

# BC Ferries' FOI Policy Undermines Transparency

By Stanley Tromp. March 1, 2011

For the past 18 years, the news media have used the B.C. Freedom of Information and Protection of Privacy Act to obtain government records. I could cite hundreds of examples of such documents forming the basis for news stories in the public interest – articles on the mistreatment of persons in nursing homes and daycares, public health risks, crime trends, hidden pollution, and the gross misuse of taxpayer funds.

But if a new proposal is enacted in Victoria, it could spell the end of such stories. To date, B.C. media FOI applicants have struggled with fees, delays and white-outs, but now they are facing their greatest challenge ever. This is akin to a nautical storm warning, one that must be heeded by journalists across Canada and around the world.

The proposal is inspired by a bold venture by David Hahn, president and CEO of BC Ferry Services Inc., to change the whole rules of the FOI game. Last October, after seven years of operating in private, the public-owned company was placed under the coverage of the FOI law, against its intense opposition, and it promptly enacted some practices that have never been seen in this country before.

One controversy is this: On its unique “FOI tracker” website (<http://www.bcferries.com/about/foi/tracker.html>) BC Ferries posts the text of FOI requests it receives, a process that tips off rival media to the stories other journalists are working on. Then after it finishes processing them, it posts the records online and sends email notices to a listserv so that anyone can read them instantly. (In some cases, it has posted them even *before* the requestor received them by mail.)

BC Ferries says it enacted its policy solely for the sake of “transparency,” but most applicants have not one iota of doubt that its main real purpose is to dissuade people from making requests – particularly journalists who would lose their exclusive scoops.

Regarding the prospect of the core B.C. government following BC Ferries' practice of posting FOI records online a spokeswoman for the ministry of Citizen's Services told the Vancouver Sun: “It's something we're actively working on. It is imminent.” On the crucial question of release timing, she didn't know yet if the government would post the records simultaneously to the world, but didn't rule out the possibility.

Yet journalists see one mildly hopeful sign. In a survey in January, Sun reporter Chad Skelton asked B.C. premier designate Christy Clark: “Would you support giving the original FOI requestor a two-week window to review the requested records before they are made available to others online?” Clark replied: “I think it is a question that needs to

be discussed. We want government to be transparent and at the same time respect the work of reporters.”

Some believe that BC Ferries’ FOI release practices violate the “duty to assist requestors” mandate found in Sec. 6(1) of the statute. The B.C. Freedom of Information and Privacy Association, FIPA, has complained to the Information and Privacy Commissioner, who is investigating. Sources say the scope of the probe has moved beyond BC Ferries to cover the whole B.C. government. (The commissioner told the Sun it would be "prudent" for Victoria to hold off on its plans until she issues her ruling on BC Ferries.) The dispute might even wind up in court.

The scope of the Commissioner’s probe has moved beyond BC Ferries to cover the whole B.C. government’s proactive FOI release policy. Anyone may submit their views on this topic to the Commissioner’s office, by the March 11 deadline. Contact Helen Morrison of the OIPC at (250) 953-4193. [hmorrison@oipc.bc.ca](mailto:hmorrison@oipc.bc.ca)

---

A cool and confident David Hahn graciously discussed all these issues with me in a phone interview on February 25.

The FOI policy seems here to stay, Hahn says: “I don’t see any reason to change it for now, it seems to be working quite well. I don’t get any complaints from the public at large.”

BC Ferries values its power to operate independently from senior government. “Will you follow what the information commissioner says?” I asked. “It depends what her ruling is, and if it’s within her jurisdiction.” Then, “Would it matter what the minister or premier say?” He replied, “No, no.”

Why not follow the FOI policies of crown corporations such as BC Hydro, the BC Lottery Corporation, ICBC or Translink? “I’m not sure they’re doing it the right way,” he applied, adding that no one has called upon BC Ferries (yet) for advice on how to run their FOI systems.

“I think we’re being the most open and transparent you can be. . . . Why not let the public read the information on their own without a particular orientation or media slant? You have to go back to ‘What is the purpose of FOI?’ It’s about empowering citizens. You’re suggesting that the purpose of FOI was to empower to media to get scoops.”

As well, “We get a lot of requests that are silly, or political in nature. And I’m not a politician, don’t want to be. But I have very little time for some of the silly stuff, right? At the top rank would probably be one request for a list of all the people I sent a Christmas card to last year and a copy of the cards.”

In response to suggestions that the FOI policies may seem vindictive in the sense of punishing the media for negative stories (such as rebukes of his \$1 million yearly salary), he scoffed, “Naah. I’ve seen all kinds of stories written for almost eight years now. This would be the weirdest way to get back at them. There’s just not the high fees involved and so on to make anyone’s life miserable. I think that’s a stretch.”

When I wondered if the new FOI policy created such excitement that it may have ironically prompted people to file more requests than they otherwise would have, he replied, “That’s OK. And I don’t think it hurts. But if people have questions, they should at least be more legitimate than a list of Christmas cards, or a list of all lost-and-found items for the month of February, or whatever the hell it is.”

Asked whose idea it was to start this unique FOI system, and if any other model inspired him, Hahn replied, “It was just my own personal approach to this. I don’t know why people who ride BC Ferries should be subsidizing FOI requests. We’re not recovering anywhere near the full cost of this, and if someone thinks the information is vitally important to them, why shouldn’t they be willing to pay for it? A lot of firms that ask for it are big corporations that are profit-driven. A good example is Postmedia [owners of the Vancouver Sun and The Province], which is owned by a Wall Street hedge fund. British Columbians should not be subsidizing a Wall Street hedge fund.”

I noted that many other applicants such as nonprofit student media and low-income freelancers have no connection to hedge funds, and the FOI law permits fee waivers for those acting in the public interest (as distinct from “commercial applicants”) and who cannot pay high fees – all to no avail. “Why set up a list of people that you won’t charge, and another list of people that you will?” he replied. “If you follow the legislation to the letter, there can’t be any claim we’re favouring one group over another, or one reporter over another.”

### **What Price Accountability?**

Another controversy has been the financial management of the BC Ferries’ FOI system, which Hahn estimates at about \$1.2 million per year to operate.

The company has been acting tough on FOI fees, being the only agency in B.C. - and I believe in Canada - to charge requesters for even 15 minutes of processing time, despite the fact it likely costs government more to process the \$11.20 cheque than the cheque is worth. (On the same principle, the federal information commissioner advised Ottawa to drop its \$5 *Access to Information Act* request fee because it cost \$55 to process that cheque.)

Moreover, BC Ferries has loudly complained about the supposed cost to ferry ratepayers of the FOI system, musing that it could prompt a rise in their ticket prices. So, in what may be an attempt to publicly shame FOI applicants - perhaps to the point of making them give their requesting - it is the only agency to post what it claims are the “Process fee” versus the “Actual cost” of each request. (For one recent media request, this was

cited as “\$0.00” for the former and “\$2,953.00” for the latter. The company’s methods for calculating these costs has been much disputed.)

I asked Hahn if it was his idea to charge for each 15 minutes. “I think that just goes back to following the principle of the law,” he replied. “This has to be black and white, no grey areas. No arbitrary rules, no second guessing around anything.” He also doubts it costs very much to process an FOI cheque, though he is not sure of the exact figure.

### **Do we always need the FOI route?**

I wondered if BC Ferries wants more transparency, why not post more information online without FOI requests, such as staff salaries and expenses, incident memos, or health or safety reports, for it would be cheaper to release these proactively.

“We already said we would be doing that,” said Hahn. “We’ll post the salaries every year, and we’ll post what else is logical, if someone can tell us what’s logical. That’s why we’re talking to the Privacy Commissioner.”

The FOI law states it was created made to be used only as a last resort and not as the default option, and so why not just hand over some such records to journalists who ask for them? “Because we’re not in the business of subsidizing media. It still costs money to pull those things, even without FOI.”

A few months after BC Ferries began posting on its website the full texts of records it released under FOI, it began a new practice of pulling them off after 90 days. I asked Hahn why.

“That’s just taking up computer space. A lot of time you’re dealing with bandwidth or capacity. It just goes into a different file off on the side. If someone wants that record, we can pull it back out easily. In fact, I think the gentleman at the Vancouver Sun [Chad Skelton] said he’s going to catalogue them and keep them online. That’s fine by me.” (FOI advocates counter that vast masses of computer storage space can be bought for trivial sums.)

### **Haste makes Waste?**

In this age of internet news, posting FOI records online, and emailing notices of it to all media, often creates a panicky race amongst journalists to beat the online news competition by a few minutes. Inevitably, this can result in errors spread throughout the world, potentially some so grievous that later corrections can never fully repair them.

A modest foreshadowing of this event has already occurred, whereby BC Ferries posted salary records in reply to Chad Skelton’s FOI request, and in their haste, three other media outlets wrongly reported from the posted records that the BC Ferries president’s salary had “quadrupled,” not doubled as it really had.

I asked Hahn if, for all these purposes, BC Ferries could grant a media FOI applicant an exclusivity period of 48 hours.

“They don’t need it,” he laughed. “This is a black and white issue. If they want our feedback, they can call us after it’s posted. We’re not in the business of trying to generate scoops for people. It’s up to the reporters and editors to monitor their own quality. I know many reporters, 99 percent, who would never have made those mistakes. The reporters need to drill down, to interpret not just what’s obvious, but what’s not obvious, and do it in a professional manner. Almost all journalists do that, all the time.”

Hahn ended the interview by marveling over the power of young people using online social media to overthrow Arab dictators.

“The internet has changed everything. And whether anyone likes it or not, this information flow is going to a place very different than any of us would have imagined five or ten years ago. See the revolutionary changes in Egypt and Libya. To me, it’s amazing to watch.

“But what we’re doing is not so dramatic as that.”



### **Some Reflections**

The campaign to prevent BC Ferries’ FOI policy - a politician's dream and a journalist's nightmare - from spreading to any other government entity is the most complex, difficult, unpleasant, and necessary challenge that transparency advocates have faced in many years. It is so difficult for FOI advocates, I concede, because to some it may appear - at a superficial first glance - to be arguing against their own expressed FOI principles.

Officials proclaim with faux-innocence that their only intent in posting completed FOI requests instantly to the world online is to promote “transparency.” To accept this pious façade would be dangerously naïve. Governments often scoff that the FOI release dynamics are “inside baseball,” too minor and complex for the public to care about. Nothing could be farther from the truth, because these dynamics lead can directly to the loss of vital stories.

My key point remains this: Since most members of the public will never make an FOI request themselves (being too busy, amongst other reasons), they depend on the press to do so on their behalf, which is its mandate. So, the practical reality is that the requests that the media file usually determine what the public will ultimately read. Anyone who understands the competitive news industry knows that the effect of such a needless

instant mass release (without even a 48 hours grace period) is to scuttle the journalists' exclusives, and thus simply wipe out their incentive to file FOI requests in the first place, which, in turn, would lead to fewer record releases in the public interest.

Hahn told columnist Vaughn Palmer: "I find the complaints pretty childish. I mean, you've got people from different organizations saying that they believe in openness and transparency, and at the same time they say, 'But not that open and transparent.' I don't get it."

In fact, governments do "get it" only too well. They calculate that the public won't understand the logic of the paradox, and so they (persuasively) oversimplify the matter into a cute but deadly pseudo-irony: "See, are the media not selfish and hypocritical, by preaching for more openness but then asking government to delay record releases to serve their own interests?"

BC Ferries' practice also raises basic questions of fairness and civility. At times, much thought and research goes into the formulation of a well-crafted FOI request, and all that labour would now count for nothing. Moreover, why should any applicant pay thousands of dollars in FOI fees only to lose all of the records' value when government sends it out to the world to co-opt the applicant? Hahn also complains of some "silly requests." That can occur indeed, but is it a justification to penalize all the other applicants?

The state well knows that a journalist today, in this era of deep newsroom cutbacks, has no way of persuading a publisher to pay large FOI processing fees if the result will be rendered useless (or to break even, in terms of newspaper cost outlay to income). FIPA executive director Vincent Gogolek said, "Mr. Hahn doesn't think charging hundreds or thousands of dollars in fees is any barrier to access, but it certainly is for those of us who make less than a million dollars a year. If they had FOI law in 18th century France, Marie Antoinette would probably have said the same thing."

## **Solutions**

What I am asking for is simple, fair and doable: Amend the FOI law to state that when the government prepares to release records in response to an applicant, it will allow that applicant exclusive access to those records for a minimum grace period of two weeks, before it releases the records to anyone else, or for the world to read online. (Ideally it would be a four week period, to accommodate writers at weekly or monthly magazines. Sadly, quarterly journal and book authors would be out of luck.)

An even better solution would be to approximate the (now-defunct) CAIRS system in Ottawa for federal Access to Information Act requests. After a month or so pause after release to the applicant, some departments posted just the topic headings online, instead of the full documents, and new applicants could make a new, cost-free, expedited request for those already released records. The Department of National Defense still follows this best practice, which could be a model for the B.C. government. (See <http://www.admfincs-smafinsm.forces.gc.ca/aip/cr-dc-09-eng.asp> )

When I wrote my first editorial on this BC Ferries practice in *The Province* on Feb. 13, public opinion seemed divided, if online comments postings at the end of the story were an accurate measure. (An unwarranted assumption?) Various critics - all anonymous - gleefully trashed my assertions, called me “simple,” one concluding that “I think asking for a system that denies access is selfish and only in the interest of some journalists.” (A few such writers, frankly, simply hate the news media and are elated to see any damage inflicted upon it.)

Yet a few came to the defense: “Stanley is correct. BC Ferries does their ‘mass release’ of FOI information specifically to stop reporters from making FOI requests. Like it or not, news is a business and BC Ferries is trying to make it un-profitable for a reporter to do any negative story about the corporation by removing the incentive for 'exclusive' investigative journalism.”

Another sensibly inquired: “If BC Ferries is so interested in transparency, then why aren't they posting and distributing executive "briefing notes" or "media lines" as soon as they are prepared?”

As the campaign continues, it helps to recall that transparency advocates in FIPA and the media have succeeded in blocking provincial anti-FOI proposals before, such as huge fee hikes in 1998, Bills 23 and 30 in 2006, and crown copyright in 2009. It could be done again.

In response to Hahn's comment upon compliance with the Information Commissioner – i.e., “It depends what her ruling is, and if it's within her jurisdiction” – Gogolek said, "He seems to be preemptively thumbing his nose at the Commissioner. It isn't acceptable coming from the head of a public body. He is required to obey the Act, and follow the Commissioner's Orders."

### **Exceptions for Urgent Topics**

The state's bluff of instilling more “transparency” is disproved when we see how the government's professed zeal for speed vanishes completely when it routinely violates its own legislated FOI deadlines with impunity, delaying the request processing for weeks for its own political advantages as it labours on a pre-release spin control plan.

Since it typically takes at least three months for the B.C. government to process an FOI request, in this context, an extra two weeks hold time after release to the applicant should generally make no difference to it. In the federal sphere, as well, it would be farcical for Ottawa to assert that after its delay of three years in reply to my last *ATI Act* request, that the government abruptly discovered such an urgency to release it to the whole world that it could not pause for an extra 48 hours.

One reader angrily objected that I should not be calling for any FOI release delay on vital topics as child protection reports. I agreed completely with him. Such releases should not be delayed for a minute if there is a true urgency factor.

That is, in fact, one key feature of my proposal: on certain special occasions, an immediate release would override any two week grace period for the applicant. It would follow the wording of the B.C. FOIPP Act's Section 25, the Public Interest Override, which states that *whether or not* an access request is made, the public body must without delay disclose to the public information "about a risk of significant harm to the environment or to the health or safety of the public."

The government can *already* apply Sec. 25 for the purpose of instant release but for the past 18 years, significantly, it has not yet (to my knowledge) chosen to do so.

### **An old game, in new forms**

BC Ferries FOI practices are just one recent sign of a growing trend to stymie the media by what I call a Preemptive Information Release, or PIR, a rather old game in some ways.

The most famous recent example is that of a 2010 Olympic Games PR official leaking the records resulting from the CBC TV *fifth estate's* FOI request to the B.C. Coroner's office (on the death of a luger at the Games), one week ahead of the CBC broadcast, explicitly to undermine it. This case was even worse than usual, for the FOI record was leaked selectively only to "friendly media" - such as the Game's official TV broadcaster - instead of to all media at once as BC Ferries does. (Many say the leak happily backfired, because the controversy resulting from it created great free publicity for the CBC, and more viewers.) The Irish government has done the same with FOI for years.

Similarly, as Chad Skelton reported in June 2008, an internal memo from a BC RCMP spokesperson noted that one way to blunt the impact of the Sun's upcoming FOI-based stories might be to send out "pre-emptive [news] releases" when the force knew embarrassing information was coming out. "Bottom line is we know the media will try to trash us again and again so why don't we look after our own release, which will take the wind out of their sails." The RCMP did so with some success, on a story about officer misconduct, the memo said: "Because of our pre-emptive release, we did not receive one call on this."

Needless to say, few things delight governments more to see journalists fighting amongst themselves instead of with the state, a divide-and-conquer strategy. To hope that the media would cooperate to boycott such games, and respect the original FOI applicant, would be ideal but unrealistic.

## The Four Backfires

Besides harming the public and media, if the B.C. government chose to duplicate BC Ferries' FOI practices, this choice would backfire upon it in at least four ways.

1) Continuous bad-will, rancour, mistrust, and conflict between the agency and applicants (and not just from media), including appeals to the Commissioner and the courts. The government would then have to defend itself, at public expense, against applicants' claims of its violating Sec. 6(1).

2) Instant mass release can result in media errors, as noted above, and such an outcome is in nobody's interest, least of all governments.

The issue goes beyond factual errors. After scanning a government report, I could write a summary and post it online media in less than 10 minutes if necessary, but I would far prefer not to, for even a little time for reflection, interviews, and supplemental research can make for a better story. Instant posting also deprives government spokespersons to voice their positive spin on the records to the journalist for the upcoming story.

In one recent story about Alberta oilsands records that I found through FOI, although much worried of being scooped, I nevertheless held up my article for two days, to obtain the government's side of the issue. It behooves government to reciprocate this time courtesy. It is far better for government to work cooperatively with those reporters who prefer to get the news right than to get it first.

3) The founders of Wikileaks - the state's anarchic nightmare where record release is totally unpredictable and uncontrolled – said they needed to create that website partly to compensate for a failed FOI system. So if the B.C. government undermines the FOI process in any way, it only makes the substitute of leaking records seem more alluring.

4) Why should agencies waste time and scarce public funds to PDF-scan and send out thousands of pages, many of them arcane and unimportant to anybody but a very few? The B.C. branch of the RCMP seemed to realize this general point, for it posted records of completed *Access to Information* requests for a few months in 2010, but then gave up the laborious practice for more important priorities.

The B.C. government might scale back its program to release not all FOI records, but only those that it deems, at its own discretion, to be "interesting to the public" - which can be a very different thing from what FOI advocates call "the public interest." When the release then becomes selective, the key question is: What is the real (not professed) criteria for selection? Who decides, and how? Inevitably, the choices would be based on political advantage.

Would some B.C. agencies post records of all applicants' FOI requests (as BC Ferries does), or just the media's? If the latter course, this would obviously be discriminatory. This outlook is already apparent: Last year one government MLA publicly complained of the cost of media requests, but said not a word about the corporate applicants who make hundreds of BC FOI requests a year to seek data on their business rivals. The Vancouver Police Department most often posts FOI requests it receives from the media, but not so many from the other requesters.

### **Who defines “public interest”?**

In this very hardball, painfully crude spin war, BC Ferries' worldview is apparently that most media FOI users are a sort of public enemy because they waste money, cause riders' fares to rise, and filter and distort the truth for their own selfish profit. The media see their role as disinterested seekers of the truth, and their interest represents the public interest.

In sum, both sides are fighting for the public's trust, asserting that they alone distribute the unalloyed Truth and free the people's minds from the spin employed by the other side. Indeed, some disputes between the government and media over FOI requests seem to be part of a larger struggle over who can better define what we call “the public interest” - a question that the public should and will ultimately decide.

(By the way, the notion of records obtained through FOI requests selling many more newspapers is quite amusing. If only it were so. Nobody gets rich by filing FOI requests, as I can well attest. When the Australian government imposed hefty FOI fees on the *Canberra Times* in 2007, it justified this by claiming the paper would gain a commercial benefit from the records' publication. The newspaper's editor scoffed: “I would dearly like to see the research to back up that claim. . . Circulation is more likely to be boosted by the most superficial superstar reporting tripe.”)

These two worldviews are surely unbridgeable - at least with the current Ferries CEO - and the outcome is so vital because it might foreshadow our future. It is quite likely that some form of BC Ferries' policy might soon be contemplated by all levels of government across Canada, and the world. (“I think that the days of government not posting it are pretty much over,” said Hahn.) As Media magazine editor David McKie writes: “This is not idle speculation. Canadian and American journalists are scared governments will attempt to thwart access with these massive, proactive releases.”

In Ottawa, the information commissioner stated that, due to response delays that can stretch into years, requestors' rights under the *Access to Information Act* are at risk of being “*totally obliterated.*” If the BC Ferries policy was ever adapted by the national government, it is not impossible that it could spell the *coup de grace* for most Canadian media *ATIA* stories.

Many governments, of course, are delighted by the prospect of instilling such fear amongst newspapers - who now struggling to stay afloat - as a form of discipline. The state's potential to utilize this powerfully tempting FOI policy could be held in reserve against the media, as a screw to be turned at its whim, invoked if journalists allegedly go "too far," i.e., pursue scandals aggressively. I even wonder if such a vague continuous cloud, a sword of Damocles hanging over reporters' heads, might sometimes even result in media self-censorship, a bit of more hesitancy to provoke the state.

Even if statesmen hold off for now, the pressure from some quarters to apply the policy will persist, probably for our lifetimes. As Toronto Star writer James Travers wrote: "Twenty-three years after access to information was born, politicians and bureaucrats continue to kill its spirit by arguing endlessly over the letter of the law. So determined is that resistance that a cottage industry now thrives counseling ministers, their staff and the civil service on how not to share public information with the public."

---

In sum, BC Ferries' policy of undermining the FOI system while at the same time glibly professing to enhance it is a tragedy for the public, the media, and the government itself, more than we yet realize. In the end no one really wins, but everyone loses.

In retrospect, one might wonder if we all have taken our precarious FOI right too much for granted, and if the media's ability to roam freely amongst government records for stories was an illusion, one too good to last. In the context of the media's economic crisis and such FOI policies, it seems little short of miraculous how any good media FOI articles are produced today at all.

The media and Hahn could debate these points in convoluted, circuitous ways forever but never agree. We await guidance from the Information Commissioner on these questions, and although BC Ferries might not be moved by it, other public bodies could still be more enlightened. A very great deal is at stake.

Stanley Tromp is a freelance journalist, and the FOI caucus coordinator of the Canadian Association of Journalists (CAJ) His FOI website - <http://www3.telus.net/index100/foi>

=====