



Ministry of Citizens' Services

Shared Services British Columbia

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

March 15, 2010

Foreword

This report provides an overview of the access to information provisions of the *Freedom of Information and Protection of Privacy* (FOIPP Act) and the role of Information Access Operations in the administration of those provisions. It also responds to specific issues raised in public submissions and presentations to the Special Committee.

Many of the issues raised by presenters at public hearings held by the Special Committee related to the administration of the FOIPP Act. Although the administration of the FOIPP Act is tangential to the actual review of the legislation, the government believed that it would be useful and informative to the Committee to provide a response to the administrative issues and matters raised in the hearings.

Overview of Right of Access Provisions

The purposes of the FOIPP Act are two-fold: 1) to promote accountability by providing a right of access to records and information of public bodies; and 2) to protect personal information by prohibiting the unauthorized collection, use, disclosure, or storage of personal information by public bodies.

Part 2 of the FOIPP Act provides details on how to access government records and what restrictions may be placed upon those access requests.

The FOIPP Act starts from the premise that the public has a right of access to all government records with the exception of information that meets certain criteria. In those cases, information may be removed in order to provide the remainder of the record to an applicant.

Requests for access must be in writing and must provide sufficient detail to allow the public body to identify the records in question. Public bodies have an obligation to assist applicants seeking access to government records and to respond to requests openly, accurately, completely, and without delay.

Providing access to records is governed by time constraints; for example, a public body must respond within 30 working days to a request or must take an extension as allowed under the FOIPP Act. An extension of time may be warranted where a large amount of records are involved, more detail is required to identify records, or another public body or third party must be consulted.

The FOIPP Act allows the transfer of a request from one public body to another public body when the records being sought are either in the possession of the second public body or that body has a greater interest in the records. A public body has 20 days to transfer a request.

Exceptions to the release of records fall under two categories: mandatory and discretionary.

There are three **mandatory** exceptions to the release of records in response to a request:

- records that would reveal the substance of deliberations by Cabinet or any of its committees or in the case of local public bodies, records related to legal instruments or that would reveal the substance of confidential local public body or governing body meetings
- third party business information relating to taxation information or meeting a three-part test that determines that harm could occur if information were released
- personal information of individuals other than the applicant. The FOIPP Act outlines when the release of another person's personal information is unreasonable and must be withheld

There are eight exceptions to disclosure that are **discretionary** and may only be applied after giving due consideration to providing access to the records. These discretionary exceptions include:

- policy advice or recommendations
- legal advice
- information that could be harmful to law enforcement matters
- inter-governmental relations or negotiations (e.g., information concerning discussions with aboriginal groups or the federal government might be withheld under this exception)
- information harmful to the financial or economic interests of a public body or the province
- information related to historical sites or the preservation of endangered species
- information that will be published within 60 days
- information, that if disclosed, may threaten someone's health or safety, including the applicant's own safety or mental/physical health.

Part 2 of the FOIPP Act also sets out conditions under which consultations with third parties should occur. Third parties (both individuals and businesses) must be notified if the public body intends to give access and believes that a third party business or personal privacy exception might apply. The third party has 20 days to respond to the notice.

Section 25 of the FOIPP Act is Public Interest Paramountcy. This section requires the disclosure of information by the head of the public body, regardless of whether a request for the records is received, if there is a risk of significant harm to the environment or to the health and safety of people, or if it is in the public interest to release the records.

INFORMATION ACCESS OPERATIONS

Information Access Operations (IAO) is a branch of Shared Services BC in the Ministry of Citizens' Services. IAO leads and delivers optimal services for and on behalf of ministries of the Province of B.C. IAO assists ministries to meet their obligations under the *Freedom of Information and Protection of Privacy Act* (FOIPP Act) and *Document Disposal Act* (DDA), by providing consistent, efficient access request processing; client centred FOIPP Act advisory and training services; and records management training, tools and services, including contracted records storage for all of government. IAO also provides input to and support for government's Core Policy and Procedures Manual Chapter 12 for the management of records within the provincial government's control and/or custody.

While IAO provides a number of FOIPP Act and DDA services to ministries, legislative accountability remains with ministries. Ministries are responsible for implementing and maintaining records management programs in compliance with core policy and managing their records accordingly. Ministry staff are responsible for the day to day management of their records and are responsible for locating and retrieving records in response to access requests. IAO works closely with ministry staff to process those records in accordance with the FOIPP Act.

To manage its functions in fiscal year 2009/10, IAO received \$10M in transferred funds from ministries as well as a number of recoveries for services such as offsite records storage. IAO has a staff complement of 148 positions. Of these, 92 positions provide FOIPP Act services, 54 provide both core and client centred records management services; the other 2 provide branch management support.

IAO processes between 5,000 and 7,000 access requests annually on behalf of ministries. Although the number of access requests fluctuates from year to year, the numbers appear to be increasing. In 2007/08 Government received 5,394 requests. This compares to 6,570 in 2008/09, a 21 per cent increase. Recent information indicates the overall number of requests continues to increase. From April 1, 2009 to February 1, 2010, Government received 6,306 requests versus 5,357 for the same period in 2008/09, an increase of 18 per cent

The number of access requests received by B.C. Government ministries and published on the Citizens' Services website does not include access requests received by ICBC or other Crown Corporations. The 6,570 requests received by B.C. ministries compares to 3,350 requests received by the Government of Alberta over the same period, including those received by boards, agencies and commissions, which are not included in the B.C. statistics. The Government of Ontario received slightly more requests during a similar time period but the volume of requests per capita is far lower than B.C. Of the 6,570 access requests received by B.C. ministries in fiscal 2008/09, 4,877 were from individuals or their representatives seeking personal information about them held by government. The remaining 1,693 requests were from individuals, media and others seeking general information about government operations.

It is estimated that the operational cost of the FOIPP Act to government on a yearly basis is approximately \$8.3 million, which includes the costs of access operations within IAO (approximately \$7.6 million), as well as an estimate of the cost to ministries to prepare requests for records for release (approximately \$0.7 million). This estimate does not include governance costs or the costs of funding the Office of the Information and Privacy Commissioner.

For calendar year 2008, as reported in the Information and Privacy Commissioner's (Commissioner) 2009 "Timeliness Report," the average processing time for access request responses was 35 days. For fiscal 2009/10 to February 1st, 2010, the average processing time for access request responses was 24 days. During this same period, the percentage of government requests responded to on time rose to 87% from 71% at the time of the Commissioner's report.

Better Outcomes

Challenge #1: Legislative timelines for the release of access requests under the FOIPP Act

Policy and Administration:

The FOIPP Act delegates responsibility for the release of records in response to access requests to the head of the public body. Prior to 2009, decentralized FOIPP Act units in individual ministries had inconsistent processes and tools. In January 2009, government centralized FOIPP Act administration in the new IAO branch and streamlined processes.

No distinction is made in the legislation with regard to the complexity of a request in regard to the prescribed time limits for responding to a request. Personal information requests, although representing the largest volume of requests tend to be more focused and require the least amount of consultation with regard to the appropriate application of exceptions.

General requests require more consultation with regard to the appropriate application of exceptions and may require a more time to locate and review records depending upon the breadth of the issue and the clarity of the request.

Issues before the Committee:

A criticism has been expressed concerning government not producing records within the time frames established in the FOIPP Act. At the end of 2008, the Commissioner issued a report that determined that government ministries were failing to abide by legislated timelines; only 71% of requests were responded to on time.

Meeting the Needs of Citizens:

Since government's centralization of FOIPP Act units, access request response times have improved from 71% of requests processed on time to 87% by February 1st, 2010. At the time of the Commissioner's report the average number of processing days for an access request was 35 days. This has now improved to 24 days. Performance

improvements have been achieved despite an increase in the volume of access requests since 2008. In addition, other records and privacy support services have been improved.

It is anticipated that all of the changes that have occurred with the creation and development of IAO will lead to significantly enhanced service to the public in relation to the FOIPP Act and the DDA, for which IAO is also responsible. IAO is also working on developing new techniques, both for responding to high volume personal information requests and high complexity general requests, to improve the ability of ministries to respond in a timely manner.

Challenge #2: Record keeping practices within the B.C. government

Policy and Administration:

Effective administration of the FOIPP Act requires public bodies to maintain strong records management practices. These are necessary for complete and timely response to access requests, and to ensure appropriate protection of individual privacy, as well as to meet the operational needs of delivering programs to the citizens of the Province.

The Ministry of Citizen's Services is responsible for maintaining an effective records management infrastructure, including government-wide policies and central services. In this regard, British Columbia compares well with other provinces and jurisdictions.

British Columbia has a comprehensive and rigorous set of policies and guidelines to support efficient government and the administration of the DDA. These range from high level government-wide Core policies to detailed procedures and best practice guidelines, all of which are readily accessible on the government internet site. Our records management processes and systems are based on and compliant with international standards. We have highly qualified records management staff providing advisory and other services to ministries and other bodies across government.

As well, British Columbia is considered a leader within Canada in establishing and broadly implementing consistent records management systems. B.C. was the first province to implement a government-wide Administrative Records Classification System (ARCS) and has established over 100 specific Operational Records Classification Systems (ORCS), all adhering to a common standard. B.C. has also established a standard Enterprise Document and Records Management System (EDRMS), so far with 4,500 users across seven ministries. This is the largest such electronic record keeping system of any province.

British Columbia also has a common system and service for storing and tracking all government off-site records. By establishing common infrastructures and processes, we have achieved the lowest records storage costs in Canada.

Issues before the Committee:

Some presenters to the Special Committee have suggested that the record keeping practices of Government may not be up to date and are a cause of deficiencies in the administration of the FOIPP Act.

Meeting the Needs of Citizens:

While British Columbia has a mature, soundly based records management infrastructure, we face the same types of records management challenges as any large, modern organization. These include huge volumes, diverse systems, and rapidly evolving electronic records technology and formats. Just in terms of off-site hardcopy records alone, IAO manages over 900,000 boxes. Each year, government generates millions upon millions of records. Our information is found in a variety of legacy systems developed and used over time, in paper based documents that date back over many years, and in the most up to date collaboration and communication tools. To manage and provide access to such a breadth and diversity of information requires consistent and effective record keeping systems and practices. This is why Shared Services BC is placing emphasis on the development and implementation of systems such as ARCS, ORCS and EDRMS and continues to improve and update central records management services.

Citizen Centred Service

Challenge #3: Government Issuing of Fees related to Freedom of Information Access Requests

Policy and Administration:

Complex freedom of information requests can result in many hours of search time by ministry program staff. That is why there is a fee structure in place under the legislation – so that taxpayers do not have to bear the full cost of extensive requests. It also helps to reduce the number of frivolous requests received by government, as individuals will evaluate whether they really need or want the information before paying a fee to receive it. The FOIPP Act, however, includes a process for requesting fee waivers where the records relate to a matter of public interest, if the applicant cannot afford the payment, or if for any other reason it is fair to excuse payment.

For fiscal 2009/10 to February 1, 2010, Government recovered approximately \$50,000 in fees. This amount only minimally offsets the overall costs of administering the FOIPP Act, covering about 0.6% of the operational costs of administering the FOIPP Act.

Several factors lead to this gap in cost versus fees. First, all requests for personal information are responded to with no cost to the applicant as directed by the legislation. About 65-70% of requests received by government are for personal information. Second, the FOIPP Act requires that the first three hours of search time for general records be provided free of charge. Additional search time is charged at \$30 per hour, but fees are not charged if they amount to less than \$50. Third, government often waives fees in cases where the records have been demonstrated to relate to a matter of public interest, or the applicant has demonstrated an inability to pay. For fiscal 2009/10 to February 1, 2010, government waived more than \$11,000 in fees. IAO regularly works with applicants to clarify requests in such a manner as to provide what they require at no or a very limited cost. IAO is committed to improving customer service, but also has an obligation to ensure that the cost of production of records by government is controlled and justifiable.

Issues before the Committee:

Some public interest groups and members of the media have expressed the concern that they are charged high fees for access to government records under the FOIPP Act process. It is suggested that ministries use fees to discourage requests for records or as a means to delay the release of records. In addition, ministries have been criticized for not adequately considering the ability to pay or the public interest exceptions within the FOIPP Act.

Two specific examples were raised before the Special Committee. One example related to a request made to the Ministry of Small Business, Technology and Economic Development for access to records related to the costs of hosting services for the Olympic Games. This led to a fee estimate of approximately \$10,000. The second example related to a request from the Sierra Legal Defence Fund for access to all Ministry of Environment compliance files for the year 2004. This resulted in a fee estimate in excess of \$100,000. In the first example, IAO staff is working closely with the applicant and the ministry to narrow the scope of the request, in order to reduce fees. At the time of writing, this request is still being processed. In the second example, after a review by the Commissioner, the fee estimate was revised and while a portion was waived, the remaining estimate was still more than \$100,000. The fee estimate remained high due to the enormous amount of work that would be required to search every hard-copy compliance file in all Ministry of Environment offices that held such files. The applicant in this case understood the rationale for the fee estimate. Rather than pay the fees the applicant chose to work cooperatively with the ministry to obtain relevant information through alternative means.

When a request is received that is extensive in scope or in the volume of records that exist, or a combination of both these issues, the cost to the ministry to produce the records may be large. IAO attempts to work with the applicant to clarify the scope and reduce the volume of records, both to reduce the cost to government and to ensure that the applicant has access to the most relevant material.

Meeting the Needs of Citizens:

The majority of access requests received by government are from individuals or their representatives seeking their personal information held by government. There is no cost for such requests. Responses to personal information requests are on time more than 87% of the time. IAO works with ministries on an ongoing basis to improve response times and find ways to provide personal information to citizens efficiently and, wherever possible, outside of the formal process.

Challenge #4: Use of the Cabinet Confidences and Policy Advice Exceptions in Processing Access Requests

Policy and Administration:

The FOIPP Act explicitly protects the substance of deliberations of Cabinet and its committees from release under an access request (section 12 – Cabinet and local public body confidences).

Cabinet committees play an integral role in Cabinet decision-making by reviewing policy and making recommendations to Cabinet through their Chairs. As such, it is necessary to ensure these committees are provided the same level of protection for the substance of their deliberations as is given to the deliberations of the Executive Council.

Even before the current government, Cabinet committees included non-ministers as members – and the Cabinet confidence exception was applied to the substance of deliberations of these committees. However, in 2002 the Commissioner ruled that the substance of deliberations of these committees could not be protected because their membership included MLAs who were not members of Cabinet (Order 02-38).

Section 12 was amended to maintain the long-standing parliamentary tradition of Cabinet confidences which was to permit Cabinet to conduct open and full deliberations without the scrutiny of external parties. This issue was thoroughly debated in the House in 2002 when the amendment was made.

The application of section 13 was addressed in an order of the Commissioner concerning the College of Physicians and Surgeon's response to a request for investigation records about a complaint of a physician's conduct. The order was judicially reviewed by the British Columbia Supreme Court and then the Court of Appeal.

During the review, which was mainly focused on other aspects of the order, the Court of Appeal unexpectedly turned to section 13 and interpreted it more broadly than had the Commissioner. It found that the exception "recognizes that some degree of deliberative secrecy fosters the decision-making process". An application by the Commissioner for leave to appeal to the Supreme Court of Canada was denied and the decision has stood since 2002.

The ruling of the Court is in line with government's application of section 13 and government has used this ruling as guidance in its review of documents responsive to an access request.

In cases where sections 12 or 13 may apply, IAO works proactively with ministry program areas to determine if records may be released, and with program areas and applicants to determine if there are other ways to provide the requested information.

These exceptions to disclosure are intended to maintain the balance between the right of the public to have access to information about the activities undertaken by government and the need for government to manage its affairs effectively. Sections 12 and 13 both include clauses that place limitations on their application, such as the length of time the information can be withheld.

While section 12 is a mandatory exception that must be applied when records meet the established criteria, section 13 is a discretionary exception. When recommending the application of section 13, IAO encourages ministries to consider all appropriate factors, and whenever possible through the exercise discretion, to disclose as much information as possible.

Issues before the Committee:

A number of individuals have stated that they believe the mandatory exception for Cabinet confidences and the discretionary exception for policy advice are applied too routinely and extensively to information requested by the public and that this practice works against the desire for open government that is one of the premises of the Legislation.

In general, several presenters argued that all substantive discussions are precluded from release to the public and that a "culture of secrecy" has developed within government.

Meeting the Needs of Citizens:

IAO constantly reviews and adjusts its interpretation of the FOIPP Act, in accordance with policy, Orders of the Information and Privacy Commissioner and court decisions to ensure that exception provisions are administered consistently and appropriately.

Stronger Engagement

Challenge #5: Pro-active disclosure of information to the Public by ministries and other public bodies

Policy and Administration:

The IAO website provides links to ministry publications and websites that contain a considerable amount of routinely available information. See <http://www.gov.bc.ca/citz/iao/foi/resources/index.html>. There are many examples of ministry websites that provide routinely available information to the public - for example, the Ministry of Environment's Quarterly Compliance Reports and the Integrated Land Management Bureau's Crown land tenure information. Interestingly enough, in order for the Ministry of Environment to post the Compliance Reports, which were being repeatedly requested by advocacy groups, the ministry required an exception to the FOIPP Act due to some personal information contained in the reports.

Government is actively seeking to make more documents readily available to the public and is looking at a variety of means to do this, including further electronic dissemination. IAO continues to encourage ministries to make more documentation available to the public in a pro-active manner. IAO is developing strategies for determining how records could be more pro-actively made public and is assisting in the determination of what types of documents can be made routinely available by ministries.

One of the challenges in providing more routine access is the requirement in the FOIPP Act that any personal information (including personal information of a routine nature that would normally be disclosed through the formal access process) only be disclosed, stored and accessed in Canada. Use of the internet to broadly disseminate data that is of interest to the public and may contain a small amount of personal information, such as individuals in contravention of environmental compliance laws, would be in violation of the FOIPP Act as currently written.

Issues before the Committee:

Criticism was raised at public sessions of the Special Committee related to the perceived failure of ministries to make government records available to the public proactively, or without the requirement to make an application for access under the FOIPP Act. It was argued that citizens are required to seek information through the FOIPP Act that should be routinely available. Presenters indicated this caused delays in receiving information as well as costs to citizens due to the assessment of fees.

Meeting the Needs of Citizens:

Part of the mandate of Shared Services BC is to develop new innovative options for proactive disclosure of information. As part of this mandate, Shared Services BC will work with the Chief Information Officer to review routine release strategies that are being developed in other jurisdictions.