OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

This is the text of a letter sent to Committee Members of the Special Committee to Review the Freedom of Information and Protection of Privacy Act

April 7, 2004

Special Committee to Review the *Freedom of Information and Protection of Privacy Act* ("FOIPPA") — Response to aspects of the Government of British Columbia Corporate Submission to the Special Committee — OIPC File No. 17730

1.0 PURPOSE OF THIS LETTER

The deadline for submissions to the Special Committee has passed. However, it would be regrettable if very grave concerns raised by aspects of the March 1, 2004 *Government of British Columbia Corporate Submission* ("submission") to the Special Committee were not raised. I therefore ask you, as a member of the Legislative Assembly and the Special Committee, to consider this response to the submission. (This same letter has been sent to each member of the Special Committee.)

The submission says it was prepared by public servants under the lead of the Corporate Privacy and Information Access Branch of the Ministry of Management Services, with "executive management review and recommendations". In several respects, the public servants' recommendations would, if they were accepted by the Special Committee and then enacted, reverse course and greatly weaken the public's right of access under FOIPPA. Despite the claim that the requested changes recommendations "demonstrate support for the principles of accountability" that underpin FOIPPA, some of the requested changes would significantly undermine the openness and accountability that the government has promised.

The submission in several places claims that its recommendations are intended only to "fine-tune" FOIPPA's language, so that its "original intent" is appropriately or better expressed. It is objectionable for appointed public servants who are subject to FOIPPA to, a decade after FOIPPA's enactment, purport to be identifying and expressing the "original intent" of FOIPPA, an Act of the Legislature. Talk of fine-tuning the law or returning to its original

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intent disguises the real effect of the recommendations discussed below—to reduce the public's right of access and impair openness and accountability.

Last, as discussed below, the submission in several respects either mischaracterizes the effect of the Commissioner's decisions respecting certain FOIPPA access exceptions or presents an incomplete picture of the situation in such cases. The submission also asserts in several places that harm is being caused by these decisions, yet offers no evidence to support these assertions.

2.0 RESPONSE TO THE SUBMISSION

2.1 Third-Party Business Information Is Already Appropriately Protected

The submission contains a recommendation to amend s. 21(1), and says the following (at p. 11):

> **Identified Issue or Concern:**
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> Recent decisions of the Information and Privacy Commissioner have determined that any contract information that is, or could have been negotiated cannot be excepted from release under section 21. The Commissioner has also determined that if a proposal is attached to a contract, the proposal is considered part of the contract and cannot be excepted from release.
>
> These decisions have raised concern that third parties will be reluctant to engage in contracts with public bodies if this type of business information is vulnerable to release. A further concern is that the limited interpretation of this section by the Commissioner means that if a public body, based on its contact with a business, develops an analysis of that business, the information developed could not be withheld even if it would be harmful to the third party's business.
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> **Supporting Arguments:**
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> This issue has been raised on a number of occasions by a variety of program areas that interact with the business community. The new era commitment to a fair and open procurement process that will result in the best deal for the Province is in essence being undermined by the Orders of the Commissioner by causing companies are hesitant to engage in the procurement process for fear of disclosure of business information that would harm their interests.
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> **Proposed Solution:**
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> Three options for the amendment have been provided:
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> - Add "negotiations" to s. 21(1)(a), remove the word "supplied" from s. 21(1)(b) and remove the word "significantly" from s. 21(1)(c)(i).
> - Amend s. 21(1)(b) by adding after supplied "or negotiated".
> - Delete s. 21(1)(b)

If accepted, this change would inappropriately and unnecessarily diminish openness and accountability. This office's February 5, 2004 submission to the Special Committee sets out, in some detail, the history and application of s. 21(1) of the Act, which protects third-party business information. Our earlier submission explains how s. 21(1) is working and why, in an era of alternative service delivery and outsourcing, it is more important than ever to ensure that the public be able to appropriately scrutinize the often significant, long-term financial commitments being made on the taxpayers' behalf. The submission is framed in a way, however, that demands further comment.

First, the submission says that the present Commissioner's "recent" decisions have interpreted s. 21(1) in a way that precludes negotiated information in a contract between a public body and a business from being covered by the section. This point arises from s. 21(1)(b), which explicitly says that s. 21(1) only applies to information "supplied" to a public body. The present and previous Commissioners have interpreted s. 21(1) in light of its express requirement for 'supply' of information, not 'negotiation' of information. As this office's main submission demonstrates, there are sound and longstanding public policy reasons for the "supply" requirement, which is widespread in Canadian access laws.

As our main submission on s. 21 demonstrates, the present Commissioner's interpretation of the "supply" requirement is consistent with s. 21 decisions of the previous Commissioner, David Flaherty. That interpretation is also consistent with longstanding authority in the Federal Court of Canada and commissioner and court decisions in Ontario, Quebec, Alberta, Nova Scotia and the Northwest Territories. It has also specifically been upheld on two occasions by the British Columbia Supreme Court in judicial review proceedings. This office's interpretation and application of the s. 21(1)(b) "supply" requirement, in other words, is the norm and not the exception, as the ministries' access and privacy experts must know.

It is necessary to address the submission's contention that negotiated information can never be protected. Section 21 is intended to protect a range of third-party business information "of or about a third party" (to quote s. 21(1)(a)), including trade secrets, confidential commercial information, confidential financial information, confidential labour relations information and so on. This office's decisions have said that, where a third party gives such business information to a public body, that information has been supplied for the purposes of s. 21(1). One example is where a private business has given its confidential financial statements in response to a government request or a formal request for proposals (whether or not the financial statements end up appended to a contract with the government, unlikely though that may be).

In any case, our decisions have held that, even where information has been negotiated, the "supply" requirement will be met if disclosure of the negotiated information would allow someone to draw accurate inferences about underlying information that was actually supplied to the public body.

A recent example of how this office's decisions protect business information is Order 04-08, issued on April 1, 2004. In that case, the Commissioner held that financial statements and other financial and commercial information of Skeena Cellulose Inc. had been supplied in

confidence and, since the harms test under s. 21(1)(c) had also been met, the supplied information had to be withheld by the Ministry in question. For another example, see Order 03-05, in which the present Commissioner held that the City of Vancouver was required to refuse access to certain commercial and financial information that a third party had, at the City's request, supplied in confidence. Also see Order 01-36, where he found that a company's customer list had been supplied to the Ministry (although he found the s. 21(1)(b) confidentiality requirement had not been made out on the evidence in that case).

More generally, the submission alleges that our decisions have "raised concern" that businesses "will be reluctant" to enter into contracts if the negotiated terms of a contract with a public body "are vulnerable to release". The submission also says an unspecified number of government program areas have raised this issue and says, offering no evidence, that companies are "hesitant" to engage in procurement processes for fear that their business information will be disclosed.

The submission claims that there are concerns about possible *reluctance* to enter into contracts and that some companies have hesitated to bid. It does not say that companies have actually refused to do business with government where it would otherwise be advantageous for them to do so. Section 21(1) has been applied as noted above for over a decade, yet no evidence is offered that actual harm to the public interest has been caused.

Last, this office objects to the submission's assertion that our decisions have undermined fair and open procurement processes that will result in the best deal for the province. This serious allegation is a calculated appeal to politics and we note that no particulars or evidence have been provided to support this sweeping claim. Moreover, the fairness and openness of procurement processes have nothing to do with s. 21(1) or its interpretation. The fairness and openness of procurement processes are governed by common-law rules created by the courts, not s. 21 or our decisions.

Contrary to the submission, the best deals for the people of this province will be those that are, within the confines of s. 21(1), open to a measure of scrutiny. The government's alternative service delivery and privatization efforts necessitate the continued appropriate scrutiny of financial commitments made on behalf of taxpayers. To reduce the effectiveness of s. 21(1) as the submission requests would put British Columbia's access law out of step with other Canadian access laws and would gravely diminish the public's ability to hold government and public bodies to account. The same change was requested of the previous Special Committee that reviewed FOIPPA, which declined to make such a recommendation. That should also be the case on this occasion.

2.2 Labour Relations Records Should Remain Under FOIPPA

The submission recommends amending s. 3 of FOIPPA to exclude "labour relations information" from the right of access. The submission alleges that the provincial government's position in labour negotiations are not adequate to protect under FOIPPA as it now reads. The submission claims that access under FOIPPA to such information "is not necessary", since access is currently available to such records by "parties to a negotiation,

arbitration or dispute". If such access is truly available—and we have grave doubts about the accuracy of this sweeping statement—how can there be any concern about harm to negotiating position through FOIPPA disclosure? The two statements are contradictory.

In any case, s. 17(1), s. 21(1) and the personal privacy provisions of FOIPPA already give appropriate protection to the interests mentioned in the submission. The general introductory language to s. 17(1) protects the provincial government's financial interests, and ss. 17(1)(b) through (e) do so in ways that can and do apply specifically to labour negotiations (and ss. 17(1)(b) may also apply in some cases). Most important, s. 17(1)(e) specifically allows the provincial government or any other public body to refuse to disclose "information about negotiations carried on by or for a public body or the government of British Columbia". The relevant parts of s. 17(1) read as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> **17**(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> …
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

The submission contends that the requested change would place public bodies on the same footing as private sector employers under the recently-enacted *Personal Information Protection Act* ("PIPA"). FOIPPA and PIPA are already on the same footing as regards negotiation information. PIPA does not allow access to such information in the hands of a private business. As noted above, s. 17 of FOIPPA permits public bodies to refuse to disclose the same information.

In any case, comparison between FOIPPA and PIPA is inapt. PIPA is intended to protect personal privacy in the private sector. FOIPPA is intended, as s. 2(1) affirms, to make public bodies more accountable to the public by creating a right of access to records. Section 17(1) and other provisions already protect the legitimate financial and other interests of public bodies in the labour context. To exclude such records from FOIPPA would greatly reduce the public's right of access to information that is not protected by s. 17, s. 22 or other exemptions. As the submission points out, at least half of all access requests to ministries are made by

individuals seeking their own personal information. The requested sweeping exclusion of labour relations records from FOIPPA would greatly undercut that right without at the same time meeting any proven pressing or substantial policy need.

The government cites no evidence that, in the decade in which has had to live under FOIPPA, real harm has ever been caused to the government's interests in the context of labour negotiations, whether actually under way or contemplated. The fact that other Canadian jurisdictions may have made changes in this area—which are not described in the submission—does not make it good policy and the requested change would not be good policy here

2.3 Protecting Third Parties From Harm

At p. 15, the submission says this:

> The current interpretation of s.19 by the Information and Privacy Commissioner, has created an extremely high threshold for ministries to meet in seeking to withhold records that may pose a threat to the health and safety of individuals or the public.
>
> In several orders the Commissioner has required public bodies to meet a very strict and high standard of evidence support the withholding of records that would "reasonably be expected to a) threaten anyone else's safety or mental or physical health". Public bodies are concerned that the Commissioner has often underestimated the perceived threat and has not taken the perception of individuals regarding the threat as seriously as that perception should be taken.
>
> There is one documented situation in the Ministry of Agriculture where a staff person left the Ministry at least indirectly as a result of fears that information would be revealed that would place that individual at risk. Ministries feel the real purpose of the section is being compromised by the unduly high standard of the Commissioner and as a result, ministries feel that are not able to adequately protect their staff as required by WCB rules.

It is objectionable for ministries to say they "feel" that they cannot protect their staff as required by law. The submission says a ministry employee left his or her job "indirectly" because of fears about disclosure of information, but does not explain what this means. Even if this were true, and it would be unfortunate, that one case would not justify the change the submission seeks.

As for the test applied in s. 19(1) cases, that test is explicitly stated in the provision itself and that is the test that has been applied by this office. The present and previous Commissioners have explicitly said that public bodies should, given the interests at stake, assess such cases with care and deliberation. The present Commissioner has said that this approach applies to our review of public bodies' s. 19(1) decisions.

Further, the submission does not say on what basis the government has been able to assess this office's findings of fact in particular cases, which are based on the evidence actually before the decision-maker in each case. Only the Ministry or other public body involved in

the specific case is privy to the evidence that it chooses to put forward or not put forward in the inquiry. Further, only four of the present Commissioner's s. 19(1) decisions have involved ministries, making it difficult to understand how the submission's authors could assess the evidence that was produced in the 16 cases involving local public bodies.

Since the present Commissioner took office, we have issued some 21 s. 19(1) decisions, all but two of them being decisions of the Commissioners. In 12 of those cases the Commissioner in fact upheld the application of s. 19(1) and this includes four cases involving a provincial government ministry. In one other case, he found that s. 19(1) did not apply, but upheld the Ministry's application of s. 22 (third-party privacy) to the same information. (This outcome also applied in one decision of a delegate of the Commissioner that involved a local government agency and, in another delegate's decision, s. 19(1) and s. 22 were both not upheld.)

Of the seven Commissioner's decisions in which he did not uphold application of s. 19(1), only *one* decisions involved a Ministry, Order 01-15.
All of the other cases in which s. 19(1) was not upheld involved local public bodies, not ministries of the provincial government. We are not aware of concerns similar to those raised in the submission having been raised by local public bodies. Since only two cases have gone against ministries, it is difficult to identify the pressing need for a change to s. 19(1) as alleged.

The fact is that s. 19(1) determinations are fact-driven, as indicated above. It is up to the public body involved to make its case and, if the public body believes that the wrong decision has been made on the facts, it can seek judicial review in the British Columbia Supreme Court. None of the present Commissioner's s. 19(1) decisions, including those involving provincial government ministries, has been the subject of judicial review proceedings.

The suggested amendment is not necessary.

2.4 Records Available Through Other Processes

At p. 17, the submission asserts that public bodies "incur significant (duplicate) costs" in responding to access requests where parties to a court proceeding or arbitration would receive the same records through the proceeding itself. The submission asks that s. 2 be amended to authorize denial of access "if another process for accessing the same information is already underway".

First, no evidence whatsoever is offered to support it's the sweeping contention that "public bodies"—not just ministries—incur supposedly "significant" costs in answering duplicate requests. In the absence of reasonable grounds to suppose there is a legitimate and pressing problem of this nature, the recommendation should be dismissed on that basis alone.
The vagueness of the actual request is also troubling from a policy perspective. For one thing, the submission does not say what it means by records being available through "another process". Such "another process" could include a non-binding policy—which could be very

limited or weak—that a ministry or other public body might adopt and apply without independent review by the Commissioner or anyone else.

Any such amendment would lead to a reduction in the public's right of access to information and result in a significant diminishment of the access that is now afforded to individuals who seek their own information. Particularly in the absence of any evidence that the asserted duplication of costs is a real and pressing problem in a specific instance, this recommendation should be rejected.

2.5 Fees and the Public Interest

The submission says, at p. 18, that the present Commissioner's "recent" orders have given a broad interpretation to the term "public interest" in s. 75(5), which deals with access fee waivers by public bodies. It also claims that his decisions "tend" to view the public interest as that which "may be interesting in a general manner to the public".

This characterization is materially inaccurate. In the Commissioner's most recent significant public interest fee case—Order 03-19, which involved a media requester—the Commissioner applied this test:

> [35] The first part of the two-stage analysis is whether the requested records relate to a matter of public interest (including an environmental or public safety matter):
>
> (a) has the subject of the records been a matter of recent public debate?;
>
> (b) does the subject of the records relate directly to the environment, public health or safety?;
>
> (c) could dissemination or use of the information in the records reasonably be expected to yield a public benefit by:
>
> > (i) disclosing an environmental concern or a public health or safety concern?;
> >
> > (ii) contributing to the development or public understanding of, or debate on, an important environmental or public health or safety issue?; or
> >
> > (iii) contributing to public understanding of, or debate on, an important policy, law, program or service?;
>
> (d) do the records disclose how the Ministry is allocating financial or other resources?
>
> …
> [51] The next question is whether the applicant's primary purpose for making the request is to disseminate the information in a way that can reasonably be expected to benefit the public or whether the purpose is to serve a private interest. It is also

> necessary to consider whether the applicant is able to disseminate the information to the public.

This is the test that has always been applied—the present interpretation of the term "public interest" is completely consistent with the previous Commissioner's interpretation, which itself built on long-standing cases from Ontario. This test does not "tend" to equate the public interest with that which is of interest to the public. The Commissioner has, in fact, stated that what is merely of interest to the public is not necessarily a matter of public interest.

The submission contends that the present Commissioner has "accepted the view that "media or special interest groups are almost always acting on behalf of an interested public". This is not accurate.

As for the allegation that the Commissioner's approach to fee waivers has supposedly resulted in a "large percentage" of media requests and requests by interest groups being excused from paying fees, absolutely no supporting evidence is offered. The submission refers to a "large" percentage, but this is not backed up with dollar figures or statistics.

The submission proposes that a (restrictive) definition of "public interest" be added to FOIPPA. The courts have for many years spoken of the folly of attempting to define what is in the "public interest". It is a context-sensitive term, although it can and has been given some flesh in the decisions on fee waivers.
If a public body considers that, in a particular case, our application of s. 75(5) is mistaken, it can and should seek judicial review of the decision. No amendment should be made, since none is warranted and any attempt to define "public interest" definitively would not serve the public interest.

2.6 Records In A Court File

The government suggests, at pp. 25 and 26, that the s. 3 reference to "record in a court file" does not account for electronic court records. I do not necessarily agree, since nothing in the Act suggests that a "file" refers only to a paper file. Even if one accepts the recommendation is needed, however, I have concerns about the scope of the government's actual recommendation. It reads as follows (at p. 26):

> **Proposed Solution:**
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> The wording of Section 3 should be changed from "record in a court file" to "court record" and a definition of "court record" should be added to Schedule 1. The definition should include:
>
> - Documents, information or other matter that is collected, received, prepared or maintained in connection with a proceeding;
> - Case-specific information contained within a case management and/or case tracking system; and,
> - Reports generated from a case management or case tracking system.

On its face, the first of these provisions could extend to documents prepared or received by a public body in relation to a proceeding, not just documents in a court system. The second could cover information within a government case-management or case-tracking system, not just court systems. The same can be said about the third aspect of the recommendation.

If any change is recommended—and I am not persuaded one is necessary—it should be very clearly restricted to records in systems of files of a court, not also public bodies.

Again, I acknowledge that the deadline for submissions has passed, but urge you personally to consider the above response to the submission. I would be pleased to discuss this letter with you or the Special Committee if you wish.

Yours sincerely,

ORIGINAL SIGNED BY

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