



BC FREEDOM OF
INFORMATION
AND PRIVACY
ASSOCIATION

**Submissions on
Information Commissioner Marleau's
12 reform proposals for
the Access to Information Act**

**Submission to
The Committee on Access to Information,
Privacy and Ethics**

April 1, 2009

BC Freedom of Information and Privacy Association

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FIPA wishes to acknowledge the Law Foundation of British Columbia for their ongoing support of FIPA's activities in the areas of law reform, research and public education



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Introduction

The BC Freedom of Information and Privacy Association (FIPA) is a non-profit society established in 1991 for the purpose of advancing freedom of information, open and accountable government, and privacy rights in Canada. We serve a wide variety of individuals and organizations through programs of public education, legal aid, research, public interest advocacy and law reform.

Although we are based in British Columbia, FIPA has maintained an active role on the federal scene as well.

We have joined the increasingly urgent calls for reform of the now outdated Access to Information Act.

Earlier this year, in association with the Canadian Newspaper Association and the Canadian Taxpayers Federation, we wrote to the Prime Minister, asking him to follow the lead of U.S. President Barak Obama and include reform of the Access to Information Act in the Speech from the Throne. He didn't.

These three groups also wrote to the Prime Minister during the last election asking him to promise to bring in the reforms to ATI he campaigned on in 2006. We are still waiting.

No doubt about the need for ATIA Reform

When the Access to Information Act ("ATIA") came into force in 1983, the world was very different than it is today:

- The Chrysler Corporation was in financial difficulty, and the first minivan was introduced.
- The Berlin Wall was still up.
- Home computer enthusiasts could play Pacman on their Commodore 64s.
- In government offices, Wang word processors the size of jukeboxes were just becoming available to process information.

Information and how it is handled has changed completely since then, but the law governing how Canadians get access to that information has remained fundamentally unchanged.

Since that time, we have been governed by seven Parliaments, with Liberal and Conservative majorities, as well as Liberal and Conservative minorities. Different parties have held the balance of power in these minority governments.

There have been serious, detailed studies of the ATI Act and many recommendations for reform.

One of the earliest studies was conducted by the Justice Committee of this House. Their report was entitled *Open and Shut*, and the vice chair was a young MP by the name of Rob Nicholson. I commend it to you for the mid-80s picture of the Minister of Justice, if nothing else.

In November 2001 the Committee on Access to Information, issued a report entitled *A Call to Openness*. Nothing happened.

This report was followed in June 2002 by *Access to Information: Making it Work for Canadians*. This report was the result of two years work that included foreign travel and cross-Canada consultations by a 14-member task force of senior specialists in the federal bureaucracy. The government released the report, but never officially commented on it.

In 2005, then Information Commissioner Reid tabled before this committee a draft bill, entitled the *Open Government Act*. This proposed legislation would have made substantial changes to the ATI Act. FIPA supported this proposal, although we were disappointed with the Commissioner's failure to seek order-making power.

In 2006, the Conservative Party platform contained extensive proposals for reform of the ATI Act, which FIPA supported. One of the proposals stated

specifically that a future Conservative government would "Implement the Information Commissioner's recommendations for reform of the ATIA".

In our 2006 submission on the Accountability Act, FIPA expressed our disappointment that the government chose to defer most of these reforms and have them dealt with by this Committee.

We are concerned that reference to the Standing Committee could once again prove to be a graveyard for positive action.

Justice Gomery also supported the proposal, and the current Commissioner in his presentation to this Committee said he "generally supports the draft bill" although he feels his 12 proposals should be implemented without delay.

In sum, this bill has been expressly supported by the last two Commissioners, Justice Gomery and, last but not least, the current Prime Minister.

It should also be noted that one of the eight commitments related to Access to Information in the 2006 Conservative platform was the pledge "To give the Information Commissioner the power to order the release of information".

FIPA is of the view that a consensus has formed over the last four years that Commissioner Reid's draft bill, with the addition of full Order making powers for the Information Commissioner, is the way forward.

What FIPA says about Commissioner Marleau's 12-step program

We would like to provide a brief response to what the current Commissioner has proposed, which I would be pleased to elaborate upon in response to your questions.

1. "That Parliament review the Access to Information Act every five years"

FIPA agrees.

2. "That all persons have a right to request access to records pursuant to the Access to Information Act"

FIPA Agrees.

3. "That the Access to Information Act provide the Information Commissioner with order-making power for administrative matters"

FIPA is of the view that the Commissioner should have full order making power, not just the power to make orders regarding administrative matters.

Order-making power is essential to ensure the proper functioning of the ATI Act. The Information Commissioners in four provinces have this power, and those systems work far better than the current federal regime.

Commissioner Reid expressed the view that order-making power would change the nature of his office. He was right, and FIPA believes this would be a positive change.

By seeking the power to make orders on administrative matters, Commissioner Marleau has apparently accepted this change regarding the nature of his office. FIPA recommends against taking a half measure, when clearly full order making power is what is needed.

4. " That the Access to Information Act provide the Information Commissioner with discretion on whether to investigate complaints"

FIPA is of the view that such a power would only be acceptable in situations equivalent of dismissal of a 'frivolous and vexatious' lawsuit, and that similar criteria should be used in these very rare circumstances.

5. " That the Access to Information Act provide a public education and research mandate to the Information Commissioner."

FIPA agrees.

6. " That the Access to Information Act provide an advisory mandate to the Information Commissioner on proposed legislative initiatives."

FIPA agrees.

7. " That the application of the Access to Information Act be extended to cover records related to the general administration of Parliament and the courts."

FIPA agrees.

8. " That the Access to Information Act apply to Cabinet confidences."

In most Canadian provinces, Cabinet documents are not excluded from review by the Commissioner. This recognizes the fact that a Cabinet confidences exception, like all exceptions from disclosure, can be misapplied or abused.

FIPA strongly recommends that Cabinet records be made an exception to disclosure, rather than an exclusion, and be subject to review by the Commissioner.

9. " That the Access to Information Act require the approval of the Information Commissioner for all extensions beyond sixty days."

FIPA is concerned that while this proposal may reduce government's ability to take extremely long periods to reply to a request, it will have the unintended consequence of instituting an automatic 60 day delay for all requests.

This has been our experience in British Columbia, where the Campbell government lengthened the response times from 30 calendar days, to 30 working days, plus 30 more working days if the ministry felt to respond faster would unduly interfere with the operation of the department. In practice, although there is an appeal to the Commissioner, no one does because there is no way the Commissioner's office could issue an order before the 30-day period expired.

10. " That the Access to Information Act specify timeframes for completing administrative investigations."

FIPA agrees and suggests a 90-day period as set out in s. 56(6) of the BC Freedom of Information and Protection of Privacy Act.

11. " That the Access to Information Act allow requesters the option of direct recourse to the Federal Court for access refusals."

FIPA is of the view that the Access to Information Act should provide requesters with an easy to understand, informal way of getting government information. This would include the procedures for resolving disputes over the release of documents.

The Commissioner has provided this recommendation as an option, and FIPA considers this a prerequisite to supporting this idea. Sophisticated or well-heeled requesters may want to push things along more quickly and may be willing and able to pay for it.

However, the person not familiar with the system, who does not have money for a lawyer specializing in administrative law, will need to have an informal, administrative process available and the Commissioner should provide that remedy. With full order making power, the Commissioner would be able to make an order for release of documents without requiring an individual to fight in court to exercise their right to information.

12. " That the Access to Information Act allow time extensions for multiple and simultaneous requests from a single requester."

This would have to be subject to review and order by the Commissioner, not the fiat of a government body.

Concluding statement

In conclusion, I would like to repeat FIPA's view that we now have in this country a consensus that Commissioner Reid's draft bill, with the addition of full Order making power for the Information Commissioner, is the way to proceed, and that time is of the essence.

Honourable Members, you have the opportunity to make a real difference by bringing forward this proposal, which has widespread support. Many of Commissioner Marleau's proposals are useful, valuable even. FIPA does not believe that it is necessary to settle for half measures. The small steps may be needed, but the big step is no less necessary. And if you don't take the big step, Canada will be left further and further behind.

Thank you.

Presented by

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