



# **Submission to the Special Committee to Review the Freedom of Information and Protection of Privacy Act**

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## Territorial Acknowledgement

FIPA acknowledges with respect the Indigenous Peoples on whose traditional territory we conduct activities. We acknowledge the insight and knowledge of Elders past, present, and emergent and their relationship to this land and these issues. While striving to increase privacy protection and access to information for everyone, we recognize that colonization and associated attitudes, policies and institutions have significantly changed Indigenous Peoples' relationship with this land. For many years, those same things served to exclude Indigenous Peoples from the privacy protection and access to information afforded to others. FIPA is committed to redressing those historic and continued barriers.

## Institutional Funders

The BC Freedom of Information and Privacy Association thanks the Law Foundation of BC and all our contributors including donors, funders, and volunteers for their ongoing support of our advocacy, programs, projects, and activities. We also acknowledge the financial support of the Province of British Columbia (Gaming Policy and Enforcement Branch).



## About FIPA

The BC Freedom of Information and Privacy Association (FIPA) is a non-partisan, non-profit society that was established in 1991 to promote and defend freedom of information and privacy rights in Canada. While we are based in BC, our membership extends across Canada and we regularly partner with organizations throughout the country.

Our goal is to empower citizens by increasing their access to information and their control over their own personal information. We serve a wide variety of individuals and organizations through programs of public education, public assistance, research, and law reform. We are one of very few public interest groups in Canada devoted solely to the advancement of freedom of information and privacy rights.

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## Introduction

The *Freedom of Information and Protection of Privacy Act* (the “FIPPA”) exists at the intersection of access to information and privacy rights.

Specifically, it:

- outlines how public bodies protect the privacy and manage the personal information of the people they interact with, and;
- empowers people to access the information held by public bodies so they can trust and understand the decisions and actions made by those public bodies.

Access to information is a right for all Canadians and a crucial tool for promoting transparency and accountability within public institutions. The Supreme Court of Canada, citing Professor Donald C. Rowat, stated that:<sup>1</sup>

[t]he overarching purpose of access to information legislation... is to facilitate democracy... [by helping] to ensure... that citizens have the information required to participate meaningfully in the democratic process... [and that] politicians and bureaucrats remain accountable to the citizenry.

A number of extraordinary events over the past year have highlighted the crucial need for a strong access to information regime.

For example:

- The COVID-19 pandemic has led to broad reliance on public health data for individuals to keep themselves safe and for organizations to plan their emergency responses. Access to timely, reliable government information about the spread of the virus and the extraordinary measures taken by governments to respond to the pandemic has been critical.

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<sup>1</sup> *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at para 113.

- The tragic discovery of burial sites of Indigenous children at numerous former Indian Residential Schools has highlighted the need for access to historical records for achieving true and lasting reconciliation.

These events show how important access to information held by public bodies can be and how critical it is to improve the current system.

Privacy has long been considered a fundamental right in Canada. Section 8 of the *Canadian Charter of Rights and Freedoms*, along with the federal *Privacy Act* and British Columbia's legislation, work together to protect people with respect to their personal information held by public bodies or private institutions. Some of the largest data sets that reflect and impact people's lives are held by public bodies. This makes them both a resource that can be abused by those in power and a high-value target for a variety of actors seeking to profit from it. A number of extraordinary events highlight the crucial need for stronger privacy consideration by public bodies. For example:

- The Cambridge Analytica scandal highlights the dangers to democracy when large data sets are misused by political actors (domestic and foreign) with mal-intent.
- Mismanagement puts information at risk. A data breach at Life labs affected the personal health information of 15 million patients in Ontario and British Columbia. This intersects both the Government's responsibility in managing the personal health information of British Columbians and the companies they contract to provide that service.
- Increasing external threats lead to more cyberattacks from hackers targeting public bodies to both gain access to the information and hold it hostage for release.

- The Clearview AI scandal was investigated by multiple Canadian Privacy Commissioners. Their investigations revealed the use of scraped personal info by private and public sector actors to develop privacy-impacting biometric technologies.<sup>2</sup> This highlights the serious challenges faced when trying to protect British Columbians' privacy in a world where surveillance technologies transcend jurisdictions.

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<sup>2</sup> Order P21-08.

# Problems and Solutions

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

### The Problem

- Actions by successive ministers in government have undermined the *FIPPA*, and the combined impact is that transparency in BC has deteriorated since the Act came into force in 1993.

### The Solution

- Adhere to the Act and institute mechanisms that require BC government to seriously consider the recommendations of the all-party Special Committee.

The administration of transparency legislation should be transparent. Section 68 of the *FIPPA* requires the Minister responsible for the Act to, “prepare an annual report on its administration and lay the report before the Legislative Assembly as soon as possible.” However, many ministers failed to comply with the Act by not tabling a report annually. Consequently, the ministers reduce the transparency of the legislation that is intended to ensure transparency. No annual report on access to information has been published since 2018-19. Additionally, for the past 9 years, the ministers showed a pattern of tabling an “annual” report “semi-annually” at best— these practices clearly contravene s. 68 of the *FIPPA*, which requires the annual tabling of a report.

It is important to note that in the absence of an Annual Report from the Minister of Citizens’ Services, many of the figures used to quantify activities under the Act in the 2019/20 and 2020/21 fiscal years can only be found in reviews conducted by the Office of the Information & Privacy (the “OIPC”). It should not be overlooked that an annual report in 2021 could have informed the discussions around Bill 22 and the work of the Committee.

**Recommendation 1: We recommend that legislation be amended to require an annual report be tabled annually rather than at some arbitrary later date.**

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 consultations and make recommendations to the existing legislation. Pursuant to s. 80 of the *FIPPA*, a special committee must review and report on the Act at least every 6 years. This report usually includes recommended amendments to the Act. By amending the legislation a few months before the formation of the Committee, the Minister disregarded the role and the work of the Committee and the democratic purpose it serves.

Additionally, Bill 22 failed to address many key recommendations from prior Committees.<sup>3</sup> There is presently no requirement for the BC government to act or respond in detail to the recommendations made by these Committees.

**Recommendation 2: We call on the Committee to recognize that the process of passing Bill 22, as led by the Minister of Citizens’ Services, short-circuited and undermined the work of this Committee.**

**Recommendation 3: We support any calls from the Committee to request mechanisms requiring the BC government to formally respond to and treat Committee recommendations seriously based on their merits, respect for the all-party efforts, and input from civil society through open consultation.**

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<sup>3</sup> Office of the Information & Privacy Commissioner for British Columbia, *General briefing for the Special Committee to Review the Freedom of Information and Protection of Privacy Act* (OIPC, 31 January 2022) at 18 – 23, online: <<https://www.oipc.bc.ca/legislative-submissions/3635>>.

## 2. Duty to Document

### The Problem

- The *Information Management Act* (the “*IMA*”) is not fit for its purpose. The *IMA* lacks oversight, enforcement and fails to reflect the recommendations of previous Special Legislative Committees reviewing the *FIPPA*. 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 *FIPPA*. The *IMA* focuses primarily on Provincial ministries and bodies, and it largely excludes municipalities and local public bodies.

### The Solution

- Legislate a duty to document within the *FIPPA*.

A duty to document is a requirement for public officials to create full and accurate records of both decisions made and procedures followed to make decisions in government. This includes a requirement to create records about business activities carried out solely by phone, instant messaging or videoconferencing.

Business practices have shifted over the course of the pandemic to accelerate the adoption of new communication technologies that facilitate remote work. This shift has led to concerns that important business decisions are not being properly documented.<sup>4</sup> In light of the fundamental shifts in the way public bodies are carrying out their functions, it is now more important than ever to enshrine a legal duty to document within the *FIPPA*.

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<sup>4</sup> Luciana Duranti et al, “Duty to Document Webinar, Canadian Institute for Information and Privacy Studies” (16 April 2021), online (webinar): *Canadian Institute for Information and Privacy Studies* <<https://www.infoandprivacy.ca/duty-to-document/>>.

A duty to document is fundamental to the success of any access to information system. It ensures that records exist to be accessed and improves public trust. It benefits institutions themselves by preserving a historical record and facilitating evidence-based decision making.<sup>5</sup>

Several international jurisdictions have a legal duty to document within their access to information legislation. New Zealand legally requires every public office to create and maintain full and accurate records of its affairs in an accessible form for subsequent reference.<sup>6</sup> The US federal law requires institutions to make and preserve records containing adequate and proper documentation of decisions, procedures, and essential transactions.<sup>7</sup>

In designing a duty to document provision for Canada, these international best practices could be followed. Marc Kosciejew, a senior lecturer at the University of Malta, notes that there are several key components that should be included in any duty to document provision:<sup>8</sup>

1. it must require the creation of appropriate records to describe the activities and decisions of public institutions;
2. it should include practical guidance on records management standards to ensure records are authoritative and complete; and
3. it must be enforceable, with reasonable sanctions for non-compliance.

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<sup>5</sup> Information Commissioner of Canada, *Statement of the Information and Privacy Commissioners of Canada on the Duty to Document*, last modified 30 November 2020 (IPC), online: <<https://www.oic-ci.gc.ca/en/statement-information-and-privacy-commissioners-canada-duty-document>>.

<sup>6</sup> *Public Records Act 2005* (NZ), 2005/40.

<sup>7</sup> 44 USC §3101 (1968)

<sup>8</sup> Marc Kosciejew, “Establishing a Duty to Document: The Foundation for Access to Information” (2016) 50:3 *Information Management J* at 34.

In 2019, the BC government made changes to the *IMA* to address concerns about record retention and disposal practices. Specifically, the amendment empowered the Chief Records Officer and required the head of a government body to ensure that there is a system in place for creating and maintaining records of government decisions. Government communications touted these changes as creating a duty to document for the BC government and said they would improve transparency and accountability. FIPA does not believe that the *IMA* as it currently stands is an adequate replacement for a duty to document within the *FIPPA*.

One of the biggest issues with the *IMA* is lack of oversight. Pursuant to s. 19, it makes the head of a government body responsible for ensuring that a government body has an appropriate documentation system. If a problem arises, government is left to its own devices without public scrutiny and may unilaterally choose to act or not without any independent oversight. Michael McEvoy, the current Information and Privacy Commissioner (the “Commissioner”) of BC, criticized this lack of oversight. The Commissioner stated that the lack of authority of his office to serve as an independent oversight of the “vital duty to document” is “a significant shortcoming of [*FIPPA*].”<sup>9</sup>

In 2016, New Democratic Party (NDP) MLA Doug Routley introduced a Member’s Bill to reflect the party’s commitment to increase transparency.<sup>10</sup>

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<sup>9</sup> Office of the Information & Privacy Commissioner for British Columbia, *Statement from BC Information and Privacy Commissioner regarding independent oversight over government’s duty to document and use of personal communication tools*, by Michael McEvoy (OPIC, 17 May 2019), online: <<https://www.oipc.bc.ca/news-releases/2312>>.

<sup>10</sup> Bill M 207, *Government Records Accountability Act, 2016*, 5th Sess, 40th Leg, British Columbia, 2016 (first reading 10 March 2016).

The duty to document is at the core of this Member’s Bill. This has not been acted upon in Bill 22.

The *FIPPA* does not create a positive duty to document for government employees. It only requires that the head of a public body put in place an “appropriate system” for creating and maintaining records. The system is not specified and the government’s own Practitioner’s Guide states that there is “significant flexibility for government bodies to determine what [constitutes] an appropriate system.”<sup>11</sup> The *IMA* does not have any penalties for non-compliance, and it is not overseen by the OIPC.

We continue to advocate for a mandatory duty to document that is embedded directly within the *FIPPA*. This was one of the recommendations of the all-party Special Committee that reviewed the *FIPPA* in 2016. Additionally, the same was recommended by former Information and Privacy Commissioners David Loukidelis and Elizabeth Denham.<sup>12</sup>

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<sup>11</sup> British Columbia, Ministry of Citizens’ Services, *A Practitioner’s Guide to the Information Management Act* (Guide), Ministry of Citizens’ Services (Ministry of Citizens’ Services, 18 May 2021) at 6, online (pdf): <<https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/crown-corporations/central-agencies/practitioners-guide-information-management-act.pdf>> [Practitioner’s Guide].

<sup>12</sup> Office of the Information & Privacy Commissioner for British Columbia, *Access Denied: Record Retention and Disposal Practices of the Government of British Columbia*, by Elizabeth Denham, Investigation Report F15-03 (OIPC, 22 Oct 2015), online: <<https://www.oipc.bc.ca/investigation-reports/1874>>.

In fact, information commissioners in Canada at both the federal and provincial levels have been calling for a legislated duty to document since the 1990s.<sup>13</sup> The time has come to finally answer these calls and create a legal duty to document within the *FIPPA*, backed up by penalties for non-compliance and oversight by the OIPC.

**Recommendation 4: Embed a legal duty to document within the *FIPPA*.**

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<sup>13</sup> Information and Privacy Commissioner of Canada, *Backgrounder: Duty to document*, last modified 25 September 2019 (IPC, 25 January 2016), online: <<https://www.oic-ci.gc.ca/en/resources/news-releases/backgrounder-duty-document>>.

### 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.
  - The government has applied a patchwork training approach with varying uptake of the *FIPPA* and privacy training for public body 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 officers, and the OIPC are not adequately resourced to ensure timely, accurate, and comprehensive access to information.

#### The Solutions

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

#### *Resourcing*

The number of access requests received by the government of BC has increased substantially in recent years. According to the Ministry of Citizens' Services, the number of access-to-information requests received by the BC government has increased from 9,310 in 2016/17 to 13,079 in 2019/20, an

increase of approximately 40%.<sup>14</sup> Although this number decreased in 2020/21, the number of pages of relevant records increased. Freedom of information teams in each BC government ministry need to be properly resourced and equipped to deal with this large increase in requests and to ensure that access is provided in a timely manner.

In addition, there is also a critical need to expand resourcing for the OIPC. The Commissioner plays a critical role in overseeing the FOI system and upholding British Columbians' access rights. In their 2019/20 Annual Report, the OIPC indicates that they received a total of 661 requests for review of government decisions to withhold information or deemed refusals. They also received more than 6,500 requests from government bodies to extend timelines to respond to FOI requests (nearly double the number of requests they received the year before).<sup>15</sup> The OIPC is inundated with requests from both the public and government in relation to the administration of the FOI system.

The OIPC needs additional resources to ensure the office can respond to the thousands of annual complaints it receives, to initiate its own investigations on systemic issues and to provide guidance to government institutions.

**Recommendation 5: We call on the provincial government to provide adequate resourcing for privacy and access to information operations to**

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<sup>14</sup> British Columbia, Ministry of Citizens' Services, *2019/20 Annual Service Plan Report* (Ministry of Citizens' Services, 18 June 2020) at 11, online (pdf): <[https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/citizens-services/spr\\_citz.pdf](https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/citizens-services/spr_citz.pdf)>.

<sup>15</sup> Office of the Information & Privacy Commissioner for British Columbia, *Annual Report 2019-2020* (OIPC, August 2020) at 22, online: <<https://www.oipc.bc.ca/annual-reports/3456>>; Office of the Information & Privacy Commissioner for British Columbia, *Annual Report 2018-2019* (OIPC, October 2019) at 22, online: <<https://www.oipc.bc.ca/annual-reports/2347>>.

support compliance efforts for every public body and to adequately support the OIPC to allow them to properly carry out their functions.

### *Culture*

Individuals making use of the access to information system have long complained of a culture of secrecy within the BC government, where information is guarded and there is a presumption against disclosure. As an example, the provincial government was recently named the winner of the “2021 Code of Silence Provincial Award for Outstanding Achievement in Government Secrecy” by the Centre for Free Expression.<sup>16</sup>

Even where information is released, it often comes with heavy and unnecessary redactions. Government culture must shift broadly towards more openness and transparency. This cultural change needs to come from the top-down, with senior leadership and head of public bodies articulating their support for the access to information system and setting a tone of openness. Former Information Commissioner of Canada Suzanne Legault wrote:<sup>17</sup>

Executive leadership is the key to how well institutions fulfill their obligations under the Act. As the policy centre, the Treasury Board of Canada Secretariat is responsible for giving institutions the guidance they need to implement the Act correctly. Within institutions, it is the head and the officials with delegated authority who are ultimately accountable.

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<sup>16</sup> Centre for Free Expression, “B.C. government’s short-circuiting citizens from accessing their rights to information earned it the 2021 Code of Silence Provincial Award for Outstanding Achievement in Government Secrecy” (Toronto: 8 February 2022), online: *Centre for Free Expression* <<https://cfe.ryerson.ca/news/bc-government%E2%80%99s-short-circuiting-citizens-accessing-their-rights-information-earned-it-2021>>.

<sup>17</sup> Office of the Information Commissioner of Canada, *Out of Time: 2008-2009 Report Cards: Systemic Issues Affecting Access to Information in Canada*, by Suzanne Legault, (Special Report) (Ottawa: IPC, April 2010) at 12.

It is difficult to change the culture of an organization, but such a change is much needed to enable our access to information system to move forward.

**Recommendation 6: Improve government culture surrounding access to information by clearly articulating the principles behind the access system and encouraging executive leadership in all public bodies to champion improved access to information.**

### *Training*

All employees of public bodies need to have a better understanding of the purpose of the access to information system and their role within it. This extends beyond access to information coordinators to all employees creating records that can be accessed by external requesters.

Government's training often focuses on a large bureaucratic solution that is not scalable for smaller local public bodies and currently has a culture of secrecy. To address these issues, the OIPC should be granted the resources to provide mandatory training modules for all employees of public bodies at every level that explains the purpose and importance of the *FIPPA*. It should also provide practical guidance on how to maintain, organize and search for records. Part of the training should include going through the process of submitting an FOI request so that employees see the system from the perspective of an external applicant.

Employees of public bodies should also be provided with ongoing communications about the importance of access to information. This should include positive stories about what requesters have accomplished using information they received through the FOI system.

**Recommendation 7: The OIPC should provide, monitor, and report on the *FIPPA* training to provincial government employees broken-down by ministries and begin the process of addressing the issues in training and support for smaller public bodies.**

## 4. Fees

### The Problem

- Application fees for filing FOI requests are a barrier to access rights.

### The Solution

- Remove the prescribed application fee to eliminate what is effectively a tax on transparency.
- Alternatively, enable a means for an affordability or public interest-based test for fee waivers with a mechanism for automatic exemptions for some applicants.

Bill 22 introduced a fee to file an FOI request. Pursuant to s. 75(1)(a) of the *FIPPA* and s. 13(2) of the Freedom of Information and Protection of Privacy Regulation, public bodies may charge a \$10 application fee for general FOI requests. As expressed by the Ministry of Citizens' Services, the purpose of the fee was to solve the problem of response time created due to the high number of FOI requests.<sup>18</sup> The fee does not serve as a cost recovery; the intended consequence was to deter FOI requests for specific information being sent to many ministries.<sup>19</sup> Acting Deputy Minister gave an example that with the fee in place, applicants will more likely send an FOI request for specific information "to the one or three ministries, potentially, that it is more relevant" instead of many more ministries.<sup>20</sup>

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<sup>18</sup> British Columbia, Special Committee to Review the Freedom of Information and Protection of Privacy Act, *Meeting Transcript*, 42-2, No 3 (3 February 2022) [SLC]; Tom Fletcher, "B.C. Sets \$10 fee for non-personal public information requests," *Victoria News* (29 November 2021), online: <<https://www.vicnews.com/news/b-c-sets-10-fee-for-non-personal-public-information-requests/>>.

<sup>19</sup>SLC, *supra* note 18.

<sup>20</sup>*Supra* note 18.

The application fee functions as a regressive transparency tax that disproportionately affects students, smaller media outlets, and marginalized groups. It is inflexible and lacks a mechanism to waive fees.

The wording of the provision is permissive, giving public bodies the discretion to charge the application fee; however, the Ministry of Citizens' Services seems to encourage all public bodies to charge this fee by stating that, "a non-refundable application fee of \$10 will now appl[y] to all general FOI requests. This fee must be paid before the request will be processed..."<sup>21</sup> In contrast, the Commissioner is discouraging the use of this fee. In his speech to the Committee, the Commissioner emphasized that the application fee is optional and advocated all public bodies to "forego charging their citizens a fee for making an access to information request."<sup>22</sup>

The fee is designed to create a barrier for anyone seeking to access information and create a chilling effect on people submitting requests. An online poll by Ipsos shows that 61% of responding British Columbians oppose the implementation of the application fee.<sup>23</sup> It could have significant impacts on free press, especially for smaller local outlets, many of whom have limited financial resources.

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<sup>21</sup> British Columbia, Ministry of Citizens' Services, *Application fee for General Requests* (Ministry of Citizens' Services, January 2022) online (pdf): [https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/information-management-technology/information-privacy/resources/2021-amendments/foippa\\_amendments\\_application\\_fee.pdf](https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/services-policies-for-government/information-management-technology/information-privacy/resources/2021-amendments/foippa_amendments_application_fee.pdf).

<sup>22</sup> Office of the Information & Privacy Commissioner for British Columbia, *Speech to the Special Committee to Review the Freedom of Information and Protection of Privacy Act*, by Michael McEvoy (OIPC, 3 February 2022) at 4, online: <https://www.oipc.bc.ca/speeches/3636> [Speech].

<sup>23</sup> Catherine Knaus, "British Columbians' Views on Freedom of Information and Privacy" (16 November 2021), online: *Ipsos* <<https://www.ipsos.com/en-ca/news-polls/british-columbians-views-on-freedom-of-information-and-privacy>> [Ipsos].

This seemingly inexpensive fee is the third highest in Canada.<sup>24</sup> The provincial government in its leadership position is establishing an example for other public bodies to follow; their implementation of a fee to discourage FOI requests sets a 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.<sup>25</sup> More will inevitably follow.

**Recommendation 8: Remove the prescribed application fee or put in place mechanisms to waive this fee.**

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<sup>24</sup> Shannon Waters, “FOI filings now 10 bucks a pop,” *British Columbia Today* (20 November 2021), online: <<https://www.politicstoday.news/british-columbia-today/foi-filings-now-10-bucks-a-pop/>>.

<sup>25</sup> Kiran Singh, “Surrey moves to charge \$10 for freedom-of-information requests, following province’s lead,” *CBC News* (24 January 2022), online: <<https://www.cbc.ca/news/canada/british-columbia/10-foi-surrey-1.6324993>>.

## 5. Scope of the *FIPPA*

### The Problem

- Key corporations and agencies created by public bodies are not automatically subject to the *FIPPA*, creating an accountability gap.
- Other legislations continue to override the application of the *FIPPA*.
- 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 the *FIPPA*.

### The Solution

- Amend the *FIPPA*'s scope to include all organizations delivering public services or carrying out governmental functions
- Recognizing the quasi-constitutional nature of transparency law, overrides of the *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.

The 2010 and 2016 Special Committee to *Review the Freedom of Information and Protection of Privacy Act* both recommended that subsidiary corporations of public bodies be subject to the *FIPPA*:

- The all-party Special Committee in 2016 recommended, “Extend[ing] the application of the *FIPPA* to any board, committee, commissioner, panel, agency, or corporation that is created or owned by a public body and all the members or officers of which are appointed or chosen by or under the authority of that public body.”<sup>26</sup>

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<sup>26</sup> British Columbia, Legislative Assembly, *Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act* (May 2016) at 35, online (pdf): [https://www.leg.bc.ca/content/CommitteeDocuments/40th-parliament/5th-session/foi/Report/SCFIPPA\\_Report\\_2016-05-11.pdf](https://www.leg.bc.ca/content/CommitteeDocuments/40th-parliament/5th-session/foi/Report/SCFIPPA_Report_2016-05-11.pdf) [2016 Special Committee].

- The all-party Special Committee in 2010 recommended, “Expand[ing] the definition of “public body” in Schedule 1 to include any corporation that is created or owned by a public body, including an educational body.”<sup>27</sup>

The amendments in Bill 22 fell short of manifesting the recommendations. Section 76.1 allows the Minister of Citizens’ Services to designate an agency, board, commission, corporation, office, or other body as a public body within the meaning of the *FIPPA* (provided that the entity meets certain criterium). However, this provision gives discretionary power to the Minister instead of automatically making entities carrying out public functions subject to the *FIPPA*.

There is a recent trend for some to exclude government bodies from FOI. Here in BC, the 1<sup>st</sup> Reading of Bill 22 attempted to remove the Premier’s office from the list of public bodies. In Alberta, the energy war room was structured to be beyond the scope of their *Freedom of Information and Protection of Privacy Act*.<sup>28</sup> It is fundamentally important to include government bodies by default.

Private entities performing public functions and services, whether or not publicly funded, should be subject to the *FIPPA*. Several private organizations

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<sup>27</sup> British Columbia, Legislative Assembly, *Special Committee to Review the Freedom of Information and Protection of Privacy Act* (May 2010) at 10, online (pdf): <https://www.leg.bc.ca/content/legacy/web/cmt/39thparl/session-2/foi/reports/PDF/Rpt-FOI-39-2-Rpt-2010-MAY-31.pdf> [2010 Special Committee].

<sup>28</sup> Janet French, “Alberta energy war room immune from Freedom of information law, rules adjudicator,” *CBC News* (22 March 2022), online: <https://www.cbc.ca/news/canada/edmonton/alberta-energy-war-room-immune-from-freedom-of-information-law-rules-adjudicator-1.6392887>.

such as bars, nightclubs and restaurants are able to collect personal information about individuals in association with programs such as Bar Watch and Restaurant Watch. However, these private organizations are subject to the *Personal Information Protection Act* (“PIPA”). Under *PIPA*, there is a lack of transparency regarding how personal information is protected from unauthorized collection, use, and disclosure.

The details of these various programs are completely opaque to citizens, and the nature of the information sharing between private venues and police agencies poses a significant risk to the privacy and liberty of individuals.

For example, an individual who shared their drivers licence information while dining in a participating restaurant had that information incorrectly recorded in a police database as he was labelled an associate of a gang member, a designation that can seriously impact employment and volunteering prospects due to civilian screening programs.<sup>29</sup> In another example, the Vancouver Police Department easily accessed personal information through the Bar Watch program that was used in a criminal investigation. The Supreme Court of BC found that this disclosure of information breached the patron’s reasonable expectation of privacy under s. 8 of the *Canadian Charter of Rights and Freedoms* and that the police should have obtained prior judicial authorization (e.g. a search warrant).<sup>30</sup> These instances highlight the legislative gap present in current legislation where private organizations

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<sup>29</sup> Letter from David Eby, Executive Director of BC Civil Liberties Association to Stan T. Lowe, BC Police Complaint Commissioner (23 January 2012) Re: *Vancouver Police Department policy complaint regarding collection and storage of personal information in PRIME-BC*, online (pdf): <<https://vancouverpoliceboard.ca/police/policeboard/agenda/2012/0222/SPCRCAgenda.pdf>>.

<sup>30</sup> *R v Roudiani*, 2018 BCSC 1101 at para 51.

performing public functions are not subject to the same levels of access and transparency on the collection, use, and disclosure of personal information as public organizations.

Other entities in this domain include the BC Association of Chiefs of Police, LifeLabs, and wholly owned subsidiaries of post-secondary institutions.<sup>31</sup> Once again, these organizations are private by designation and not subject to FOI requests; therefore, individuals cannot inquire into the operations of these organizations, such as how they use, collect, and disclose personal information or public funds. Numerous public concerns have been raised regarding the actions of these private entities, yet legislative reform has not occurred. Organizations that exercise public functions, sometimes via public resources, should be required to be transparent and accountable to the public, regardless of whether they're public or private in nature.

**Recommendation 9: Expand the definition of public bodies to automatically cover entities performing public functions and services.**

Additional to entities performing public functions and services, two other government organizations should also be captured by the *FIPPA*. The Legislature is currently not subject to any transparency law, including the *FIPPA*, despite the government's promise of transparency reform following the Legislature spending scandal.<sup>32</sup> Following the scandal, the Commissioner, the Ombudsperson, and the Merit Commissioner drafted a joint letter for the

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<sup>31</sup> Order F09-06; Order F11-3; *Simon Fraser University v British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1481.

<sup>32</sup> "Farnworth promises transparency reforms to B.C. legislature after bombshell allegations," *The Canadian Press* (5 February 2019), online: <<https://bc.ctvnews.ca/farnworth-promises-transparency-reforms-to-b-c-legislature-after-bombshell-allegations-1.4283785>>.

Legislative Assembly to be subject to the *FIPPA*.<sup>33</sup> They called for the administrative functions of the Legislative Assembly to be, “subject to the same transparency and accountability rules as the more than 2,900 public bodies across the province.”<sup>34</sup> However, the Legislative Assembly is still not a public body within the meaning of the *FIPPA*.

The second government organization is the Executive Council Operations. Hidden amongst the changes, the Executive Council Operations has been removed from the list of public bodies covered by the *FIPPA*. As the Executive Council Operations has not been defined, the ramification of this removal is currently unknown. To prevent the potential narrowing of transparency rights of British Columbians, this organization should be re-included as a public body.

### **Recommendation 10: Include the Legislative Assembly and the Executive Council Operations to Schedule 2 of the *FIPPA*.**

A large and growing number of statutes expressly exempt themselves from the application of the *FIPPA*. There are currently at least 62 statutes that override the operation of the *FIPPA*, and 8 of these overrides were enacted after the previous Special Committee in 2016. Statutes that override the operation of the *FIPPA* undermine the information rights of British Columbians.

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<sup>33</sup> Letter from Michael McEvoy, Fiona Spencer, Jay Chalke to the Honourable Darryl Plecas, Speaker of the Legislative Assembly (4 February 2019) online (pdf): [https://bcombudsperson.ca/assets/media/Legislative\\_Reform\\_letter\\_LAMC.pdf](https://bcombudsperson.ca/assets/media/Legislative_Reform_letter_LAMC.pdf)

<sup>34</sup> *Ibid* at 2.

Bill 22 modernized the *FIPPA*; therefore, the overrides should be carefully considered and, given the quasi-constitutional nature of the *FIPPA*, repealed if the provisions are not justified.

**Recommendation 11: Recognizing the quasi-constitutional nature of transparency law, overrides of the *FIPPA* should be rare, well documented, reviewed on a set schedule, and fully and publicly justified. These records should be publicly available through proactive disclosure from the government.**

## 6. Exemptions

### The Problem

- A culture of secrecy by default results in over-application of exemptions, which in turn triggers complaints and review processes, leading to backlog and friction in the system.

### The Solution

- By enacting the recommended policy changes under Heading 3 [*Resourcing, Culture and Training*] to improve and shift to a culture of transparency, many of these problems would be addressed.

Decreasing trust in government institutions means that, when exemptions are applied, the requester has little faith it was done without ulterior motives.<sup>35</sup> Sections 12 and 13 are examples of exemptions that are routinely used to reduce transparency. Section 12 is a mandatory exception to disclosure to protect Cabinet and local public body confidence. Section 13 is a discretionary exception for policy advice and recommendations. Both sections allow public bodies to withhold advice and/or recommendations: “submitted or prepared for submission to the Executive Council or any of its committees” (s. 12); or “developed by or for a public body or a minister” (s. 13).

The courts widened the application of s. 13(1) by broadly defining the terms “advice and recommendation.”<sup>36</sup> The BC Appeal Court defined “advice” to “include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.”<sup>37</sup> Within the meaning of the *FIPPA*,

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<sup>35</sup> “Trust in Government” online: *OECD* <<https://www.oecd.org/gov/trust-in-government.htm>>.

<sup>36</sup> Speech, *supra* note 22 at 5.

<sup>37</sup> *College of Physicians of B.C. v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 113.

“recommendation” is not comprehensively defined but has a separate meaning from “advice.”<sup>38</sup>

Subsection 13(2) ineffectively attempts to narrow the scope of s. 13(1) by excluding, inter alia, factual, investigative or background materials from the exception. In Order F13-24, adjudicator Flanagan defined factual material as, “just that, a set of facts.”<sup>39</sup> However, factual material that is “assembled from other sources and becomes integral to the analysis and views expressed in the document” is protected under s. 13(1).<sup>40</sup> This protection is to prevent accurate inferences from being drawn about advice or recommendations. The result is that the “policy advice and recommendations” exception has been expanded over time to prevent disclosure of too many records.

The mandatory exception for Cabinet and local public body confidences prevents the disclosure of records where there is a strong public interest. Due to the broad interpretation of s. 12, the number of exempted cabinet records continues to increase. In *Aquasource Ltd. v British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, [1999] 6 WWR 1, the Court stated at para 41 that s. 12 “must be read as widely protecting the confidence of Cabinet communications.”

Due to its broad nature, the cabinet exception should be discretionary, rather than mandatory, so that cabinet records can be released if public interest

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<sup>38</sup> *Ibid* at para 99.

<sup>39</sup> *Ibid* at para 18.

<sup>40</sup> *Insurance Corporation of British Columbia v Automotive Retailers Association*, 2013 BCSC 2025 at para 52.

outweighs the reason for the exception. The OIPC supports making this exception discretionary and allowing Cabinet to waive the exception.<sup>41</sup>

**Recommendation 12: Government should review the existing categories of information that cannot be withheld under s. 13(2) 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.**

**Recommendation 13: Public bodies should be encouraged to routinely identify those records that are not subject to exemptions and implement mechanisms to release these without Ministerial intervention.**

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<sup>41</sup> Office of the Information & Privacy Commissioner for British Columbia, *OIPC Response to Stakeholder Recommendations to the Special Committee to Review the Freedom of Information and Protection of Privacy Act*, by Elizabeth Denham (OIPC, 8 March 2016) at 9 – 10, online: <<https://www.oipc.bc.ca/legislative-submissions/1935>>.

## 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.
- Key historical records relating to Indian residential schools remain sealed, presenting a barrier to reconciliation

### The Solution

- Consult with Indigenous Peoples on ways to improve their access to the FOI system
  - Explore ways to support Indigenous Peoples' access to historical records on Indian residential schools held by both governmental and non-governmental bodies
- Ensure that a duty to consult and cooperate in good faith, as prescribed under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and s. 3 of the *Declaration on the Rights of Indigenous Peoples Act (DRIPA)*, is exercised to support self-determination when applying exemptions within s. 18.1 of the *FIPPA*.
- Amend the word “may” under s. 23(2) to “shall.”

The *FIPPA* enables the Government to apply an exception on behalf of Indigenous Peoples without consulting Indigenous Peoples. Bill 22 introduced a provision that allows public bodies to refuse disclosure of information that is harmful to Indigenous People, s. 18.1. Previously, such information was withheld under s. 13. There is no requirement for a public body to notify the owner of the information when withholding that information pursuant to s. 13. To withhold information under s. 18.1, there is only a discretionary notification provision. Under s. 23(2), public bodies may opt not to notify the relevant Indigenous Peoples when there is an FOI request for their information. The discretionary nature of s. 23(2) fails to meet the duty to consult requirement under UNDRIP and s. 3 of *DRIPA*.

Most recently, the BC government announced a new Action Plan to advance the Rights of Indigenous Peoples which includes a commitment to more transparent processes. Specifically, provision 2.4 of the Action Plan describes the intention to "negotiate new joint decision-making and consent agreements under section 7 of the [*DRIPA*] that include clear accountabilities, transparency and administrative fairness between the Province and Indigenous governing bodies."<sup>42</sup> This degree of commitment to transparency should also be reflected in s. 23(2) of the Act." [insert citation].

Subsection 18.1(2) allows the relevant Indigenous governing entity to consent to the disclosure of the Indigenous Peoples' information impugned under s. 18.1(1). However, it is virtually impossible to give consent without being notified of the FOI request.

**Recommendation 14: Make the discretionary notification provision, under subsection 23(2) of the Act, mandatory for Indigenous Peoples' records.**

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<sup>42</sup> British Columbia, Ministry of Indigenous Relations and Reconciliation, *Declaration on the Rights of Indigenous Peoples Act Action Plan*, (Ministry of Indigenous Relations and Reconciliation, 2022) online (pdf): [https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration\\_act\\_action\\_plan.pdf](https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf).

## 8. Timing and Delays

### The Problem

- Access delayed is access denied.
  - Public bodies routinely take too long to release records.
  - 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, which subsequently increases concerns, as cited in the [Special Report Now is the time](#) by the Commissioner.

### The Solution

- 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.

The average processing time for FOI requests in 2019/20 was 49 business days, compared to the legislatively mandated time frame of 30 days pursuant to s. 7 of the *FIPPA*.<sup>43</sup> Additionally, in the same fiscal year, only 55% of FOI requests were processed within the legislatively mandated response time of

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<sup>43</sup> Office of the Information & Privacy Commissioner for British Columbia, *Now is the time: A report card on government's access to information timeliness* (OIPC, 2 September 2020) at 13, online: <<https://www.oipc.bc.ca/special-reports/3459>>.

30 business days.<sup>44</sup> This is at least an eight-year low.<sup>45</sup> Yet, the BC government is still claiming to be “on time” for 83% of FOI requests. This “on time” figure is skewed by regularly claiming extensions under s. 10 and routinely seeking consent for added deadline extensions. This is a departure from extensions sought “in limited and exceptional circumstance.”

Under s. 10(1) of the *FIPPA* public bodies may extend the time limit for responding to an FOI request for up to 30 days in four situations, three of which can be unilateral:

- (a) the applicant does not give enough detail to enable the public body to identify a requested record;
- (b) a large number of records are requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body;
- (c) more time is needed to consult with a third party or other public body before the head can decide whether or not to give the applicant access to a requested record; and
- (d) the applicant has consented, in the prescribed manner, to the extension.

The OPIC clarified that s. 10 extension cannot be utilized, inter alia, when:<sup>46</sup>

- the operation has not been allocated sufficient resources,
- long term or systemic problems, and
- vacations.

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<sup>44</sup> *Ibid* at 11.

<sup>45</sup> *Ibid*.

<sup>46</sup> Office of the Information & Privacy Commissioner for British Columbia, *Time Extension Guidelines for Public Bodies* (Guide) (OIPC, January 2018) at 6, online: <<https://www.oipc.bc.ca/guidance-documents/1430>>.

However, given the number of extensions taken under s. 10, it is hard to believe that there are no systematic issues or that public bodies are allocating sufficient resources to process FOI requests.

More concerningly, in 2019/20, 17% of cases were delayed without legal authority.<sup>47</sup> In over 4,000 cases between April 1, 2017 and March 31, 2020, the BC government, “extend[ed] the response time for an access request without any legal right to do so.”<sup>48</sup> The Commissioner stated that the “Government has chosen to ignore the rules,” and the result of ignoring the law will be “the public losing confidence in the system if it continues.”<sup>49</sup>

If an applicant does not think the extension is in accordance with s. 10(1), they can ask the matter be investigated by the Commissioner under s. 42(2)(b). Combined with the new penal provisions, public bodies that create unjustified delays, including deemed refusals, should be held accountable and should be considered to be concealing records. Under ss. 65.3 and 65.6, a person who conceals records may be fined up to \$50,000. Access delayed is access denied; therefore, public bodies should be fined for unjustified delays.

**Recommendation 15: Public bodies that show a pattern of unjustified delays, including deemed refusals, should be held accountable under s. 65.6.**

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<sup>47</sup> *Ibid* at 13.

<sup>48</sup> *Ibid* at 3.

<sup>49</sup> “B.C. government ‘has chosen to ignore the rules’ over freedom of information requests: privacy commissioner,” *The Canadian Press* (2 September 2020), online: <<https://www.cbc.ca/news/canada/british-columbia/bc-government-freedom-of-information-privacy-commissioner-report-1.5709689>>.

## 9. Proactive Disclosure

### The Problem

- 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 Solution

- 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.

Issues around s. 71 [proactive disclosure](#) is well documented.<sup>50</sup> Many public bodies do not adhere to the proactive disclosure requirement. The new “transparency tax” aggravates the issue by making those requesting information bear the cost of accessing categories of records that could or should be proactively and routinely released. It creates an economic incentive for public bodies to not proactively release information as forcing requests can create revenue from the application fee.

The previous Special Committees, those in 2010 and 2016, both recommended ways to improve proactive disclosure. As aforementioned, s. 13(2) provides a

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<sup>50</sup> Office of the Information & Privacy Commissioner for British Columbia, *Section 71: Categories of records available without a request*, Investigation Report 20-01 (OPIC, 11 June 2020), online: <https://www.oipc.bc.ca/investigation-reports/3432> [Investigation Report 20-01].

list of information that public bodies must disclose upon request. The 2016 Special Committee recommended that the records on the list be proactively disclosed.<sup>51</sup> The same was recommended in 2010.<sup>52</sup> Additionally, the OIPC submitted to the 2010 Special Committee that routine disclosure will benefit public bodies by reducing the cost of processing individual requests for the same information.<sup>53</sup>

60% of all access requests are directed toward five ministries: Children and Family Development, Public Safety and Solicitor General, Finance, Social Development and Poverty Reduction, and the Office of the Premier.<sup>54</sup> There is room to improve proactive disclosure for these public bodies.<sup>55</sup> Focusing on proactive disclosure of records from these ministries, in particular, would significantly reduce backlogs in the freedom of information system and improve customer service by making records available without a request.

**Recommendation 16: Require OIPC oversight on records that are routinely requested and released to identify and publicly recommend the key categories of records that should be made available through proactive disclosure.**

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<sup>51</sup> 2016 Special Committee, *supra* note 26 at 30.

<sup>52</sup> 2010 Special Committee, *supra* note 27 at 13.

<sup>53</sup> Office of the Information & Privacy Commissioner for British Columbia, *Submission of the A/Information and Privacy Commissioner to the Special Committee to Review the Freedom of Information and Protection of Privacy Act* (OIPC, 15 March 2010) at 16, online: <<https://www.oipc.bc.ca/legislative-submissions/1275>>.

<sup>54</sup> British Columbia, Ministry of Citizens' Services, *Report on the Administration of the Freedom of Information and Protection of Privacy Act: 2017/18 & 2018/19* (Ministry of Citizens' Services, 28 Nov 2019) at 19, online: <[https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/initiatives-plans-strategies/open-government/open-information/citz\\_-\\_report\\_on\\_the\\_administration\\_of\\_foippa\\_-\\_2017-2018\\_2018-2019.pdf](https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/initiatives-plans-strategies/open-government/open-information/citz_-_report_on_the_administration_of_foippa_-_2017-2018_2018-2019.pdf)>.

<sup>55</sup> Investigation Report 20-01, *supra* note 50 at 13 and 16 - 17.

## 10. Data Residency Requirement

### 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 Solution

- Ensure that government regulations and resourcing 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 appropriate resource allocation.
  - 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.

Pursuant to s. 30.1, public bodies were required to store personal information of British Columbians in Canada and grant access only to requests from within Canada except under limited circumstances. This requirement allowed Canadian privacy law to protect Canadian information and was consistent with privacy law followed in countries including German, France, and

Australia.<sup>56</sup> However, The BC NDP turned their backs on the well-established best practice for data security by repealing this provision.

Bill 22 removed data residency requirements leading to an increase in risk to the personal information of British Columbians. An online poll by Ipsos shows that 73% of responding British Columbians oppose this amendment.<sup>57</sup> Now citizens rely on contracts and technology to protect their personal information, but this protection may not be sufficient.<sup>58</sup> This is especially concerning when some of Canada's international allies are advocating for an end to encryption.<sup>59</sup> This means that any personal information of British Columbians held in those foreign jurisdictions that may be encrypted now may not have the same protections in the future.

FIPA recognizes that this protection cannot return and that removal of the data residency requirement now more closely aligns our privacy law with that of the EU's General Data Protection Regulation. Therefore, best efforts must be made to maximize data security in the current environment. Section 69 of the *FIPPA* and the Personal Information Disclosure for Storage Outside of Canada Regulation (the "Regulation") attempts to protect Canadian data

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<sup>56</sup> Mangesh Gharote et al, "Decision support framework for data residency compliance in cloud" (2022) *CSI Transactions on ICT*, online:

<<https://link.springer.com/article/10.1007/s40012-022-00349-8>>; "Data Localization/Residency" (last modified 24 January 2020), online: *Baker McKenzie* <<https://resourcehub.bakermckenzie.com/en/resources/data-privacy-security/emea/france/topics/data-localizationresidency>>.

<sup>57</sup> Ipsos, *supra* note 23.

<sup>58</sup> Office of the Information & Privacy Commissioner for British Columbia, *Reasonable security measures for personal information disclosures outside Canada* (Guide) (OIPC, March 2022) at 1, online: <<https://www.oipc.bc.ca/guidance-documents/3646>>.

<sup>59</sup> Jay Thakkar, "End-to End Encryption: The Good, the Bad and the Politics" (29 April 2021), online: *hashedout* <<https://www.thesststore.com/blog/end-to-end-encryption-the-good-the-bad-and-the-politics/>>; Nicole Perlroth, "What is End-to-End Encryption? Another Bull's-Eye on Big Tech," *The New York Times* (19 November 2019), online: <<https://www.nytimes.com/2019/11/19/technology/end-to-end-encryption.html>>.

stored outside of Canada. Large public bodies with sufficient resources will be able to adhere to the security measure under the Act and the Regulation and maintain a high degree of security and data breach response in this new scenario. However, the complicated regime is setting smaller public bodies up for failure.

**Recommendation 17: We ask the Committee to recommend that Government regulation and guidance be scalable from the provincial level to the smaller local public bodies. These regulations should be built on comprehensive open consultation with both the people whose personal information is being collected and put at risk as well as the local public bodies controlling this information.**

## Conclusion

In conclusion, there are well-documented and important intersections between transparency and trust in government.<sup>60</sup> Over time, multiple studies document the reduction in trust of public bodies corresponds with perceived and/or real reduction in transparency.

When a scandal occurs, there is a defensive reaction from the government 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. Then, the government is empowered to redact and withhold information because of the risk of release. FOI requests are often time-sensitive, concerning emerging matters of public interest, and the process consistently fails to provide full and timely access to information.

There are ways to reverse this onus: the clearest example is the [Government Information \(Public Access\) Act](#) (*GIPA*) in New South Wales Australia.<sup>61</sup> Unlike s. 25 of the *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 situation of a

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<sup>60</sup> “Edelman Trust Barometer 2022” (2022), online (pdf): <[https://www.edelman.com/sites/g/files/aatuss191/files/2022-01/2022%20Edelman%20Trust%20Barometer%20FINAL\\_Jan25.pdf](https://www.edelman.com/sites/g/files/aatuss191/files/2022-01/2022%20Edelman%20Trust%20Barometer%20FINAL_Jan25.pdf); <https://www.law-democracy.org/live/rti-rating/>>; Gustavson School of Business University of Victoria, “Gustavson Brand Trust Index” (2021), online: <[https://www.uvic.ca/gustavson/brandtrust/assets/docs/final--gbti-2021-main-report.pdf?utm\\_source=google&utm\\_medium=website&utm\\_campaign=utm\\_campaign%3Dbrand\\_trust\\_2020&utm\\_term=brand%2Btrust](https://www.uvic.ca/gustavson/brandtrust/assets/docs/final--gbti-2021-main-report.pdf?utm_source=google&utm_medium=website&utm_campaign=utm_campaign%3Dbrand_trust_2020&utm_term=brand%2Btrust)>.

<sup>61</sup> 2009/52.

reversed onus, the tone and culture coming from the top have the largest impact on the effectiveness of the Act.

FIPA's research and stakeholder consultations included formal and informal discussions with a broad cross-section of British Columbians including the public and civil society groups. We would like to add our voice of support and endorsement for the verbal and written submissions made by the following individuals and organizations that made submissions to the Committee:

- Chris Atchison for B.C. Construction Association;
- Jordan Bateman for Independent Contractors and Businesses Association of B.C.;
- Charlotte Dawe for Wilderness Committee;
- Vincent Gogolek;
- Sean Holman for University of Victoria;
- Spencer Izen and Jessica Kim for the Student Press Freedom Act;
- Robyn Laba and Kukpi7 Judy for Union of B.C. Indian Chiefs;
- Bob Mackin;
- Toby Mendel for Centre for Law and Democracy;
- Teri Mooring for B.C. Teachers Federation;
- Stanley Tromp.

## Summary of recommendations

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

**Recommendation 1:** We recommend that legislation be amended to require an annual report be tabled annually rather than at some arbitrary later date.

**Recommendation 2:** We call on the Committee to recognize that the process of passing Bill 22, as led by the Minister of Citizens' Services, short-circuited and undermined the work of this Committee.

**Recommendation 3:** We support any calls from the Committee to request mechanisms that require the BC government to formally respond to and treat Committee recommendations seriously based on their merits, respect for the all-party efforts, and input from civil society through open consultation.

### 2. Duty to Document

**Recommendation 4:** Embed a legal duty to document within the *FIPPA*.

### 3. Resourcing, Culture and Training

**Recommendation 5:** We call on the provincial government to provide adequate resourcing for privacy and access to information operations to support compliance efforts for every public body and to adequately support the OIPC to allow them to properly carry out their functions.

**Recommendation 6:** Improve government culture surrounding access to information by clearly articulating the principles behind the access system and encouraging executive leadership in all government institutions to champion improved access to information.

**Recommendation 7:** The OIPC should provide, monitor, and report on the *FIPPA* training to provincial government employees broken-down by ministries and begin the process of addressing the issues in training and support for smaller public bodies.

#### 4. Fees

**Recommendation 8:** Remove the prescribed application fee or put in place mechanisms to waive this fee.

#### 5. Scope of the *FIPPA*

**Recommendation 9:** Expand the definition of public bodies to automatically cover entities performing public functions and services.

**Recommendation 10:** Include the Legislative Assembly and the Executive Council Operations to Schedule 2 of the *FIPPA*.

**Recommendation 11:** Recognizing the quasi-constitutional nature of transparency law, overrides of the *FIPPA* should be rare, well documented, reviewed on a set schedule, and fully and publicly justified. These records should be publicly available through proactive disclosure from the government.

#### 6. Exemptions

**Recommendation 12:** Government should review the existing categories of information that cannot be withheld under s. 13(2) 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.

**Recommendation 13:** Public bodies should be encouraged to routinely identify those records that are not subject to exemptions and implement mechanisms to release these without Ministerial intervention.

## 7. Supporting Indigenous Access

**Recommendation 14:** Make the discretionary notification provision, under subsection 23(2) of the Act, mandatory for Indigenous Peoples' records.

## 8. Timing and Delays

**Recommendation 15:** Public bodies that show a pattern of unjustified delays, including deemed refusals, should be held accountable under s. 65.6.

## 9. Proactive Disclosure

**Recommendation 16:** Require OIPC oversight on records that are routinely requested and released to identify and publicly recommend the key categories of records that should be made available through proactive disclosure.

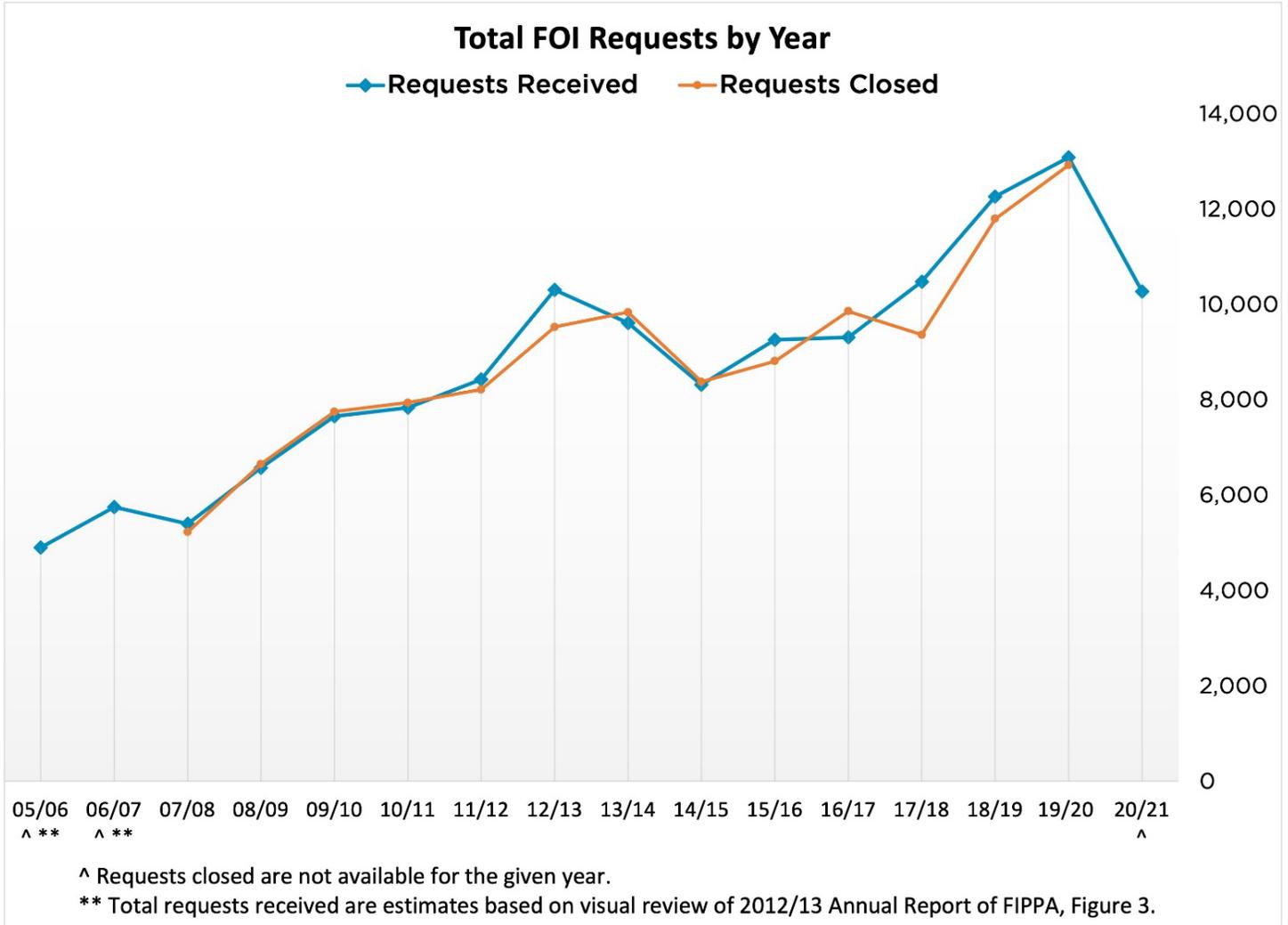
## 10. Data Residency Requirement

**Recommendation 17:** We ask the Committee to recommend that Government regulation and guidance be scalable from the provincial level to the smaller local public bodies. These regulations should be built on comprehensive open consultation with both the people whose personal information is being collected and put at risk as well as the local public bodies controlling this information.

# Supporting Charts & Tables

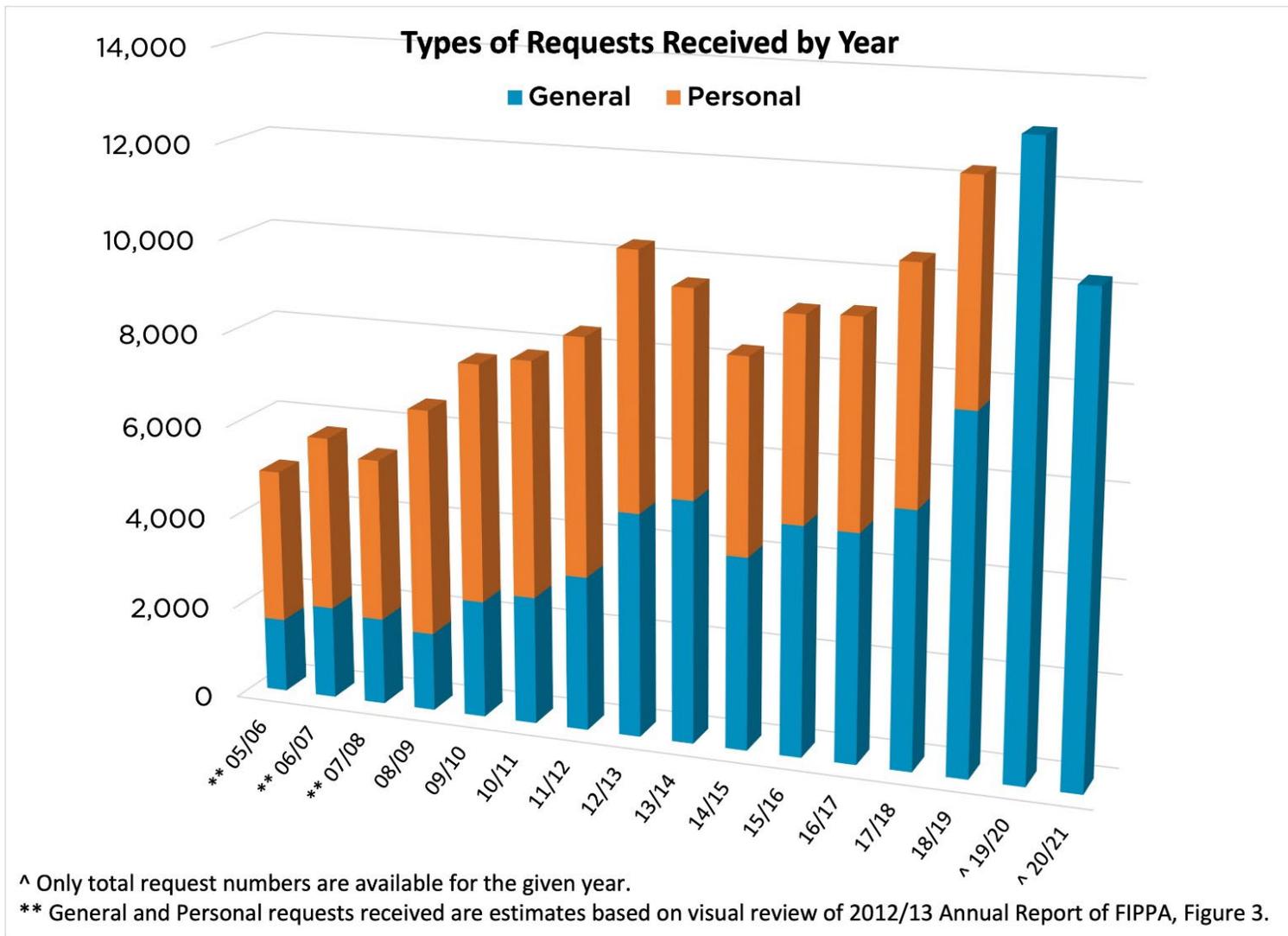
## Chart 1: Total FOI Requests Opened and Closed by Year

- Data and supporting sources listed in Table 1



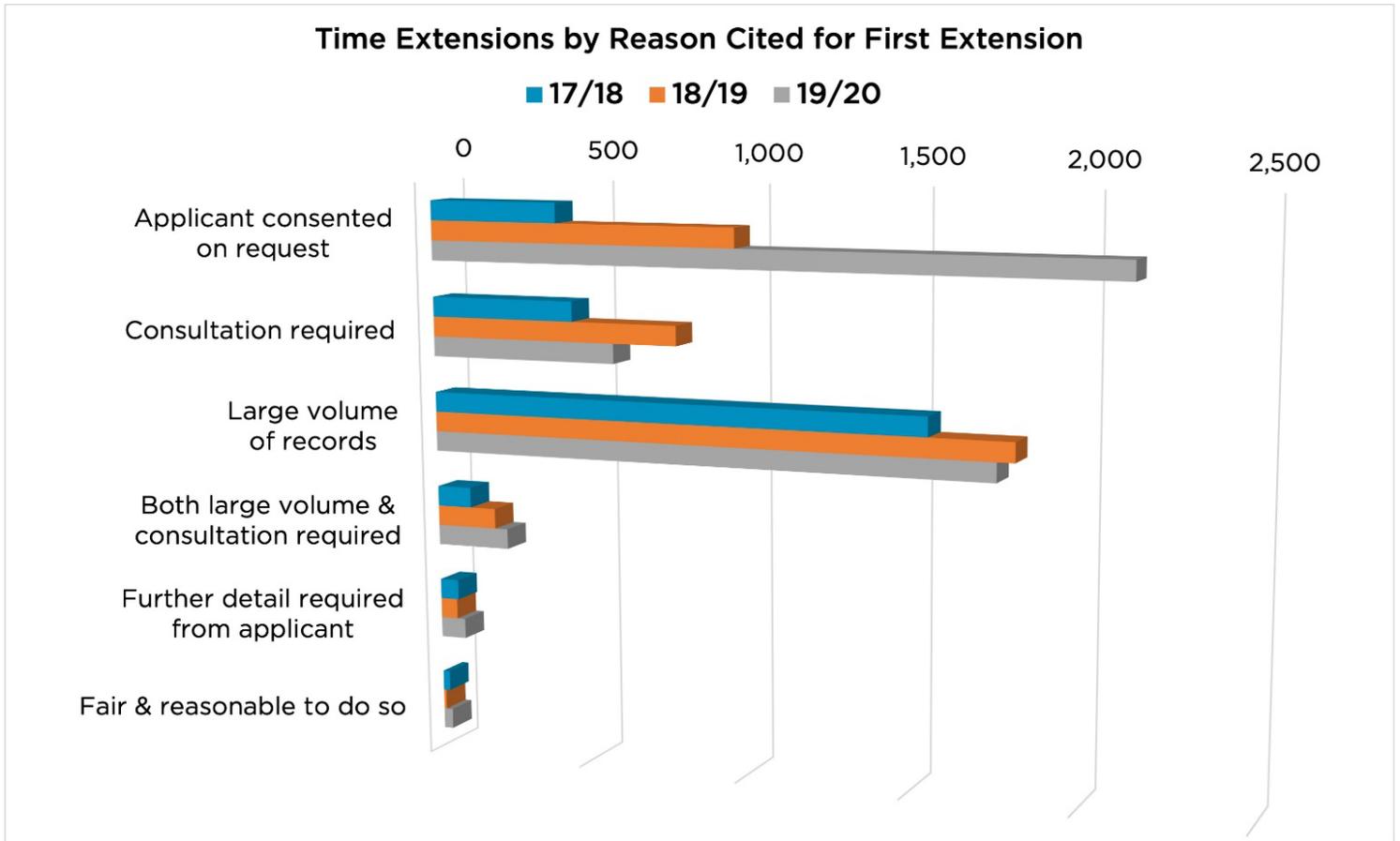
## Chart 2: Types of FOI Requests Received by Year

- Data and supporting sources listed in Table 2



### Chart 3: Time extensions by reason cited for first extension

- Data and supporting sources listed in Table 3



**Table 1: Total FOI Requests Opened and Closed by Year**

- Supporting data for Chart 1

Year	Requests Received	Requests Closed	Source
20/21 ^	10,268		<a href="#">OIPC Timeliness Report p.12</a>
19/20	13,079	12,918	<a href="#">BC Gov Service Report p. 11</a>
18/19	12,255	11,792	<a href="#">BC Gov Annual Report 17/18 &amp; 18/19</a>
17/18	10,471	9,364	
16/17	9,310	9,857	<a href="#">BC Gov Annual Report 15/16 &amp; 16/17</a>
15/16	9,261	8,809	
14/15	8,317	8,377	<a href="#">BC Gov Annual Report 13/14 &amp; 14/15</a>
13/14	9,611	9,832	
12/13	10,306	9,525	<a href="#">BC Gov Annual Report 12/13</a>
11/12	8,423	8,212	<a href="#">BC Gov Annual Report 11/12</a>
10/11	7,829	7,939	
09/10	7,654	7,750	
08/09	6,570	6,653	
07/08	5,394	5,222	
06/07 ^ **	5,750		
05/06 ^ **	4,900		

^ Requests closed are not available for the given year.

\*\* Total requests received are estimates based on visual review of 2012/13 Annual Report of the *FIPPA*, Figure 3.

**Table 2: Types of FOI Requests Received by Year**

- Supporting data for Chart 2

Year	General	Personal	Source
^ 20/21	10,268		<a href="#">OIPC Timeliness Report p.12</a>
^ 19/20	13,079		<a href="#">BC Gov Service Report p. 11</a>
18/19	7,622	4,633	<a href="#">BC Gov Annual Report 17/18 &amp; 18/19</a>
17/18	5,501	4,970	
16/17	4,905	4,405	<a href="#">BC Gov Annual Report 15/16 &amp; 16/17</a>
15/16	4,932	4,329	
14/15	4,141	4,176	<a href="#">BC Gov Annual Report 13/14 &amp; 14/15</a>
13/14	5,216	4,395	
12/13	4,819	5,487	<a href="#">BC Gov Annual Report 12/13</a>
11/12	3,329	5,094	<a href="#">BC Gov Annual Report 11/12</a>
10/11	2,756	5,073	
09/10	2,532	5,122	
08/09	1,693	4,877	
** 07/08	1,880	3,500	
** 06/07	2,000	3,750	
** 05/06	1,600	3,300	

^ Only total request numbers are available for the given year.

\*\* General and Personal requests received are estimates based on visual review of 2012/13 Annual Report of the *FIPPA*, Figure 3.

**Table 3: Time extensions by reason cited for first extension**

- Supporting data for Chart 3

Time Extensions by Reason Cited for First Extension			
	17/18	18/19	19/20
Applicant consented on request	408	972	2,142
Consultation required	456	788	588
Large volume of records	1,554	1,810	1,756
Both large volume & consultation required	108	189	230
Further detail required from applicant	58	53	79
Fair & reasonable to do so	21	8	28
Total files, time extension taken	2,605	3,820	4,823

[Source: OIPC Timeliness Report](#)

## Table 4: Tabling of Annual Reports

- Data based on review of:
  - [Archive Library Journals of British Columbia, 1851 to 2021](#)

Journal Sessions	Freedom of Information and Protection of Privacy Act Annual Reports	Date / Method of tabling the report
1992	FOIPPA Introduced	
1993	FOIPPA Passed	
1994	No Annual Report Tabled	
1995	Freedom of Information and Protection of Privacy Annual Report for the period of October 4, 1993 to December 31, 1994	Wednesday, July 5, 1995
1996	No Annual Report Tabled	
1997	No Annual Report Tabled	
1998	No Annual Report Tabled	
1999	No Annual Report Tabled	
2000	No Annual Report Tabled	
2001	No Annual Report Tabled	
2002	No Annual Report Tabled	
2003	No Annual Report Tabled	
2004	No Annual Report Tabled	
2005	No Annual Report Tabled	
2006	No Annual Report Tabled	
2007	No Annual Report Tabled	
2008	No Annual Report Tabled	
2009	No Annual Report Tabled	
2009	No Annual Report Tabled	
2010	No Annual Report Tabled	
2011	No Annual Report Tabled	
2012	<a href="#">Administration of the Freedom of Information and Protection of Privacy Act Annual Report, 2011/2012</a>	received by the Office of the Clerk during adjournment:
2013	No Annual Report Tabled	
2013 2014	No Annual Report Tabled	
2014	<a href="#">Administration of the Freedom of Information and Protection of Privacy Act Annual Report, 2012/2013.</a>	Thursday, February 27, 2014
2014 2015	No Annual Report Tabled	

Journal Sessions	Freedom of Information and Protection of Privacy Act Annual Reports	Date / Method of tabling the report
2015 2016	<a href="#">Report on the Freedom of Information and Protection of Privacy Act (FOIPPA), 2014/15</a>	Thursday, October 8, 2015
2016 2017	No Annual Report Tabled	
2017	No Annual Report Tabled	
2017	<a href="#">Report on the Administration of the Freedom of Information and Protection of Privacy Act, 2015/2016 &amp; 2016/2017</a>	Tuesday, June 27, 2017
2017	No Annual Report Tabled	
2018	No Annual Report Tabled	
2019	<a href="#">Report on the Administration of the Freedom of Information and Protection of Privacy Act, 2017/18 &amp; 2018/19</a>	Thursday, November 28, 2019
2020	No Annual Report Tabled	
2020 2021	No Annual Report Tabled	
2021	No Annual Report Tabled	
2022	No Annual Report Tabled (At time of document submission)	

**Table 5: Exemptions in other legislation**

Name of Legislation with Exemption	Relevant Section	Link to Section
Administrative Tribunals Act	Section 61, Subsection(s) 2, 3	<a href="#">Section 61</a>
Adoption Act	Division 2, Part 5, Section 70	<a href="#">Section 70</a>
Adoption Act	Division 2, Part 5, Section 72, 73, 74	<a href="#">Section 74</a>
Adult Guardianship Act	Part 3, Section 46, Subsection 2	<a href="#">Section 46</a>
Animal Health Act	Part 3, Division 1, Section 16	<a href="#">Section 16</a>
Animal Health Act	Part 5, Division 1, Section 60	<a href="#">Section 60</a>
Architects Act	Section 51.2	<a href="#">Section 51.2</a>
Financial Information Regulation	Schedule 1, Section 10, Subsection 3	<a href="#">Section 10</a>
Child, Family and Community Service Act	Part 3, Division 1, Section 14	<a href="#">Section 14</a>
Child, Family and Community Service Act	Part 3, Division 2, Section 24	<a href="#">Section 24</a>
Child, Family and Community Service Act	Part 5, Section 74-79	<a href="#">Part 5</a>
Civil Resolution Tribunal Act	Part 9, Division 1, Section 90	<a href="#">Section 90</a>

Name of Legislation with Exemption	Relevant Section	Link to Section
Coroners Act	Part 7, Division 3, Section 64	<a href="#">Section 64</a>
Coroners Act	Part 7, Division 3, Section 66	<a href="#">Section 66</a>
Criminal Records Review Act	Part 2, Section 6, Subsection 3, 4	<a href="#">Section 6</a>
E-Health (Personal Health Information Access and Protection of Privacy) Act	Part 2, Section 20	<a href="#">Section 20</a>
Election Act	Part 13, Section 275, Subsection 7	<a href="#">Section 275</a>
Emergency Communications Corporations Act	Section 9	<a href="#">Section 9</a>
Employment Standards Act	Part 10, Section 75	<a href="#">Section 75</a>
Employment Standards Act	Part 11, Section 101	<a href="#">Section 101</a>
Evidence Act	Section 51, Subsection 5 to 8	<a href="#">Section 51</a>
Family Law Act	Part 2, Division 2, Section 11	<a href="#">Section 11</a>
Family Law Act	Part 6, Division 6, Section 133	<a href="#">Section 133</a>
Family Law Act	Part 11, Section 243	<a href="#">Section 243</a>
Family Maintenance Enforcement Act	Part 4, Section 43	<a href="#">Section 43</a>

Name of Legislation with Exemption	Relevant Section	Link to Section
Health Professions Act	Part 3, Section 26.2	<a href="#">Section 26.2</a>
Heritage Conservation Act	Section 3, Subsection 3	<a href="#">Section 3</a>
Income Tax Act	Part 2, Section 64, Subsections 6, 8	<a href="#">Section 64</a>
Laboratory Services Act	Part 3, Division 1, Section 29	<a href="#">Section 29</a>
Legal Profession Act	Part 10, Section 88, Subsection 2, 7, 8	<a href="#">Section 88</a>
Local Elections Campaign Financing Act	Part 5, Division 3, Section 63, Subsection 3	<a href="#">Section 63</a>
Local Government Act	Part 3, Division 1, Section 49	<a href="#">Section 49</a>
Mines Act	Section 34 Sub Section(s) 8, 9	<a href="#">Section 34</a>
Missing Persons Act	Part 3, Section 21	<a href="#">Section 21</a>
Motor Vehicle Act	Part 2, Section 93.1	<a href="#">Section 93.1</a>
Pharmaceutical Services Act	Part 1, Section 7	<a href="#">Section 7</a>
Police Act	Part 2, Section 4.04	<a href="#">Section 4.04</a>
Police Act	Part 10, Section 68.1, Subsection 9	<a href="#">Section 68.1</a>

Name of Legislation with Exemption	Relevant Section	Link to Section
Police Act	Part 11, Division 7, Section 182	<a href="#">Section 182</a>
Provincial Immigration Programs Act	Section 10	<a href="#">Section 10</a>
Public Guardian and Trustee Act	Part 2 , Section 17, Subsection 3	<a href="#">Section 17</a>
Public Health Act	Part 5, Division 1, Section 53	<a href="#">Section 53</a>
Public Inquiry Act	Division 3, Section 26,	<a href="#">Section 26</a>
Public Inquiry Act	Division 4 Section 28, Subsection 7	<a href="#">Section 28</a>
Recall and Initiative Act	Part 10, Section 168, Subsections 5, 8	<a href="#">Section 168</a>
Securities Act	Part 17, Section 148	<a href="#">Section 148</a>
Statistics Act	Section 9	<a href="#">Section 9</a>
Teachers Act	Part 6, Division 3, Section 53, Subsection 7, 9	<a href="#">Section 53</a>
Vancouver Charter	Part 1, Division 1, Section 8.1	<a href="#">Section 8.1</a>
Victims of Crime Act	Section 7, Subsection 2	<a href="#">Section 7</a>
Employer Health Tax Act	Part 6, Section 90, Subsection 9	<a href="#">Section 90</a>

Name of Legislation with Exemption	Relevant Section	Link to Section
Professional Governance Act	Part 9, Section 110, Subsection 7	<a href="#">Section 110</a>
Speculation and Vacancy Tax Act	Part 8, Section 120, Subsection 10	<a href="#">Section 120</a>
Cannabis Control and Licensing Act	Part 2, Division 2, Section 13	<a href="#">Section 13</a>
Cannabis Distribution Act	Part 6, Section 21, Subsection 2 Paragraph f	<a href="#">Section 21</a>
Temporary Foreign Worker Protection Act	Part 7, Section 34	<a href="#">Section 34</a>
Witness Security Act	Part 4, Section 38	<a href="#">Section 38</a>
Workers Compensation Act	Part 2, Division 7, Section 53, Subsection 5	<a href="#">Section 53</a>
Local Government Act	Part 8, Section 266, Subsection 1	<a href="#">Section 266</a>
Community Charter	Part 4, Division 3 Section 95, Subsection 1, 5	<a href="#">Section 95</a>