Proposed Reforms of BC's Freedom of Information and Protection of Privacy Act

August, 2005

Summary of Recommendations

FIPA endorses most of the recommendations for reform of the *Freedom of Information and Protection of Privacy Act* (FOIPP Act) presented in the two reports *Enhancing the Province's Public Sector Access and Privacy Law* (Special Committee to Review the Freedom of Information and Protection of Privacy Act, 2004) and *Privacy and the USA Patriot Act* (the report of the Information and Privacy commissioner on the privacy implications of public sector outsourcing).

FIPA has been asked for our shortlist of priorities for reform of the FOIPP Act. While we urge the government to take a comprehensive approach to updating and reforming the Act, including full consideration of the reports mentioned above and our own submissions, here are some of our top priorities:

1. Reinforce the principle of open and ready public access to information by increasing the routine release of information, access to electronic information, and the responsibility of public bodies to respond to requests in a full and timely manner.
2. Build principles of public access into the creation, preservation and destruction of records, including:
   - a positive duty to create and maintain records of key government decisions, orders, actions, deliberations and transactions; and
   - penalties for improperly tampering with or destroying records to avoid disclosure.
3. Restore the scope of the Act by extending its coverage to all public and "quasi-public" bodies not currently covered, to categories of records exempted by "notwithstanding clauses" in other statutes, and to records created by or in the custody of alternate service providers.

4. Reinforce section 25 of the Act, "Public Interest Paramount".
5. Take a more expansive approach to evaluating when disclosure of records is in the public interest and a fee waiver is merited.
6. Strengthen privacy protections to meet the higher standards embodied in the Personal Information Protection and Electronic Documents Act (PIPEDA) and Personal Information Protection Act (PIPA).
7. Narrow section 12, the exception for Cabinet and local public body confidences, and make the rules regarding the disclosure of background materials consistent for Cabinet and local public bodies.
8. Narrow section 13, the Policy Advice Exception, by clarifying that it does not apply to factual materials and expert reports and allowing records to be withheld only until a government decision on the subject has been made, or the record has been in existence for five or more years.
9. Narrow section 14, the Legal Advice Exception, so that:
    - it applies to legal advice only as originally intended;
    - documents are released after information subject to solicitor-client privilege and other applicable exceptions is severed; and
    - legal advice is released when release will not harm the interests of government, or a reasonable period of time has passed.
10. Narrow section 15, the exception for "Disclosure Harmful to Law Enforcement" to proceedings or investigations which could result in penal sanctions.
11. Maintain section 21, harm to third-party business interests.
12. Extend to 90 days the time period allowable for appeals to the Information and Privacy Commissioner.

Analysis of Recommendations

1. Reinforce the principle of open and ready public access to information

The general rationale of FOI acts is that public information is gathered using public funds, is held in trust for the public, and should be as freely available as possible. Therefore, the original intent of BC's act was that formal FOI requests for information and records would be a last resort for obtaining information, not the routine method that they have unfortunately become.

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

We think that the addition of such an affirmative statement would help foster what the original framers of the Act intended and the Special Committee supported: a culture of openness in Government which embraces the widest possible access to public information. It would send a powerful message to officials and reinforce the government's pledge to be the "the most open, accountable and democratic government in Canada."[1]

- **Routine release of information**

  The second Special Committee to Review the Freedom of Information and Protection of Privacy Act stated, "In a knowledge-based society, government information is a public resource and must be made available as widely as possible, through a variety of channels. Information technology provides cost-effective ways to disseminate a great deal of this information, without the need to make formal requests. However, *the concept of routine disclosure of public records has not yet been fully integrated into the core values of public bodies in British Columbia or embedded in routine practices."*[2] [Emphasis ours.]

  This Committee made two recommendations aimed at encouraging routine release:

  Recommendation No. 2 – Add a new section 2(3) stating that the Act recognizes that new information technology can play an important role in achieving the purposes outlined in subsection (1) [of the FOIPP Act], particularly with respect to promoting a culture of

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[1] *A New Era of Leadership*, Liberal Party of British Columbia, 2000
[2] *Enhancing the Province's Public Sector Access and Privacy Law*, Special Committee to Review the Freedom of Information and Protection of Privacy Act, May 2004, at page 9

openness and informal access to information and by enhancing privacy protection.

Recommendation No. 12 – Amend section 13(2) [the Policy Advice Exception] to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public.

The information listed in section 13(2) (a) to (n) of the FOIPP Act is:

(a) any factual material,

(b) a public opinion poll,

(c) a statistical survey,

(d) an appraisal,

(e) an economic forecast,

(f) an environmental impact statement or similar information,

(g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,

(h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,

(i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,

(j) a report on the results of field research undertaken before a policy proposal is formulated,

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

(l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,

(m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or

(n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

FIPA strongly endorses the Committee's recommendation to release these types of information routinely.

- **Access to Electronic Information**

It is the goal of every government in Canada to move toward electronic service delivery. The fact that government records are increasingly in electronic format cannot be allowed to limit or degrade public access to information.

New systems must be created to provide routine, affordable access to the government's electronic information. Rather than adding to the cost and difficulty of obtaining access to information, new technologies should be harnessed to increase access, reduce costs and make records routinely available.

The second Special Committee recommended:

Recommendation No. 5 — Add a new section at the beginning of Part 2 of the Act requiring public bodies — at least at the provincial government level — to adopt schemes approved by the Commissioner for the routine disclosure of electronic records, and to have them operational within a reasonable period of time.

FIPA endorses this recommendation, and also recommends that special provision be made for access to electronic and published information by public interest groups. (See Recommendation 13 of the Submission of the Information and Privacy Commissioner to the Special Committee, Feb. 5, 2005.)

- **The responsibility of public bodies to respond to requests in a full and timely manner**

As the Information and Privacy Commissioner has often stated, undue delay in the response to FOI requests has become the most serious and persistent problem of FOIPP Act administration. The government should take positive steps to ensure that public bodies respond to requests in a full and timely manner.

The first Special Committee agreed that public bodies should be encouraged to complete information requests in a timely manner. They recommended:

Recommendation #3: That public bodies comply with time lines under section 7 of the Act, and that in the event of non-compliance with time lines, fees for requests that are not fulfilled within the prescribed time be waived.

We recommend that this recommendation be implemented.

The second Special Committee stated that "All British Columbians, regardless of their affiliations, have the right to expect that their formal requests for records will be treated equally, impartially and in a timely manner by public bodies." They recommended:

Recommendation No. 1 – Change the administrative policy and practice regarding the sensitivity ratings process used in the corporate records tracking system to ensure that complexity becomes the sole criterion for classifying formal requests for public records, and that the new complexity ratings process treats all

requesters equally and impartially and protects their personal identity.

FIPA is in full agreement with this recommendation.

- **Contracts with service providers**

FIPA recommends that contracts with service providers should be routinely available to the public, subject to any exceptions that may apply.

2. Build principles of public access into the creation, preservation and destruction of records

Virtually everyone who has an opinion on the management of government information and records agrees that this area badly needs re-engineering, and that the principle of public access should be better incorporated into design.

- **Creation of records**

There can be no public access to records if records are not created. Unfortunately, it has been widely noted that "oral culture" is growing in government as officials choose not to record sensitive information or delete it as soon as possible. This completely defeats the FOIPP Act's purpose of making public bodies more open and accountable.

The "oral culture" phenomenon gained some notoriety in BC in 2003 when a senior public official publicly admitted "I don't put stuff on paper that I would have 15 years ago…Civil servants are choosing not to write things down, or at least I am." Regarding email, he stated "I delete the stuff all the time as fast as I can."[3]

The fallout was that the official was forced to "clarify" his statements and re-affirm the application of the FOIPP Act to all government records. But there is no question that the informal practices that he revealed will continue to some degree.

In order to avoid unwanted scrutiny, many public servants communicate more with phone calls, avoid making notes, fail to keep minutes of meetings, and use e-mail which they delete in contravention of the *Document Disposal Act*.

Avoiding scrutiny by failing to create records poses a threat not only to access, but also to the archival and historical interests of the province. Left without records of their predecessors' thoughts, decisions and precedents, other officials are deprived of the benefit of their wisdom — and their folly. History is impoverished and our collective wisdom is "dumbed down". As the saying goes, those who fail to learn the lessons of history are doomed to repeat them.

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[3] Ken Dobell, quoted in *The Province*, October 2, 2003, Michael Smyth's column.

The best solution to this problem is to gradually create a "culture of openness" within government to replace the oral culture. This was declared to be one of the purposes of the FOIPP Act when it was passed, but the deeply set culture of secrecy within governments in our adversarial democracies does not die easily.

Federally, Information Commissioner John Reid reports that the oral culture of record keeping for sensitive information is on the decline, thanks in part to the adoption of a management policy requiring ministers to make records of their decisions, orders, actions, deliberations and transactions.

FIPA recommends that a positive duty to create and maintain records be incorporated into the FOIPP Act or other legislation – a duty to record decision-making, and minimum requirements for record keeping in critical areas.

- **Introduce penalties for malicious destruction of documents**

There should be a specific duty to retain documents subject to FOI requests or containing personal information, and there should be penalties for malicious destruction or alteration of documents.

At least five Canadian governments have introduced penalties for document tampering into their FOI acts: the federal, Alberta, Manitoba, Quebec and Yukon governments.

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

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

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

3. Restore the scope of the Act

- **Extend coverage to categories of records exempted by "notwithstanding clauses" in other statutes**

FIPA and the BC Civil Liberties Association have urged the government to conduct a rigorous review of all the statutory exemptions that have been passed over the last decade that exclude Ministry records from the ambit of the FOIPP Act. It is our joint submission that there are no legitimate grounds for such exclusions. The Act was carefully crafted with all the checks and balances necessary to fulfill its purposes while protecting important interests.

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

We were pleased to receive the assurance of BC's Minister of Management Services, in a letter of December 10, 2001, that such a review of statutory exemptions would be undertaken as part of the legislative review of the Act. The government never followed through on this promise, and we urge the government to undertake a review as soon as possible.

- **Extend coverage to all public and "quasi-public" bodies**

In the last two decades of downsizing, privatization, deregulation and fiscal restraint, more and more government responsibilities and functions have been transferred out of the public sector proper and into the sector of organizations that have been called "quasi-governmental" or "quasi-public" bodies. These bodies include multi-governmental partnerships, government-industry consortia, foundations, trade associations, non-profit corporations and advisory groups.

Any loss in the Act's coverage of institutions that are funded by taxpayers, carry out public policy as determined by Legislatures, or deliver public services on behalf of government, is a diminishment of transparency, accountability and democracy.

We recommend that the FOIPP Act be extended to all public and quasi-public bodies and to records created by or in the custody of alternate service providers.

In BC, examples of bodies which are not covered by the FOIPP Act are the new BC Ferry Corporation, TransLink and the Health Care and Care Facility Review Board.

- **Access to records of service providers**

The second Special Committee stated, "The Committee is persuaded that there needs to be some explicit assurance in the Act that alternate service

delivery does not affect access rights, particularly as recent amendments have established that privacy rights are protected [under these arrangements]. They made this recommendation:

Recommendation No. 4 – Amend section 3 to clarify that records, including personal information, created by or in the custody of a service provider under contract to a public body are under the control of the public body for which the contractor is providing services.

See also recommendation no. 11 in the submission of the Information and Privacy Commissioner.

4. Reinforce section 25 of the Act, "Public Interest Paramount"

The cornerstone and ethical yardstick of effective access and privacy legislation is a workable "public interest paramount" provision. The purpose of such a provision is to ensure that, regardless of other interests that may tend to influence the decision of a public body, the final decision regarding the disclosure of records is taken in the public interest.

It is unfortunate that section 25 of the FOIPP Act has not fulfilled its purpose for a variety of political and bureaucratic reasons. Chief among these is the subjectivity of the term "public interest" and the question of who has the privilege of defining it.

To restore the intent of section 25, we make the following recommendations:

i) Section 25 should be amended to include a clear set of factors to define and determine "public interest".

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

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

5. The granting of fee waivers "in the public interest"

The criteria that have developed for determining whether the release of records is "in the public interest" and therefore merits a fee waiver under s. 75 (5) of FOIPPA are too narrow. A clearer concept of the public interest and a more expansive test for when the standard for a fee waiver is met are needed.

When deliberating reform of this section, the current government should bear in mind that the Legislature clearly intended that "Fees will not be a barrier to access" under the FOIPP Act. The Liberal Party in opposition adopted this principle wholeheartedly in their own statements – "All citizens must have timely, effective and affordable access to the documents which governments make and keep."[4]

Fees have proven to be the single greatest barrier to access for the average citizen seeking access to general (that is, non-personal) records. FIPA constantly hears of cases where citizens have been denied fee waivers when disclosure would, in our opinion, be in the public interest.

We recommend that a less restrictive approach be taken to evaluating when disclosure is in the public interest and that section 75 be amended to require the waiving of fees when to do so is in the public interest or when FOI requests are subject to excessive delay.

6. Strengthen privacy protection

The BC government has gone a long way in improving privacy protection in the province. It has shown strong leadership among the provinces by introducing the *Personal Information Protection Act* and strengthening the privacy provisions of the FOIPP Act to counter the potential impact of foreign legislation when the personal information of British Columbians is disclosed to foreign owned corporations.

In spite of these exemplary actions, privacy continues to be a difficult issue in the face of growing demands for access to personal information by both governments and the private sector, and growing demand from the public for privacy protection.

We recommend the following actions be taken to strengthen privacy protection:

- The full recommendations in the Information and Privacy Commissioner's report *Privacy and the USA Patriot Act* should be implemented.
- The privacy impact of programs and practices should be measured against a legislative yardstick such as a privacy charter. If not justifiable, they should be modified or abandoned. (See recommendation 10, Information and Privacy Commissioner.)

[4] Then Opposition Leader Gordon Campbell, in a letter to FIPA, July 22, 1998.

- Sections 27 and 33 of the FOIPP Act should be re-examined and upgraded to meet the higher standards embodied in PIPEDA and PIPA. In particular:
  - "Consistent use" is too broad.
  - The "Collection" section is too lax.
  - The "Disclosure" section is too broad.
- Section 71 should be amended to require public bodies to make personal information available to the individual without charge, with limited exceptions for costly records as X-rays and other special cases. (See Special Committee recommendation no. 26 and recommendation no. 1, Information and Privacy Commissioner.)

7. Narrow the exception for Cabinet and local public body confidences

We agree with the Information and Privacy Commissioner's recommendations 4 and 5, which are that section 12 should be made discretionary and that the time limit for withholding records should be reduced to 10 years.

Local public bodies – We are at a loss as to why section 12(3), which applies to local public bodies, lacks a parallel to s. 12 (2)(c) which applies to Cabinet confidences.

Section 12(2)(c) states that Cabinet confidentiality does not apply to "…[I]nformation in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if

> (i) the decision has been made public,
> (ii) the decision has been implemented, or
> (iii) 5 or more years have passed since the decision was made or considered.

The lack of similar qualifying language in 12(4) allows local public bodies to withhold background materials or analysis in conditions not allowed to Cabinet. FIPA finds this to be completely inappropriate and we recommend that the exception be amended to remedy what we conclude was an unfortunate oversight.

8. Restore the intent of S. 13, the Policy Advice Exception

Section 13 needs emergency repair, as noted at length in the reports of the Special Committee, the Information and Privacy Commissioner, and FIPA in our 2004 report *A Prescription for Dr. Doe*.[5] The exception needs to be re-written to undo the damage done by a court decision that broadened the definition of "policy advice" far beyond what was intended by the Legislature.

The Special Committee recommended as follows:

[5] http://fipa.bc.ca/library/Reports_and_Submissions/A_Prescription_for_Dr_Doe.doc

Recommendation No. 11 – Amend section 13(1) to clarify the following:

(a) "advice" and "recommendations" are similar terms often used interchangeably that set out suggested actions for acceptance or rejection during a deliberative process,

(b) the "advice" or "recommendations" exception is not available for the facts upon which advised or recommended action is based; or for factual, investigative or background material; or for the assessment or analysis of such material; or for professional or technical opinions.

FIPA agrees that the exception should be amended to clarify that factual materials and expert reports are subject to access, while recommendations about proposed or alternative courses of action may be withheld – but we further recommend that records should be withheld only until a government decision on the appropriate course of action has been made, or the record has been in existence for five or more years. (See also recommendations 6 and 7 of the Information and Privacy Commissioner.)

But beyond this, FIPA is of the opinion that s. 13 needs more fundamental reconsideration in an era where greater transparency is expected of government. Modern democracies are based on a high degree of public awareness of and participation in decision-making. In contrast, the sole purpose of a policy advice exception is to ensure that government policy making is not subject to public scrutiny. The basic rationale is that government decision-making and policy formulation merit freedom from constant scrutiny and criticism, and that too much openness stifles creativity. This is at direct odds with current public expectations and the fundamental aims of freedom of information.

One rationale for FOI is that it improves the quality of decision making in the public sector by ensuring that all government decisions are subjected to continuous, informed, and vigorous debate. Another is that transparency keeps governments honest by providing fewer dark places for corruption to thrive. These rationale are evident in the federal government's choices of solutions to prevent future "sponsorship scandals", namely improvements to the *Access to Information Act*, the enactment of legislation to protect whistleblowers, and the extension of the Auditor General's oversight to additional public and quasi-public bodies.

The pertinent question is, does secrecy in the formation of public policy really benefit the government or the society – or does it actually cause harm? We think that excessive secrecy causes very real harm to government decision-making, and thus to society. This cautions us that the policy advice exception should, like all exceptions, be drafted as narrowly as possible.

9. Narrow S. 14, the Legal Advice Exception

The legal advice exception is another example of one that has been stretched far beyond its original intent.

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

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

FIPA recommends that section 14 be narrowed as follows:

a) The exception should apply to legal advice only as originally intended.

b) Documents must be released after information subject to solicitor-client privilege and other applicable exceptions is severed, and

c) legal advice should be released when release will not harm the interests of government, or a reasonable period of time has passed.

10. Narrow section 15, the exception for "Disclosure harmful to law enforcement"

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

11. Maintain section 21, harm to third-party business interests

Suffice it to say that the Special Committee, the Information and Privacy Commissioner and FIPA all agree that the balance in the FOIPP Act between access to information and protection of third party business interests is the right one, and is consistent with other Canadian access laws – See Special Committee report p. 23 and Information and Privacy Commissioner submission p. 20.

We live in the era of the Enron scandal and other major business corruption catastrophes that stem directly from a lack of corporate transparency and accountability. On the political, law enforcement and public fronts, all are united in demanding more, not less, access to information and scrutiny. To lower the standards in our FOIPP Act would be folly.

12. Extend the time period allowable for appeals to the Information and Privacy Commissioner

FIPA's experience is that it is often a hardship for lay individuals to respond to a refusal of an access request and file their appeal with the Commissioner within the 30 days that is currently allowed.

Many FOI requesters are unclear on their rights under the FOIPP Act, are confused and upset or do not possess the literacy and communication abilities needed to find their way efficiently through the FOI process. In addition, we find that public servants do not always take their "Duty to assist" under section 6 seriously and some are downright obstructionist.

These and many other factors militate against requesters' being able to meet the 30-day deadline for appeals. We recommend that the time allowance be increased to 90 days.

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