Core Issues Affecting the Freedom of Information and Protection of Privacy Act

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Core Issues

Other than the first item, the following are not in a ranked order

1. Disregard for the Legislature and requirements under the Act.

The Problem

- Recent Ministerial actions have highlighted several problems.
  - The Minister fails to comply with the Act by not tabling an annual report annually. In so doing, she reduced the transparency of transparency legislation.
  - Bill 22 undermined the work of the Special Committee to Review the Freedom of Information and Protection of Privacy Act (the "Committee") by introducing legislative changes while the Committee was to conduct open consultation and make recommendations on the existing legislation.
  - Bill 22 failed to address many key recommendations from prior Committees. There is presently no requirement for the BC Government to act or even respond in detail to the recommendations made by these Committees.
- The combined impact is that recommendations that could improve transparency in BC – based on a hard-won consensus built across party lines routinely go to waste.

The Solutions

- The administration of transparency legislation should be transparent. We recommend that an annual report be tabled annually rather than at some arbitrary later date. Failure to meet this requirement should result in penalty to the minster.
- We call on the Committee to recognize that the Bill 22 process, as led by the Minister of Citizens' Services, short-circuited and undermined the work of this Committee.
- Institute mechanisms that require the BC Government to formally respond and treat Committee recommendations seriously, based on their merits and respect for the all-party efforts and input from civil society that gave rise to them.

2. Duty to Document

The Problem

- The *Information Management Act* (IMA) is not fit for purpose. It lacks oversight, enforcement and fails to reflect the recommendations of previous Committees. The result is that there are minimal legal requirements for employees of public bodies to keep records of important government business decisions.
- The IMA does not apply to the range of public bodies captured under the *Freedom of Information and Protection of Privacy Act* (FIPPA). The IMA focuses primarily on Provincial Ministries and Bodies, it largely excludes Municipalities and local public bodies.

The Solution

- Legislate a duty to document within FIPPA which has embedded oversight.

3. Resourcing, Culture and Training

The Problems

- Freedom of information (FOI) continues to be set up to fail by successive governments, creating a system that is impenetrable and inaccessible.
  - There is a patchwork approach and uptake of FIPPA and privacy training for government employees.
  - The training that is acted upon emphasizes the risk of release leading to secrecy by default rather than by exception.
  - Secrecy by default reduces the public's access to information driving up the need for FOI requests, corresponding complaints, and for the public to pay the new application fee.
  - The Information Access Office (IAO), privacy teams, and the Office of the Information and Privacy Commissioner (OIPC) are not adequately resourced to ensure timely, accurate, and comprehensive access to information.

The Solutions

- Encourage executive leadership in all government institutions to champion improved FOI by shifting organizational culture from secrecy to transparency by default.
- Development plans to improve transparency, with specific objectives, should be developed, implemented, and reviewed annually.
- Provide, monitor, and report on FIPPA training to provincial government employees broken-down by ministry. Ensure training encourages both a culture of transparency, and a knowledge of FIPPA.
- Increase resources for IAO, privacy teams, and the OIPC to address the backlog and delays.
- The contents of the FIPPA s. 68 Government annual report should be defined by this Committee and the OIPC.

4. Fees

The Problem

- Application fees for filing FOI requests create barriers.
    - As expressed by the Ministry of Citizens' Services, the purpose of the fees was to reduce the number of requests to clear the backlog.
    - The provincial government in its leadership position establishes acceptable behaviour and example for other public bodies to follow. Their implementation of a fee to discourage FOI requests sets precedent across the province. Within two months of Bill 22 passing, it was similarly implemented by a Municipality seeking to limit public access to records. More will inevitably follow.
    - The fees do not serve as a cost recovery but a deterrent to use. The intended consequence is to reduce the use of FOI.
    - It functions as a regressive transparency tax that disproportionately affects students, smaller media outlets, and marginalized groups. It is also inflexible, as it lacks a mechanism to waive fees.

The Solutions

- Remove the prescribed application fee from regulation to remove the transparency tax.
- Failing this, enable a means for an affordability or public interest-based test for fee waivers with a mechanism for automatic exemptions for some applicants.

5. Scope of FIPPA

The Problem

- Key corporations and agencies created by public bodies are not automatically subject to FIPPA, creating an accountability gap.
- Other legislations continue to override the application of FIPPA.
    - A large and growing number of statutes expressly exempt themselves from the application of FIPPA
    - Acts that override the operation of FIPPA undermine the information rights of British Columbians
- The Government has failed to act on its own promise with an all-party agreement to increase transparency through the inclusion of offices of the Legislative Assembly under the scope of FIPPA.

The Solution

- Amend FIPPA's scope to automatically include all organizations delivering public services or carrying out a governmental function.
    - This is particularly relevant as the number of data-sharing initiatives and public-private partnerships are increasing. The collection of personal information by private organizations that intersect public bodies functions lead to a potential conflict between application of the *Personal Information Protection Act* (PIPA) and FIPPA. A relevant example is Bar Watch.
- Recognizing the quasi-constitutional nature of transparency law, overrides of FIPPA should be rare, well documented, reviewed on a set schedule, and fully and publicly justified.
- Implement the transparency changes agreed upon by House leaders and recommended by Independent Offices of the Legislative Assembly to the Legislative Assembly.

6. Exemptions

The Problem

- A culture of secrecy by default results in over-application of exemptions, which in turn trigger complaint and review processes, leading to backlog and friction in the system.
    - Decreasing trust in government institutions means when exemptions are applied, the requester has little faith it was done without ulterior motives.
- Examples of exemptions that are routinely used to reduce transparency include:
    - The "policy advice and recommendations" exception (s. 13) that has been expanded over time to prevent disclosure of too many records
    - The mandatory exception (s. 12) for Cabinet and local public body confidences that prevents the disclosure of records where there is a strong public interest. The number of cabinet records continues to increase.

The Solutions

- By enacting the recommended policy changes to improve and shift to a culture of transparency, many of these problems would be addressed.
- Not everything is a cabinet document. If the numbers continue to increase at this rate the cabinet exception will need to be discretionary, rather than mandatory, so that cabinet records can be released if public interest outweighs the reason for the exception.
- Specific to section 13(2), review the existing information categories to ensure that the list is comprehensive enough to facilitate transparency, and provide clear guidance on what constitutes factual, investigative or background materials. Then once reviewed, enable proactive release of these categories of records.
- Encourage public bodies to routinely release information that is specifically excluded from coverage of the advice and recommendations.

7. Supporting Indigenous Access

The Problem

- Colonization and associated attitudes, policies and institutions exclude Indigenous peoples from access to information and privacy afforded to others, failing to recognize the right to self-determination.
    - Sections 13 and 18.1 of FIPPA enable Government to apply an exemption on behalf of Indigenous Peoples without consulting Indigenous People. This fails to meet the duty to consult requirement within United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
- Many historical records relevant to decolonization remain sealed or inaccessible, presenting a barrier to reconciliation.

The Solutions

- Consult with Indigenous peoples on ways to improve their access to information and privacy.
    - Explore ways to support Indigenous peoples' access to historical records held by both governmental and non-governmental bodies including churches.
- Ensure that a duty to consult and cooperate in good faith, as prescribed in the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) s. 3, is exercised to support self-determination when applying exemptions within FIPPA section 18.1.
- Amend the word "may" under s. 23(2) to "shall".

8. Timing and Delays

The Problem

- Access delayed is access denied.
    - It routinely takes too long for records to be released.
    - FIPA has seen an increase in public bodies claiming extensions under s.10 and seeking consent for additional deadline extensions. These extensions seem to be sought in routine or standard practise rather than "in limited circumstance."
    - Delays in providing access to records erode public trust in government.
- Timeliness shows a growing backlog increasing concerns as cited in the Special Report by the Commissioner.

The Solutions

- The government should implement the recommendations found in the Special Report Now is the time from the OIPC.
- Provide clarity around the use of extensions by public bodies and when a public body can ask a requester for consent to extend deadlines.
- To disclose records more promptly, examine options for automating FOI processes, automatically triggering proactive disclosure, and streamlining signoff procedures.
- Heads of public bodies that create unjustified delays, including deemed refusals, should be held accountable. A pattern of deemed refusal should be subject to consequences under section 65.6.

9. Proactive Disclosure

The Problem

- Issues around s. 71 proactive disclosure are well documented.
- There are many categories of records that are routinely requested and released that are not captured by existing proactive disclosure plans.
- Citizens are forced to repeatedly submit the same requests, and this inefficiency contributes to backlogs in the FOI system and poor user experience.
- The new Transparency Tax makes those requesting information bear the cost of accessing categories of records that could or should be proactively and routinely released.

The Solutions

- The government should implement the recommendations found in OIPC Investigation Report 20-01.
- Require proactive disclosure of key categories of records that are routinely requested and released. Maintain ministerial orders but reduce political involvement.
- Enable transparent reporting to and monitoring of routinely requested and released records by the OIPC for them to report on and publicly recommend changes to categories of records for proactive disclosure through Ministerial Order.

10. Privacy implications of data residency.

The Problem

- Data residency requirements were removed.
    - This is counter to prior Committee recommendations, which recognized that data residency protections benefit the privacy and security of the data and information of British Columbians.
    - As evident in the current context of unstable geopolitical conflicts and cyber warfare, the loss of data residency increases the risk to the privacy of British Columbians at precisely the time it is needed the most.

The Solutions

- Ensure that the regulations and resourcing that government implements work beyond ministries and are scalable to local public bodies.
    - There is little doubt that large public bodies will be able to maintain some degree of security in these new scenarios assuming resource allocation appropriately.
    - Malicious actors can target smaller public bodies as easily as large public bodies for valuable information. Regulations and guidance need to be scalable from the ministries with departmental staff to the local water district or drop-in health clinic with community volunteers. The government must not set smaller public bodies up for failure.

11. In Conclusion

- In conclusion there are well documented and researched intersections between transparency and trust in government. Multiple studies over time document the reduction in trust of public bodies correspond with perceived and/or real reduction in transparency.
- When a scandal occurs there is a defensive reaction to blame the legislation that enabled the release of information rather than the wrongdoing in the scandal itself.
- The onus is currently on the public to make a request to gain access to public information empowering the government to redact and withhold information because of the risk of release.
- There are ways to reverse this onus. The clearest example is the *Government Information Public Access Act* (GIPA) in New South Wales Australia. Unlike s. 25 of FIPPA where records are only proactively released if disclosure is in the public interest, s. 6 of GIPA mandates proactive disclosure unless the proactive release is against public interest. However, even in this reversed onus, tone from the top and culture impact effectiveness under the Act.
- A more detailed written submission will follow.