March 28, 2012

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Re: Consultation on amendments to the regulation to the *Freedom of Information and Protection of Privacy Act*

BC Freedom of Information and Privacy Association and BC Civil Liberties Association both have long-standing policies of not participating in government consultations that require confidentiality undertakings. We have agreed to provide the following joint comments to the Ministry of Labour, Citizens' Services and Open Government in lieu of confidential participation in this consultation process.

Introductory Remarks

We should be clear that FIPA and BCCLA are fundamentally in disagreement with most of the amendments included in the *Freedom of Information and Protection of Privacy Amendment Act, 2011*, pursuant to which the amendments to the regulation are being considered.

The bulk of these amendments were passed in order to provide enabling legislation for programs that will collect, use and disclose British Columbians' personal information on a vast and unprecedented scale in the name of providing "citizen-centered services". In our view, the program as currently envisioned trades citizens' essential privacy rights for administrative efficiency and will move the province closer than any other in Canada to being the "surveillance state" that privacy commissioners across Canada and around the world have warned about.

This is not the kind of leadership British Columbia should be pursuing. It is a radical departure from the leadership in information rights and privacy protection the province demonstrated over the past 20 years, by enacting the *Freedom of Information and Protection of Privacy Act* (FIPPA) in 1992, the *Personal Information Protection Act*

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(PIPA) in 2003, and the *Personal Health Information Access and Protection of Privacy Act* (e-Health Act) in 2008.

Unfortunately, leadership in this area of law has been delegated to the province's information technocrats, who have stated that the privacy rights and protections they are eliminating are 'obsolete' and a barrier to the modernization of government through information technology.

Over-reliance on Regulations

With regard to amendments to the regulation to FIPPA, it is our view that there has been over-reliance on regulations to protect our collective privacy rights in the amendments made to FIPPA last fall. We are making these brief comments in the hope that they may result in better regulations, but we do not believe these should take the place of statutory provisions debated and enacted by our elected representatives.

New section 76(m.1) permits the Lieutenant Governor in Council to make regulations defining any word or expression used but not defined in the Act. These definitions could substantially re-define terms and conditions in FIPPA.

The authority to make regulations is allocated differently throughout the amendments, between the Lieutenant Governor in Council and the ministry responsible for FIPPA. This is also not reassuring to those concerned about protection of our privacy rights.

Comments on Consultation Topics

Of the topics proposed for consultation, we will comment only on the following:

1. **Amendments to prescribe the manner of gaining consent from an individual under several sections of the Act (e.g., consent to collect personal information for a prescribed purpose, consent to disclose personal information or consent to extend the period of time for responding to an information request.)**

The individual right of consent to the collection, use and disclosure of personal information is a fundamental mechanism by which both individuals and society protect privacy and client confidentiality. Any law that purports to protect privacy without affording individuals meaningful consent is more pretense than reality.

Federal Privacy Commissioner Stoddart has described informed consent as "…[t]he backbone of our net of privacy principles and practice – the glue that holds the fair information principles together. . . In turn, confidentiality refers to a duty that one owes to safeguard information that has been entrusted to them by another…In the

health care context, care providers have confidentiality duties in regard to their patients that are founded on and emphasized both by ethical and legal principles."[1]

Both *FIPPA* and *PIPA* require consent with limited exceptions. As a matter of law, there is no question that consent, to be validly given, must be voluntary and informed. Informed consent is the requirement by which we ensure that the client understands to what they are consenting.

Regarding collection for a prescribed purpose with consent [section 26(d)], consent to collect information is not the basis upon which public services generally operate, since service delivery is based on need and the statutory mandate of public bodies. However, if a public body wishes to broaden the collection, allowable uses or disclosure of information beyond the customary constraints of Canadian privacy law, service should never be denied on the basis of the individual's denial of consent.

The federal PIPEDA adopts this principle in the private sector, and it is even more important in the public sector, where there is no alternative service provider, just one government. The PIPEDA wording is as follows:

> An organization shall not, as a condition of the supply of a product or service, require an individual to consent to the collection, use or disclosure of information beyond that required to fulfil the explicitly specified and legitimate purposes.[2]

As regards the type of consent that will be required in the context of the expanded allowance for data linkage envisaged by the provincial government, we are of the view that citizens must be given the opportunity to consent or not to the disclosure of their personal information.

There is also some question about the need for consent for use beyond what was originally set out by the public body. In the case of the proposed Integrated Case Management system (ICM) and other data linkage systems, it is our view that the law requires the consent of the individual before the information can be disclosed or moved to other places for other purposes. It will not be sufficient to claim that the purpose of collection is "citizen-centred services" and allow the information collected to circulate freely inside and outside government without further consent from the client. We do not believe this would be a use 'consistent with the original purpose'.

Commissioner Denham laid down several markers about the high standard that public bodies will have to meet in order to establish a secondary use as 'consistent' in her investigation report on ICBC's use of facial recognition technology.[3]

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[1] Address by Jennifer Stoddart, Privacy Commissioner of Canada, *Privacy Laws & Health Information: Making it Work*, presented at Privacy Laws & Health Information Conference, October 27, 2004, Regina, Saskatchewan. http://www.privcom.gc.ca/speech/2004/sp-d_041027_e.asp

[2] PIPEDA in Schedule 1, Principle 3

[3] http://www.oipc.bc.ca/orders/investigation_reports/InvestigationReportF12-01.pdf

As the Commissioner stated in that report:

> [73] For a secondary use to be consistent with the original purpose for collection, the secondary use must have a reasonable and direct connection to the original purpose for collection and must be necessary for performing the statutory duties of the public body or for operating a program or activity of the public body [FIPPA, ss. 32 and 34].

Denham also stated that "…[t]he use of personal information by public bodies covered by FIPPA will be reviewed in a searching manner and it is appropriate to hold them to a rigorous standard of necessity while respecting the language of FIPPA." (Para. 108) In our view, this shows the Commissioner will not be taking a lax view of what is 'necessary' in terms of use of personal information by public bodies.

Further, the Commissioner states:

> [32] Under FIPPA, privacy means maximizing a citizen's control over the collection, use and disclosure of his or her personal information whenever possible and to the extent that is reasonable. Public bodies are accountable to the public and must collect, use and disclose personal information in accordance with the rules and standards set out in FIPPA.

Pursuant to section 76(2.1), the Lieutenant Governor in Council, after consultation with the Commissioner, may make regulations for the purposes of this provision.

There are no criteria set out in the legislation itself, so the type of 'prescribed purposes' that may be established will have to be done by regulation. We suggest that such regulations clearly indicate that such consent be used on an exceptional and *voluntary* basis; for example, for activities or programs not otherwise authorized under other provisions and which do not meet the established 'necessity' test. For example, it should permit an 'opt out' for the proposed smart card, similar to the disclosure directive now available under the e-Health Act.

At minimum, no regulation under this section should be used in a manner inconsistent with the purposes of FIPPA. Consent must never be a free pass by which the government avoids the privacy protections in the act that otherwise would apply.

2. Prescribe the documentation required to verify that a program or activity is a common or integrated program or activity for the purposes of the Act.

At minimum, this documentation must show the requisite degree of integration necessary to meet the standards set out in FIPPA.

The removal of the word "operating" from the definitions in the Act will make it much easier for public bodies to satisfy the new legal requirements. It has consequently reduced the protection previously available, and which is still available under the

federal *Privacy Act*. Virtually any “activity” of government could meet the new standard.

The definition of ‘common or integrated program’ is based on ‘collaboration’ between public bodies and agencies or one public body working on behalf of other public bodies or agencies. There are no statutory qualifications or criteria. This could conceivably justify the sharing of personal information simply because two or more entities desire to work together on a proposed program or to integrate their program or technology infrastructure for cost-saving purposes alone. At the outside, it could allow multiple public bodies to work together and share personal information for different purposes.

The expanded scope permits more open personal information-sharing, by expanding the powers of collection currently in section 26 beyond the traditional ‘scope of practice’ for public bodies. This could create uncertainty and a degree of overlap with respect to what is permitted collection of information in the public sector.

The Commissioner has indicated that she will employ a stringent test of necessity for collection, use and disclosure of personal information. If the program or activity concerned is a common or integrated program or activity, the requirement of necessity for collection would apply to each participating public body, although their needs may be different. Any regulation being proposed would have to find a way to set out what is necessary where several different public bodies cooperate together to provide a common program but have different purposes and goals.

3. Prescribe rules for data-linking activities.

As noted in our comments under consent, we are of the view that citizens must be given the opportunity to consent or not to the disclosure of their personal information in the context of the expanded data linkage envisaged by the provincial government.

Section 46.1 describes data linking initiatives, which are defined in Schedule 1. Section 66(2.1) provides that a public body participating in such initiatives must comply with regulations prescribed for this section, ‘*if any*’, which will define the scope and conduct of data-linking.

Section 36.1 enables data linking among and between and within “participating” public bodies in respect of “new” or “significantly revised” data-linking initiatives. Health care bodies and the ministry have been specifically exempted from these regulations, which to our mind has never been properly explained or justified by the government.

It will be necessary for the regulations to set limits for the words “participating in” new and significantly revised data-linking initiatives. We would also want to ensure that ICM and similar initiatives are covered by regulations, even though they are existing initiatives and even though the Act as amended provides that existing initiatives are *not* subject to the regulations until they are ‘significantly revised’.

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Existing initiatives should not be excluded from the definition of a new data-linking initiative merely because they have a completed project plan that meets defined parameters. Arbitrary exemptions of this kind undermine the purposes of the Act.

A regulation should also include a definition of 'database' which would cover situations where incremental changes made to a database over time result in a new or substantially revised database, but which may not fall within the definition of a new data-linking initiative.

4. Simplify and modernize the schedule of fees that can be charged related to the processing of access to information requests.

The current consultation process should not be seen as an opportunity for public bodies to raise fees for access requests.

The first purpose of FIPPA is "…[t]o make public bodies more accountable to the public and protect personal privacy by (a) giving the public a right of access to records, and (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves…" and it was a stated principle of FIPPA when it was introduced that "Fees should not be a barrier to access."

There is no question that this principle has been undermined over the past two decades by governments of all stripes, but every government has recognized the importance of affordable access and no government has found it appropriate to raise the basic fees found in section 75. As former Premier Gordon Campbell stated, "…all citizens must have timely, effective and affordable access to the documents which governments make and keep. Governments should facilitate access, not obstruct it."

Further, it would not meet the spirit or the declared goals of the current BC government's "Open Government, Open Data" initiative to make access to information more expensive and put it out of reach of more members of the public. As Premier Christy Clark has stated, ""We are changing our approach to governing by putting citizens at the centre of our web services and making government data and information more freely available."

The emphasis should continue to be on empowering citizens by making the vast majority of public information available to the public in the easiest and most adaptable format, preferably electronic, for free or at the lowest possible cost.

Sincerely,

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