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

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INTRODUCTION

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. 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 thank the Special Committee for the opportunity to provide input for this review of *Freedom of Information and Protection of Privacy Act*. We hope you will find these suggestions helpful.

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When the *Freedom of Information and Protection of Privacy Act* (herein referred to as *FIPPA* or the *Act*) was passed in 1992, it was at the leading edge of freedom of information (FOI) and privacy legislation, and was praised internationally for being the best legislation of its kind.

After almost a quarter century later, it is clear that while the *Act* itself is basically sound, it needs a number of improvements and updates to reflect developments both in government and in technology.

Changes to FOI

On the freedom of information side, the promise of the *Act* was that it would help create a culture of openness within government; that FOI requests would be necessary only as a last resort and that routine release of information would be the rule. Today, however, we frequently see public bodies either failing to create records, or destroying them in order to avoid the possibility of release to FOI requesters. This is a crisis not just for freedom of information, but for the proper conduct of government business.

There have also been victories for transparency since our last submission. The Office of the Information and Privacy Commissioner has taken action to curb the government's practice of redacting large parts of records on the pretext that they are 'outside the scope' of a given request.[1] One ministry estimated that they used this dodge in 25-40 per cent of requests when they could not find an exception that applied.[2] The elimination of this practice will have a huge beneficial effect, primarily for less sophisticated requesters who may be

[1] These orders include Orders F15-23 https://www.oipc.bc.ca/orders/1801 , F15-24 https://www.oipc.bc.ca/orders/1802 and F15-25, https://www.oipc.bc.ca/orders/1803 ,
[2] Order F-15-24, para 16.

unaware of their rights or reluctant to challenge unsupported redactions to the records they receive.

Another victory was the Commissioner's decision to change how section 25 of the *Act*, the public interest override, would be interpreted, in order to better reflect the letter and spirit of the *Act*.[3] We have a great deal to say about this decision, and need for legislative reform to supplement what the Commissioner has done. In fact we are working with the Environmental Law Clinic at the University of Victoria to produce a more detailed proposal, which will be provided to the Committee before the deadline for written submissions in January.

Changes to privacy

On the privacy side, BC has taken a step backward. The 2011 amendments to the *Act* reflect a position—largely criticized by the Committee for being overly intrusive—that the government had advanced during the prior year's statutory review. Other changes to the *Act* suggested that year—such as mandatory breach notification—should have been brought in, but were not.

Further, we will argue that the *FIPPA* be altered to be better-aligned with the *Personal Information Protection Act* (*PIPA*).

This review

We hope this Committee will follow in the footsteps of its predecessor, which had the intestinal fortitude to make recommendations they saw as advancing freedom of information and privacy rights in BC. Regardless of what action the government takes to amend the *Act*, the existence on the record of recommendations by this Special Committee is of great value and importance.

[3] Investigation Report F15-02 https://www.oipc.bc.ca/investigation-reports/1814

HOW GOVERNMENT INFORMATION BECOMES PUBLIC

There are essentially three ways information is released to the public. These are routine release, release through freedom of information and unauthorised informal release.

Routine release

Routine release of information is an absolute necessity for 'open government'. Routine release, also called proactive disclosure, is the forward trend in government information management in all the world's democracies.

FIPPA was amended in 2011 to include a new subsection, 71.1, which gives ministries power to establish categories of records to be routinely disclosed =without a FOI request.

We are currently working with the University of Victoria's Environmental Law Clinic to produce recommendations in this area; we will reserve our input until that report is submitted to you.

Freedom of information requests

The second method of release of information is by request under the *Act*. *FIPPA* provides a complete code for making access requests to government, and a process for the review of decisions to refuse release. The *Act* balances citizens' right to information, and government's need for confidentiality in certain clearly defined, limited circumstances. However, FOI requests should not be—and were not intended to be—the primary method of release.

Unauthorized informal release

The third method of information release is what happens when there is no FOI system, or when the system is dysfunctional. That is unauthorized release, also known as whistleblowing in cases where a public employee "leaks" information. *FIPPA* protects government employees who blow the whistle in good faith in s. 30.3, but there have been repeated calls (including from the Auditor General) for great protection for whistleblowers.

FIPA recommends that the protections provided to whistleblowers be set out in law. This would ideally be done through the creation of a separate law, as was done at the federal level.

PRIMARY AREAS OF CONCERN

In this submission, we are highlighting particular areas of concern rather than attempting to redraft the *Act*. Our comments are based on our experience and the experiences of people who contact our office for assistance. We will also touch on administrative issues which have a large impact on FOI and privacy management.

Regarding freedom of information, the biggest issue is the destruction of records or the failure to create them in the first place. In order for the *Act* to have any relevance, on one side **there must be an obligation to create records,** and on the other side, **records must not be destroyed without proper procedures being followed.**

The issue of **delay** has long been identified as a problem with the *Act* and its administration. **Fees** have also been used to delay or block release under the *Act*, or to discourage requesters.

There is also a need to prevent what we call **'information laundering'**. This involves public bodies hiding behind private contractors or corporations that they fully control, in order to avoid scrutiny.

We will also provide recommendations regarding reform of several exceptions to release in Part 2 of the *Act*. These include exceptions for Cabinet confidences, policy advice, legal privilege and law enforcement.

Finally, the ability to **release information in the public interest** must be clarified. The current interpretation of this section is such that almost no information meets the standard, and we have some alternatives for the Committee to consider.

On the privacy side, we have a number of concerns. The government has an almost unlimited ability to do what it wants with any personal information that it controls. New technology means that **government's ability to data match and data mine** are no longer subject to technical constraints. We need legal protections that are currently missing from *FIPPA* to limit government's uses of personal information, and to prevent data matching and mining.

There is also a serious issue with domestic data storage provisions in s.30.1.Those requirements are being circumvented by the government through the use of tokenization. We are also concerned about the possible effect of the Trans-Pacific Partnership (TPP) Agreement, which appears to undermine this part of *FIPPA* (based on summaries released to date by the federal government).

FREEDOM OF INFORMATION

An obligation to create records and penalties for improper destruction

There can be no public access to records if records are not created. Unfortunately, as noted in several recent reports from the Office of the Information and Privacy Commissioner (OIPC), there has been an increasing trend toward oral government. 4 An "oral culture" is growing in government as officials choose not to record sensitive information or to delete it as soon as possible. This is in complete opposition to *FIPPA*'s legislated purpose of making public bodies more open and accountable.

In September 2012, FIPA filed a complaint with the OIPC about the rapidly increasing number of non-responsive answers to FOI requests.[5] The OIPC's investigation not only confirmed our theory, but also went on to show that the problem is even worse than we originally suspected. Most damning was the finding that the Office of the Premier had seen a dramatic spike in non-responsive FOI requests over the past year. In the 2011/12 fiscal year, 45% of all FOI requests received by the Premier's Office were returned with no responsive records.

Media requesters were hit the hardest by this decline in responsive records. In the 2010/11 fiscal year, Denham's investigators found 37% of media requests filed with the Office of the Premier came back unresponsive. By the end of the 2011/12 fiscal, that number had jumped to 49%. Denham pointed to the growing oral culture as one cause of the problem. Her report showed that most communication in the Premier's Office happens verbally or is classified as "transitory," meaning it is either never written down or quickly deleted.[6]

The Commissioner's report recommended the creation of a legislative "duty to document" to ensure records are in fact created, but the government's response was that it preferred to wait for this Special Committee to consider the questions as part of its review. That time is now at hand.

When government officials avoid scrutiny by failing to create records, this is a threat not only to access, but also to the archival and historical interests of the province. Left without

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[4] Investigation Report F13-01 Increase in No Responsive Records to General Access to Information Requests: Government of British Columbia https://www.oipc.bc.ca/investigation-reports/1510
See also FIPA's complaint:
https://fipa.bc.ca/new-fipa-calculations-show-dramatic-decline-in-foi-performance-4/

[5] https://fipa.bc.ca/new-fipa-calculations-show-dramatic-decline-in-foi-performance-4/

[6] This is apparently what happened with the investigation of former chief of staff Ken Boessenkool.

records of their predecessors' thoughts, decisions and precedents, other officials are deprived of the benefit of their wisdom – and their folly. History is impoverished and our collective wisdom is diminished. As the saying goes, those who fail to learn the lessons of history are doomed to repeat them; if there is no history, it will be impossible to learn any lessons at all.

FIPA recommends that a positive duty to create and maintain records be incorporated into *FIPPA* or other legislation. This would be a duty to record decision making, and would set out minimum requirements for record keeping in critical areas.

Related to the duty to create records, there should also be a specific duty to retain documents subject to FOI requests or containing personal information, and there should be penalties for intentional destruction or alteration of documents.

Seven provinces and territories, plus the Canadian government have introduced penalties for document tampering into their FOI acts.[7] Canada's *Access to Information Act* includes fines of up to $10,000 and jail terms of up to two years for anyone who tries to deny the right of access to information by destroying, falsifying or concealing records, or counseling another to do so.[8]

Alberta's *Freedom of Information and Protection of Privacy Act* includes fines of up $10,000 for anyone who, among other things, destroys records for the purpose of blocking a freedom of information request.[9]

Earlier this year we were shocked to hear a former of the political staffer of BC's minister of transportation allege that he was ordered to delete dozens of emails relating to the Highway of Tears consultation, which were being requested under the *Act*.[10] The Commissioner is investigating this case, but it is not clear what, if any, penalty those responsible for these deletions could face.

It may be that the current section 74 may be sufficient to deal with cases like this, where destruction of records takes place in the face of a request for information under the *Act*, and appears to be designed to frustrate an actual request being processed by a public servant. Specifically, section 74(1) states that a person who willfully "obstruct[s] the commissioner or another person in the performance of the duties, power or functions of the commissioner or other person under this *Act*" faces a fine of up to $5,000. Section 6 of *FIPPA*, which imposes a duty on public bodies to assist requesters, may also apply.

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[7] Newfoundland and Labrador, Prince Edward Island, Nova Scotia, Quebec, Manitoba, Alberta and Yukon.
[8] *Access to Information Act*, RSC c. A-1 s.67.1
[9] *Freedom of Information and Protection of Privacy Act*, RSA 2000 c.F.25, s.86.
[10] http://www.huffingtonpost.ca/2015/05/29/former-bc-staffer-alleg_n_7463762.html

It does not appear, however, that current legislation is adequate to deal with situations like this, but where there is not an actual FOI request or OIPC investigation underway. These are cases where records are not kept or where records are destroyed under claims that they are "transitory".

As the Commissioner has noted in her report on FIPA's complaint about no responsive records and in her investigation of the 'quick wins' scandal[11], the move to oral government and failure to keep adequate or any records is a growing problem. She also found "the general practice of staff in that office [the Office of the Premier] is to communicate verbally and in person. We were informed that staff members do not usually use email for substantive communication relating to business matters, and that most emails are 'transitory' in nature and are deleted once a permanent record, such as a calendar entry, is created."[12]

As Commissioner Denham stated regarding the complete absence of records in the investigation of the resignation of the Premier's former Chief of Staff:

> *It appears that government has chosen not to document matters related to the resignation of the former Chief of Staff. The OIPC has investigated hundreds of complaints where government claimed requested records did not exist because they were never created in the first place. There is currently no obligation under* FIPPA *that requires public bodies to document their decision-making. As such, government did not contravene* FIPPA *in opting to conduct a verbal investigation regarding the former Chief of Staff.*[13]

Another major problem is the misunderstanding (either deliberate or through ignorance) of the nature of a transitory record.

Commissioner Denham pointed to another factor in the absence of records – they were being destroyed because they were considered transitory. She expressed doubts that these records would fall under any definition of the word:[14]

> *Staff in the Office of the Premier use the following factors in determining whether a record is transitory:*
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> - *Temporary usefulness;*
> - *Drafts;*

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[11] SeeF13-04 Aug 1, 2013 *Sharing of Personal Information as Part of the Draft Multicultural Strategic Outreach Plan* https://www.oipc.bc.ca/investigation-reports/1559

[12] Investigation Report F13-01 p.4

[13] Ibid., p.18

[14] Ibid., p.17

- *Convenience copies of items that originate in other offices or are filed by other departments. Examples: copy of a meeting request, copy of an incoming letter to the Premier;*
- *Only required for a limited time or for preparation for an ongoing record;*
- *Not required to meet statutory obligations or to sustain administrative functions; and*
- *Phone messages.*

Commissioner Denham pointed out that current government policy governing what is to be considered a transitory record was not being followed by the BC government.

> *The Office of the Chief Information Officer ("OCIO"), the central office responsible for information management in government, offers guidance on transitory records on its website, stating that "Transitory records are records of temporary usefulness that are needed only for a limited period of time in order to complete a routine action or prepare an ongoing record." The Ministry of Citizens' Services and Open Government provides a similar definition in its approved government-wide records schedule on transitory records.*
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> *The OCIO makes it clear that not all drafts or working papers are transitory records. The OCIO also states that some, but not all, email records are transitory. I believe that the determination of whether a record is transitory is not dependent on the medium of communication, but instead depends on whether it is a record of action or decision-making. The Office of the Premier should ensure that its practices regarding transitory records align with the government policy as recommended by the OCIO.*[15]

The Premier's Office is not the only part of government where the word 'transitory' is treated as a magic incantation that allows the destruction of inconvenient or embarrassing records.

In one set of records available on the BC government's open information website, a senior bureaucrat sends an email to staff, telling them to "please delete all drafts of the materials and e-mail correspondence should be treated as transitory."[16] This is not the only case where this has happened.

Records are either transitory or they are not. One does not have the option of "treating them as transitory", and the CIO has set out clear rules and procedures that set out what records are transitory and subject to destruction.

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[15] Ibid., p.18

[16] http://docs.openinfo.gov.bc.ca/D45786213A_Response_Package_JTI-2013-00073.PDF

BC needs sanctions for the wanton destruction of information, but unfortunately it looks like the government has been moving in the opposite direction. In Bill 5, the *Government Information Act*, the government brought in much-needed measures to improve electronic preservation and access to government records. It updates the Depression-era *Document Disposal Act*, which used to govern how information could be handled, kept or destroyed.

Unfortunately, the good news stops here. Bill 5 failed to bring in a legal duty to document, which is essentially a requirement that bureaucrats create records of what they do. Compounding the problem, Bill 5 also brought in the removal of the possibility of anybody being charged for violating the law regarding the destruction of government records.

Where the *Document Disposal Act* created a provincial offence for violations, Bill 5 abolished that law without preserving that possibility that someone destroying records contrary to the law could face legal consequences.

But this was not the only instance where the BC government absolved wrongdoers of any consequences for their actions.

In Bill 11, which amended the *School Act*, the government brought in some profound changes [17]to how student records are to be handled. Under the previous section 170, it was an offence to "knowingly disclose any information contained in a student record that identifies a student."

Bill 11 still restricts the purposes for which what is now to be called "student personal information" can be used for, but it removes the offence of +improperly disclosing the information.

The common element here is the elimination of either personal or organizational responsibility or liability for the misuse of information held by a public body. Even if these provisions were seldom if ever used, they did serve as a deterrent; that deterrent has now been removed.

Time limits and delay

What started out as a thirty-calendar-day response time has been turned into thirty business days, and the government amended s.10 of the *Act* to give itself a thirty-day extension if they feel "meeting the time limit would unreasonably interfere with the operations of the public body".[18]

[17] http://www.huffingtonpost.ca/2015/03/26/bcs-plans-for-professi_n_6951326.html
[18] FOIPPA s.10(1)(b)

As a practical matter, this delay is at the discretion of the public body, as there is no way for a requester to complain to the Commissioner about the additional time being taken, nor would the matter be heard by that office before the end of the additional thirty-business-day period. This means there is no recourse where a public body takes additional time.

This is a serious problem.

Under s.6, the head of a public body must "…make every reasonable effort to assist applicants and to respond without delay..."

Black's Law Dictionary defines duty as:

> *A human action which is exactly conformable to the laws which require us to obey them. Legal or moral obligation. Obligatory conduct or service. Mandatory obligation to perform.*

A duty is not discretionary, nor subject to whim or budget constraints.

Timeliness is extremely important in the context of FOI. *FIPPA* is perhaps the only statute on the books that is routinely violated without any chance of penalty.

One recent and egregious example can be found in the OIPC mediation summaries.[19] In that case, the public body denied access to audit summaries on the basis of s.12(3). When that failed to convince the OIPC, the public body moved on to s.22. After the privacy argument was shot down, the public body moved on to s.15, saying release could harm investigative techniques, could not point to any likelihood of harm. As a final gambit, the public body resorted to s.21, again shot down because of the weakness of their proposed arguments. After a delay of six months while these increasingly implausible exception claims were raised, the requester finally received the records they were entitled to all along.

This case illustrates the need to have some type of sanction to prevent public bodies from wantonly engaging in this type of high handed and wasteful behavior.

FIPA recommends that a section be added to *FIPPA* that penalizes any person or public body that flagrantly breaches the duty to assist requesters by obstructing access rights or failing to properly document government decisions.

Fees are also used to delay and discourage requests

FIPA has experienced numerous instances where fees have been levied by a public body, only to have them reduced or eliminated on review. We have developed a practice of paying the deposits requested to avoid the delays set out in s.7(4) and s.7(5), but other FOI users

[19] F15-10MS https://www.oipc.bc.ca/mediation-summaries/1817

may not be able to be afford the fees, and either abandon their request or go through an extended delay while they protest the fee.

We have also noticed that some public bodies are refusing to accept requests for fee waivers that accompany the request for information, insisting that such requests can only be made once fees have been assessed and requested. The only conceivable reason for such a demand is s.75(5.1), which requires a head of a public body to respond within twenty days to a request for a fee waiver. **FIPA recommends s.75(5.1) be amended to clarify that a fee waiver can be requested as part of the request for information.**

The first Special Committee agreed that public bodies should be encouraged to complete information requests in a timely manner. They recommended:

> *That public bodies comply with time lines under section 7 of the* Act*, and that in the event of non-compliance with time lines, fees for requests that are not fulfilled within the prescribed time be waived.*

FIPA recommends that an automatic fee waiver for non-compliance be implemented.

The provincial government has had a centralized system for handling of FOI requests for several years, which means that misdirected FOI requests can be sent to the relevant ministry or public body immediately, rather than being transferred from one ministry to another. Section 11 of *FIPPA*, however, still provides a twenty day period for transferring misdirected requests. This is not necessary due to the provincial government's current practices. With that in mind, your immediate predecessors recommended the period be reduced to ten days to prevent misuse and confusion, but this recommendation was not implemented.

FIPA recommends that section 11 of the *Act* be amended to altogether eliminate the twenty day transfer period for public bodies which are part of the new FOI request system.

"Information laundering"

Access to records of 'quasi-governmental' bodies

The trend of the past two decades to outsource work formerly done entirely within government has created new problems for access to records related to public functions.

Some of these responsibilities and functions have been transferred out of the public sector proper and into the sector of organizations that have been called "quasi-governmental" or "quasi-public" bodies. These bodies include multi-governmental partnerships, government-industry consortia, foundations, trade associations, non-profit corporations and advisory groups.

Access to records of subsidiaries of educational public bodies

It will be ten years this year since then- Education Minister Shirley Bond promised to put the subsidiary companies of school boards under *FIPPA*. This promise was made in response to a report about school board subsidiaries losing huge amounts of taxpayer money, which included the recommendation that those subsidiaries be subject to *FIPPA*. This is also an issue for post-secondary institutions in the wake of an unfortunate BC Supreme Court decision in *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*.[20] That decision was a judicial review of an adjudicator's decision regarding a private company owned and operated by Simon Fraser University (SFU). Some of the relevant facts regarding this company are:

- Its shares are 100% held by SFU
- All its directors are appointed by SFU
- Its physical presence is entirely within SFU without even a distinct office
- All records were held on SFU's campus
- Its activities are 100% dedicated to marketing SFU research

The adjudicator had found that due to these factors, SFU had control of those records for the purposes of *FIPPA* and should therefore provide them to the requester,[21] but Mr. Justice Leask disagreed, finding that "the Delegate erred in law by piercing SFU's corporate veil without applying the proper legal standard for doing so. I also find that the Delegate erred in finding that those records were under the control of SFU and hence subject to the *FIPPA*…"[22]

Justice Leask's decision was appealed, but the BC Court of Appeal shut down its hearing of this case[23] after the death of the requester on the grounds of mootness.

The Commissioner wrote to the Minister of Citizens Services in 2011to express her concern about this situation and to seek amendments to the *Act*.[24] In her letter she pointed out that *FIPPA* provides language that would deal with these subsidiaries, since it covers the subsidiary companies of local government bodies.

It includes in the definition of a "local government body":

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[20] Simon Fraser University v. British Columbia (Information and Privacy Commissioner 2009 BCSC 1481
[21] Order F08-01 at para 93
[22] Simon Fraser University v. British Columbia (Information and Privacy Commissioner), op cit para 81
[23] BCCA File CA 37692
[24] https://www.oipc.bc.ca/public-comments/1138

(n) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in paragraphs (a) to (m) and all the members or officers of which are appointed or chosen by or under the authority of that body

By using a similar definition for 'educational bodies', the gap could easily be closed. It would also remove an anomaly in the way education subsidiaries are covered compared to those of municipalities.

The Minister responded that this was a complicated question and would require extensive consultation. That was almost four years ago, and there is no indication that there has been any serious consultation at any point since then.

FIPA recommends that the definition of education body in Schedule A of the *Act* should be amended to mirror the definition of 'local government body'.

Legislative overrides of *FIPPA*

A large number of bills have been passed which take advantage of s.79 to specifically override some or all parts of *FIPPA*. The most recent is Bill 39 currently before the Legislature, the *Provincial Immigration Programs Act*. The Commissioner expressed her concern[25] about yet another use of the legislative override in a situation where the existing protections in the *Act* (in s.22) appear to be entirely adequate to deal with the claimed purpose of the override.

At this point there are 43 laws on the books in this province that include overrides of *FIPPA* in whole or in part. Bill 39 will bring that total to 44, and that is not acceptable, especially since *FIPPA*'s existing exceptions to release appear to be entirely adequate to protect the other societal interests involved.

The problem seems to be based on the preference of public bodies to simply claim the protection of an exception without going to the trouble of showing why it would apply to the records in a given situation. However, exceptions to our information rights should not be made simply for the convenience of the bureaucracy.

FIPA recommends that no further overrides be made to the *FIPPA*, and that existing overrides be examined to see if *FIPPA's* current exceptions would be suitable. Public written justification should be provided for each.

[25] Letter to Minister Bond https://www.oipc.bc.ca/public-comments/1869

Exceptions to release

These exceptions were set out in the original version of the *Act* to balance the right of access to information with various other societal interests.

Over the years a number of these exceptions have come to be more broadly interpreted by government and in some cases by the courts, leading to diminished access rights and ever greater scope for preventing the release of information.

Ideally all exceptions would be harm based. Public bodies should be required to show not just that a particular interest is engaged, but that there is a real risk of harm to that interest if access is given to certain records. The *Act* already contains a number of harms tests, and these have not proven to be insurmountable barriers to protecting legitimate exceptions to release.

Cabinet confidences (s.12)

There was once a time (1968) when conventional legal wisdom was that Crown privilege meant a police officer's notebook could not be released for use in a civil case about a traffic accident.[26]

Since that time, the concept of Crown privilege has been restricted primarily to the deliberations of Cabinet and related records that might reveal what ministers were discussing. The preservation of such confidences is necessary to maintain conventions of responsible government, such as Cabinet solidarity, and to protect the integrity of decision making.

The common law approach to Cabinet confidences in Canada was set out in *Babcock v. Canada*[27] by Chief Justice McLachlin. This involves balancing the public interest in disclosure against the need for Cabinet confidentiality.

> *At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield. Courts began to weigh the need to protect confidentiality in government against the public interest in disclosure, for example, preserving the integrity of the judicial system. It follows that there must be some way of determining that the information for which confidentiality is claimed truly relates to Cabinet deliberations and that it is properly withheld. At common law, the courts*

[26] *Conway v Rimmer* [1968] AC 910; 1 All ER 874 (HL)

[27] Babcock v. Canada (Attorney General), 2002 SCC 57, [2002] 3 S.C.R. 3.

did this, applying a test that balanced the public interest in maintaining confidentiality against the public interest in disclosure.[28]

The rules governing what is not subject to release in response to a request under *FIPPA* are set out in s.12 of the *Act*.

The leading interpretation of this section is found in the 1996 BC Court of Appeal decision in *Aquasource Ltd. v. British Columbia (Information & Privacy Commissioner)*.[29]

That decision turned on wording in s.12(1) as to whether information requested by an applicant must be refused because it "would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees."

The Court in *Aquasource* took a very broad view of what was included in "substance of deliberations". In the words of Mr. Justice Donald,

> *I do not accept such a narrow reading of s.12(1). Standing alone, "substance of deliberations" is capable of a range of meanings. However, the phrase becomes clearer when read together with "including any advice, recommendations, policy considerations or draft legislation or regulations submitted ...". That list makes it plain that "substance of deliberations" refers to the body of information which Cabinet considered (or would consider in the case of submissions not yet presented) in making a decision.*[30]

Since *Aquasource* was decided, other provinces with similar or identical provisions in their FOI laws have declined to follow the decision of the BC Court of Appeal, preferring a less restrictive approach which still protects the actual deliberations of Cabinet. One leading case is the Nova Scotia Supreme Court decision in *O'Connor v. Nova Scotia*.[31]

In that case, the court considered two possible interpretations of this section:

> *[20] In this context, the word "substance" may allow two potentially conflicting interpretations. It could broaden the meaning of "deliberations" to include all information upon which the deliberations are based. That was the approach taken by the British Columbia Court of Appeal in Aquasource Ltd. v. B.C. (Information and*

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[28] Ibid. para 19
[29] Aquasource Ltd. v. British Columbia (Information & Privacy Commissioner) (1998), 8 Admin. L.R. (3d) 236 BCCA
[30] ibid at 39
[31] O'Connor v. Nova Scotia, 2001 NSSC 6

Privacy Commissioner), [1998] B.C.J. No. 1927 when interpreting British Columbia's equivalent provision.

[21] On the other hand, "substance" could refer to Cabinet's actual deliberation process. In other words, only that information touching on the actual deliberations would be protected. This view would significantly limit the s. 13(1) exception in favour of more Government disclosure.

[22] With respect, when comparing the two approaches, I prefer the latter interpretation. To interpret the "substance of deliberations" as protecting all information "form [ing] the basis of Cabinet deliberations", would paint Cabinet confidentiality with too broad a brush. Cabinet may base its deliberations on a variety of data, some of which deserves no protection at all.

FIPA's experience has been that where the s.12 exception is claimed, the government is taking an ever-wider interpretation to the already very broad approach set out in *Aquasource*. Fortunately, the courts do not seem inclined to follow the government's lead, requiring the release of subject headings of agendas for example.

It is imperative that BC's FOI laws reflect the proper protection of the deliberations of Cabinet, and not a notion that any document however vaguely related, falls within this mandatory exception.

Local public bodies

We are at a loss as to why section 12(3), which applies to local public bodies, lacks a parallel to s. 12(2)(c), which applies to Cabinet confidences.

Section 12(2)(c) states that Cabinet confidentiality does not apply to "…information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if

(i) the decision has been made public,

(ii) the decision has been implemented, or

(iii) 5 or more years have passed since the decision was made or considered."

The lack of similar qualifying language in 12(4) allows local public bodies to withhold background materials or analysis in the above conditions not allowed to Cabinet. FIPA finds this to be inappropriate and we recommend that the exception be amended to remedy what we conclude was an unfortunate oversight.

Subsections (5), (6) and (7) provide that records of what are known as Caucus Cabinet Committees are to be treated as actual committees of Cabinet. These subsections were

enacted after the Commissioner found that these committees could not be construed to be actual Cabinet committees for the purposes of s.12.

The Commissioner was correct, and these extensions of what should be an exception limited to the protection of the deliberations of Cabinet are contrary to the spirit (and what was the letter) of the *Act*.

FIPA recommends that:

- **Section 12 should be amended to clarify that "substance of deliberations" only applies to the actual deliberations of Cabinet or a local public body.**
- **Section 12 should be made discretionary and that the time limit for withholding records should be reduced to 10 years.**
- **Section 12(4) should have similar qualifying language to s. 12(2) (c)**
- **Section 12(5)(6) and (7) should be removed.**

Advice and recommendations (s.13)

The purpose of the exception in s.13 is to allow for the unfettered discussion and development of policy within government by public servants for decision by their political masters.

As the BC government itself once stated:

> *The Ministry submits that the underlying intent of section 13 is "to allow full and frank discussion of advice or recommendations within the public service, preventing the harm that would occur if the deliberative process of government decision and policy making was subject to excessive scrutiny." (Submission of the Ministry, paragraph 5.02) (emphasis added)*
>
> *A common step in the deliberative process of government decision making is the preparation of a discussion paper which lists and evaluates recommendations developed by the Public Body for change in policy or programs. This process requires full and frank discussion within the Public Body of the advice and recommendations which are developed. This is exactly the type of information which section 13 is intended to protect from disclosure. (Reply Submission of the Ministry, paragraph 5)* (emphasis added)[32]

[32] Order 215-98. See also Order No. 193-1997 p7

Clearly the intent of the legislature in the design of s.13 was to protect the legitimate interest of society in allowing public servants to freely and candidly provide advice or recommendations to decision makers in government without fear of premature disclosure.

However, the legislature only intended to protect the advice and recommendations of public servants, not to create a blanket that could be thrown over any information provided for use in the deliberative process.

In a speech to the 2007 BC Information Summit, former Attorney General Colin Gabelmann (the Minister responsible for the original *FIPPA*) pointed out that the intention of the legislature in drafting s.13 was very different from what the BCCA in *College of Physicians* thought it was:[33]

> *Section 13 was so clear and obvious that there was not a word spoken by any member of the House on it during the committee stage debate. Not a word! Somehow, the B.C. Court of Appeal in 2002 determined that the Information and Protection of Privacy Commissioner got it wrong in interpreting the words "advice and recommendations" in this manner. They said the trial judge was wrong, too, in concurring with the commissioner.*
>
> *I have to tell you that the Appeal Court quite simply failed to understand our intention - the intention of the legislature - when using these words as we did…. I can't think of another example where the Appeal Court got something as wrong as they did here. The Act should not really have to be amended because it is really clear in every way, but unfortunately an amendment has been our only option for the past five years. A government which believes in freedom of information would have introduced amendments in the first session of the legislature after that Appeal Court decision to restore the act's intention.*
>
> *Now, the Appeal Court decision means that the secrecy advocates in government are using the two sections of the Act in tandem to refuse to allow public access to material that is at the very heart of the principles of freedom of information. This is an outrage and must be remedied.*

The legislature also foresaw the potential for abuse in subsection (1) if there was an overbroad reading of the words advice and recommendations. In subsection (2) they added an extensive list of types of information which could not be withheld under the rubric of 'advice and recommendations', even though they may have formed much of the basis for the advice or recommendation.

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[33] See: http://thetyee.ca/Views/2007/10/15/FOI/

The John Doe decision

Earlier this year, the Supreme Court of Canada had the opportunity to pronounce on the nature of the policy advice exception in a case called *John Doe v. Minister of Finance*.[34]

In that case, the high court held that a series of drafts were covered under s.13 of the Ontario law (which also covers policy advice) and did not have to be released to the requester.

In the words of the court,

> *Protection from disclosure would indeed be illusory if only a communicated document was protected and not prior drafts. It would also be illusory if drafts were only protected where there is evidence that they led to a final, communicated version. In order to achieve the purpose of the exemption, to provide for the full, free and frank participation of public servants or consultants in the deliberative process, the applicability of s. 13(1) must be ascertainable as of the time the public servant or consultant prepares the advice or recommendations. At that point, there will not have been communication. Accordingly, evidence of actual communication cannot be a requirement for the invocation of s. 13(1). Further, it is implicit in the job of policy development, whether by a public servant or any other person employed in the service of an institution or a consultant retained by the institution, that there is an intention to communicate any resulting advice or recommendations that may be produced. Accordingly, evidence of an intention to communicate is not required for s. 13(1) to apply as that intention is inherent to the job or retainer*.[35]

There is a great deal of concern that information which was previously available to requesters through FOI will now be denied by public bodies, forcing another lengthy legal fight to determine just how far this exception can be stretched.

And it appears to stretch quite far indeed.

In a decision following the *John Doe* decision, the BC Court of Appeal upheld the decision of a judge of the BC Supreme Court in a case involving a request not for audits, but the summaries of audits that had been released without an FOI by other health authorities.[36]

The Commissioner has also identified audits as the types of records that should be released as best practices for open government.[37]

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[34]John Doe v. Ontario (Finance) 2014 SCC 36 http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13633/index.do

[35] Ibid., para 51

[36] Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner), 2013 BCSC 2322

It would be perverse if the Supreme Court of Canada's ruling in *John Doe* becomes the means by which public bodies are able to prevent the release of information through the FOI process – especially when that information is the type that the Commissioner would recommend to be released proactively.

We ask that you eliminate the uncertainty, and take action to amend s.13 to restore it to its proper role: of protecting the advice of public servants to their political masters.

FIPA recommends that the s.13 advice and recommendation exception be amended to include only information which recommends a decision or course of action by a public body, minister or government.

Legal privilege (s.14)

The operation of this section has come to our attention as a barrier to transparency.

In 2010 the OIPC handed down a ruling in a case involving the Vancouver School Board (VSB).[38] The VSB claimed that a review of its policies and practices prepared by a lawyer was exempted from release because it was covered by s.14. The Adjudicator disagreed, pointing out that there was no indication in the retainer letter or elsewhere that the lawyer was retained for the purpose of providing the public body with legal advice.[39]

Subsequent orders have shown that where public bodies retain lawyers to provide reports which do not themselves constitute or contain legal advice, they are now careful to include a line in their retainer that the lawyer is also retained for the purpose of providing legal advice.[40]

This loophole allows public bodies to avoid releasing reports (especially controversial ones) by retaining a lawyer through an agreement that mentions legal advice, and then employing s.14.

Clarifying this section to prevent this practice would not undercut the importance of the legal privilege exception, but would properly frame its application in the FOI context. This is not a problem exclusive to BC: The Ontario Commissioner is now hearing a case involving a university whose hockey team was involved in sexual assault allegations. The university hired a law firm, and the firm then engaged a consultant to conduct an investigation of the incident. A journalist requesting the report was told that it was privileged because the law

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[37] Investigation Report F11-02 Investigation Into The Simultaneous Disclosure Practice Of BC Ferries https://www.oipc.bc.ca/investigation-reports/1243 Appendix A

[38] Order F10-18

[39] Ibid., at para 34.

[40] See for e.g. Order F12-05 (2012 BCIPC No. 6), para 23: https://www.oipc.bc.ca/orders/923

firm had hired the consultant. The hearing has taken place and we are awaiting the Commissioner's decision. If this maneuver is successful in blocking access to the consultant's report, we can expect to see this type of activity take place in this province unless the law is changed.

Law enforcement (s.15)

A recent decision by the Information and Privacy Commissioner has brought up the question of when an investigation is open for the purpose of the *Act*.

In a response to FIPA's complaint about the mysterious RCMP investigation into the Ministry of Health data breach firings, Information and Privacy Commissioner Elizabeth Denham found that it was "not unreasonable" for the BC government to believe an RCMP file was not really closed, because it would be reopened "if and when" the government's own related investigation was completed.[41]

Responding to a FOI request from FIPA, the BC government claimed an RCMP investigation could be harmed by releasing the requested records. The RCMP sent an email supporting the government's position, but after the hearing, and before the OIPC made their decision, the RCMP closed the file and told the BC government that it would be reopened "if and when" the latter completed their investigation into the matter.[42]

This leaves some uncertainty about when an investigation can be finally defined as concluded, and it also raises the question of whether

FIPA recommends that s.15(1)(a) be amended to add the word "active" before "law enforcement matter".

Release in the public interest (s.25)

There has been important and positive change in the way this section is being interpreted by the Commissioner since the last review of the *Act*.

In a major report released in July of this year[43], Commissioner Denham made a major reinterpretation of the law dealing with release of information in the public interest without a freedom of information request.

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[41] https://fipa.bc.ca/wordpress/wp-content/uploads/2015/09/OIPC-resp-ltd-re.-Cowan-letter-F15-61767.pdf

[42] See: http://www.vancouversun.com/health/RCMP+probe+fired+health+workers+never+happened/11106928/story.html

[43] Investigation Report F15-02 https://www.oipc.bc.ca/investigation-reports/1814

Commissioner Denham has told the government to have all other departments to look through their files for information that must be released under a new interpretation of Section 25 of *FIPPA*.

Section 25(1) of *FIPPA* requires a public body to release information "without delay" without a FOI request where there is "…a risk of significant harm to the environment or to the health or safety of the public or a group of people", or that is "for any other reason, clearly in the public interest."

According to the Commissioner's new interpretation, the element of urgency implied by the words "without delay" applies to the release of information by the public body. In other words, all information that is clearly in the public interest must be released without delay – not just emergency information.

This new interpretation is similar to one we have suggested to this Committee's predecessors, and which was included as a recommendation in the 2010 Special Committee Report.[44]

In our view, and that of the Commissioner, the current interpretation of section 25, which claims it contains an 'implied' temporal requirement is in error. Information need not be of an urgent nature to be disclosed in the public interest. The only temporal requirement set out in law is that of the public body to disclose, without delay, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or which is otherwise clearly in the public interest.

The Commissioner had previously released another investigation report on the lack of use of s.25 by public bodies in 2013, stating that the reading-in of a temporal requirement into s.25(1)(b) has resulted in a situation where; "[t]he intention of Legislature with respect to this provision is not being achieved."[45]

In that report, the Commissioner had also recommended the BC government amend the law to remove the 'urgency' requirement.[46]

FIPA's preferred solution to this problem would be for s.25 to be amended to restore its original intent. The purpose of the provision is to ensure that, regardless of other interests that may tend to influence the decision of a public body, the final decision regarding the disclosure of records is made in the public interest.

FIPA recommends that s.25 be amended in accordance with the Commissioner's recommendation to remove the temporal requirement.

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[44] Op cit, Recommendation 19

[45] Investigation Report F13-05 – Information & Privacy Commissioner for B.C., p. 36

FIPA will supply this Special Committee with a more detailed submission on possible implementation strategies for the new approach being put forward by the Commissioner (and hopefully supported by amendment of the *Act*).

[46] Ibid.

PRIVACY PROTECTION

The BC government has had a record of accomplishment in the privacy sector. It has shown leadership among the provinces, first by introducing the *Personal Information Protection Act* and second by strengthening the privacy provisions of *FIPPA* to counter the potential impact of foreign legislation when the personal information of British Columbians is disclosed to foreign-owned corporations.

However, there are some storm clouds on their way.

During the 2010 consultation, the provincial government made a number of requests for greater ability to share personal information in the name of "citizen-centred services". Your predecessors in 2010 were not convinced and specifically rejected many of the government's recommendations.[47] However, the government went ahead and instituted those changes in 2011.

Domestic data storage (s.30.1)

This section was added to the *Act* in 2004 after a huge controversy over the outsourcing of pharmacare information to a subsidiary of the American company Maximus.

The amendment followed the recommendations in an extensive Special Report by the Office of the Information and Privacy Commissioner entitled *Privacy and the USA Patriot Act – Implications for British Columbia Public Sector Outsourcing*.[48] That report recommended that *FIPPA* be amended to, among other things,

> *Prohibit personal information in the custody or under the control of a public body from being temporarily or permanently sent outside Canada for management, storage or safekeeping and from being accessed outside Canada;*[49]

This provision has ensured that all public bodies in BC store personal information in this country, but it is now under threat.

The first and most serious threat was just revealed last week when the federal government unveiled the Trans-Pacific Partnership agreement.

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[47] Report of the Special Committee to review *FIPPA* 2010, p.22 "We do not support the idea of indirect collection of personal information, without consent, except for the extenuating circumstances specified in the existing Act, nor the addition of an implicit consent clause. With regard to the recommendations promoting information sharing, we do not think a compelling case was made in general terms to expand the consistent-purpose provision, and the language of the amendments was not specific enough to guide committee members during their deliberations."

[48] OIPC Oct 29, 2004 https://www.oipc.bc.ca/special-reports/1271

[49] Ibid., Recommendation 1 (a)

Buried in one of the various backgrounders were two bullet points about the effect of the TPP on Electronic Commerce. They read as follows:

- *Prevents governments in TPP countries from requiring the use of local servers for data storage.*
- *Prevents governments in TPP countries from demanding access to an enterprise's software source code.*[50]

The TPP clearly is designed to prevent governments from having laws on their books which require domestic data storage, and s.30.1 of FIPPA will clearly contravene the TPP if it was to be ratified.[51]

In case there was any doubt about what the drafters of the treaty intended in this chapter, the federal government provided a cheerful example of how it would work to help businesses:

> ***Bringing down virtual barriers***
>
> *An entrepreneur has developed a proprietary system for electronic payments that protects both the consumer and vendor with every transaction. When he heard about the TPP, he knew it would help him expand his business into important Asian markets. He is pleased with the TPP's dedicated Electronic Commerce Chapter, which will help establish an environment that is more conducive to the type of work he and his customers do.* ***Of particular interest to this entrepreneur are provisions that enable the free flow of data across borders and prevent the Parties from requiring the local establishment of computing facilities.*** *That means that not only can he sell his technology to online vendors in TPP markets right from his home in Canada, but there will be more demand for his technology as online vendors in TPP markets expand their own business to take advantage of the benefits of the TPP.*[52] (emphasis added)

It is possible that these provisions may not apply to *FIPPA*, but this would require that the *Act* be covered by what is known as a 'reservation'. A reservation is usually contained in an appendix to the treaty in question and it lists existing laws of the various signatories which are specifically exempted from the operation of the treaty's general provisions.

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[50] http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/13-E-Comm.aspx?lang=eng

[51] It should be noted that the Canada-Europe Trade Agreement (CETA) does not use this language. http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/18.aspx?lang=eng

[52] Ibid.

If no reservation has been made for *FIPPA*, two possible outcomes flow from that fact.

The first is that BC amends the law to remove the prohibition on public bodies storing or making personal information accessible outside Canada. This would significantly reduce the protection for our personal information and would open up data storage for public bodies to companies and organizations from outside the country, possibly making out information subject to their laws, including the *USA PATRIOT Act*.

The second possibility is that BC does not amend *FIPPA*'s data protection sections, thereby opening up the federal government to lawsuits under the TPP from companies prevented from bidding on (and making a profit on) storage of public sector controlled personal information. It is unclear exactly how much that could cost the federal government, but other cases have seen settlements in the millions of dollars.[53]

FIPA has used freedom of information requests to try to find out how the BC government has been discussing the TPP and *FIPPA*, so far without success. The first request—which asked about a conference call between the Ministry of Citizens' Services and the Office of the US Trade Representative (USTR)—resulted in no responsive records, despite the fact we had already obtained information about the call from the USTR through the American FOIA system.[54] The second, which asked for Ministry of International Trade's records relating to the TPP's potential effects on *FIPPA*, has been delayed until November.

We are perturbed by this at least partly because during the 2010 review of *FIPPA*, the government submission requested that the domestic data storage requirements be scrapped. Your predecessors rejected this proposal out of hand:

> *…we are not prepared to recommend amending the provision in the* Act *prohibiting the storage of information outside Canada to take into account changes in information technology. We believe it is important to protect the integrity of records held by BC public bodies as much as we can.*[55]

We urge this Special Committee to call whatever government officials necessary to get to the bottom of this situation. This is especially important, as the federal government has now stated it will not provide the promised text of the TPP agreement until sometime after the federal election.[56]

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[53] Bowater

[54] https://fipa.bc.ca/us-trade-representative-calls-bc-privacy-law-a-trade-barrier/

[55] Special Committee report 2010, op.cit, p.22

[56] http://www.cbc.ca/news/politics/canada-election-2015-tpp-text-release-delay-1.3270806

There is no firm timetable for when the final text of the TPP will be released. In fact, we are still waiting for a final text[57] of the Canada Europe Trade Agreement (CETA) which the federal government announced with much fanfare in October 2013.

Tokenization and BC government contract with Salesforce.com

There is another aspect to the domestic data storage provisions of the *Act*, one that is playing out behind closed doors in government. If the Special Committee is inviting government officials to testify, we would suggest you also ask them about a contract signed in October 2013 with CRM software giant Salesforce.com, based in San Francisco.

This contract is referred to in a memo from the CIO to Assistant Deputy Ministers and ministerial information officers urging them to contract the office of the CIO for more information on how to use the services offered by Salesforce.com, despite it being a US-based company.[58]

The government is of the view that tokenization of the personal information is a means to avoid the domestic data storage provisions of *FIPPA*.

Commissioner Denham had been contacted by the BC government about the possibility of using tokenization to get around the domestic data storage requirements in s.30.1 of the *Act*. The Commissioner released her response in June 2014.[59]

This is how Commissioner Denham described tokenization:

> *Tokenization involves replacing information in an electronic record with a randomly-generated token. The original information can only be linked to the token by what is known as a 'crosswalk table'. Tokenization is distinct from encryption; while encryption may be deciphered given sufficient computer analysis, tokens cannot be decoded without access to the crosswalk table.[60]*

In her response to the CIO, the Commissioner stated that the government's plan could be in compliance with *FIPPA* if tokenization of the information being stored outside Canada was "adequate" and the personal information was not identifiable without the 'crosswalk table' which had to be stored in Canada and not be accessible outside Canada. In this situation, the Commissioner states that the information would no longer be 'personal information' for the purposes of the *Act*, so there would be no prohibition on storing it outside the country.

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[57] A consolidated text is available here. http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng

[58] http://docs.openinfo.gov.bc.ca/d11384614a_response_package_ctz-2014-00009.pdf

[59] Ibid.

This leaves us with a number of questions.

Is the government's tokenization adequate? We have no idea to what extent information is being tokenized before it is being sent to Salesforce. The Commissioner states in her letter that she has concerns about the level of tokenization and the possibility of the individuals being identifiable from the untokenized information. If only the names of individuals—and not the rest of their personal information—are being tokenized, then clearly that would be inadequate. We need to know what is happening with this personal information that is being sent to the United States.

It is difficult if not impossible to supervise the level of tokenization across the government and in each individual case. What might be adequate tokenization for a person living in a large city may not be adequate for someone living in a small town.

FIPA recommends that the BC government and other public bodies be required to make public the details of any tokenization system they use to avoid the operation of the domestic data storage requirements of *FIPPA*.

Posting of personal information contained in government reports

The reports in question deal with the mysterious Ministry of Health data breach firings (the McNeil report) and with excessive executive payments at Kwantlen University (the Mingay Report). Both reflect unfavourably on the government and senior officials.

In order to avoid posting the reports, the government had claimed that *FIPPA*'s section 33.2 prevented them from posting the reports—which contained personal information, and might run counter to the "reputational interests" of public servants or public figures—online, where they would be "accessible" outside Canada.

Strangely, other public bodies like the BC Lottery Corporation go out of their way to post the personal information of lottery winners on their website, but the BC government has not seen fit to require them to put a stop to this practice.

In response to our complaint[61], the OIPC has now confirmed and clarified that *FIPPA* would not be an impediment to the posting of such reports online – it just requires the minister to make an order.[62]

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[60] OIPC public comment June 16, 2014 Updated guidance on the storage of information outside of Canada by public bodies https://www.oipc.bc.ca/public-comments/1649

[61] https://fipa.bc.ca/wordpress/wp-content/uploads/2015/01/Complaint-Letter-re-BC-govt-refusal-to-post-vg1.pdf

[62] https://fipa.bc.ca/wordpress/wp-content/uploads/2015/08/OIPC-letter-to-FIPA-re-s33-150730.pdf

Clearly this is not the best way to ensure that these reports are posted, and in the letter to FIPA the OIPC stated that the law should be changed to eliminate this anomalous two-step procedure:

> *This matter can, and the Commissioner believes should, be put to the Special Committee reviewing* FIPPA*, which was struck in May 2015, so that the Legislature can assess whether and how to authorize the online publication of personal information contained in such reports. This would be consistent with the broad purposes of* FIPPA *and in particular the need to hold government accountable in s. 2. Our Office encourages stakeholders to bring any matters of concern of this nature to the attention of the Special Committee.*[63]

FIPA recommends that the *Act* be amended to allow posting of government reports and similar publications without the need for a ministerial order.

When privacy rights collide with government programs

Government bodies routinely collect, use and disclose a huge amount of sensitive personal information about citizens. Often this information is collected under the force of law in situations where receiving a license, benefit or a government service depends on the individual providing the information.

Consider the range and detailed nature of the personal information gathered by public bodies in the course of administering, for example, health care services, income assistance programs, family and child support services, and education. It is clear that government possesses an intimate and detailed picture of all our lives.

This information is used every day to make life-affecting administrative decisions about individuals – decisions that affect our family lives, our jobs, our financial and physical well-being, and even our freedom.

The collection of much of this information is necessary for government to carry out its programs properly and efficiently. But the possession by government of a vast amount of information about our personal lives can also present a serious threat to such constitutionally-guaranteed rights as privacy, freedom of expression and freedom of assembly.

Most people would agree that citizens in a democracy should know as much as possible about their government. But how much should a government know about its citizens? That is to say "what about privacy?" After all, if government can look into your health, your mental state, your consumer habits, your finances, even your sexual behavior, and it can go

[63] ibid

further and share this information across ministries and assemble it into comprehensive files on each citizen, what privacy is left to protect?

Governments have been well aware of this dilemma for some time, and this awareness is reflected in privacy protections that have been created in the *Canadian Charter of Rights and Freedoms* and in privacy legislation at both the federal and provincial levels.

The Supreme Court has much to say about our constitutional right to privacy. As stated *R. v. Dyment*,

> *Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state.*[64]

The right to privacy with respect to documents and records was addressed by the Supreme Court in *R.* v. *Plant* as follows:

> *In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the* Charter *seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.65*

The basic question this committee faces is where the balance should be struck between privacy rights and government demands for increased powers to match and mine data.

Collection, use and disclosure of personal information by private-sector agencies of government operating under contract as social service providers

We have raised this previously with your colleagues reviewing the *Personal Information Protection Act* (*PIPA*), which governs the private sector in this province.

There are several hundred BC public bodies, most of which engage private sector entities to assist with some provision of services, at least some of the time. In such cases, these agencies may have access to highly sensitive personal information of citizens. Such information is collected by the private sector entity, on behalf of or for the public body, in order that the citizen may obtain needed public services, including health care, mental health care, social services or education services, among other things.

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[64] *R. v. Dyment* [1988] 2 S.C.R. 417

[65] *R.* v. *Plant*,[1993] 3 S.C.R. 281, para. 19

Typically, the public body is obliged to take the position that the private sector agency is a "service provider" under *FIPPA*, and to require the agency to execute an agreement in respect of the protection of personal information. The agreement typically contains terms by which the service provider agrees to comply with the duties under the *Act* in respect of all the information collected by it for the purposes of the services. The public body may also require employees or contractors to sign confidentiality agreements, and other related agreements such as security terms.

But this is not always the case. Sometimes the public body and the private sector agency do not adequately identify the obligations and laws that apply; sometimes the parties fail to execute the necessary agreements. The impact of these failures is that often each of the parties implicitly relies on the other to protect the information and neither does an adequate job.

This becomes particularly problematic when information is collected by an agency for social services purposes, and then disclosed by that agency into a government information system. Who is responsible for the data collection? Who is responsible for notifying the individual of their rights, responding to access requests, protecting the data during the collection and disclosure process? Is consent necessary for the collection of the personal information, or not? When the individual is dealing with a private sector service provider but the services are funded in whole or in part by government, what does the individual know about their privacy and confidentiality?

These are important questions because in order for the individual to trust the agency enough to provide reliable information, he or she needs to understand his or her rights. The problem is, their rights under *FIPPA* and *PIPA* are quite different.

PIPA requires the individual to provide some form of consent for the organization to collect, use and disclose her personal information. This consent must be voluntary, and informed. This regime is fundamentally different than that under the *FIPPA* which is not consent-based and permits collection, use and disclosure where relates directly to or is necessary for an operating program or activity of the public body, or for a wide range of other permitted purposes. Further, *FIPPA* permits personal information to be disclosed by the public body to another public body for a very long list of purposes. The reality is that once a public body collects an individual's personal information, it can be shared with other public bodies under *FIPPA* much more readily than it could be by any organizations subject to *PIPA*.

While there are good reasons that *FIPPA* is not consent-based, it is unquestionably a less rigorous standard. Currently, there are several government systems now operating or in development which will require personal information being transferred by agencies subject to *PIPA*, to public bodies subject to *FIPPA*.

The effect of this move towards further integration of systems and social services agencies with public bodies is to apply the less rigorous standard of *FIPPA* to private sector organizations. What this means is that the individual client seeking assistance and believing the services to be provided on a confidential basis may not be aware that their personal information is being disclosed, as a matter of course, to a public body that may then decide—quite lawfully, under *FIPPA*—to further share the personal information with other public bodies.

Take, for example, a single parent, coping with poverty, struggling to adequately provide for his or her children, while dealing with their own emotional or physical health problems. Increasingly we are seeing small non-profits collaborating to share space and resources. Their funding and services might be funded in whole or in part by different public bodies; one may be funded by the Ministry of Social Development and Social Innovation, another by the local health authority, the third by the Ministry of Children and Family Development.

That parent might have come through the doors seeking help from one agency, and end in using all of them. This may be an efficient way to ensure the individual can get all the support available, but if the agencies share their information amongst themselves on their own behalf and then disclose that information to the public body funding some or all of their services, the individual must be provided notice and an opportunity to consent or not. Suddenly the parent seeking confidential assistance for a mental health concern may find that her personal information has been shared among the agencies, and by each of them with their funder. Now this parent may fear that the agency is reporting her to the government and may withdraw. Ultimately the client's trust is undermined and the agency's ability to provide services is compromised.

This is not just a theoretical concern. We conducted a study several years ago, and looked at a number of agencies in BC. We found that for clients who access several services provided by different programs and potentially linked to funding from several Ministries, the failure to maintain confidences could have far-reaching implications. Our stakeholder survey suggested that failure to maintain client confidences could severely affect access and referrals to many community social services.[66]

Our research indicates that clients will refuse to access the services they need if their confidentiality is not assured. When that happens, social services costs, health costs and costs to society inevitably increase. The data is less reliable because people are less trusting, and less truthful. There are poorer outcomes for families and wasted taxpayers dollars on systems that are ineffective. Thus the value of the government's investment in such electronic systems is diminished as is the reliability of the data collected.

Clearly, it is essential that individuals understand where their personal information goes. Even though the *FIPPA* does not require consent for a public body to collect personal information, *PIPA* does require consent. Agencies that are subject to *PIPA* but provide service under service-provider contracts with public bodies must be made aware of their obligation to provide notice to individuals (as they are required to do as the agent of the public body) *and to obtain the individual's consent*, as they are required to do as an organization subject to *PIPA*.

This may not require an amendment. It is possible that the problem can be remedied through a policy change that would add a clause to the standard Privacy Protection Schedule required by the Ministry of Technology, Innovation and Citizens Services.

We recommend the Committee amend *FIPPA* to provide that where an organization collects personal information on behalf of a public body, it is obliged to ensure that the individual is provided notice and that all the rights including the right to refuse consent and be advised of the consequence of such refusal, apply in the circumstances.

Mandatory breach notification

At present there is no requirement for notification of the Commissioner if a public body suffers a privacy breach.

The Commissioner pointed out in her report on Health Authority Privacy Breach Management[67] that breach notification is required by a directive in the federal public sector and is legislatively mandated in Newfoundland and Nunavut, while six jurisdictions require breach notification in their health information statutes.

Your colleagues on the Special Committee that reviewed *PIPA* earlier this year recommended mandatory breach notification and reporting for the private sector in BC.

FIPA recommends that there should be mandatory breach notification for public bodies included in *FIPPA*.

* * *

[66] Survey done for Culture of Care or Culture of Surveillance 2010 https://fipa.bc.ca/wordpress/wp-content/uploads/2014/03/Culture_of_Care_or_Culture_of_Surveillance_March_2010.pdf

[67] Special Report Examination of British Columbia Health Authority Privacy Breach Management Sept 30, 2015

CONCLUSION

This Committee's predecessors reviewed this *Act* in 2010 and made a number of valuable recommendations to improve information and privacy rights in this province.

Equally important is the fact that they rejected a number of proposals from the government which would have undermined those rights.

We urge you to consider carefully the recommendations we have brought before you, and thank you for the opportunity to have presented them.

VIA EMAIL TO:

Special Committee to Review the *Freedom of Information and Protection of Privacy Act*
Room 224, Parliament Buildings
Victoria, BC V8V 1X4

foicommittee@leg.bc.ca

January 29, 2016

Re: Supplementary submissions by BC Freedom of Information and Privacy Association

Dear Chair McRae,

As we promised in our submission on October 16, 2015, please find attached supplementary written submissions from BC FIPA. We would appreciate it if these two items could be added as appendices to our current written submission.

The first appendix is a very extensive review of release in the public interest under section 25 of the *Act*. It was prepared by law student Rebecca Kantwerg of the Environmental Law Centre at the University of Victoria, supervised by ELC Legal Director Calvin Sandborn. It also provides a comprehensive set of recommendations regarding how to effectively put into effect the interpretation of s.25 put forward by Commissioner Denham in her report on public interest disclosure in the Mount Polley tailings pond failure.

This will be an important part of reform of the *Act*, and we hope you will find it of assistance in putting together your own recommendations in the coming months.

The second appendix includes tables from a poll conducted earlier this month for BC FIPA by Ipsos Canada. Ipsos asked 802 British Columbians four questions related to important FOI issues that have come up repeatedly before this committee, and which were addressed in BC FIPA's submissions. These include a legislated duty to document, the need to implement penalties for interfering with information rights, the temporal aspect of release under s.25, and whether legislative reform should come before the next provincial election.

As you can see, British Columbians surveyed by Ipsos expressed strong support for the relevant legal reforms that FIPA and many others have recommended, and want to see action sooner rather than later. Please feel free to incorporate this public opinion research in your report if you find it helpful.

We look forward to your report. If you have any questions or concerns, please feel free to contact us.

Yours truly,

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In the Public Interest: Unlock the Vault

Law Reform to ensure proactive disclosure of "Public Interest" Records

Submitted to the Special Committee to Review the Freedom of Information and Protection of Privacy Act, on behalf of the BC Freedom of Information and Privacy Association

By Rebecca Kantwerg, Law Student

Supervised by Calvin Sandborn, Legal Director

January, 2016

Introduction

"Open Government" has been described as "the transparency of government actions", the "accessibility of government services and information", and "the responsiveness of government to new ideas, demands and needs."[1] The concept of "Open Government" has gained wide public support in recent years. Open government is one of the rare political issues that does not polarize— people of every political stripe agree that government should not operate in secrecy.

Access to information is essential to the functioning of democracy. Transparent government is an accountable government. Without information, it is difficult, if not impossible, for citizens to meaningfully participate in democracy. As Mendel writes:

> Voting is not simply a political beauty contest. For elections to fulfil their proper function- described under international law as ensuring that '[t]he will of the people shall be the basis of the authority of government'- the electorate must have access to information.[2]

Access to information is the way we battle corruption in democratic governments. The Carter Center notes:

> "Transparency is the remedy to the darkness under which corruption and abuse thrives...Poor public access to information feeds corruption. Secrecy allows back-room deals to determine public spending in the interests of the few rather than the many. Lack of information impedes citizens' ability to assess the decisions of their leaders".[3]

Justice La Forest has also commented on the importance of access to information to democracy, writing in the Supreme Court of Canada case *Dagg v. Canada (Minister of Finance)*:

> As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them...
>
> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his

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[1] "Ch. 1: Open Government", *Modernising Government: The Way Forward*, Organisation for Economic Co-operation and Development (OECD), OECD Publishing (2005) at p. 29

[2] Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 4

[3] *Access to Information: A Key to Democracy* (The Carter Center, 2002), ed. Laura Newman, online: http://www.cartercenter.org/documents/1272.pdf at p. 5

classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:

> Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view."[4]

A government that cloaks itself in secrecy by hiding information subverts democracy. The oft-quoted phrase "knowledge is power" is true. If citizens are not aware of what their government is doing or what decisions their elected officials are making, the exercise of democracy is weakened.

Information must not only be made available reactively (in response to access requests) – but also proactively. As Mendel writes in his Freedom of Information report for UNESCO, "[t]o give practical effect to the right to information, it is not enough simply to require public bodies to accede to requests for information. Effective access for many people depends on these bodies actively publishing and disseminating key categories of information even in the absence of a request."[5] British Columbia's Information and privacy law is ahead of its time. Our *Freedom of Information and Protection of Privacy Act* includes a groundbreaking provision, section 25 [See Appendix 3], which – as newly interpreted by the Commissioner[6] – requires that government agencies proactively release all information that discloses a significant risk to the environment or to the health or safety of the public, or is otherwise in the public interest. While this provision is a major step toward Open Government, there is still a lot of work to do. A struggle in many jurisdictions attempting to "open" their governments has been actual compliance with open government provisions and policies. Possible reasons for this include a culture of secrecy that seems to pervade the public service, along with the practical difficulty of sorting through the vast amounts of government held information and releasing public interest information.

One way of combating government resistance to proactive disclosure is to make clear exactly what information is public interest information. In her 2013-14 Annual Report, Commissioner Elizabeth Denham referenced a resolution passed at the annual 2013 meeting of Canada's Information and Privacy Commissioners and Ombudspersons. On the topic of proactive disclosure, the resolution urged government to "recommit to the fundamental democratic values underpinning access and personal privacy legislation" and to "modernize access and privacy legislation in light of modern information

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[4] *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403, online: https://www.canlii.org/en/ca/scc/doc/1997/1997canlii358/1997canlii358.html?autocompleteStr=dagg%20v.%20&autocompletePos=1 at paras. 60-1

[5] Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 33

[6] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814

technologies, evolving government practices and citizens' expectations."[7] The resolution made a number of recommendations, one of which was that government "establish minimum standards for proactive disclosure, including identifying classes or categories of records that public entities must proactively make available to the public and, in keeping with the goals of Open Data, make them available in a usable format."[8]

In this submission, we urge the Special Committee to recommend specific amendments to sections 25, 71 and 71.1 of BC's *Freedom of Information and Protection of Privacy Act* (*FIPPA*), to strengthen and create a wider legal obligation to proactively disclose information. In this submission, we make the following recommendations:

<u>RECOMMENDATION 1:</u> The principles laid out in the Commissioner's Report (July 2015) should be legislated. Section 25 should be amended to:

i. explicitly require public bodies to proactively disclose information whenever a disinterested and reasonable observer, knowing what the information is and knowing all of circumstances, would conclude that disclosure is plainly and obviously in the public interest,

ii. include two more explicit categories of "public interest" information that must be proactively released by government:

a. information about a topic inviting public attention; a topic about which the public has a substantial concern because it affects the welfare of citizens; or a topic to which public notoriety or controversy has attached, and
b. information that promotes government accountability.

<u>RECOMMENDATION 2:</u> Amend s. 25 to require proactive disclosure of specific categories and classes of records.

<u>RECOMMENDATION 3:</u> Amend s. 25 to require the proactive disclosure of environmental information described in the Aarhus Convention and adopted by the United Kingdom:

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the

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[7] Office of the Information and Privacy Commissioner for British Columbia, *2013-14 Annual Report*, (Victoria: OIPC, July 2014), online: https://www.oipc.bc.ca/media/16312/ar_2013-14.pdf at p. 13
[8] Office of the Information and Privacy Commissioner for British Columbia, *2013-14 Annual Report*, (Victoria: OIPC, July 2014), online: https://www.oipc.bc.ca/media/16312/ar_2013-14.pdf at p. 13

elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).[9]

RECOMMENDATION 4: The legislature should establish a category of proactive disclosure requiring environmental compliance orders, authorizations, convictions, contraventions, penalties and assessments to be proactively released.

RECOMMENDATION 5: The law should require the proactive disclosure of environmental quality reports, including air pollution surveys, water quality reports, and reports examining the health of particular species.

RECOMMENDATION 6: The legislation should require the proactive disclosure of all compliance orders, authorizations, inspection reports and penalties under all administrative schemes.

RECOMMENDATION 7: The law should require the proactive disclosure of contracts over $10,000 and information about the procurement process.

RECOMMENDATION 8: The law should require the proactive disclosure of final audit reports.

RECOMMENDATION 9: The law should require the proactive disclosure of all budget and expenditure information.

RECOMMENDATION 10: Government should seriously consider making certain policy information, including project charters and research reports, a category of records that must be proactively disclosed under s. 25.

RECOMMENDATION 11: Following the recommendations by the Commissioner and by the 2004 and 2010 Special Committees, we recommend that *FIPPA* be amended to require that the exceptions listed in s.13(2) be proactively released.

RECOMMENDATION 12: Include a provision that permits the Minister to prescribe additional categories or records of information that must be proactively disclosed under s. 25.

RECOMMENDATION 13: The law should prescribe a maximum timeframe for the prompt proactive release of s. 25 information.

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[9] *The Environmental Information Regulations 2004*, United Kingdom, online: http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made at section 2

RECOMMENDATION 14: Section 25 should be amended to require that proactively released information be posted online by each Ministry, either on the Data BC or Open Information website or on specific open information webpages linked to each Ministry's website

RECOMMENDATION 15: Section 71 should be amended to more closely match the publication scheme requirement in the United Kingdom. It should be amended so that it requires:

- **public bodies to produce publication schemes or lists of information that will be available proactively;**
- **that the publication schemes include any public interest information that falls under s. 25;**
- **that the publication schemes be posted online; and**
- **that the information listed in the publications schemes be posted online.**

RECOMMENDATION 16: Section 71 should be amended to provide the Commissioner with the power to review and approve the publication schemes created by public bodies under s. 71.

RECOMMENDATION 17: The law should require that the lists be produced and posted within a legislated timeframe under s. 71.

Why legislative reform?

Current scheme

i. Section 25 of BC's *Freedom of Information and Protection of Privacy Act*

Currently, s. 25 requires proactive disclosure of information that is "clearly in the public interest". Sections 25(1)(a) and (b) set out the requirement for proactive disclosure of public interest information:

> **25** (1) Whether or not a request for access is made, the head of the public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

Information must be proactively released if it discloses a risk of significant harm to the environment or the health or safety of the public, or if it is "for any other reason" in the public interest to disclose.

The rest of s.25 determines that public interest information will be disclosed "despite any other provision" of the *Act*, including privacy provisions. It also requires the public body disclosing the information to notify both third parties to whom the information relates and the Information and Privacy Commissioner.

The determination of what documents are in "the public interest" is largely left to the discretion of the heads of government bodies making the decision to release information proactively. *FIPPA* does not identify any examples of public interest information.

ii. Sections 70 – 71.1 of the *Act –The Open Government Initiative*

Sections 70-71.1 of *FIPPA* [See Appendix 4] touch on categories of documents that may be disclosed without a request. These sections were enacted as a part of the government's 2011 amendment package.

Section 70 is the only legislated provision that sets out a specific category of documents to be made available without request. It specifically requires that all policy manuals be made available without request. (Policy manuals include instructions or guidelines issued to officers or employees of the public body and substantive rules or policy statements adopted by the public body.)

In addition, sections 71 and 71.1 provide for the establishment of categories that will be made available without request. Section 71 requires the head of a public body to "establish categories of records that are in the custody or under the control of the public body and are available to the public without a request for access". Section 71.1 gives the minister responsible for *FIPPA* (the Minister of Technology, Innovation and Citizens' Services) the power to establish categories of records that must be made available to the public without a request.

In her 2013 review of the Open Government Initiative[10], the Information and Privacy Commissioner, Elizabeth Denham, notes that allowing public bodies to identify what documents are to be released without a request is an approach that acknowledges that:

> ...individual ministries are likely to be best placed to assess which categories of records ought to be made publicly available. This is because these ministries are intimately familiar with their specific mandates and any particular laws affecting their operations. This puts them in the position of being able to assess which kinds of records should be made available as a priority, not to mention being able to best assess other pertinent factors that will shape, on an ongoing basis, their proactive disclosure program.[11]

She notes that giving the minister responsible for *FIPPA* the power to intervene and require specific categories of information to be released is laudable because the "minister has a larger-scale knowledge

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[10] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553

[11] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 10

and expertise respecting information rights across the provincial government" and "is likely to be most attuned to what kinds of records are most frequently requested under *FIPPA* overall." [12]

While individual ministries must create categories of information that is disclosable without a request, s. 71 does not require any specific categories – and does not require that "public interest" information form a category. Furthermore, section 71.1 does not require that the minister create any categories; it only gives the minister discretion to do so.

iii. Government policy and official direction

In 2011, the Office of the Chief Information Officer released the "Open Information and Open Data Policy."[13] This Policy was produced at the time of the BC Government's Open Government Initiative, and as a response to the BC Premier's direction to ministries "to expand the public availability of Government Data, and, to the extent practicable and subject to the *Freedom of Information and Protection of Privacy Act*."[14] This Policy sets certain requirements outlining ministries general responsibilities, including:

> 2.2.1 Ministries should consider making information that they determine to be of interest or useful to the public, available to the public on a routine basis (i.e., without a request for access under the FOIPP Act) unless its release is limited by law, contract or policy.[15] (emphasis added)

The above policy "requirement" is discretionary; ministries "should consider" making the information described publicly available. With the Commissioner's recent interpretation of s.25, however, information that is clearly in the public interest must be proactively disclosed.[16] This policy should be updated to reflect this interpretation, and should be legislated.

In 2011, in line with the 2011 Open Information and Open Data Policy, the BC government began proactively posting information online by way of two websites – openinfo.gov.bc.ca and data.gov.bc.ca. On the Open Info website, government posts travel expenses of ministers and "information releases".

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[12] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 10

[13] Open Information and Open Data Policy (2011), Office of the Chief Information Officer, Knowledge and Information Services Branch, Ministry of Labour, Citizens' Services and Open Government, online: http://www.cio.gov.bc.ca/local/cio/kis/pdfs/open_data.pdf

[14] Open Information and Open Data Policy (2011), Office of the Chief Information Officer, Knowledge and Information Services Branch, Ministry of Labour, Citizens' Services and Open Government, online: http://www.cio.gov.bc.ca/local/cio/kis/pdfs/open_data.pdf at p. 1

[15] Open Information and Open Data Policy (2011), Office of the Chief Information Officer, Knowledge and Information Services Branch, Ministry of Labour, Citizens' Services and Open Government, online: http://www.cio.gov.bc.ca/local/cio/kis/pdfs/open_data.pdf at p. 5

[16] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814

These information releases are copies of information released in response to (some but not all) FOI requests. The Data BC site posts datasets organized by various categories, such as "natural resources" and "education".

A "Tip Sheet" about "How to know when you must disclose information under s.25" was released by the Privacy and Legislation Branch in 2014.[17] This Tip Sheet provides an overview of s.25 and the procedure for ministry approval of release of information under s.25.The Tip Sheet focuses on the requirement that information disclose "risks of significant harm" and provides a list of examples:

> An example of a "risk of significant harm to the environment" could be the accidental release of a pesticide into a stream, which will affect fish and other aquatic life.
> An example of a "risk of significant harm to the health of the public or a group of people" could be the presence of the polio virus in the public drinking water.
> An example of a "risk of significant harm to the safety of the public or a group of people" could be a natural gas leak which could cause an explosion in a populated area.[18]

Finally, the "FOIPP Act Policy and Procedures Manual" includes direction on s. 25[19]. However, the manual has not been updated since 2007 and does not reflect the new interpretation of s.25 explained by the Commissioner in her summer report.

iv. Office of the Information and Privacy Commissioner - Reports

In June 2015, Commissioner Denham released a report that redefined her office's interpretation of s. 25(1)(b) and clarified the meaning of "clearly in the public interest". The previous interpretation of this provision was that public interest information would only be proactively disclosed if it was connected to urgent circumstances, or circumstances of "temporal urgency". In the 2015 report, the Commissioner removed the requirement that temporally urgent circumstances exist in order for information that is "clearly in the public interest" to be released.

The Commissioner also examined the meaning of the phrase "clearly in the public interest". She determined that "s. 25(1)(b) requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest."[20] She then continued to consider what is meant by the term

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[17] TIP SHEET, Privacy and Legislation Branch, Ministry of Technology, Innovation and Citizens' Services, online: http://www.cio.gov.bc.ca/local/cio/priv_leg/documents/foippa/s25tipsheet.pdf
[18] TIP SHEET, Privacy and Legislation Branch, Ministry of Technology, Innovation and Citizens' Services, online: http://www.cio.gov.bc.ca/local/cio/priv_leg/documents/foippa/s25tipsheet.pdf
[19] FOIPP Act Policy and Procedures Manual, "Section 25 – Information Must Be Disclosed if in the Public Interest", Ministry of Technology, Innovation and Citizens' Services, online: http://www.cio.gov.bc.ca/cio/priv_leg/manual/sec20_29/sec25.page?
[20] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 6

"public interest", drawing on Canadian case law and reasoning by Information and Privacy adjudicators in Ontario. She reasoned that:

> ...the public interest is that which affects, or is in the interests of, a significant number of people, something that transcends private interest, that is of concern or interest to the public. This is consistent with the Supreme Court of Canada's observation, in the context of defamation law, that a subject will be of public interest if it is 'one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached.[21]

She also reasoned that information that would encourage government accountability qualified as information in the public interest, noting that "[t]here may be cases where pro-active disclosure is clearly in the public interest in order to hold the public body, or others, accountable.[22]

Problems with the current scheme – Compliance and Inaction

Despite the various legislative, regulatory and policy tools that government has created to encourage proactive disclosure of information, government bodies have been failing to meet their legal obligation to proactively release information in the public interest under s.25.

Sections 71 and 71.1 -- the only legislative provisions that are intended to create a regime permitting certain kinds of documents specific to ministries to be made available without request -- have not had much effect on the release of information. Section 71 does not require public bodies to list any specific categories for disclosure, and gives them the discretion to choose what should be publicly available. The Commissioner has pointed out that public bodies have yet to create any lists or release any information under ss.71 and 71.1. In her 2013 review, the Commissioner noted that in the "18 months since the passage of ss.71 and 71.1, neither the minister responsible nor any ministries [had] established categories of records."

Failure by public bodies in exercising their discretion to define what will be proactively released is not unique to BC. The struggle experienced by public bodies to develop publication schemes in the United Kingdom, where public bodies are legally required to develop publication schemes, led the UK's Information Commissioner's Office (ICO) to publish model publication schemes outlining non-exhaustive lists of categories that the ICO would expect specific public bodies to proactively release.[23] It is clear that

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[21] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 30

[22] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 32

[23] Information Commissioner's Office, "Definition documents", online: https://ico.org.uk/for-organisations/guide-to-freedom-of-information/publication-scheme/definition-documents/

giving public bodies the *discretion* to determine what they will release and requiring them to produce a list has not been an effective method of encouraging proactive disclosure.

Public interest information has not been proactively released, and information falling within this category continues to be subject to FOI requests. While arguably much of the information released through the Data BC and Open Info websites could fall under s.25, there is still a large amount of information and records clearly falling within s.25 that has not been released. Commissioner Denham noted in her report that the data posted to the DataBC website is limited to data about "basic information about the province" or meant to "spur innovations" -- but did not include data meant to increase government transparency or accountability.[24]

For example, proactive release of information relating to threats to the environment or to public health or safety is clearly required by s.25(1)(a). Compliance orders against operations that present a threat to the environment, public health or safety falls squarely within s.25(1)(a) [and within s. 25(1)(b)]. Whether or not a threat is imminent, it is in the public interest that information about how our government is managing these threats be proactively released, because it relates to the public interest in government accountability.

Unfortunately, information relating to industries operating in our environment is not being proactively released. While the Ministry of Environment has released information relating to the Mount Polley dam failure, including permits, orders, and reports[25], these were released in response to the Commissioner's investigation into the failure to release public interest information about the Mount Polley dam. Legislative reform is necessary to ensure that public information is proactively released before there is a Commissioner's investigation into non-compliance with s. 25.

An Example

The Commissioner's July 2015 Report is being ignored, and the need for reform is palpable. For example, this fall, the Environmental Law Centre at the University of Victoria requested access to MOE authorizations issued pursuant to a compliance order governing the spraying of manure effluent by a farm in an area with very high nitrate levels in its drinking water. These nitrate levels were apparently caused by the farm's release of effluent in the past, which led to an MOE compliance order requiring that the farm seek special MOE authorization whenever it intended to spray effluent on the field near the aquifer. It also led to Interior Health issuing a Drinking Water Advisory for residents, warning of a potential health hazard. High nitrate levels in drinking water is particularly dangerous for infants and people with compromised immune systems. Drinking water containing high nitrate levels can cause a condition called methaemoglobinaemia, commonly known as "blue baby syndrome", which is a result of

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[24] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 31

[25] These documents can be accessed via this webpage: Government of British Columbia, "Mount Polley Mine Tailings Dam Breach, Likely, August 4, 2014", online: http://www.env.gov.bc.ca/eemp/incidents/2014/mount-polley/updates.htm#6

oxygen deprivation. Nitrate contamination of drinking water is also linked to certain types of cancer, thyroid dysfunction and impacts on the immune-compromised. The compliance order authorizations to spray effluent clearly fall within both ss.25(1)(a) and (b) of *FIPPA*. The release of effluent by this farm presents a potential risk to the environment and to the health of the people who drink the water in that watershed. Disclosure of the authorizations themselves is clearly in the public interest -- because citizens are interested in how their government manages threats to their health and to the environment. Yet, the compliance order and subsequent spraying authorizations were not posted online.

When the ELC asked the Ministry of the Environment for the spray authorizations, the ELC was asked to complete a formal FOI request. The ELC made the request and included the file number of the compliance order and authorizations. The Ministry responded to the request with an initial estimate of a cost of $150. The ELC called Information Access Operations BC to ask why the fee was so high, and was told that the cost could increase, perhaps to $600, depending on how long it took to find the records (despite being provided with the file reference number). One official suggested that they might not be released at all. The ELC submitted a revised request in an attempt to further specify the authorizations they were seeking. Eventually, 39 business days after the revised request, the ELC received the authorizations.

If s. 25 of FIPPA was being respected, the ELC would not have had to submit a request to access these authorizations. These authorizations would have been posted proactively online.

Common reasons for government resistance to proactive disclosure

i. <u>Cost</u>

There is no doubt that it will require resources for public bodies to begin to comply with s.25. Employees in each public body will need to spend time surveying the information that they hold, determining what information is in the public interest, and then releasing the information. Public bodies will have to set up processes for ensuring that new information is proactively released as required. They may need to develop web pages or reading rooms to ensure the information is accessible.

It is important to note that the World Bank report *Proactive Transparency* recognizes that "proactive disclosure regimes have high start-up costs" but notes that "over time, having such systems in place is likely to save money."[26] The report notes:

> For countries planning to use the Internet as the primary vehicle for disclosing information, information will need to be in digital format. Resources may therefore be needed for digitizing slightly older information (the scanning of documents over five to ten years old for example). The cost of this can be weighed against the increased internal benefits of better information

[26] Helen Darbishire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online: http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf at p. 33

management, as internal filing systems are ordered and digitized, and from the increased ability to share information not only with members of the public but also with other public bodies, as well as the reduced burden of responding to requests from the public.[27]

Mendel notes that proactively disclosing information online is easier and less expensive than the relative cost of processing information requests, and argues that it "is likely the case that the request load in countries which upload actively is far less than it would be if they did not do this."[28] The report points to India as a jurisdiction that "expressly recognizes the role of proactive publication in reducing the number of requests for information, specifically requiring public bodies to endeavour to increase proactive publication to this end."[29] Similarly, in a 2012 Special Report to the Canadian Parliament by the Information Commissioner of Canada, it was noted that "some institutions have had success in reducing the number of incoming requests by taking a proactive approach to access to information" and that this approach "can sometimes divert the number of formal requests to the institution."[30]

ii. The need for certainty about what information is "clearly in the public interest"

What information is "clearly in the public interest" has been clarified recently by the Commissioner in her 2015 report. Still, s.25 leaves public officials wide discretion in determining what information is in the public interest. A complex balancing of interests is required to determine what must be released under s. 25. Even though s. 25(2) operates to provide for public interest disclosure regardless of any other provision in the *Act*, it is still necessary to consider the interests of individuals who may be impacted by disclosure. The Commissioner notes in her 2015 report that a public body considering disclosure under s. 25 must also "consider the purpose of any relevant access exceptions (including those protecting third-party interests or rights that will be, or could reasonably be expected to be, affected by disclosure)" and determine whether the "nature of the information and of the rights or interests engaged, and the impact of disclosure on those rights or interests" weigh in favour of public interest disclosure.[31] This creates some uncertainty when deciding whether particular information should be released in the public interest or not.

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[27] Helen Darbishire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online: http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf at p.

[28] Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 147

[29] Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 147

[30] Information Commissioner of Canada, *Measuring Up: Improvements and Ongoing Concerns in Access to Information, 2008-2009 to 2010-2011*, A Special Report to Parliament (Ottawa, May 2012), online: http://publications.gc.ca/site/eng/422536/publication.html at p. 28

[31] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies"

The Centre for International Media Assistance have commented that without "clear guidance in the law, lower-level public officials are apt to approach FOI cases in an ad hoc or politically motivated way – or to avoid them altogether."[32] Fear of releasing something that should have been kept confidential can also lead officials to err on the side of caution and opt for non-disclosure.[33] Clear, legislated categories of information that must be proactively disclosed would provide clear direction to public officials making disclosure decisions – and reduce uncertainty and time-consuming examination and assessment of particular individual records.

iii. Combatting a culture of secrecy

As Mendel notes, "[i]n most countries, there is a deep-rooted culture of secrecy within government, based on long-standing practices and attitudes."[34] Roberts argues that "[t]he first challenge that will confront advocates of transparency in years ahead is ongoing official resistance to transparency requirements."[35] Although cultural change is required to move bureaucratic culture from one of secrecy to one of transparency, clear laws defining what information must be released can help encourage this culture change. Clear legislated requirements for the release of information would make it easier for citizens to assert their right to such information. Legislated requirements would also encourage public officials to release information because to not do so would be clearly against the law.

Recommendations for s. 25 reform

1. The principles laid out in the Commissioner's Report (July 2015) about how to determine whether information should be released "in the public interest" should be adopted by legislation

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(Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 29

[32] Craig L. LaMay, Robert J. Freeman, and Richard N. Winfield, *Breathing Life into Freedom of Information Laws: The Challenges of Implementation in the Democratizing World*, The Center for International Media Assistance(Washington, D.C., September 10, 2013) online: http://www.centerforinternationalmediaassistance.org/wp-content/uploads/2015/02/CIMA-Freedom_of_Information_ISLP_09-10-13.pdf at p. 21

[33] Mitchell W. Pearlman, "Proactive Disclosure of Government Information: Principles and Practice", National Freedom of Information Coalition (2012), online: http://www.nfoic.org/proactive-disclosure-of-government-information

[34] Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 33

[35] Alasdair Roberts, "Open Government: The Challenges Ahead", *Access to Information: Building a Culture of Transparency* (The Carter Center, 2006), online: https://www.cartercenter.org/documents/2364.pdf at p. 134

The Commissioner's Mount Polley Report (July 2015) [36] provided clarification about how public bodies should determine whether information should be released "in the public interest" under s. 25. This clarification should be adopted by legislation.

As mentioned above, the Commissioner examined the meaning of the phrase "clearly in the public interest". She determined that "s. 25(1)(b) requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest."[37] This test should be legislated.

The Commissioner also identified two possible factors in determining whether information is in the public interest:

- information about a subject "inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached"[38]; and
- information that "may contribute, in a meaningful way to holding a public body accountable for its actions or decisions"[39].

These two categories—information about a topic which the public has a substantial concern or to which public notoriety or controversy has attached, and information that promotes government accountability—should be included as specific public interest categories under s. 25. This would help clarify what information is "clearly in the public interest", and would provide a clear legislative direction to public bodies as to the information that they can and must disclose. Any added categories should be additions to s. 25. Section 25(1)(b) should remain to provide for further types of information that may

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[36] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814

[37] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 6

[38] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 30

[39] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 32

be in the public interest.[40] See Appendix 1 for more about adding categories of public interest information.

RECOMMENDATION 1: The principles laid out in the Commissioner's Report (July 2015) should be legislated. Section 25 should be amended to:

i. explicitly require public bodies to proactively disclose information whenever a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest,

ii. include two more explicit categories of "public interest" information that must be proactively released by government:

a. Information about a topic which the public has a substantial concern or to which public notoriety or controversy has attached, and
b. Information that promotes government accountability.

2. Legislating a requirement for proactive release of specific types of "public interest" records

Legislating a requirement for proactive release of specific types of records would be an effective way of ensuring public bodies meet the proactive disclosure requirements already imposed on government by s.25. In her 2013 review, the Commissioner points out:

> Observers in other jurisdictions have noted that a standardized approach is most effective. Adopting a consistent approach may promote harmonization of disclosure respecting common, basic, functions of all ministries (e.g., records about budgeting processes and financial controls). It

[40] Section 25(1)(b) provides for disclosure of information in the public interest that falls outside of the currently legislated category of information disclosing a significant risk to the environment or to the health and safety of the public: "the disclosure of which is, for any other reason, clearly in the public interest."

can also make it easier for citizens to find information that they may find useful or relevant across the ministerial public sector.[41]

Beyond promoting consistency across public bodies, a legislated requirement to release specific types of information would place a clear duty on public bodies to release this information, and could help combat the culture of secrecy and assumption of non-disclosure that pervades our public service. Legislated acknowledgement of the kinds of information that must be released proactively sends a clear message to public bodies that this information is meant to be public.

The Open by Default report from a working group examining Ontario's Freedom of Information legislation also recommends that their Act be reformed to require "proactive publication of certain types of information."[42] In making this recommendation, the report acknowledges the long wait times and high costs for access to information by request. The report recommends that "government move to a default practice of proactive disclosure for certain types of information such as briefing notes, survey data, policy papers and other analysis."[43]

i. Examples from other jurisdictions

Many jurisdictions have legislated lists of specific documents that must be proactively released. In 2013, 72% of OECD countries required certain categories of information to be proactively disclosed by law.[44] These lists most often include categories of documents related to the administration of government and government employees, such as procurement contracts, employee salaries, and the layout of the bureaucratic structure. A few jurisdictions have made the effort to expand their lists to include a broader range of information. Some sample jurisdictions are listed below.

- ***New South Wales***

In New South Wales, Schedule 1 of the *Government Information (Public Access) Regulation 2009* provides a list of information that must be proactively released.[45] This includes plans of management for

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[41] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 10

[42] Open Government Engagement Team, *Open By Default: A new way forward for Ontario*, (Queen's Printer for Ontario, 2014), online: https://dr6j45jk9xcmk.cloudfront.net/documents/2428/open-by-default-2.pdf at p. 31

[43] Open Government Engagement Team, *Open By Default: A new way forward for Ontario*, (Queen's Printer for Ontario, 2014), online: https://dr6j45jk9xcmk.cloudfront.net/documents/2428/open-by-default-2.pdf at p. 32

[44] OECD (2011), *Government at a Glance 2011*, OECD Publishing, online: https://books.google.ca/books?id=bFDWAgAAQBAJ&pg=PA142&lpg=PA142&dq=proactive+disclosure+of+audits+open+governmnet&source=bl&ots=pWicgijyjS&sig=44D6weMjsxkJ9XN4eHf3xOXAvSc&hl=en&sa=X&ved=0ahUKEwjauIX6n6XJAhVL1mMKHbpFDOQ4ChDoAQgbMAA#v=onepage&q=proactive%20disclosure%20of%20audits%20open%20governmnet&f=false at p. 142

[45] New South Wales Legislation, *Government Information (Public Access) Regulation 2009*, online at: http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+343+2010+cd+0+N

community land; environmental planning instruments; development applications pursuant to the *Environmental Planning and Assessment Act* and associated documents, including land contamination consultant reports; applications for approvals under Part 1 of Chapter 7 of the *Local Government Act*, which include approvals for sewerage work and management and treatment of human waste; applications for approvals "under any other Act and any associated documents received in relation to such an application"; "orders given under the authority of any other Act"; and "leases and licences for use of public land classified as community land." For the full list, see Appendix 7.

- ***India***

India's *Right to Information Act* provides an extensive list of records that must be proactively published in s. 4(1)(b).[46] The list includes budgetary information and information about the structure of the organization, but also information about its subsidy programmes including the amounts granted to beneficiaries of the program and particulars of recipients of concessions, permits or authorizations granted by it. While information about beneficiaries of subsidy programmes would likely infringe on privacy rights in Canada (in India that might include people receiving disability or low-income benefits, for example), the Indian example shows how legislatures can require more information to be released than just information about the structure of the Ministry, its policies and its employees. The legislation also provides for the release of "such other information as may be prescribed". This provides more flexibility to the government in addressing future proactive release categories. For the full list, see Appendix 8.

- ***Mexico***

Mexico also has legislated specific categories of government information that must be proactively disclosed to the public. This year, legislation was passed by the Mexican congress that updates their previous freedom of information and laws, and applies federally and at the state level.[47] The new legislation added to the previous categories of information that was required to be proactively released. These categories include results of any audit compelled by the law, all concessions, permits or authorizations granted and their recipients specified, and information about land use permits.[48]

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[46]Government of India, *The Right to Information Act*, 2005, No. 22 of 2005, online: http://rti.gov.in/webactrti.htm

[47]Margarita Garate, "Mexico: The New 'Transparency & Access to Public Information Act' Enters into Force", mondaq (June 2015), online: http://www.mondaq.com/mexico/x/408112/Human+Rights/The+New+Transparency+Access+To+Public+Information+Act+Enters+Into+Force

[48] The previous version of the Act is available in English here: *Federal Transparency and Access to Governmental Public Information Act*, June 6, 2006, online: https://www.wilsoncenter.org/sites/default/files/LFTAIPG%20traducci%25C3%25B3n%20certificada.pdf
The most recent version of the Act is available here, but in Spanish: http://www.diputados.gob.mx/LeyesBiblio/pdf/LGTAIP.pdf
Note: Cabinet documents are not required to be proactively released. Cabinet documents are also, however, not included in legislative exemptions to disclosure in Mexico.

- ***Nova Scotia***

Nova Scotia's *Environment Act* lists specific records that must be included in their Environmental Registry. While this registry is not accessible online – currently, the records are made "routinely available to the public upon request."[49] East Coast Environmental Law, in partnership with the Environmental Law Student Society at the Dalhousie University, wrote a report criticizing the government of Nova Scotia for not complying with this provision and continuing to require formal FOI requests to be made for access to the information listed in s. 10.[50] However, in theory, this list of records is a good start, and reflects the types of information that should be proactively released. Section 10 of the *Environment Act* requires that the environmental registry contain information like approvals, orders, directives, appeals, decisions and hearings made under the *Environment Act*, and more. See Appendix 6 for the full list.

RECOMMENDATION 2: Amend s. 25 to require proactive disclosure of specific categories and classes of records.

ii. What are the specific records that must be proactively released?

A. Environmental Information

Excell writes that "a right to access environmental information is a central tool to promote democratic accountability and transparency in decision making on the environment."[51] Access to environmental information encourages the promotion of sustainable development and a healthy environment, and allows the minimum standards of environmental health to be monitored and enforced by citizens.[52]

The development of a right to access environmental information is a recent one. It has its start in Europe, where the European Directive on Freedom of Access to Environmental Information emerged out of the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters. The Directive creates a right to environmental information, a right to participate in environmental decision-making, and a right to procedure to challenge public decisions made without appropriately informing the public of environmental effects or without considering

[49] Nova Scotia Environment, "Environmental Registry", online: http://www.novascotia.ca/nse/dept/envregistry.asp

[50] *Failure to Enforce? Time for transparent and effective environmental enforcement in Nova Scotia*, East Coast Environmental Law, (June 2014), online: http://www.cbu.ca/wp-content/uploads/2015/10/NOFRAC-5-Failure-to-enforce.pdf at p. 5

[51] Carole Excell, "The Right to Environmental Information", *Access to Information: Building a Culture of Transparency* (The Carter Center, 2006), online: https://www.cartercenter.org/documents/2364.pdf at p. 105

[52] Carole Excell, "The Right to Environmental Information", *Access to Information: Building a Culture of Transparency* (The Carter Center, 2006), online: https://www.cartercenter.org/documents/2364.pdf at p. 105

environmental law generally.[53] Canada is not yet a signatory to this convention. The United Kingdom has implemented the Directive through its *Environmental Information Regulations* [See Appendix 5]. Section 2 of the *Environmental Information Regulations* provides a wide and complete definition of "environmental information":

> "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—
>
> (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
> (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
> (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
> (d) reports on the implementation of environmental legislation;
> (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
> (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)[54]

Section 4 of the *Environmental Information Regulations* requires public authorities to "progressively make the information available to the public by electronic means which are easily accessible", and to "take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information."[55]

Environmental information is increasingly demanded by the Canadian public. Cairns et al. recommend that proactive disclosure of environmental information is the best solution to increasing access requests:

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[53] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, online: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF

[54] *The Environmental Information Regulations 2004*, United Kingdom, online: http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made at section 2

[55] *The Environmental Information Regulations 2004*, United Kingdom, online: http://www.legislation.gov.uk/uksi/2004/3391/regulation/4/made at section 4

> Proactive dissemination of environmental enforcement information would more adequately respond to the growing interest in access environmental information among the Canadian public. This interest is reflected in a 35 percent increase in ATIP requests to Environment Canada from 2008 to 2009. The current "reactive disclosure" approach for environmental enforcement information is inefficient. The backlog of requests suggests that the principle of community right to know is unlikely to be achieved through access to information requests. An effective realization of this right is inextricably linked to the governments' ability to publish data comprehensively, accurately, accessibly and in a timely manner... Instead of the current cumbersome ATIP approach, the public would benefit from the dynamic opportunities Internet technology provides for immediate and universal access to such data.[56]

Environmental information that discloses a risk of serious harm is already required to be released under s. 25(1)(a), but all relevant environmental information, no matter how serious the risk harm, is in the public interest pursuant to s. 25(1)(b). Therefore, key environmental information should be specifically required to be proactively released, as it is in the United Kingdom.

RECOMMENDATION 3: Amend s. 25 to require the proactive disclosure of environmental information described in the Aarhus Convention and adopted by the United Kingdom:

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the

[56] Meredith Cairns, Ceyda Turan and William Amos, "Disclosure of Environmental Law Enforcement in Canada: Lessons from America", McGill International Journal of Sustainable Development Law & Policy, (2012) 7:2, online: https://www.mcgill.ca/jsdlp/files/jsdlp/jsdlp_volume7_issue2_203_232.pdf at p. 215

elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)

B. Environmental assessments, compliance orders, authorizations, convictions, contraventions and penalties

Assessments of specific and/or proposed industries' or operations' impact on the environment, compliance orders, convictions, contraventions and penalties imposed against specific operations, and authorizations for the release of pollution into the environment by land, air, or water, is all information that should be required to be proactively disclosed under s.25. This kind of information often engages both ss. 25(1)(a) and (b) of the Act. The operation of industry in our environment presents the risk of accidental or intentional release of pollutants that can have serious effects on the health of our environment and on the health and safety of people. Furthermore, compliance orders, authorizations and assessments are also in the public interest because they disclose how government is regulating industrial actors in our environment, and how they are ensuring compliance with environmental and health legislation meant to protect the public.

Proactive disclosure of compliance information can itself be an important mechanism to ensure compliance with environmental rules. Cairns et al. note that public disclosure of environmental information "provides an incentive to facilities to control their pollution emissions, adding a different source of pressure to comply with laws and regulations in addition to other enforcement instruments such as penalties, fines and inspections."[57] Schatz notes that governments "traditionally use information

[57] Meredith Cairns, Ceyda Turan and William Amos, "Disclosure of Environmental Law Enforcement in Canada: Lessons from America", McGill International Journal of Sustainable Development Law & Policy, (2012) 7:2, online: https://www.mcgill.ca/jsdlp/files/jsdlp/jsdlp_volume7_issue2_203_232.pdf at p. 216

to pressure firms to reduce toxic chemical releases from the environment" and that one major benefit of disclosure is that it is "more politically feasible than direct regulation, because it is framed as a 'right to know' law, and is not easily characterized as coercive."[58] A study out of the United States on the Toxics Release Inventory (TRI) showed that providing accessible information to the public about the release of toxic chemicals lead to significant reductions in health risks.[59] Another study from Massachusetts found that a requirement that drinking water utility companies directly mail reports of their drinking water violations to consumers reduced total violations by 30 – 44%, and severe health violations by 40 – 57%.[60] Cairns et al. recommend that the federal government "provide the public with access to an online environmental enforcement and compliance database, updated monthly, that includes all non-sensitive information about all inspections, investigations and prosecutions, as well as compliance information concerning facilities that respect the law."[61] This recommendation can be extended to provincial governments.

The BC Forest Practices Board has identified significant problems arising from the BC Government's failure to release information about environmental enforcement. The Board has noted the BC Government's failure to release decisions imposing fines on those that contravene Forest and Range Practices and Wildfire laws. The independent Board has recommended that government "establish a publicly-accessible, online database of all penalty determinations under the [*Forest and Range Practices Act*] and the [*Wildfire Act*]."[62] This recommendation was discussed in the Board's 2014 Special Investigation into Timeliness, Penalty Size and Transparency of Penalty Determinations, where the Board noted that "[w]ith respect to transparency, government does not publish determination letters, which means penalties are not effective in promoting compliance in the wider regulated community or contributing to public confidence in enforcement."[63]

A legislative requirement that environmental assessments, compliance orders, and authorizations be released would be evolutionary rather than revolutionary. Some proactive disclosure of environmental

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[58] Andrew Schatz, "Regulating Greenhouse Gases by Mandatory Information Disclosure", *Virginia Environmental Law Journal* (2008) 26:335 at pp. 335-6

[59] This study also noted that accessible information (i.e. processed and structured information), in contrast to raw data, resulted in reduced health risks. Hyunhoe Bae, Peter Wilcoxen, and David Popp, "Information Disclosure Policy: Do State Data Processing Efforts Help More Than the Information Disclosure Itself?", *Journal of Policy Analysis and Management* (2010) 29:1

[60] Lori S. Bennear and Sheila M. Olmstead, "The Impacts of the "Right to Know": Information Disclosure and the Violation of Drinking Water Standards", *Journal of Environmental Economics and Management* (2008)

[61] Meredith Cairns, Ceyda Turan and William Amos, "Disclosure of Environmental Law Enforcement in Canada: Lessons from America", McGill International Journal of Sustainable Development Law & Policy, (2012) 7:2, online: https://www.mcgill.ca/jsdlp/files/jsdlp/jsdlp_volume7_issue2_203_232.pdf at p. 216

[62] Forest Practices Board, *Special Investigation: Timeliness, Penalty Size and Transparency of Penalty Determinations*, (October 2014), online: https://www.bcfpb.ca/reports-publications/reports/timeliness-penalty-size-and-transparency-penalty-determinations/ at p. 8

[63] Forest Practices Board, *Special Investigation: Timeliness, Penalty Size and Transparency of Penalty Determinations*, (October 2014), online: https://www.bcfpb.ca/reports-publications/reports/timeliness-penalty-size-and-transparency-penalty-determinations/ at p. 7

assessments, orders and authorizations is already occurring in BC and other jurisdictions, even without a legislative requirement. Below are some examples:

British Columbia

- The Environmental Assessment Office (EAO) posts information about various industrial projects that are required to complete an environmental assessment online through their project information centre (e-PIC).[64] Section 25 of the *Environmental Assessment Act* requires the executive director of the EAO to maintain the e-PIC, and gives the executive director discretion to determine what records should be made available and in what format.[65]
- Meta-information regarding BC water licenses issued to individuals or corporations for water use are also available on the "Water Licenses Query" website[66], and scanned copies of water licenses and orders are available in an online directory[67].

- Applications and permits for the use of Crown land can be accessed and viewed online on the Ministry of Forests, Lands and Natural Resources Operations website.[68]

- A fracking information website, fracfocus.ca, provides listing of chemicals used in BC wells fractured after January 1, 2012.[69] However, at the time of this submission, the search function that grants users access to well- specific information was not functional.

- The Ministry of Environment operates an online database[70] of some environmental compliance reports, searchable by name or company, enforcement action, or year. The database provides meta- information about what kind of enforcement action was taken (e.g. ticket), under what statute, location, monetary penalty (if any), and a short description of the offence (e.g. Introduce waste into environment by prescribed activity).However, it is important to note that users cannot access the specific individual compliance order or penalty for more detailed information.

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[64] "Project Information Centre (e-PIC)", Environmental Assessment Office, Government of British Columbia, online: https://a100.gov.bc.ca/pub/epic/projectStatusCategoryReport.do#curr
[65] *Environmental Assessment Act*, [SBC 2002] Chapter 43, online: http://www.bclaws.ca/civix/document/id/complete/statreg/02043_01#section25 at section 25
[66] http://a100.gov.bc.ca/pub/wtrwhse/water_licences.input
[67] "Water Licenses Query", Government of British Coolumbia, online: http://www.env.gov.bc.ca/wsd/water_rights/scanned_lic_dir/
Note: this directory is not user-friendly. It is not searchable and the folders are not marked in a meaningful way.
[68] Ministry of Forests, Lands and Natural Resource Operations, "Applications and Reasons for Decision" search database, online: http://www.arfd.gov.bc.ca/ApplicationPosting/search.jsp
[69] Frac Focus, "Chemical Disclosure Registry", online: http://www.fracfocus.ca/find_well
[70] Ministry of Environment, "Environmental Violations Database (EVD)", online: https://a100.gov.bc.ca/pub/ocers/searchApproved.do?submitType=menu

Other jurisdictions

- In stark contrast to our experience in seeking copies of orders issued to a dairy farm in British Columbia, in Alberta the Natural Resources Conservation Board proactively releases environmental compliance orders against farms on its website.[71] The operational division of the Board is responsible for the ongoing regulation of confined feeding operations, including cows. Two kinds of orders are posted on their website; enforcement orders and emergency orders. Enforcement orders can be issued "if an operator is creating a risk to the environment or an inappropriate disturbance, or is contravening or has contravened the act, the regulations or a permit issued under the act."[72] Emergency orders "are issued when a release of manure, composting materials or compost into the environment may occur, is occurring or has occurred, and the release is causing or has caused an immediate and significant risk to the environment."[73] Users of the website can view both "Active Orders" and "Archived Orders".

- Ontario's *Environmental Bill of Rights*[74] requires the government to post notices of government proposals, like Acts or Regulations, which will have an effect on the environment. These are posted on the Environmental Registry.[75] A summary of the government action is posted on the website for comment by the public. Summaries are also posted for permits and for variations of existing permits, and include links to relevant orders issued by the public body. The address of the government body that holds further information is also provided, and users are directed to contact the body for more information if they wish to.

- The Canadian government operates the National Pollutant Release Inventory (NPRI).[76] Users of the NPRI can search pollutant releases by company or facility name or by postal code. This information is collected and posted pursuant to ss. 46 – 50 of the *Canadian Environmental Protection Act*, which permits the Minister for the Environment to collect and publish information about toxic substances.[77] The Minister of the Environment sets the minimum

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[71] Natural Resources Conservation Board, "Confined Feeding Operations: Enforcement and Emergency Orders", online at https://cfo.nrcb.ca/Compliance/Orders.aspx
[72] Natural Resources Conservation Board, "Confined Feeding Operations: Enforcement and Emergency Orders", online at https://cfo.nrcb.ca/Compliance/Orders.aspx
[73] Natural Resources Conservation Board, "Confined Feeding Operations: Enforcement and Emergency Orders", online at https://cfo.nrcb.ca/Compliance/Orders.aspx
[74] *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28, online: http://www.ontario.ca/laws/statute/93e28
[75]"Environmental Registry", Government of Ontario, online: http://www.ebr.gov.on.ca/ERS-WEB-External/
[76] Environment Canada, "National Pollutant Release Inventory: Tracking Pollution in Canada", Government of Canada, online: https://www.ec.gc.ca/inrp-npri/default.asp?lang=En&n=4A577BB9-1
[77] *Canadian Environmental Protection Act, 1999* (S.C. 1999, c. 33), online: http://laws-lois.justice.gc.ca/eng/acts/c-15.31/page-13.html#h-21 at Section 46

quantities of pollutant releases that will require reporting, so small-scale emitters may not be included in the inventory.[78]

- In the fall of 2015, the National Energy Board began posting compliance inspection reports for pipeline facilities proactively on its website.[79] They have committed to proactively publish safety inspection reports, environmental protection inspection reports, integrity management inspection reports, and damage prevention inspection reports. This is in addition to their regular publication of compliance orders and other enforcement documents.[80]

- In the United States, the federal Environmental Protection Agency operates ECHO (Enforcement and Compliance History Online). This is an online inventory of all orders made by the EPA. Users can access summaries of compliance history of industries and individuals subject to environmental regulation, but not the actual compliance orders.[81]

The above examples highlight the fact that different public bodies have determined that proactive release of environmental information is a good idea.

As mentioned above, s. 10 of Nova Scotia's *Environment Act* provides a list of records that must be held in their Environmental Registry. This list covers all enforcement orders, authorizations, and other actions or documents that may be produced in the enforcement of environmental legislation:

> **10 (1)** The Minister shall establish an environmental registry containing
>
> (a) approvals;
> (b) certificates of qualification;
> (c) certificates of variance;
> (d) orders, directives, appeals, decisions and hearings made under this Act;
> (e) notices of designation given pursuant to this Act;
> (f) notices of a charge or lien given pursuant to Section 132;
> (g) policies, programs, standards, guidelines, objectives and approval processes established under this Act;
> (h) convictions, penalties and other enforcement actions brought under this Act;

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[78] Environment Canada, "The National Pollutant Release Inventory Oil and Gas Sector Review", Government of Canada, online: https://www.ec.gc.ca/inrp-npri/default.asp?lang=En&n=02C767B3-1
[79] National Energy Board, "All Companies under the National Energy Board's (NEB) Jurisdiction – Transparency of NEB Compliance Verification Activities UPDATE" Government of Canada (23 November 2015), online: https://www.neb-one.gc.ca/sftnvrnmnt/cmplnc/2015-11-23nbl-eng.html
[80] National Energy Board, "Compliance and Enforcement", Government of Canada, online: https://www.neb-one.gc.ca/sftnvrnmnt/cmplnc/index-eng.html
[81] "ECHO: Enforcement and Compliance History Online", United States Environmental Protection Agency, online: http://echo.epa.gov/?redirect=echo

(i) information or documents required by the regulations to be included in the registry;
(j) annual reports; and
(k) any other information or document considered appropriate by the Minister.[82]

This list of records could be adopted by the legislature as records requiring proactive disclosure. The legislature should adopt a category of proactive disclosure requiring environmental compliance orders, authorizations and assessments to be proactively released. This information falls squarely within s. 25 because it often relates to serious risks to our environment or to public health and safety. The information is also otherwise in the public interest because it discloses how government is regulating environmental risks, and provides the opportunity for the public to hold government accountable for the decisions it makes about the environment and public health.

RECOMMENDATION 4: The legislature should establish a category of proactive disclosure requiring environmental compliance orders, authorizations, convictions, contraventions, penalties and assessments to be proactively released.

C. Environmental Quality reports

Such information is in the public interest because it relates to the health of the environment and the public. While environmental quality reports may not always disclose a "serious risk", disclosure of these reports is still important to the public because it allows the public to be aware of the state of their environment and to make more informed decisions about how we should manage our environment and our resources. While this information is often provided online (for example, the Ministry of Environment releases hourly air quality ratings on their website[83]), a legislative requirement that this information be proactively released will ensure that this approach continues and that similar kinds of environmental quality information is released.

RECOMMENDATION 5: The law should require the proactive disclosure of environmental quality reports, including air pollution surveys, water quality reports, and reports examining the health of particular species.

D. Inspection reports and penalties

[82] *Environment Act* Chapter 1 of the Acts of 1994-5, Nova Scotia, online: http://nslegislature.ca/legc/statutes/environment.pdf at section 10
[83] "BC Air Quality", British Columbia, online: http://www.bcairquality.ca/readings/index.html

Records of ministerial inspections to ensure compliance with the law should generally be considered "public interest" records. Not only can these reports contain information that can warn of risks to the environment or to public health and safety, reports and penalties provide information that reveals how the government is managing risks to the public and enforcing the law.

Most jurisdictions proactively release at least some kinds of inspection reports and penalties. In BC, Health Inspection reports are made available online through the governing health authorities.[84] WorkSafeBC also releases information about compliance with workplace safety rules, posting detailed summaries of penalties issued online[85], and compliance related data such as injury rates, claim costs and injury characteristics, and assessment rates.[86] In almost every province, food establishment inspection reports are posted online. In Florida, the Department of Heath posts online metadata regarding compliance with heath regulations regarding swimming pools, septic tanks, biomedical waste, mobile homes and RV parks, migrant labour camps, tanning and body piercing facilities, and food hygiene.[87] A similar approach is taken in other states, including California.[88]

A category including inspection reports and compliance orders should be added to s. 25. Many public bodies already post this information proactively, and including the category would encourage other public bodies to do so as well.

RECOMMENDATION 6: The legislation should require the proactive disclosure of all compliance orders, authorizations, inspection reports and penalties under all administrative schemes.

F. Contracts over $10,000 and procurement related documents

Government contracts are frequently the subject of FOI requests in BC.[89] Commissioner Denham has recommended that the BC government proactively disclose contracts worth $10,000 or more in her July 2013 report and her BC Ferries report. The publication of contracts "enhances transparency as to how

[84] See, for example, the Vancouver Island Health Authority Inspection reports, online: http://www.healthspace.ca/viha
[85] Work Safe BC, "Penalties", online: http://www2.worksafebc.com/Topics/AccidentInvestigations/Penalties.asp?_ga=1.71411987.1243913321.1445720596
[86] Work Safe BC, "Open Data", online: http://www.worksafebc.com/about_us/open_data/default.asp
[87] Florida Health, "Inspection Reports and Data", online: http://www.floridahealth.gov/statistics-and-data/eh-tracking-and-reporting/
[88] Kings County California, "Online Inspection Reports", online: http://www.countyofkings.com/departments/environment-health-service/online-inspection-reports
[89] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 16

much government is paying to deliver services and programs to citizens."[90] In her July 2013 report, the Commissioner recognized that the BC government had determined that it was more efficient to post contracts by request, but noted that "what should drive the decision to proactively disclose information is the clear public interest in its disclosure." [91] She recommended that contract-related information should include:

- with whom the government is contracting;
- the purpose, value and duration of contracts; and
- information about the procurement process.[92]

Other jurisdictions require proactive disclosure of government contracts worth a similar amount and accompanying procurement information. The federal government requires the proactive disclosure of contracts worth over $10,000 and amendments to contracts worth $10,000 or more,[93] and has developed a website where it posts procurement information and tenders.[94] This fall, a new directive from the Alberta Treasury Board mandated that all sole-source service contracts worth more than $10,000 but less than $75,000 be posted online, but in implementing the directive the Alberta government included contracts worth more than $75,000 on their disclosure website.[95] The United Kingdom requires proactive disclosure of government contracts worth £10, 000 or more and posts this information, along with procurement information and data, online.[96]

We support the Commissioner's recommendation that government contracts worth $10,000 or more and any accompanying procurement information must be proactively released, and recommend that these be included as a category of public interest information under s. 25.

RECOMMENDATION 7: The law should require the proactive disclosure of all contracts over $10,000 and information about the procurement process.

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[90] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553
[91] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 16
[92] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 16
[93] Treasury Board of Canada Secretariat, "Guidelines on the Proactive Disclosure of Contracts", Government of Canada, online: https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14676
[94] Public Works and Government Services Canada, Buyandsell.gc.ca, online: https://buyandsell.gc.ca/
[95] Alberta Government, "Government releases list of sole source service contracts", (September 17, 2015), online: http://alberta.ca/release.cfm?xID=385359854D039-EF88-D134-D1B220EA03F0A891
[96] GOV.UK, "Contracts Finder", online: https://www.gov.uk/contracts-finder

G. Audit reports

In her July 2013 report, the Commissioner recommended, for the second time, that public bodies proactively disclose final audit reports. This kind of information should form a category of disclosure under s. 25. This summer, the Commissioner explored the meaning of "public interest" in her Mount Polley Report, and reasoned that information may be in the public interest where it "may contribute, in a meaningful way to holding a public body accountable for its actions or decisions." [97] The Commissioner writes in her July 2013 report that audit reports are important to the public because they are about "government operations and decision-making and measure compliance with law, policy and best practices."[98] She notes that "proactive disclosure of audit reports is, thus, critically important for greater government transparency and accountability."[99]

The BC Court of Appeal decision in *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*[100] surprisingly limits what can be released. In that case, the Court upheld the public body's denial of a request for summaries of audits under the policy exemption found in s. 13(1). Still, final audit reports, however, should not be denied to the public – and should be proactively released.

In 2013, 72% of OECD countries required proactive release of audit reports.[101] The World Bank's report on Proactive Transparency lists audit reports as one of the basic minimum standards for proactive

[97] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 31

[98] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 17

[99] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 17

[100] *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322, online: https://www.oipc.bc.ca/orders/1197

[101] OECD (2011), *Government at a Glance 2011*, OECD Publishing, online: https://books.google.ca/books?id=bFDWAgAAQBAJ&pg=PA142&lpg=PA142&dq=proactive+disclosure+of+audits+open+governmnet&source=bl&ots=pWicgijyjS&sig=44D6weMjsxkJ9XN4eHf3xOXAvSc&hl=en&sa=X&ved=0ahUKEwjauIX6n6XJAhVL1mMKHbpFDOQ4ChDoAQgbMAA#v=onepage&q=proactive%20disclosure%20of%20audits%20open%20governmnet&f=false at p. 142

disclosure worldwide.[102] Mexico requires that any formal audit compelled by the law and completed by a government body must be proactively released.[103] We recommend that we do the same here in BC.

RECOMMENDATION 8: The law should require the proactive disclosure of final audit reports.

H. Budget and expenditure information

Budget and expenditure information fits within s. 25, because it is public interest information, as it relates to government accountability. As the International Budget Partnership points out, the budget "is a government's plan for how it is going to use the public's resources to meet the public's needs" and argues that "open budgets are empowering; they allow people to be the judge of whether or not their government officials are good stewards of public funds."[104] The World Bank's Proactive Transparency report lists "budget information", including projected budget, actual income and expenditure, salary information, and other financial information, as one of the minimum standards for proactive disclosure.[105]

Most jurisdictions proactively release budget information. British Columbia has an entire webpage dedicated to budget information.[106] Adding a category of budget information to s. 25 should be relatively easy and uncontroversial.

A recent BC OIPC order, released on December 3, 2015, dealt with whether the costs of legal fees paid by government to government and contracted lawyers was "public interest" information within the meaning of s. 25. These costs were sought by a former of employee of the Ministry's Pharmaceutical Services Division, in connection to the investigation into the health data breach in 2012. Adjudicator Barker determined that the costs associated with these fees were not required to be released, because they did not rise to the level of "clearly in the public interest." She reasoned that:

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[102] Helen Darbishire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online: http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf at p. 21

[103] Instituto Federal de Accesso a la Informacion Publica, *Transparency, Access to Information and Personal Data: Regulatory Framework*, (Mexico:2004), online: https://www.ip-rs.si/fileadmin/user_upload/Pdf/Publikacije_ostalih_pooblascencev/foia_in_mexico.pdf at Article 7(10), at p. 17

[104] "Open Budget Initiative", International Budget Partnership, online: http://internationalbudget.org/opening-budgets/open-budget-initiative/

[105] Helen Darbishire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online: http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf at p. 21

[106] BC Budget, "Balanced Budget 2015", British Columbia, online: http://bcbudget.gov.bc.ca/2015/default.htm

> While I accept that the LSB fees may be interesting to the public in the sense that it is generally concerned with how its tax dollars are spent, there was nothing to indicate that disclosing the amount paid to [the Legal Services Branch] over an eleven month period would change or contribute in any significant way to the public discourse about the health data breach investigation.[107]

The costs of investigations, the payment of employees, intergovernmental budgetary distribution, and the costs of contracts with outside counsel, is information that relates to the government's budget. This information is clearly in the public interest not because it may relate to an issue that has gained public notoriety, but because it relates to the ability of the public to hold government accountable for its spending of tax dollars. The above order now provides a precedent in BC that budgetary information related to legal costs is not in the public interest. The law should be reformed to make it clear that budgetary information, including the spending distributed to specific ministries and branches of government (including the Legal Services Branch) and to contracted workers is in the public interest and must be proactively released.

RECOMMENDATION 9: The law should require the proactive disclosure of all budget and expenditure information.

I. Policy and research information, including project charters and research reports

In order for the public to both assess their government's direction and to provide input into government decisions, it is necessary that government policy information be made available to the public. As Mendel notes, it is difficult for the public "to provide useful input to a policy process without access to the thinking on policy directions within government, for example, in the form of a draft policy, as well as background information upon which that thinking is based."[108] Usually, policy information is expressed in project charters and in research reports that are created to inform what kind of policy the government should take to address a problem. Ontario's Open by Default report also recommends proactive publication of policy and research information, including opinion polling that is publicly funded and research reports and studies related to bills.[109]

Some concerns with the proactive release of policy information arise. One major concern with proactively releasing policy documents is the need to sometimes protect the confidentiality of stakeholders who provide input into the policy decision process. Stakeholders and their input must

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[107] *Order F15-64*, 2015 BCIPC 70, OIPC, Adjudicator Barker at para. 15

[108] Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 4

[109] Open Government Engagement Team, *Open By Default: A new way forward for Ontario*, (Queen's Printer for Ontario, 2014), online: https://dr6j45jk9xcmk.cloudfront.net/documents/2428/open-by-default-2.pdf at p. 35

remain confidential in order to encourage open and honest input from the public in the policy decision making process. However, this concern does not arise in every case – government consultations with outside stakeholders are sometimes exempted from non-release and provided in response to FOI requests. In the case of this Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, submissions are proactively posted on its website. [110] Another concern that may arise in the context of proactively releasing policy information and documents is that personal and private information may be released.

Other concerns are reflected in the policy exceptions to disclosure that is found in most jurisdictions' access to information legislation. Mendel points out that the policy exception common to almost all access to information regimes prohibit the release of information where the release would lead to:

- Prejudice to the effective formulation or development of public policy;
- Frustration of the success of a policy, by premature disclosure of that policy;
- Undermining of the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; and
- Undermining of the effectiveness of testing or auditing procedures.[111]

While these concerns are valid, sensitive information can still be excluded from proactive disclosure under s. 25. The concerns about proactively releasing information that should be kept confidential under s. 25 are addressed by Commissioner Denham in her Oliver Dam report. In that report, Commissioner Denham directed that proactive disclosure must be made with an eye to excluding information that is not in the public interest to be disclosed.[112] In the case of proactive release of policy

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[110] "Special Committee to Review the Freedom of Information and Protection of Privacy Act", Past Meetings, online: https://www.leg.bc.ca/parliamentary-business/committees/40thParliament-4thSession-foi/calendar . See the links titled "Meeting Documents".

[111] Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 150

[112] Commissioner Denham notes that:

> When disclosing information under s. 25, public bodies need only disclose information that 'satisfies either the significant harm or clear public interest tests'; they need not disclose entire records. So, while the exceptions in Part 2 of FIPPA cannot be applied, information in records that is not compelling is not required to be disclosed.

The Commissioner has also directed:

> A public body should, when deciding whether information 'clearly' must be disclosed in the public interest, consider the purpose of any relevant exceptions (including those protecting third-party interests or rights that will be, or could reasonably be expected to be, affected by disclosure)...the nature of the information and of the rights or interests engaged, and the impact of disclosure on those rights or interests will be factors in assessing whether disclosure is 'clearly in the public interest'.

information, the exclusion from release of information that must be kept confidential in the public interest can still be achieved. Information that may undermine the policy –making process or engages privacy concerns does not need to be proactively disclosed under a requirement that policy information be proactively released.

RECOMMENDATION 10: Government should seriously consider making certain policy information, including project charters and research reports, a category of records that must be proactively disclosed under s. 25.

J. All the exceptions to s.13(1) listed in s.13(2) of FIPPA

Section 13(1) of *FIPPA* permits a public body to refuse to disclose "information that would reveal advice or recommendations developed by or for a public body or minister."[113] The policy rationale behind this provision is to protect the process of government decision making – it permits decision makers to discuss an issue freely before coming to a decision. Section 13(1) protects the advice and recommendations made by civil servants and those engaged by government to provide advice. However, section 13(2) sets out the types of information that does not fall under s.13(1). In the Commissioner's 2013 Report, she recommends that the listed exceptions to s.13(1) listed in s.13(2) should be proactively released, noting that these "are all types of information that are of significant interest to the public and would enable citizens to better evaluate government policy and decision making."[114] In both 2004 and 2010, the Special Committee recommended that s.13(2) be amended to require the head of a public body to release on a routine and timely basis the information listed in that section.

Section 13(2) provides the following exceptions to s.13(1):

- Any factual material
- Public opinion polls
- Statistical surveys
- Appraisals

Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 29

[113] *Freedom of Information and Protection of Privacy Act* [RSBC 1996] Chapter 165, online: http://www.bclaws.ca/civix/document/LOC/complete/statreg/--%20F%20--/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20[RSBC%201996]%20c.%20165/00_Act/96165_02.xml

[114] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 19

- Economic forecasts
- Environmental impact statements or similar information
- A final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities
- A consumer test report or a report of a test carried out on a produce to test equipment of the public body
- A report on the results of field research undertaken before a policy proposal is formulated
- A report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body
- A plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body
- Information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
- A decision, including reasons, that is made, in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

RECOMMENDATION 11: Following the recommendations by the Commissioner and by the 2004 and 2010 Special Committees, we recommend that *FIPPA* be amended to require that the exceptions listed in s. 13(2) be proactively released.

K. Additional categories by regulation

Some proactive disclosure regimes give Government the ability to simply prescribe additional categories of information that must be proactively released. For example, India's *Right to Information Act* provides for the proactive release of a list of information, followed by a provision that requires the release "of such other information as may be prescribed".[115] New South Wales' *Government Information (Public Access) Act 2009* has a similar provision; s. 18 defines "what constitutes open access information", and s .18(g) provides that open access information includes "such other government information as may be prescribed by the regulations as open access information"[116].

Ministerial prescriptions or regulations are much easier to implement than amendments to the statute. In the future, it is inevitable that we will discover that certain types of records not required for proactive release should be. A provision permitting the Minister responsible for the *Act* to create new categories

[115] Government of India, Ministry of Law and Justice, *Right to Information Act, 2005*, online: http://www.righttoinformation.gov.in/rti-act.pdf at section 4(1)(b)(xvii)
[116] *Government Information (Public Access) Act 2009* No. 52, New South Wales Government, NSW legislation, online: http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+343+2010+cd+0+N at section 18(g).

or records for proactive release would provide government with more flexibility in administering s. 25 of *FIPPA.*

RECOMMENDATION 12: Include a provision that permits the Minister to prescribe additional categories or records of information that must be proactively disclosed under s. 25

3. Legislating timelines for disclosure

Ideally in the future information will be posted as it is created or stored- a compliance order being saved on a government computer, for example, could be posted online at the same time with a click of a button. However, a major hurdle in implementing a proactive disclosure regime in government is getting it started, and releasing the vast amounts of information that is currently held by government but not currently posted.

The Commissioner has recommended that "Government should also set timelines as to when this information should be released since the timeliness of the disclosure has a direct impact on the relevance and usefulness of the information."[117] A provision requiring that public bodies release specific information mentioned above (environmental assessments, compliance orders, etc) within a year of the passing of the amendment would encourage public bodies to begin to release information. The provision could also set a past date as a benchmark for disclosure, to make the release of information a little bit less daunting- the provision could provide, for example, that past information from January 1, 2010, be proactively released within one year. The provision should also provide that any information produced on or after the passing of the amendment must be proactively released immediately.

A few jurisdictions have legislated timelines for proactive disclosure. India's *Right to Information Act* provides that every public authority must publish specified categories of information "within one hundred and twenty days from the enactment of this Act" and to "thereafter update these publication every year."[118] In Mexico, proactive disclosure of certain categories of information must be updated "at least every three months, unless otherwise indicated" by regulation.[119] The World Bank report notes that Hungary's FOIA "specifies when each class of information should be updated. So for example, information about tenders has to be continuously updated, whereas other data, such as performance

[117] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 20
[118] Government of India, Ministry of Law and Justice, *Right to Information Act, 2005*, online: http://www.righttoinformation.gov.in/rti-act.pdf at Section 4(b)
[119] Instituto Federal de Accesso a la Informacion Publica, *Transparency, Access to Information and Personal Data: Regulatory Framework*, (Mexico:2004), online: https://www.ip-rs.si/fileadmin/user_upload/Pdf/Publikacije_ostalih_pooblascencev/foia_in_mexico.pdf at p. 58

indicators, should be updated quarterly."[120] Section 4 of the United Kingdom's *Environmental Information Regulations* limits the disclosure requirement by setting a historical benchmark beyond which record do not need to be proactively disclosed- Section 4 requires the environmental information be proactively disclosed (as discussed above), but s. 4(2) states that "the use of electronic means to make information available or to organize information shall not be required in relation to information collected before 1st January 2005 in non-electronic form."[121]

Setting specific timelines for disclosure provides public bodies with legal guidelines for the release of information and an enforceable legal requirement for disclosure.

RECOMMENDATION 13: The law should prescribe a maximum timeframe for the prompt proactive release of s. 25 information.

4. Information online

Given modern technology and the high level of internet use and access among British Columbians, the most efficient way of proactively releasing information is online. Mendel notes that a growing trend in all countries is to proactively release information on the web. He writes that disclosure online promotes "a number of efficiencies for the public sector, as well as better service provision" and that given "the relative ease and low cost of proactive publication over the Internet, it only makes sense that this should be promoted".[122]

Information should be released online and it should be released in a way that makes it easy to find. The World Bank notes in its report that an important part of proactive release of information is that the information is "findable". They recommend:

> Information proactively disclosed on the Internet, or using other formats and communications channels, should be organized so that it is easy to find. User's information needs should be a primary consideration when determining where to publish information, including whether to opt for departmental, central or sectoral web portals.[123]

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[120] Helen Darbishire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online: http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf at p. 30

[121] *The Environmental Information Regulations 2004*, United Kingdom, online: http://www.legislation.gov.uk/uksi/2004/3391/regulation/4/made at section 4

[122] Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 147

[123] Helen Darbishire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online: http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf at p. 31

British Columbia has two main websites geared specifically toward proactive disclosure: DataBC and Open Information. Individual ministries will also sometimes disclose information on certain sections of their websites. This can make finding proactively released information confusing. Proactively released information should be disclosed through either one centralized portal or through specifically labelled open government webpages associated with individual ministries websites. Adopting this format would make it easier for the public to search and access publicly released information.

President Obama's Open Government Directive required that each US Government agency publish data sets on their Data.gov website, but also required that each agency create a web page devoted to its open government activities. Having a webpage devoted to proactive releases makes it much easier for users to look for information specific to each agency. Mexico opted for one centralized portal, the Portal de Obligaciones Transparencia. Either approach would make accessing information easier. Information posted on a specific "open" webpage attached to individual ministries websites would make it easier for users to find information that they know is produced by a specific ministry, while one unified disclosure website would provide a clear centralized portal to all information.

RECOMMENDATION 14: Section 25 should be amended to require that proactively released information be posted online by each Ministry, either on the Data BC or Open Information website or on specific open information webpages linked to each Ministry's website.

5. Amend sections 71 and 71.1 to ensure that they require proactive publication schemes.

Section 71 requires the head of every public body to "establish categories of records that are in the custody or under the control of the public body and are available to the public without a request for access"[124]. Section 71 does not provide any basic requirements for what kinds of documents must be included in the list. Section 71 also does not require that the list of records developed by public bodies under s. 71 be made public.

Section 71 is often discussed as a provision that encourages proactive disclosure, but in reality, it only permits it. The Commissioner in her July 2013 report expresses the opinion that as a result of s. 71, "all public bodies, including ministries, are now required to identify records that they must 'make available' to the public on a routine basis."[125] However, on its face, the section does not require that the information identified under s. 71 be proactively or routinely available to the public. Section 71 only

[124] *Freedom of Information and Protection of Privacy Act* [RSBC 1996] Chapter 165 online: http://www.bclaws.ca/civix/document/LOC/complete/statreg/--%20F%20--/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20[RSBC%201996]%20c.%20165/00_Act/96165_06.xml at section 71

[125] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03,* "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: https://www.oipc.bc.ca/investigation-reports/1553 at p. 10

requires that it is "available to the public without a request for access under this Act."[126] Ian Christman argues that this simply "means that the records are reviewable without having to fulfil the formalities of s. 5 of *FIPPA*" and not that they be made publicly available.[127] This is made clear by s. 71(2), which permits the head of a public body to charge a fee in return for a copy of a s. 71 document. While s. 71 does permit a public body to release information without a request and without a fee, it does not require it. This interpretation of s. 71 has been adopted by the BC government. In the "FOIPPA Policy and Procedures Manual", released by the Ministry of Technology, Innovation and Citizens' Services, s. 71 is described as a section that "permits the head of a public body to designate categories of records appropriate for routine release to the public"[128](emphasis added). The key word in this interpretation is "permits"– the government is clear that public bodies are not required to release the information.

Section 71 was adopted following the Commissioner's recommendation in her BC Ferries report and the 2010 Report of the Special Committee[129] that government adopt a requirement that public bodies develop proactive publication schemes. The Commissioner pointed to a few good practice jurisdictions that had taken the publication scheme approach to proactive disclosure, including the United Kingdom and jurisdictions in Australia. In the United Kingdom, the *Freedom of Information Act* requires that every public authority "adopt and maintain a scheme which relates to the publication of information by the authority and is approved by the Commissioner."[130] The Act also requires that each publication scheme specifies what information it intends to publish and how.[131]

RECOMMENDATION 15: Section 71 should be amended to more closely match the publication scheme requirement in the United Kingdom. It should be amended so that it requires:

- **public bodies to produce publication schemes or lists of information that will be available proactively;**

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[126] *Freedom of Information and Protection of Privacy Act* [RSBC 1996] Chapter 165 online: http://www.bclaws.ca/civix/document/LOC/complete/statreg/--%20F%20--/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20[RSBC%201996]%20c.%20165/00_Act/96165_06.xml at section 71.1(1)

[127] Ian Christman, "Proactive Disclosure- New Development in Public Body Transparency", CLE Privacy—2013 Update, Paper 2.1, online: http://online.cle.bc.ca/CourseMaterial/pdfs/2013/732_2_1.pdf at p. 9

[128] FOIPP Act Policy and Procedures Manual, "Section 71- Records Available Without Request", Ministry of Technology, Innovation and Citizens' Services, online: http://www.cio.gov.bc.ca/cio/priv_leg/manual/sec70_81/sec71.page?

[129] Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, Report May 2010, Legislative Assembly of British Columbia, online: https://www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#/content/legacy/web/cmt/39thParl/session-2/foi/index.htm at Recommendation 7

[130] *Freedom of Information Act 2000*, c. 36, Part I Publication schemes, online: http://www.legislation.gov.uk/ukpga/2000/36/part/I/crossheading/publication-schemes at section 19(1)

[131] *Freedom of Information Act 2000*, c. 36, Part I Publication schemes, online: http://www.legislation.gov.uk/ukpga/2000/36/part/I/crossheading/publication-schemes at section 19(2)

- **that the publication schemes include any public interest information that falls under s. 25;**
- **that the publication schemes be posted online; and**
- **that the information listed in the publications schemes be posted online.**

6. Section 71 and empowering the Commissioner to review and approve

Granting the Commissioner the power to review and approve the publication schemes created by public bodies under s. 71 was recommended by the Special Committee in 2004.[132] Such a power would add the extra level of enforcement necessary to ensure that public bodies follow the law. As the Carter Center notes, "the law needs to have teeth, in order to take bites – big bites – out of the bureaucratic culture of secrecy."[133] As noted above, the UK's Information Commissioner's Office (ICO) publishes model publication schemes outlining non-exhaustive lists of categories that the Commissioner's Office expects specific public bodies to proactively release.[134]

RECOMMENDATION 16: Section 71 should be amended to provide the Commissioner with the power to review and approve the publication schemes created by public bodies under s. 71.

7. Section 71 and legislated timeframes

In the 2010 submission by the Office of the Information and Privacy Commissioner to the Special Committee reviewing *FIPPA*, the Commissioner recommended that public bodies be required to adopt

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[132] In the 2010 Report of the Special Committee reviewing FIPPA, the Committee recommended that the legislature:

> Add a new section at the beginning of Part 2 of the Act requiring public bodies – at least at the provincial government level – to adopt schemes approved by the Information and Privacy Commissioner for the routine proactive disclosure of electronic records, and to have them operational within a reasonable period of time.

Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, Report May 2010, Legislative Assembly of British Columbia, online: https://www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#/content/legacy/web/cmt/39thParl/session-2/foi/index.htm at Recommendation 7

[133] Nancy Anderson, "Enforcement Under the Jamaica Access to Information Act", *Access to Information: Building a Culture of Transparency* (The Carter Center, 2006), online: https://www.cartercenter.org/documents/2364.pdf at p. 104

[134] Information Commissioner's Office, "Definition documents", online: https://ico.org.uk/for-organisations/guide-to-freedom-of-information/publication-scheme/definition-documents/

proactive disclosure schemes to be approved by the Commissioner, but added that these schemes should be required to be operational within a reasonable period of time.[135]

RECOMMENDATION 17: The law should require that these lists and/or publication schemes be produced and posted within a legislated timeframe under s. 71.

[135] Office of the Information and 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*, (March 25, 2010), online: https://www.oipc.bc.ca/special-reports/1275 at p. 18

Conclusion

British Columbia's *Freedom of Information and Protection of Privacy Act* is forward thinking; through s. 25, it expressly requires proactive disclosure of information to the public in certain circumstances. However, government's response to s. 25's requirement for proactive disclosure of public interest information and to ss. 71 and 71.1 that permit public bodies to create categories of information they may release without a request, has been one of neglect and inaction. Sections 25, 71 and 71.1 should be strengthened to promote and require government proactive disclosure.

For the above reasons, we respectfully submit that the Special Committee make the following recommendations for reform:

<u>RECOMMENDATION 1:</u> The principles laid out in the Commissioner's Report (July 2015) should be legislated. Section 25 should be amended to:

i. explicitly require public bodies to proactively disclose information whenever a disinterested and reasonable observer, knowing what the information is and knowing all of circumstances, would conclude that disclosure is plainly and obviously in the public interest,

ii. include two more explicit categories of "public interest" information that must be proactively released by government:

- **a. information about a topic inviting public attention; a topic about which the public has a substantial concern because it affects the welfare of citizens; or a topic to which public notoriety or controversy has attached, and**
- **b. information that promotes government accountability.**

<u>RECOMMENDATION 2:</u> Amend s. 25 to require proactive disclosure of specific categories and classes of records.

<u>RECOMMENDATION 3:</u> Amend s. 25 to require the proactive disclosure of environmental information described in the Aarhus Convention and adopted by the United Kingdom:

- **(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;**
- **(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);**
- **(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;**
- **(d) reports on the implementation of environmental legislation;**

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).[136]

RECOMMENDATION 4: The legislature should establish a category of proactive disclosure requiring environmental compliance orders, authorizations, convictions, contraventions, penalties and assessments to be proactively released.

RECOMMENDATION 5: The law should require the proactive disclosure of environmental quality reports, including air pollution surveys, water quality reports, and reports examining the health of particular species.

RECOMMENDATION 6: The legislation should require the proactive disclosure of all compliance orders, authorizations, inspection reports and penalties under all administrative schemes.

RECOMMENDATION 7: The law should require the proactive disclosure of contracts over $10,000 and information about the procurement process.

RECOMMENDATION 8: The law should require the proactive disclosure of final audit reports.

RECOMMENDATION 9: The law should require the proactive disclosure of all budget and expenditure information.

RECOMMENDATION 10: Government should seriously consider making certain policy information, including project charters and research reports, a category of records that must be proactively disclosed under s. 25.

RECOMMENDATION 11: Following the recommendations by the Commissioner and by the 2004 and 2010 Special Committees, we recommend that *FIPPA* be amended to require that the exceptions listed in s.13(2) be proactively released.

RECOMMENDATION 12: Include a provision that permits the Minister to prescribe additional categories or records of information that must be proactively disclosed under s. 25.

RECOMMENDATION 13: The law should prescribe a maximum timeframe for the prompt proactive release of s. 25 information.

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[136] *The Environmental Information Regulations 2004*, United Kingdom, online: http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made at section 2

<u>RECOMMENDATION 14:</u> Section 25 should be amended to require that proactively released information be posted online by each Ministry, either on the Data BC or Open Information website or on specific open information webpages linked to each Ministry's website.

<u>RECOMMENDATION 15:</u> Section 71 should be amended to more closely match the publication scheme requirement in the United Kingdom. It should be amended so that it requires:

- **public bodies to produce publication schemes or lists of information that will be available proactively;**
- **that the publication schemes include any public interest information that falls under s. 25;**
- **that the publication schemes be posted online; and**
- **that the information listed in the publications schemes be posted online.**

<u>RECOMMENDATION 16:</u> Section 71 should be amended to provide the Commissioner with the power to review and approve the publication schemes created by public bodies under s. 71.

<u>RECOMMENDATION 17:</u> The law should require that the lists be produced and posted within a legislated timeframe under s. 71.

Appendix 1: Public interest categories

Currently, s. 25 operates to include only one category of "public interest" information in s. 25(1)(a): "information about a risk of significant harm to the environment or to the health or safety of the public or a group of people". More categories of could be adopted, to provide clarity to what is meant by the term "public interest." Stanley Tromp, in his 2010 plan for reform, notes that s. 25 "would be aided by several examples to help partially flesh it out."[137] He points to the Commonwealth Secretariat Model Freedom of Information Bill, produced in 2002 as a sample bill for jurisdictions to adopt and follow, for examples of other "public interest" categories.[138] While the model bill does not have an express proactive disclosure provision, it does list exceptions to information exempt from disclosure where the release of the information is in the public interest because it discloses:

- abuse of authority or neglect in the performance of official duty;
- injustice to an individual;
- danger to the health or safety of an individual or of the public; or
- unauthorised use of public funds.[139]

Kenya's draft Access to Information law similarly defines "public interest" in stating the exceptions that apply to require disclosure of otherwise exempt information. Public interest information includes that which:

- promote accountability of public entities to the public;
- ensure that the expenditure of public funds is subject to effective oversight;
- promote informed debate on issues of public interest;
- keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and
- ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.[140]

Newfoundland and Labrador also has a proactive disclosure public interest provision in their Freedom of Information legislation.[141] Newfoundland's policy direction to public officials applying the public interest provision defines public interest information as relating to:

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[137] Stanley L Tromp, *The Road Forward: Raising British Columbia's Freedom of Information and Protection of Privacy Act to World Standards.* (Vancouver, 2010), online: http://www3.telus.net/index100/theroadforward at p. 112

[138] Human Rights Initiative, Freedom of Information (2002), online: http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/Cth%20model%20law%20-%20FOI%20Act.pdf

[139] Human Rights Initiative, Freedom of Information (2002), online: http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/Cth%20model%20law%20-%20FOI%20Act.pdf at section 35

[140] Human Rights Initiative, Freedom of Information (2002), online: http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/Cth%20model%20law%20-%20FOI%20Act.pdf at section 6(5)

- Good governance, including transparency and accountability;
- The health of the democratic process;
- The upholding of justice;
- Ensuring the honesty of public officials;
- And general good decision-making by public officials.[142]

These lists provide a starting point for the development of additional categories of public interest information. A major commonality between the lists of public interest information in the Model Bill, Kenya's draft bill and in Newfoundland's policy direction is a focus on information that promotes government accountability. Information that discloses "abuse of authority or neglect", "unauthorized use of public funds", ensuring proper expenditure of funds, "promoting accountability", and ensuring a public authority is adequately discharging its functions, are all related to ensuring and encouraging government accountability. This category of public interest information also arose in this summer's OIPC report, where the Commissioner explored the meaning of the term "public interest."

The types of information that may be in the public interest that were explored by the Commissioner in this summer's report could form the basis of additional categories of public interest information in BC. In the report, the Commissioner identified two possible factors in determining whether information is in the public interest:

- information about a subject "inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached"[143]; and
- information that "may contribute, in a meaningful way to holding a public body accountable for its actions or decisions"[144].

These two categories—information about a topic which the public has a substantial concern or to which public notoriety or controversy has attached, and information that promotes government accountability—could be included as specific public interest categories under s. 25. This would help clarify what information is "clearly in the public interest", and would provide a clear legislative direction to public bodies as to the information that they can and must disclose. Any added categories should be

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[141] See Appendix 2 for a response to the BC Government's oral submissions of November 18, 2015 to the Special Committee to Review the *Freedom of Information and Protection of Privacy Act*

[142] Newfoundland and Labrador, "Access to Information: Policy and Procedures Manual"(November 2015), http://atipp.gov.nl.ca/info/pdf/Access_to_Information_Manual.pdf

[143] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 30

[144] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 32

additions to s. 25. Section 25(1)(b) should remain to provide for further types of information that may be in the public interest.[145]

[145] Section 25(1)(b) provides for disclosure of information in the public interest that falls outside of the currently legislated category of information disclosing a significant risk to the environment or to the health and safety of the public: "the disclosure of which is, for any other reason, clearly in the public interest."

Appendix 2: Response to BC Government's oral submissions on November 18, 2015 regarding Newfoundland's new *Access to Information and Protection of Privacy Act*

Response to the BC Government's oral submissions on November 18, 2015

In its' oral submissions on November 18, 2015 the BC government points to Newfoundland as a model jurisdiction for s. 25 reform, and suggests that they will reform s. 25 to fit with the Newfoundland approach. Their interpretation of Newfoundland's ATIPPA is that it better protects private information that may be contained in information that is of public interest:

> Newfoundland and Labrador have adopted a more measured approach to the release of information that is in the public interest. This approach also requires the proactive release of information, but the information that must be released is measured against and commensurate with the nature of the exception being overridden. In particular, the bar for releasing personal information is higher than that for other types of information.[146]

This submission is puzzling, however, because it is not clear that Newfoundland's provision requires a more "measured approach" than BC's provision. Newfoundland's proactive public release provision is found in s. 9(3) of their ATIPPA:

> **9** (3) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

Subsection 9(4) provides that s. 9(3) applies regardless of any provision of the Act. The regulations do not offer any further guidance on s. 9.

On its face, s. 9(3) seems exactly the same as BC's provision. The government may have been referring to other parts of s .9. Section 9(1) expressly directs that when considering ***requests*** for information, the head of a public body must disclose the information even if an exception to disclosure applies if the "public interest in disclosure of the information outweighs the reason for the exception."[147] Section 9(2) lists the exceptions that may be overridden if it is in the public interest to do so. It does not seem that ss. 9(1) and 9(2) are meant to apply to s. 9(3). Section 9(3) operates to provide for public interest proactive disclosure, and is exempt from any part of the *Act* by s. 9(4); ss. 9(1) and (2) provide exceptions to disclosure that can be overridden in the public interest when responding to requests, and guidance for the proper exercise of discretion when deciding to release information in the public interest where the exception is discretionary rather than mandatory.

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[146] "Minutes: Special Committee to Review the Freedom of Information and Protection of Privacy Act", Committee Transcript, Wednesday, November 18, 8:30 am, Douglas Fir Committee Room, Parliament Buildings, Victoria, BC, online: https://www.leg.bc.ca/documents-data/committees-transcripts/20151118am-FIPPAReview-Victoria-Blues (Debates of the Legislative Assembly (Hansard))

[147] *Access to Information and Protection of Privacy Act, 2015* SNL 2015 Chapter A-1.2, Newfoundland and Labrador, online: http://www.assembly.nl.ca/legislation/sr/statutes/a01-2.htm

Furthermore, the Commissioner has made it clear that BC's s. 25 does require a measured approach. She has noted that public bodies disclosing information under s. 25 do not necessarily need to disclose an entire record, but only the information in a record that is in the public interest. [148] While exemptions to disclosure do not apply to information disclosed under s. 25, a public body should still consider "the purpose of any relevant exceptions (including those protecting third-party interests or rights that will be, or could reasonably be expected to be, affected by disclosure),...the nature of the information and of the rights or interests engaged, and the impact of disclosure on those rights or interests will be factors in assessing whether disclosure is 'clearly in the public interest'".[149] It is unclear to us what a more 'measured' approach to s. 25 would look like, unless it is to provide greater scope for officials to refuse to release information at their discretion.

[148] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-05*, "Public Body Disclosure of Information under Section 25 of the *Freedom of Information and Protection of Privacy Act*", (Victoria, OIPC, December 2, 2013), 2013 BCIPC No. 33, online: https://www.oipc.bc.ca/investigation-reports/1588 at p. 10

[149] Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: https://www.oipc.bc.ca/investigation-reports/1814 at p. 29

Appendix 3: Section 25 of BC's *Freedom of Information and Protection of Privacy Act*

Information must be disclosed if in the public interest

25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

(3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify

(a) any third party to whom the information relates, and

(b) the commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form

(a) to the last known address of the third party, and

(b) to the commissioner.

Policy manuals available without request

70 (1) The head of a public body must make available to the public, without a request for access under this Act,

(a) manuals, instructions or guidelines issued to the officers or employees of the public body, or

(b) substantive rules or policy statements adopted by the public body,

for the purpose of interpreting an enactment or of administering a program or activity that affects the public or a specific group of the public.

(2) The head of a public body may delete from a record made available under this section any information he or she would be entitled to refuse to disclose to an applicant.

(3) If information is deleted, the record must include a statement of

(a) the fact that information has been deleted,

(b) the nature of the information, and

(c) the reason for the deletion.

(4) If a person asks for a copy of a record under this section, section 71 (2) applies.

Records available without request

71 (1) Subject to subsection (1.1), the head of a public body must establish categories of records that are in the custody or under the control of the public body and are available to the public without a request for access under this Act.

(1.1) The head of a public body must not establish a category of records that contain personal information unless the information

(a) may be disclosed under section 33.1 or 33.2, or

(b) would not constitute, if disclosed, an unreasonable invasion of the personal privacy of the individual the information is about.

(1.2) Section 22 (2) to (4) applies to the determination of unreasonable invasion of personal privacy under subsection (1.1) (b) of this section.

(2) The head of a public body may require a person who asks for a copy of an available record to pay a fee to the public body.

(3) Subsection (1) does not limit the discretion of the government of British Columbia or a public body to disclose records that do not contain personal information.

Records that ministries must disclose

71.1 (1) Subject to subsection (2), the minister responsible for this Act may establish categories of records that are in the custody or under the control of one or more ministries and are available to the public without a request for access under this Act.

(2) The minister responsible for this Act must not establish a category of records that contain personal information unless the information

(a) may be disclosed under section 33.1 or 33.2, or

(b) would not constitute, if disclosed, an unreasonable invasion of the personal privacy of the individual the information is about.

(3) Section 22 (2) to (4) applies to the determination of unreasonable invasion of personal privacy under subsection (2) (b) of this section.

(4) The minister responsible for this Act may require one or more ministries to disclose a record that is within a category of records established under subsection (1) of this section or section 71 (1).

(5) If required to disclose a record under subsection (4), a ministry must do so in accordance with any directions issued relating to the disclosure by the minister responsible for this Act.

Appendix 5: Sections 2 and 4 of the United Kingdom's *Environmental Information Regulations 2004*
Online: http://www.legislation.gov.uk/uksi/2004/3391/contents/made

The Environmental Information Regulations 2004

Interpretation

2.—(1) In these Regulations—

"the Act" means the Freedom of Information Act 2000(**1**);

"applicant", in relation to a request for environmental information, means the person who made the request;

"appropriate records authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"the Commissioner" means the Information Commissioner;

"the Directive" means Council Directive 2003/4/EC(**2**) on public access to environmental information and repealing Council Directive 90/313/EEC;

"environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the

state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

"historical record" has the same meaning as in section 62(1) of the Act;

"public authority" has the meaning given by paragraph (2);

"public record" has the same meaning as in section 84 of the Act;

"responsible authority", in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

"Scottish public authority" means—

(a) a body referred to in section 80(2) of the Act; and

(b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002(3);

"transferred public record" has the same meaning as in section 15(4) of the Act; and

"working day" has the same meaning as in section 10(6) of the Act.

(2) Subject to paragraph (3), "public authority" means—

(a)government departments;

(b)any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding—

(i)any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or

(ii)any person designated by Order under section 5 of the Act;

(c)any other body or other person, that carries out functions of public administration; or

(d)any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and—

(i)has public responsibilities relating to the environment;

(ii)exercises functions of a public nature relating to the environment; or

(iii)provides public services relating to the environment.

(3) Except as provided by regulation 12(10) a Scottish public authority is not a "public authority" for the purpose of these Regulations.

(4) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998(4), namely—

(a)“data” except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;

(b)“the data protection principles”;

(c)“data subject”; and

(d)“personal data”.

(5) Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

[...]

Dissemination of environmental information

4.—(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds—

(a)progressively make the information available to the public by electronic means which are easily accessible; and

(b)take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.

(2) For the purposes of paragraph (1) the use of electronic means to make information available or to organize information shall not be required in relation to information collected before 1st January 2005 in non-electronic form.

(3) Paragraph (1) shall not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12.

(4) The information under paragraph (1) shall include at least—

(a)the information referred to in Article 7(2) of the Directive; and

(b)facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.

Appendix 6: Section 10 of Nova Scotia's *Environment Act*
Online: http://nslegislature.ca/legc/statutes/environment.pdf

Environmental registry

10 **(1)** The Minister shall establish an environmental registry containing

(a) approvals;

(b) certificates of qualification;

(c) certificates of variance;

(d) orders, directives, appeals, decisions and hearings made under this Act;

(e) notices of designation given pursuant to this Act;

(f) notices of a charge or lien given pursuant to Section 132;

(g) policies, programs, standards, guidelines, objectives and approval processes established under this Act;

(h) convictions, penalties and other enforcement actions brought under this Act;

(i) information or documents required by the regulations to be included in the registry;

(j) annual reports; and

(k) any other information or document considered appropriate by the Minister.

(2) All information under the control of the Department is accessible to the public, subject only to the *Freedom of Information and Protection of Privacy Act*.

(3) The Minister shall ensure public access to the information and documents contained in the environmental registry during business hours of the Department.

(4) Where the Minister, administrator or delegated agent makes a decision under Section 34, 35, 40, 52, 54 or 56, any person who asks for a reason for the decision shall, within thirty days, and subject to the *Freedom of Information and Protection of Privacy Act*, be furnished with a written statement of the decision, setting out the findings of fact upon which it is based and the reasons for the decision.
1994-95, c. 1, s. 10; 2006, c. 30, s. 6; 2011, c. 61, s. 7.

APPENDIX 7: New South Wales Government Information (Public Access) Regulation 2009
Online: http://www5.austlii.edu.au/au/legis/nsw/consol_reg/giar2009459/

Government Information (Public Access) Regulation 2009

Current version for 12 December 2014 to date (accessed 15 November 2015 at 09:11)

3 Additional open access information

(1) The government information listed in Schedule 1 that is held by a local authority is prescribed as open access information of the local authority.

(2) An advertising compliance certificate issued by the head of a Government agency under the *Government Advertising Act 2011* is prescribed as open access information of that agency.

Note. The fact that information is open access information does not create an obligation to keep records indefinitely and does not interfere with records management practices and procedures of local authorities that are consistent with the *State Records Act 1998*.

Government Information (Public Access) Regulation 2009

Current version for 12 December 2014 to date (accessed 15 November 2015 at 09:06)

Schedule 1 Additional open access information—local authorities

(Clause 3)

1 Information about local authority

(1) Information contained in the current version and the most recent previous version of the following records is prescribed as open access information:

(a) the model code prescribed under section 440 (1) of the LGA and the code of conduct adopted under section 440 (3) of the LGA,

(b) code of meeting practice,

(c) annual report,

(d) annual financial reports,

(e) auditor's report,

(f) management plan,

(g) EEO management plan,

(h) policy concerning the payment of expenses incurred by, and the provision of facilities to, councillors,

(i) annual reports of bodies exercising functions delegated by the local authority,

(j) any codes referred to in the LGA.

(2) Information contained in the following records (whenever created) is prescribed as open access information:

(a) returns of the interests of councillors, designated persons and delegates,

(b) agendas and business papers for any meeting of the local authority or any committee of the local authority (but not including business papers for matters considered when part of a meeting is closed to the public),

(c) minutes of any meeting of the local authority or any committee of the local authority, but restricted (in the case of any part of a meeting that is closed to the public) to the resolutions and recommendations of the meeting,

(d) Departmental representative reports presented at a meeting of the local authority in accordance with section 433 of the LGA.

(3) Information contained in the current version of the following records is prescribed as open access information:

(a) land register,

(b) register of investments,

(c) register of delegations,

(d) register of graffiti removal work kept in accordance with section 13 of the *Graffiti Control Act 2008*,

(e) register of current declarations of disclosures of political donations kept in accordance with section 328A of the LGA,

(f) the register of voting on planning matters kept in accordance with section 375A of the LGA.

2 Plans and policies

Information contained in the current version and the most recent previous version of the following records is prescribed as open access information:

(a) local policies adopted by the local authority concerning approvals and orders,

(b) plans of management for community land,

(c) environmental planning instruments, development control plans and contributions plans made under the *Environmental Planning and Assessment Act 1979* applying to land within the local authority's area.

3 Information about development applications

(1) Information contained in the following records (whenever created) is prescribed as open access information:

(a) development applications (within the meaning of the *Environmental Planning and Assessment Act 1979*) and any associated documents received in relation to a proposed development including the following:

(i) home warranty insurance documents,

(ii) construction certificates,

(iii) occupation certificates,

(iv) structural certification documents,

(v) town planner reports,

(vi) submissions received on development applications,

(vii) heritage consultant reports,

(viii) tree inspection consultant reports,

(ix) acoustics consultant reports,

(x) land contamination consultant reports,

(b) records of decisions on development applications (including decisions made on appeal),

(c) a record that describes the general nature of the documents that the local authority decides are excluded from the operation of this clause by subclause (2).

(2) This clause does not apply to so much of the information referred to in subclause (1) (a) as consists of:

(a) the plans and specifications for any residential parts of a proposed building, other than plans that merely show its height and its external configuration in relation to the site on which it is proposed to be erected, or

(b) commercial information, if the information would be likely to prejudice the commercial position of the person who supplied it or to reveal a trade secret.

(3) A local authority must keep the record referred to in subclause (1) (c).

4 Approvals, orders and other documents

Information contained in the following records (whenever created) is prescribed as open access information:

(a) applications for approvals under Part 1 of Chapter 7 of the LGA and any associated documents received in relation to such an application,

(b) applications for approvals under any other Act and any associated documents received in relation to such an application,

(c) records of approvals granted or refused, any variation from local policies with reasons for the variation, and decisions made on appeals concerning approvals,

(d) orders given under Part 2 of Chapter 7 of the LGA, and any reasons given under section 136 of the LGA,

(e) orders given under the authority of any other Act,

(f) records of building certificates under the *Environmental Planning and Assessment Act 1979*,

(g) plans of land proposed to be compulsorily acquired by the local authority,

(h) compulsory acquisition notices,

(i) leases and licences for use of public land classified as community land.

(j) performance improvement orders issued to a council under Part 6 of Chapter 13 of the LGA.

APPENDIX 8: Proactive disclosure provisions in India's Right to Information Act

Online: http://www.righttoinformation.gov.in/

CHAPTER II

Right to information and obligations of public authorities

3 Subject to the provisions of this Act, all citizens shall have the right to information.

4 (1) Every public authority shall—

(a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated;

(b) publish within one hundred and twenty days from the enactment of this Act,—

(i) the particulars of its organisation, functions and duties;

(ii) the powers and duties of its officers and employees;

(iii) the procedure followed in the decision making process, including channels of supervision and accountability;

(iv) the norms set by it for the discharge of its functions;

(v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(vi) a statement of the categories of documents that are held by it or under its control;

(vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;

(viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;

(ix) a directory of its officers and employees;

(x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

(xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

(xiii) particulars of recipients of concessions, permits or authorisations granted by it;

(xiv) details in respect of the information, available to or held by it, reduced in an electronic form;

(xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;

(xvi) the names, designations and other particulars of the Public Information Officers;

(xvii) such other information as may be prescribed and thereafter update these publications every year;

(c) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

(d) provide reasons for its administrative or quasi-judicial decisions to affected persons.

(2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo motu to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.

(3) For the purposes of sub-section (1), every information shall be disseminated widely and in such form and manner which is easily accessible to the public.

(4) All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.

Explanation.—For the purposes of sub-sections (3) and (4), "disseminated" means making known or communicated the information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority.

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1. In your opinion, how important is it that provincial government officials are legally required to keep accurate and complete records of what they do on the job? (Duty to document)

		Gender		AGE			EDUCATION		
	Total	Male	Female	18-34	35-54	55+	<HS/HS	Post Sec	Univ Grad
		A	B	C	D	E	F	G	H
Base: All Respondents	802	335	467	186	286	330	197	368	237
Weighted	802	394	408	230	288	284	195	360	247
Very important	627	294	333	163	219	246	148	287	193
	78%	75%	82%	71%	76%	87%	76%	80%	78%
			A			CD			
Somewhat important	141	82	59	58	53	30	36	60	45
	18%	21%	15%	25%	19%	11%	19%	17%	18%
		B		E	E				
Not very important	19	12	6	2	10	6	5	8	6
	2%	3%	2%	1%	4%	2%	3%	2%	2%
Not at all important	2	2	-	2	-	1	-	1	2
	*	1%	-	1%	-	*	-	*	1%
Don't know	12	3	10	6	5	1	6	5	2
	2%	1%	2%	3%	2%	*	3%	1%	1%
				E					
Summary									
Top2Box (Very/ Somewhat Important)	769	376	392	220	273	276	184	347	237
	96%	96%	96%	96%	95%	97%	94%	96%	96%
Low2Box (Not Very/ Not At All Important)	21	15	6	3	10	7	5	8	7
	3%	4%	2%	2%	4%	2%	3%	2%	3%

- Column Proportions:
  Columns Tested (5%): A/B, C/D/E, F/G/H
  Minimum Base: 30 (**), Small Base: 100 (*)
- Column Means:
  Columns Tested (5%): A/B, C/D/E, F/G/H
  Minimum Base: 30 (**), Small Base: 100 (*)

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2. BC's information and privacy law currently does not have penalties for interfering with information access rights. Many other Canadian jurisdictions do have such penalties. Should government officials who interfere with access to information rights face penalties?

		Gender		AGE			EDUCATION		
	Total	Male	Female	18-34	35-54	55+	<HS/HS	Post Sec	Univ Grad
		A	B	C	D	E	F	G	H
Base: All Respondents	802	335	467	186	286	330	197	368	237
Weighted	802	394	408	230	288	284	195	360	247
Yes	670	330	340	179	236	254	151	316	203
	84%	84%	83%	78%	82%	90%	77%	88%	82%
						CD		F	
No	32	27	6	17	7	9	11	7	14
	4%	7%	1%	7%	2%	3%	6%	2%	6%
		B		DE			G		G
Don't know	99	37	62	33	45	21	33	38	29
	12%	9%	15%	15%	16%	7%	17%	10%	12%
			A	E	E		G		

- Column Proportions:
  Columns Tested (5%): A/B, C/D/E, F/G/H
  Minimum Base: 30 (**), Small Base: 100 (*)
- Column Means:
  Columns Tested (5%): A/B, C/D/E, F/G/H
  Minimum Base: 30 (**), Small Base: 100 (*)

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3. BC's information and privacy law currently requires governments to release information even without a Freedom of Information request if it is in the public interest. Some people say this duty to release information without a request should only apply in emergency situations. Other people say this duty to release information should apply

Which of these is closest to your view as to when this duty to release information should apply?

		Gender		AGE			EDUCATION		
	Total	Male	Female	18-34	35-54	55+	<HS/HS	Post Sec	Univ Grad
		A	B	C	D	E	F	G	H
Base: All Respondents	802	335	467	186	286	330	197	368	237
Weighted	802	394	408	230	288	284	195	360	247
Only in emergency situations	242	111	131	79	96	67	56	110	77
	30%	28%	32%	35%	33%	24%	29%	31%	31%
				E	E				
Whenever there is a public interest	452	243	209	113	153	185	104	201	146
	56%	62%	51%	49%	53%	65%	53%	56%	59%
		B				CD			
Don't know	108	40	68	37	39	31	35	49	24
	13%	10%	17%	16%	14%	11%	18%	14%	10%
			A				H		

- Column Proportions:
  Columns Tested (5%): A/B, C/D/E, F/G/H
  Minimum Base: 30 (**), Small Base: 100 (*)
- Column Means:
  Columns Tested (5%): A/B, C/D/E, F/G/H
  Minimum Base: 30 (**), Small Base: 100 (*)

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4. A number of experts (including BC's Information and Privacy Commissioner) have called for changes to the law to include both a legal duty to document and penalties for those who interfere with information rights. How important do you think it is that these reforms to the information and privacy law be passed before the next BC election (in 2017)?

		Gender		AGE			EDUCATION		
	Total	Male	Female	18-34	35-54	55+	<HS/HS	Post Sec	Univ Grad
		A	B	C	D	E	F	G	H
Base: All Respondents	802	335	467	186	286	330	197	368	237
Weighted	802	394	408	230	288	284	195	360	247
Very important	387	196	191	76	147	164	94	190	103
	48%	50%	47%	33%	51%	58%	48%	53%	42%
					C	C		H	
Somewhat important	297	147	150	113	97	87	69	119	108
	37%	37%	37%	49%	34%	31%	35%	33%	44%
				DE					G
Not very important	32	15	17	10	9	13	6	14	12
	4%	4%	4%	4%	3%	5%	3%	4%	5%
Not at all important	9	7	2	2	1	6	-	7	2
	1%	2%	*	1%	*	2%	-	2%	1%
Don't know	77	29	48	29	34	14	25	30	21
	10%	7%	12%	13%	12%	5%	13%	8%	9%
			A	E	E				
Summary									
Top2Box (Very/ Somewhat Important)	684	343	341	189	244	251	163	309	211
	85%	87%	84%	82%	85%	88%	84%	86%	86%
Low2Box (Not Very/ Not At All Important)	41	22	19	12	10	19	6	21	14
	5%	6%	5%	5%	4%	7%	3%	6%	6%

- Column Proportions:
  Columns Tested (5%): A/B, C/D/E, F/G/H
  Minimum Base: 30 (**), Small Base: 100 (*)
- Column Means:
  Columns Tested (5%): A/B, C/D/E, F/G/H
  Minimum Base: 30 (**), Small Base: 100 (*)

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1. In your opinion, how important is it that provincial government officials are legally required to keep accurate and complete records of what they do on the job? (Duty to document)

		REGION			HOUSEHOLD INCOME				HOUSEHOLD COMPOSITION	
	Total	Metro Vancouver	Vancouver Island	North/Interior	<$40K	$40K - <$60K	$60K - <$100K	$100K+	Kids	No Kids
		A	B	C	D	E	F	G	H	I
Base: All Respondents	802	390	173	239	267	141	184	110	148	654
Weighted	802	422	137	243	267	139	193	115	155	647
Very important	627	314	110	203	208	107	153	91	119	508
	78%	74%	81%	84%	78%	77%	79%	80%	77%	79%
				A						
Somewhat important	141	87	23	31	46	28	33	20	28	114
	18%	21%	17%	13%	17%	20%	17%	17%	18%	18%
		C								
Not very important	19	13	1	4	6	2	8	2	5	14
	2%	3%	1%	2%	2%	1%	4%	2%	3%	2%
Not at all important	2	2	1	-	-	1	-	2	-	2
	*	*	1%	-	-	1%	-	1%	-	*
Don't know	12	7	2	4	7	1	-	-	3	9
	2%	2%	1%	2%	3%	1%	-	-	2%	1%
					F					
Summary										
Top2Box (Very/ Somewhat Important)	769	401	133	235	254	135	185	111	147	622
	96%	95%	98%	97%	95%	97%	96%	97%	95%	96%
Low2Box (Not Very/ Not At All Important)	21	15	2	4	6	3	8	4	5	16
	3%	4%	1%	2%	2%	2%	4%	3%	3%	2%

- Column Proportions:
  Columns Tested (5%): A/B/C,D/E/F/G,H/I
  Minimum Base: 30 (**), Small Base: 100 (*)
- Column Means:
  Columns Tested (5%): A/B/C,D/E/F/G,H/I
  Minimum Base: 30 (**), Small Base: 100 (*)

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2. BC's information and privacy law currently does not have penalties for interfering with information access rights. Many other Canadian jurisdictions do have such penalties. Should government officials who interfere with access to information rights face penalties?

		REGION			HOUSEHOLD INCOME				HOUSEHOLD COMPOSITION	
	Total	Metro Vancouver	Vancouver Island	North/Interior	<$40K	$40K - <$60K	$60K - <$100K	$100K+	Kids	No Kids
		A	B	C	D	E	F	G	H	I
Base: All Respondents	802	390	173	239	267	141	184	110	148	654
Weighted	802	422	137	243	267	139	193	115	155	647
Yes	670	351	118	201	221	120	159	100	123	547
	84%	83%	86%	83%	83%	86%	82%	88%	80%	85%
No	32	16	5	12	11	6	10	4	8	25
	4%	4%	3%	5%	4%	4%	5%	4%	5%	4%
Don't know	99	55	14	30	36	13	24	10	24	75
	12%	13%	10%	12%	13%	9%	13%	9%	15%	12%

- Column Proportions:
  Columns Tested (5%): A/B/C,D/E/F/G,H/I
  Minimum Base: 30 (**), Small Base: 100 (*)
- Column Means:
  Columns Tested (5%): A/B/C,D/E/F/G,H/I
  Minimum Base: 30 (**), Small Base: 100 (*)

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3. BC's information and privacy law currently requires governments to release information even without a Freedom of Information request if it is in the public interest.
Some people say this duty to release information without a request should only apply in emergency situations. Other people say this duty to release information should apply whenever there is a

Which of these is closest to your view as to when this duty to release information should apply?

		REGION			HOUSEHOLD INCOME				HOUSEHOLD COMPOSITION	
	Total	Metro Vancouver	Vancouver Island	North/Interior	<$40K	$40K - <$60K	$60K - <$100K	$100K+	Kids	No Kids
		A	B	C	D	E	F	G	H	I
Base: All Respondents	802	390	173	239	267	141	184	110	148	654
Weighted	802	422	137	243	267	139	193	115	155	647
Only in emergency situations	242	132	39	72	82	42	57	36	60	183
	30%	31%	28%	30%	31%	30%	30%	32%	39%	28%
									I	
Whenever there is a public interest	452	233	84	135	144	85	109	69	73	378
	56%	55%	61%	56%	54%	61%	56%	60%	47%	58%
										H
Don't know	108	58	14	36	41	12	27	10	22	86
	13%	14%	10%	15%	15%	9%	14%	9%	14%	13%

- Column Proportions:
  Columns Tested (5%): A/B/C,D/E/F/G,H/I
  Minimum Base: 30 (**), Small Base: 100 (*)
- Column Means:
  Columns Tested (5%): A/B/C,D/E/F/G,H/I
  Minimum Base: 30 (**), Small Base: 100 (*)

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4. A number of experts (including BC's Information and Privacy Commissioner) have called for changes to the law to include both a legal duty to document and penalties for those who interfere with information rights. How important do you think it is that these reforms to the information and privacy law be passed before the next BC election (in 2017)?

		REGION			HOUSEHOLD INCOME				HOUSEHOLD COMPOSITION	
	Total	Metro Vancouver	Vancouver Island	North/Interior	<$40K	$40K - <$60K	$60K - <$100K	$100K+	Kids	No Kids
		A	B	C	D	E	F	G	H	I
Base: All Respondents	802	390	173	239	267	141	184	110	148	654
Weighted	802	422	137	243	267	139	193	115	155	647
Very important	387	198	64	126	134	70	94	55	68	319
	48%	47%	47%	52%	50%	50%	49%	48%	44%	49%
Somewhat important	297	160	56	80	89	56	75	42	57	240
	37%	38%	41%	33%	33%	40%	39%	37%	37%	37%
Not very important	32	19	6	8	10	7	9	6	9	23
	4%	4%	4%	3%	4%	5%	4%	5%	6%	4%
Not at all important	9	6	-	3	5	-	2	1	1	8
	1%	1%	-	1%	2%	-	1%	1%	1%	1%
Don't know	77	40	11	27	29	6	13	11	20	57
	10%	9%	8%	11%	11%	4%	7%	10%	13%	9%
					E					
Summary										
Top2Box (Very/ Somewhat Important)	684	358	120	206	223	126	169	97	125	559
	85%	85%	88%	85%	83%	91%	88%	84%	81%	86%
Low2Box (Not Very/ Not At All Important)	41	25	6	10	15	7	10	7	10	31
	5%	6%	4%	4%	6%	5%	5%	6%	6%	5%

- Column Proportions:
  Columns Tested (5%): A/B/C,D/E/F/G,H/I
  Minimum Base: 30 (**), Small Base: 100 (*)
- Column Means:
  Columns Tested (5%): A/B/C,D/E/F/G,H/I
  Minimum Base: 30 (**), Small Base: 100 (*)

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