should do – how much openness – how much privacy protection.

14. And it worked. In June 1992, after making 50 amendments, the BC Legislature passed the act unanimously, and David Loukidelis, President of FIPA at that time, said, "...with the new amendments, FIPA can state, unequivocally that this is the most open, balanced and effective information rights legislation in Canada."

15. Later that year, after the NDP's first session concluded, the Vancouver Sun wrote, "It's most outstanding achievement, which sharply increased its point average, was the passage of a freedom of information bill that was handled in exemplary fashion, with full opportunity for public input, resulting in what experts agree is the best legislation of its kind in Canada."

16. Most importantly, the degree of openness in the Act was no accident. It reflected a hard won balance that everyone believed would be respected.

17. Fast forward to 2010. That promise of openness has been broken in numerous ways. Let me illustrate with some examples.

Access to information is not timely – Access delayed is access denied

18. Section 6 of the Act places a positive duty on public servants to respond **without delay** openly, accurately, and completely. This was intended to make it clear that time limits under the Act, such as the requirement to respond **not later** than 30 days after the request was received, would be the outer limit. We even equipped the Commissioner with order making power to enforce this duty.

19. The government's response? Amend the Act to relax the deadlines and legalize delay. Through the stroke of a legislative pen, the 30 calendar day outside response deadline morphed into a 30 working day outside response deadline – 4 weeks became 6 weeks.

Access to information still depends on who you are and why you want the information

20. Even with these changes, former Commissioner David Loukidelis found that response deadlines were missed over 20% of the time for individuals and businesses and a staggering 50% of the time for media and opposition requests.

21. To be fair, the government has promised to correct this problem, but my inquiries suggest that access to information requests are now delayed using another tactic – huge fee estimates.

Fees are still a barrier to access

22. Let me give you a prime example – introduction of the HST. In August 2009, a media outlet requested background correspondence on the HST. The government required payment of an $800 fee to

process the request. Now, 5 months later, the request for a fee waiver – under the Act fees are waived if the information is in the public interest - has ended up in the hands of the new interim Commissioner who is on a steep learning curve. And no information has been released.

23. It is inconceivable that it would cost $800 to locate and process public records on a high profile issue like the HST. This information should be at government's fingertips. We live in an era of Google and I-pads not filing cabinets and typewriters. This information must have been generated and stored on computers.

24. Either government records management is in a shambles or the government has something to hide and is doing everything it can to delay responding to this request. Either way the public paid through their taxes to have the HST information prepared and have a right to know what it says.

The Courts have turned policy advice into a black hole

25. Once the HST information is released don't be surprised if most of it is blacked out.

26. This is because, as documented in former Commissioner David Loukidelis's 2004 submission, and in FIPA's submissions, the Courts have broadened the s. 12 cabinet confidence exemption and s. 13 policy advice exemption. The Courts have broadened what qualifies as advice to the point where factual background material of many types is exempt from disclosure.

27. Taking s. 13 as an example I can assure you that we never intended the policy advice exemption to be so broad. We modeled the section on the Ontario policy advice exemption.

28. I know. I was there. And when I briefed deputy ministers and others inside and outside government on the legislation, I advised them as follows:

"For the purposes of the Act "advice or recommendations" refers to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient during a deliberative process. Advice must contain more than mere information. "

29. At the time my view was, and still is, that large portions of briefing notes or issue notes including topic, background, discussion, options, and transmittal information are accessible for the purpose of s. 13, providing they do not enable the applicant to infer the final recommendation. And my view was then, and still is, that briefing notes can and should be written in a manner to keep advice and recommendations separate from facts to facilitate greater public disclosure through routine disclosure as contemplated by s. 71 and the now repealed s. 72 of the Act.

30. Based on my experience and the experience of other jurisdictions such as Ontario, this level of disclosure will not jeopardize the frankness and candour of professional public servants. And it will pave the way for routine disclosure at much less cost than processing of freedom of information requests.

31. If key information is still blacked out and the issue is a matter of significant public interest, then Section 25's public interest over-ride was intended to come into play. Unfortunately, this section has also been given an overly restrictive interpretation. When government makes a major decision with major implications for the public, such as privatizing BCR with a 999 year lease or building Fastcats with huge cost overruns, the legislators in 1992 intended the public to be able to access full information on a timely basis for those decisions.

32. To do otherwise converts a question of accountability into a research project for historians.

33. When arguing in favour of respecting the Legislature's 1992 promise of openness, I am reminded of the words of noted British political philosopher John Plamenatz.

Commissioner and ministry public servants in a particular year, those funds are guaranteed. This

" If there is to be responsible government...information should be so distributed amongst professionals and ordinary citizens, so that competitors for power, influence and popular support are exposed to relevant and searching criticism."

Loss of judicial deference

34. I expected the courts to show the Commissioner deference and to take into account our clear legislative intent – to be the most open legislation in Canada. Clearly I was wrong. The time has now come, after hundreds of Commissioner's Orders, and the build up of specialized expertise within the Commissioner's office, to give the Commissioner greater protection from judicial review. This can be achieved by enacting a strong privative clause, like the one under the Employment Standards Act.

35. I have only highlighted a few of the ways in which the openness promise has been broken. I urge you to also:

- Carefully consider past submissions and recommendations of former Information and Privacy Commissioner David Loukidelis. It is a tribute to his integrity and expertise that he has been appointed to the position of Deputy Attorney General.

- Give special weight to the submissions and recommendations of the Freedom of Information and Protection of Privacy Association (FIPA). It was David Loukidelis, in his capacity as president of FIPA in 1992, who persuasively and successfully argued for numerous amendments to improve the draft Act. Since that time, Darrell Evans has continued this tradition of constructive criticism, when freedom of information or privacy protection appears at risk. While none of us like being criticized, even when it is well intentioned, Darrel deserves the Order of BC for his lifetime contribution to freedom of information and protection of privacy in this province.

36. When all is said and done freedom **of** information has been converted to freedom **from** information in this province.

37. And it is not due to an unwillingness to make amendments. Changes to sections of the Act since 1994 – 50. Number of amendments expanding openness - 0.

38. Nor can the government claim that FOI is unaffordable. $1 for every $4,000 of government spending is a small price to pay for a fundamental democratic right.

39. And this is a non-partisan problem. By the late 90's the NDP's commitment to freedom of information also waned with funding cuts and response delays.

40. No. The real issue is that politicians of all stripes really don't like being called to task or embarrassed. None of us do.

41. I am here today to remind you that embarrassment is not an exemption under the Act.

42. I am here today to remind you that administrative convenience is not a legitimate reason to abandon a fundamental democratic right, the public's right to access information.

43. I am here today to remind you that the debate about whether openness should take priority over secrecy and political calculus was resolved in 1992.

44. Your predecessors promised the people of British Columbia the most open government in Canada.

45. And it is your Committee's important responsibility as the guardians of that promise to insist on amendments that will once again make this legislation the most open in Canada.

46. It is not enough to make recommendations, refer them to the bureaucracy and then move on to the next issue. Your

responsibility, is to put the interests of the people of British Columbia, the people who elected you, first and press for the changes you recommend.

47. What amendments and changes are needed?

48. There is no single amendment that will address the concerns I have raised in this presentation. All of the following steps need to be taken:

- Full implementation of the 2004 recommendations of former Commissioner David Loukidelis.
- Careful consideration of the 2010 FIPA recommendations.
- A statutory appropriation which **guarantees sufficient**, stable funding to enable the Commissioner's office and freedom of information staff to fully comply with the Act.[1]
- A strong privative clause covering Commissioner's Orders similar to the one under the Employment Standards Act.
- A s. 25 public interest override that is workable and will be used.[2]
- Implementation of the public record index to support routine disclosure.
- Establishment of the consultative committee comprising major access and privacy stakeholders from outside government.

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[1] An example is the statutory appropriation for fire suppression. Important functions in government, where it is not always possible to forecast funding requirements, are covered by a statutory appropriation. A base budget can be established, but if more funds are needed to properly discharge the information and privacy functions of the Information and Privacy Commissioner and ministry public servants in a particular year, those funds are guaranteed. This approach takes the appearance of "playing politics" with funding out of the equation. Another option, although second best, would be for the all party Select Standing Committee on Public Accounts to establish the budget for freedom of information and protection of privacy, after hearing public input and reaching consensus. It would then require the agreement of both parties to underfund freedom of information and protection of privacy.

[2] Amendments to section 25 are required that would have the effect of reducing the threshold for invoking s. 25 to a "balance of probabilities" from the current "beyond a reasonable doubt".

- Repeal of all provisions that have relaxed deadlines for response to information requests.
- An affordable, all in, flat fee of say $25 per request for access to general information that includes up to 200 pages of copying.[3]

49. I call on you to join me in urging the Premier and the Leader of the Opposition to set aside politics, as your predecessors did, and jointly make a renewed commitment on their own behalf and on behalf of the parties they lead to uphold the promise of openness made by a unanimous Legislature in 1992.

50. Thank you. I look forward to reading your final Committee report.

[3] Under this approach, fees would no longer be a barrier to accessing general information. Importantly, an applicant could still apply for a fee waiver because of limited financial means or because the matter is in the public interest. This approach would create an incentive for the government to improve records management in areas of high request volumes and thereby reduce the cost of complying with requests. Please note that for information requests over 200 pages, there would be an additional fee to cover reasonable out of pocket photocopying costs.