The Road Forward

Raising British Columbia’s Freedom of Information and Protection of Privacy Act to World Standards

A plan of reform

With 67 recommendations for amendments

A submission to the British Columbia Legislative Special Committee to Review the Freedom of Information and Protection of Privacy Act

By Stanley L. Tromp

Preface by Toby Mendel

February 2010
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10 Most Important Recommendations

Recommendation No. 6

Amend Sec. 3 of the Act to state that the law’s coverage extends to any institution that is established by the Legislature or by any public agency - that is publicly funded; publicly controlled; wholly owned; performs a public function and/or is vested with public powers; or has a majority of its board members appointed by it. This includes public foundations and all crown corporations and all their subsidiaries.

Both options - definitions and entity listings in a schedule - could be implemented; and it would be noted that covered bodies are those “included but not limited to” those listed in schedules.

Recommendation No. 14

Amend the Act to implement the approach in some laws (e.g. Mexico), so that if an agency is in a deemed refusal situation, it is required to gain the approval of the Commission before withholding any information under exemptions.

Recommendation No. 27

If the Recommendation 26 is not accepted, there is a second option: Amend Sec. 12 to state that at least 2/3 of the members of the committee must be members of the Executive Council (not 1/3), and the cabinet members of the committee must have attended at least 50 percent of the meetings in the calendar year in order for the committee records to qualify for Sec. 12 coverage. Include all cabinet or caucus committees dealing with climate change.

As well, state that parliamentary committees (including the legislative assembly management committee) fall within the scope of the B.C. FOIPP Act, though excluded from Sec. 12.

Recommendation No. 34

Amend Sec. 13 to include a section on the model of Quebec’s FOI law Sec. 38, whereby the B.C. government may not withhold policy advice records after the final decision on the subject matter of the records is completed and has been made public by the government.

If the record concerns a policy advice matter that has been completed but not made public, the B.C. government may only withhold the record for two years.
If the record concerns a policy advice matter that has neither been completed nor made public, the B.C. government may only withhold the record for five years (on the model of Nova Scotia’s FOI law, Sec. 14).

**Recommendation No. 35**

Amend Sec. 13 to include a harms test, wherein a policy advice record can be withheld only if disclosing it could cause “serious” or “significant” harm to the deliberative process. The best models can be found in the FOI laws of South Africa (Sec. 44), the United Kingdom (Sec. 36), or Article 19’s *Model Freedom of Information Law* (2001).

**Recommendation No. 54**

Amend Sec. 70 to add a much longer list of records that must be routinely released or proactively published, on the examples of Article 19’s *Model of Freedom of Information Law* (2001), and those of many other nations and commentators noted in this report.

**Recommendation No. 56**

Regarding penalties, consider amending the B.C. Act’s Section 74 along the models of Article 19’s *Model Freedom of Information Law* (2001) and the Commonwealth Secretariat’s *Model Freedom of Information Bill* (2002).

**Recommendation No. 60**

First option: Repeal B.C. *FOIPP Act* Act Sec. 79 and its related schedule. If that is not accepted, there is a secondary option (which was FIPA’s recommendation in 2005): Extend coverage to categories of records exempted by “notwithstanding clauses” in other statutes.

**Recommendation No. 62**

The B.C. government should pass an effective *Archives and Information Management Act*, designed to regulate the entire life-cycle of government-held information.

**Recommendation No. 63**

Seek an effective way to oblige public officials, in law, to create the records necessary to document their actions and decisions.
Preface by Toby Mendel

Much has changed in the world in relation to access to information since British Columbia’s Freedom of Information and Protection of Privacy Act was first passed in 1992. At that time, only 14 countries, almost all established western democracies, had passed access to information laws at the national level. Today, the number is well over 80, including countries from every region of the world.

Running in parallel to these remarkable developments has been a radical shift in the way in which the right to access information held by public bodies is understood. In 1992, the adoption of access to information laws was seen primarily as a governance reform. Such laws were seen as stimulating participation, thereby leading to better decision-making, and supporting citizen oversight, enhancing accountability and the exposure of corruption and other forms of wrongdoing.

Today, in stark contrast, access to information is understood as a fundamental human right, the right to information, something it is not within the power of government to refuse. Many of the new constitutions adopted since 1990 – including by former communist countries of Eastern Europe but also countries in Latin America, Africa and Asia – include the right to information among their human rights protections.

In other countries, peak or constitutional courts have held that human rights guarantees which do not refer explicitly to the right of access – for example of the right to freedom of expression or to life – include a right to access information held by public bodies. A case arguing that the right to information is protected by the Canadian Charter of Rights and Freedoms is currently before the Supreme Court of Canada.

At the international level, it is now clear that the guarantee of freedom of expression includes a right to information. Article 19 of the International Covenant on Civil and Political Rights, for example, protects the right to “seek” and “receive”, as well as to “impart”, information and ideas. Leading authorities and human rights courts have held that this, or similar guarantees in regional systems for the protection of human rights, includes a right to access information held by public bodies.

Numerous other international authorities – including the European Court of Human Rights and the UN Special Rapporteur on Freedom of Opinion and Expression – have also recognised that access to information is a fundamental human right.
These developments are of great significance for governments around the world, and for the government of British Columbia in particular, as it reviews its right to information law. If access is a human right then governments are bound to respect it, subject only to recognised regimes for limitations on rights. Aspects of the right such as scope, exceptions and oversight are no longer at the discretion of governments; rather, these must comply with international and constitutional rules for limiting rights.

Mr. Tromp’s very comprehensive critique of British Columbia’s *Freedom of Information and Protection of Privacy Act*, including comparisons to better practices in other Canadian and international jurisdictions, provides a very strong basis for moving towards a rights-based approach to access to information.

It highlights well the problems with the existing law from a rights-based perspective, and points to the reforms that are necessary to redress them. If British Columbia wishes to retain its position as a leading openness jurisdiction in Canada, as Premier Gordon Campbell claimed in his victory night speech in 2001, it would do well to heed Mr. Tromp’s advice.

Toby Mendel

Centre for Law and Democracy, Halifax
January 2010

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In that capacity, he has worked extensively on right to information issues in Asia, Africa, Europe, the Middle East and Latin America, running training seminars, taking cases to both national and international bodies, advising NGOs and governments, and working with officials to prepare draft right to information laws. Prior to joining *Article 19*, Toby Mendel worked as a senior human rights consultant with Oxfam Canada, and as a human rights policy analyst at the Canadian International Development Agency (CIDA). He has a first class LLB (law) from Dalhousie University.

Introduction

“The Most Open Government in Canada”? 

Speaking notes for appearance at B.C. legislative committee reviewing the B.C. Freedom of Information and Protection of Privacy Act, February 2, 2010

“The essence of democracy is choice. The essence of choice, informed choice. Without freedom of information, democracy cannot work. The astonishing thing about B.C. is that it is left to those who want a freer flow of information to make the case. The onus ought to be on those who would keep the secrets.”


“For the most part, officials love secrecy because it is a tool of power and control, not because the information they hold is particularly sensitive by nature.”


“We will bring in the most open and accountable government in Canada. I know some people say we’ll soon forget about that, but I promise that we won’t!”

- Newly elected Premier Gordon Campbell, victory night speech, 2001

When it was passed in 1992, British Columbia’s Freedom of Information and Protection of Privacy Act was hailed by some FOI commentators as “the best in North America.”

Yet since then, in its practice, several flaws and shortcomings have become apparent, and the need for certain amendments are obvious. While it certainly remains overall the best FOI law in Canada, it is still a very modest achievement within the world context.

In fact, it is even not the best in Canada in every single aspect, for some provinces’ FOI laws, e.g., that of Quebec and Nova Scotia, have several sections much
advanced over B.C.’s law, as will be shown. Yet is there any valid reason why the B.C. FOIPP Act could not be reformed so as to render it the best transparency law in the world?

I spoke to B.C. legislative committees reviewing the B.C. FOIPP Act twice before in 1998 and 2003, and no major positive amendments resulted from those committee reports. Although I believe you are very well meaning, can you provide any cause for hope that the political result will be different this time?

As both a political idealist and a realist, I wish to place on the record today what needs to be done,¹ while being well aware that the prospect of most of these new recommendations being passed into law are very slim indeed, and I wonder if I might have to return in five years to plead all the same points.

Although as a journalist I have made hundreds of B.C. FOIPP Act requests and have intensively studied FOI theory and statutes for the past 15 years, I still do not have all the answers, nor does any single individual or institution. Yet I do believe many of these recommendations merit consideration. In the end, of course, the choices remain yours.

**Why It Matters**

A legislative review of an FOI statute may appear, to some readers, very remote from their practical daily concerns. Why, in fact, should they care if we have an effective FOI law?

As a kind of answer, I have collected and posted on my website summaries of B.C. news stories from the past two years on issues as diverse as health, safety, government waste, public security, and environmental risks.² They all share two common features: all reveal issues vital to the public interest - i.e., not merely topics the public “might find interesting” - and all were made possible through B.C. FOIPP Act requests. On occasion we need to view the human face on abstract legal questions, as we can here. These topics include:

- British Columbia Coroners Service statistics obtained through FOI note that at least 54 people have died on SkyTrain tracks and platforms since

¹ I have considered each section of the Act, and if I am silent upon a section (e.g., 18, 19), it means I believe it is adequate and requires no change at this time.

² The full citations can be found at the website for these stories and others, where I have also posted a dozen articles I wrote on BC FOI problems. www3.telus.net/index100/foi
1985, yet there is no plan to retrofit any Skytrain platforms with barriers to stop people from falling or jumping on tracks.

• A briefing note prepared for the B.C. Housing and Social Development Minister advised there would be “significant” fire safety concerns with five and six storey wood-frame buildings - yet the government still moved ahead with its plan to permit the construction of those buildings.

• Many of the trucks used to make B.C.’s highways safe are themselves unsafe. The violations committed by the private heavy commercial vehicles are the type of infractions targeted under a new safety program announced by the provincial government.

• B.C.’s Agriculture Ministry warned the poultry industry two years ago that if farmers didn't take biosecurity measures more seriously, B.C. could face a bird-flu outbreak within months of the 2010 Olympics.

• Documents show that scores of accidents at B.C. ski resorts go unpublicized and that visitors are far more likely to be injured while loading, unloading, or just falling off a lift. The B.C. Safety Authority recorded 106 "reportable incidents" at ski hills in 2008.

• Records show how the Environment Ministry's negotiation with Western Forest Products actually ended in the government excusing the company from protecting elk and deer on its land, despite promises.

• The number of public complaints against transit police officers rose sharply since the B.C. government granted them permission to carry firearms, all alleging “abuse of authority.”

• Vancouver-area transit police will be included in a public inquiry into the use of Tasers by B.C. police officers, after reports the stun guns were used on at least four non-violent transit users in 2007, primarily those who had failed to pay their fares.

• Dozens of B.C. nurses guilty of everything from stealing narcotics to abusing patients have been allowed to quietly leave the profession over the past few years without the public ever learning of their misconduct, according to internal discipline records.

• The media learned the B.C. Lottery Corp. underreported suspected money laundering at the province's casinos for years.
• The B.C. Lottery Corp. has caught at least eight lottery retailers ripping off their customers over the past two years, including one employee from a Maple Ridge outlet who pre-scratched more than 100 scratch-and-win tickets before putting them up for sale.

• Its own auditors warned the B.C. government to step up oversight of Olympic Games preparations to guard against cost overruns and public embarrassment.

• Vancouver's new council agreed to pay the city manager it abruptly replaced in December 2008 a severance of about $572,000.

• Auditors figured the B.C. government overpaid private contractors by at least $1 million and as much as $6.5 million during the second phase of the Job Placement Program.

• Rising energy costs are hitting a quarter-million low-income families three times as hard as other British Columbians, according to a report done for the B.C. government and obtained by the B.C. Old Age Pensioners' Organization via FOI.

• An elderly woman died in 2006 at a Retirement Concepts care home while eating food of the wrong consistency; despite being on a medically prescribed minced-food diet because of a risk of choking, the unidentified woman was fed waxed beans, according to a report by the Fraser Health Authority.

• Using FOI, the Vancouver Sun made detailed inspection data for all licensed care facilities in the Lower Mainland available online for the first time at www.vancouversun.com/care/ (The Sun also revealed many records of daycare centre inspections.)

From such examples, one may realize that while debating esoteric points of the B.C. FOIPP Act that there is a fact that one can easily lose sight of but what would ideally remain the primary focus: how often freedom of information is not about documents in filing cabinets nor data in digital storage, but about real issues impacting everyday people.

These texts require a second look, for when they appear in a daily newspaper they may be forgotten within days, but many should not be, because we could be living continuously with the unresolved problems that they have raised. In fact, many of matters revealed are so serious that one can wonder why government did not publish them proactively instead of waiting for FOI requests.
Some such articles have also prompted regulatory improvements. Moreover, not every FOI story necessarily reveals a scandal, but can still be valuable in educating the public on the scope of a little-known issue, and on how the government operates.

The stories can serve as an antidote against despondency or cynicism regarding the weakened B.C. FOI system, for they show how reporters can still overcome the barriers of bureaucratic and political resistance to produce valuable results. While these are impressive enough, imagine how much more could yet be achieved with an FOI law reformed up to global standards, and the potential loss of such stories if the system deteriorates further.

In reply to the common governmental complaints of the cost to taxpayers of the FOI system, one could well argue that the reverse is true, because public outrage at government waste – exposed through FOI requests - prompts the state to cut such waste, or even prevent it before it occurs. Hence the modest annual cost of FOI may be an impressive bargain. (All the more reason to reduce 2010 Olympic Games secrecy, as noted in Appendix 3.)

Vaughn Palmer noted this fact back in 1992, before the FOI law was passed, while reporting that the government had advanced hundreds of millions of dollars in loans to private businesses, with all the terms secret, even the loan size. In lieu of FOI law, the media had to rely on leaks, which exposed cases of massive waste in the loan program. Today records on such cases could be found obtained by FOI requests.

In one case then, a minister tried to push through a loan to an aviation company, at cost to taxpayers of $40 million or $160,000 per job - which the media only knew because a confidential cabinet papers on the proposal was leaked to the Sun. The “loan” died soon afterward, a victim, some said, of premature disclosure, wrote Mr. Palmer, adding:

That kind of disclosure might have helped to derail other boondoggles - and there are plenty of examples. The recent review of government finances determined that some $300 million worth of government loans have gone

3 Or sometimes perhaps not. In such cases of government loans, I could easily envision the government inappropriately applying FOIPP Act exemptions to deny access, such as Sec. 12, Sec. 13, Sec. 17, Sec. 21, and others. This in turn might prompt appeals to the Commissioner, two years for a ruling, an order that the government might then appeal to judicial review, etc. Woeful as all this is, still better overall to have the Act than not.
bad in recent years. Part of the price tag for not having freedom of information.\(^4\)

**British Columbia in the World Context**

Most of the arguments regarding B.C. *FOIPP Act* reform are by now familiar. So I wish to consider another perspective on the issue, one not explored yet: we need instead to continuously reframe and re-conceptualize the Act in the light of rapidly-changing international and historical contexts. This could positively alter what British Columbians come to expect, perhaps even demand, their own rights to information. Exemplary sections of our *FOIPP Act* have been adopted in other jurisdictions’ FOI laws, so why not visa versa?

Although the provincial government may resist this concept, its long-term value will become evident. Some of my recommendations below may seem to be ahead of their time. Yet we should consider that the most traditionalist practices that we live with and accept today were themselves once done for the first time, and that within our senior citizens’ living memory, governments derided the very idea of an FOI law.

Since 2004 our knowledge and experience of the FOI subject have multiplied, and we can now draw more accurate conclusions about it. To this end, I created the *World FOI Chart* in 2008 as an aid to FOI scholars, and posted it to my website - [www3.telus.net/index100/foi](http://www3.telus.net/index100/foi).

This chart cross-references by topic key primary documents on freedom of information law, including texts of 73 national FOI laws, 29 draft FOI bills, 12 Canadian provincial and territorial FOI laws, the commentaries of 14 global and 17 Canadian political organizations. (It is also the basis of my report *Fallen Behind: Canada’s Access to Information Act in the World Context*, and for a global index of FOI rulings, both posted there.) On the chart, upon scrolling down to Row 15, you can compare B.C.’s *FOIPP Act*, section by section, to all other laws.

The whole ground has shifted. Previously we did not have clear global FOI standards that each FOI law could be measured besides, but now we do. Even in a world growing ever more integrated and interdependent, I would still never

suggest that the domestic FOI laws of every nation should be harmonized. Yet British Columbia surely needs to at least raise its own FOI law up to the best standards of Commonwealth nations - and then, hopefully, look beyond the Commonwealth to consider the rest of the world.

This statement from a legal scholar could apply equally well to the B.C. FOIPP Act: “A number of elements of the stronger international models considered here, especially the UK legislation, can be found among the suggestions for reform of the ATIA [federal Access to Information Act] that have been proposed for consideration in recent years in Canada. This fact suggests that the legislation and experiences of these countries may be useful in developing an updated ATIA for Canada.”

From which laws can we draw inspiration? Some assert only Commonwealth statutes, as these conform to our legal traditions. But is this correct? As we embark upon a tour through the FOI world, I ask BC legislators to consider that a positive and workable idea could be welcomed whatever its source.

For example, in Mexico’s FOI statute, ‘information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake.’ As well, its agencies ‘must place computer equipment at the disposal of interested persons so that they may obtain information directly or by printing it out.’ In Serbia’s law, agencies must respond to FOI requests in 15 days (the global standard), except in cases where there is a threat to the person's life or freedom, protection of the public health or environment, in which case the reply must be made within 48 hours.

Should we spurn helpful concepts for B.C. FOIPP Act amendments solely because they originated in non-Commonwealth nations? Are the adjustment difficulties – and the ‘harm’ that would supposedly result from their broader provisions – often overstated here? I believe so. Features from others’ FOI statutes need not be transplanted verbatim to British Columbia but many could - with the exercise of political imagination - be adopted and modified to suit our context.

Some senior bureaucrats and politicians habitually warn of the grievous harms that could occur if the public’s FOI rights were expanded in law. From the experience of other nations, we can see if these speculative injuries actually came to pass, or not. Very rarely do we hear complaints from foreign governments that such harms

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ensued, nor urgent calls to amend their FOI to bring them down to the Canadian level; if such proposals were put forth, the public reaction could be imagined. If our provincial government insists upon staying within the political and legal comfort zone of the Commonwealth “box” as regards FOI laws, this choice would still not argue for retaining the status quo of the B.C. *FOIPP Act*; for some of the Commonwealth has in some ways moved ahead of Canada since 1992 (as will be seen throughout this report). This is partly due to the process of ‘leap frog’ by which, as times change, counties learn from the experience and mistakes of others, and consider new theories and realities, all to forge new statutes that surpass existing ones.

Thus even the United Kingdom – B.C.’s model for parliamentary secrecy – has well outpaced us on many critical points (although frankly it still lags behind us on a few others). Some Canadian officials, to deter FOI reform, still invoke the great tradition of Westminster-style confidentiality. If so, how do they explain why the UK *Freedom of Information Act* has a harms test for policy advice, a 20 day response deadline, a 30 year time limit for legal advice records, and coverage of a vastly wider range of quasi-governmental bodies – all features lacking in our B.C. *FOIPP Act*?

The best Commonwealth examples for Canada to generally follow for inspiration are, I believe, the access laws of India and South Africa - in most but not all their respects. Amongst draft FOI bills, that of Kenya offers a superlative model.

In response, would not critics laugh and call it absurdly naïve to assume such provisions will be enforced or possibly affect any reality on the ground? The statutes might be just “paper tigers,” they say, for recalcitrant officials can (and sadly do) find countless means to sabotage a law, such as by creating harmful regulations, or undermining its spirit by fixating on its letter. Moreover, “the most secretive authoritarian regimes may have impeccably democratic constitutions allowing in principle for perfect openness.”

Should these facts discourage us? Yes, and no. Although fully aware of such objections, I would reply that statutes are comparatively more important and enduring than actual governmental practices of the day. The relationship is not reciprocal - that is, there are many good FOI laws that do not result in good practice, but one very rarely sees good FOI practice without a good FOI law first in place as a foundation for it.

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Drifting Backward

Yet even a comparative study of actual freedom of information practices worldwide might not be to British Columbia’s gain, for B.C.’s access practices so often fall short of the FOI law itself.

In its 2009 election platform the Liberals proudly stated: “The BC Liberals have worked over the past eight years to make government more open and accountable, and take decisive action towards real democratic reform,” and “We have created the strongest Freedom of Information Act in the country.” (A claim of having “created” the Act might come as some surprise to former NDP Premier Mike Harcourt whose administration passed the law 17 years earlier.)

Yet the B.C. Liberal government has undermined both the law and practice of FOI in countless ways since assuming power in 2001. (This is not to say, in fairness, that several NDP reigns were any more advanced.)

For example, the government introduced Bill 25 in April 2007, claiming that it would "strengthen" the B.C. FOIPP Act. But as the diverse groups that make up the Campaign for Open Government noted, Bill 25 actually impeded them by increasing the ability of officials to stall requesters when a request is transferred from one public body to another.

Most recently, the B.C. Liberal’s neglect of FOI rights can be measured by the fact that the executive director of the Office of the Information and Privacy Commissioner, Mary Carlson, felt compelled send a letter this Jan. 22 marked "Extremely Urgent" to the Speaker of the Legislative Assembly.7

It complained that operations at the Commissioner’s officer had ceased, because the government had not appointed an acting commissioner to replace David Loukidelis (who retired two years early in his term to become assistant Attorney General this Feb. 1, after 20 years of distinguished service fighting for FOI and privacy rights, his departure being a grievous loss for those causes). This was an extremely serious oversight.

In 2004 a special legislative committee, with 13 BC Liberals and one New Democrat, held hearings on the FOIPP Act and issued an exemplary report. Yet the BC Liberals have been very selective in choosing which of the report's

7 B.C. ’s privacy office frozen, leaked letter says, by Tiffany Crawford, Vancouver Sun, Jan. 23, 2010. Ms. Carlson said staff have shut down the whole operation to avoid any legal issues that could arise from reviewing cabinet files or law-enforcement information.
recommendations to implement: of its 28 points, not one of the 10 picked for action improves the actual FOI request process. (To be fair, the 1999 legislative committee report on the same topic was also neglected by the NDP then in power. Ideally, FOI would transcend political parties and ideologies. 8)

Ideally, the government would implement all of that committee's recommendations - such as to allow persons to ask for their own personal records without an FOI request, and to amend section 13 to require the government to proactively publish 14 types of information. Instead, since their election in 2001, the Liberals have:

- Passed 16 amendments that have made the FOI process more difficult and time consuming. Allowable response times now stretch to many months.

- Slashed the portion of the Information and Privacy Commissioner's budget available for enforcement of the B.C. FOIPP Act.

- Failed to restore huge FOI staff cuts made by the anti-FOI administration of NDP premier Glen Clark. Many requests are not answered within required timelines, and the delay skyrockets when a request is deemed to be politically sensitive.

- Extended cabinet secrecy to several Liberal caucus committees - a step without precedent in B.C. history - most recently to its new Climate Action Committee. The discussions of that body will bring major changes to the lives of every person in B.C. "It's the first time I can remember that we weren't consulted on an amendment of the FOI Act," said the commissioner.

8 The dichotomy is not so much between right or left wing as it is between elitist "insiders" and populist "outsiders," characteristics which might be claimed, accurately or not, by any party. One might expect that most conservative parties would be less inclined towards FOI, insofar as they favour the traditions of past eras, when FOI law were absent. This is indeed often the case but not necessarily so, for ideology is not always tied to governing style. In B.C. the worst period for government transparency in many ways occurred in the reign of NDP premier Glen Clark, who openly disparaged the FOI concept and never even feigned support for it; here one might appreciate only the complete "transparency" of his intentions.
• Removed B.C. Ferries from the scope of the Act\(^9\) and refused to include VANOC, the Olympic organizing committee. Then, the Olympic Secretariat *stopped recording minutes* of its meetings after being displeased by FOI requests for them, the most outrageous and violation of the Act’s intent I have ever encountered.

• In 2006 the government tried to pass a bill called the Public Inquiries Act that would have allowed it to keep secret the final reports of its public inquiries. Pressure from the Opposition party and the Campaign for Open Government forced the government to back down, but it re-introduced the bill in a modified form.

• The Liberals introduced a B.C. Community Charter - the law governing local government - that would have allowed municipal councils to place many more subjects into closed meetings. Unfortunately there are no rules at all setting out what B.C. school boards, colleges, universities and some other public bodies can place in-camera. (See Appendix 2-B)

• Initiated a highly secretive review of the B.C. *FOIPP Act* by bureaucrats in 2005 instead of adopting the many pro-FOI recommendations of the 2004 special legislative committee.

This review of government openness of was ironic for its secrecy: any group that refused to sign a confidentiality undertaking could not take part. Half of the submissions by public bodies are still being concealed from public view. Thanks to the growing trend towards oral government, no written report was delivered to government by the consultant George Macauley who reported on the process.

• Failed to respond to urgent calls from the Special Committee, the Information Commissioner David Loukidelis and others to clarify the highly-abused section of the B.C. *FOIPP Act* relating to policy advice, section 13, so that only true advice and recommendations can be withheld, not background documents.

• Attempted to pass a bill in 2006 that would have exempted designated contracts and projects with private sector partners from FOI requirements.

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\(^9\) It its 2009 election platform the Liberals proudly stated: “For the first time, BC Ferries operations, decisions and fare increases are now subject to public scrutiny, review and approval through the independent Ferries Commissioner.” This measure is welcome indeed, but not a substitute for FOI coverage.
Concerted opposition from Campaign for Open Government and the Opposition scuttled it.

- Routinely have engaged in political interference with FOI requests, e.g., with "sensitivity" filters.
- Routinely have made excessive fee estimates for access to records in order to dissuade requesters.

An example of this was brought to light in April 2007 when the Information Commissioner's office ruled that a fee of $173,000 levied against Sierra Legal for data on polluters was unreasonable, that the Environment Ministry did not even examine the requested records in making its estimate, and that it improperly failed to adequately consider waiving the fee in the public interest. (These records were freely posted on government websites in the NDP days.)

In May 2007, the minister for FOI, Olga Illich, bluntly told her hometown paper, the Richmond News, "These (fees) are also intended to address nuisance requests. If you pay a fee, sometimes you'll be a little more thoughtful about asking for information."

According to one survey of 2008: "The B.C. government is the second-worst province in Canada after Ontario for responding to freedom of information requests, according to a national audit commissioned by the Canadian Newspaper Association. Overall, B.C. received a C-, just slightly ahead of Ontario."

**The Main Obstacle**

But not only politicians are trying to curtail the Act's powers. In fact, the main initiative likely lies elsewhere: In its own submission to the 2004 review, the provincial bureaucracy had claimed that it was only trying to "fine-tune" the act's language, so that its "original intent" would be better expressed. In response, the information commissioner's aide, in a largely overlooked letter of April 2004, noted "very grave concerns" in a reply:

"It is objectionable for appointed public servants who are subject to FOIPPA to, a decade after FOIPPA's enactment, purport to be identifying and expressing the 'original intent' of FOIPPA, an Act of the Legislature. Talk of fine-tuning the law
or returning to its original intent disguises the real effect of the [bureaucracy's] recommendations discussed below - to reduce the public's right of access, and impair openness and accountability."

As 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 B.C. some external law firms specialize in expert legal maneuvers to block FOI requests, bypassing the spirit of the law by torturing its letter.

There is painful irony in our government spending hundreds of thousands of dollars of B.C. taxpayers’ money from an apparently bottomless reserve on lawyers to keep records hidden away from those same taxpayers, who also paid for the records’ creation and who in some regard own them.

As noted by columnist Vaughn Palmer (in *A colossal waste of court time: Information commissioner battles challenges by bureaucracy*), last December the commissioner sought a $400,000 legal budget to cover the growing number of court challenges to his rulings by the B.C. government and other public bodies, up by 50 per cent over 2008.

Of the premier’s reversal of his 2001 openness pledge (and his office’s two court challenges of OIPC orders), the column concluded: “This hypocrisy is bad enough . . . No wonder [Loukidelis] wants to be able to hire his own high-priced legal help to stand up to all the government-funded lawyers swarming over him and his office.

“But from a taxpayers' point of view, I can think of a much better outcome. Let treasury board direct that in future, any government-funded agency hauling Loukidelis into court will have its budget docked threefold. Once to pay for government's legal bills. Once to pay for the commissioner's legal bills. And once to cover the waste of court time.”

A noteworthy concept.

This bureaucratic outlook has often been noted. In his final annual report, David Flaherty, B.C.’s first information and privacy commissioner, wrote that:

11 *Harper: Do as I say, not as I do*, by James Travers, The Toronto Star, April 13, 2006

Senior government officials have complained that they were no longer free to give candid advice to their political masters, because of the risks of disclosure of what they write in briefing notes. It was almost as if democracy was being undermined by too much democracy. I was actually told by a senior public servant that the public's right to know was limited to what they could ask for through their elected representatives. When I countered that this sounded too much like the BBC-TV series, *Yes Minister*, there was unabashed acclaim for Sir Humphrey as an outstanding public servant.

One hopes this hardline may have softened since then. Yet there remains the obvious imbalance of power, with senior bureaucrats and crown lawyers, some opposed to FOI laws, potentially having the ear of ministers every day, as opposed to FOI advocates whom politicians might hear once every five years at a parliamentary hearing. Above all, I plead with the bureaucracy not to oppose needed B.C. *FOIPP Act* reforms (particularly on Sec. 12 and 13).

There are other approaches. On his very first day in office - January 21, 2009 - U.S. President Barack Obama issued an Executive Order to all government agencies to reverse the default secrecy position of his predecessor, writing:

> The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government.

A similar public order from the premier to the B.C. public service would be most welcome.

The conclusion of U.S. Senator Daniel Patrick Moynihan’s 1998 book, *Secrecy: the American Experience* was succinct: “Secrecy is for losers.” Why? First, he wrote, because it shields internal analyses from the scrutiny of outside experts and dissenters. As a result, some very poor advice is used to inform many government decisions. Second, secrecy distorts the thinking of the citizenry, giving rise to unfounded conspiracy theories and an unnecessarily high level of mistrust of governments.

As George F. Will wrote in a review of Sen. Moynihan’s book: “Government secrecy breeds stupidity, in government decision making and in the thinking of
Indeed, if politicians and bureaucrats do not trust the public with information, how can they expect the public to trust them in return? Might the former groups, on occasion, seriously consider not just the liabilities but also the many benefits of transparency?

**Moving Forward**

After NDP Premier Mike Harcourt's FOI law came into force in 1993, it worked fairly well for the first two years. Then, perhaps inevitably, the honeymoon soured when FOI requests began revealing scandals. Harcourt's genuine support for the FOI concept was sharply reversed when Glen Clark took over in 1996.

In fact, Clark, made a joke (or was it?) at an event with media present, that "If I had my way in cabinet, we wouldn't have an FOI Act." On that point, the first Commissioner David Flaherty - a privacy expert whose rulings were mostly harmful to FOI - upon retiring in 1999 disturbingly wrote that he had considered the possibility of the Clark government "abolishing" the B.C. FOIPP Act as being "by no means an idle threat."

The supreme irony is that while in Opposition, the Liberals were the single biggest user of the FOI law, and in 1998 Gordon Campbell wrote, "When government does its business behind closed doors, people will invariably believe that government has something to hide."

This is just as true today as it was when the NDP was in power. We can, and must, do much better. After years of effort, I have found prospects for raising Canada’s Access to Information Act up to world FOI standards to be virtually hopeless. But I have much higher hopes for British Columbia’s law. In this province we have - if enough political will and imagination is present - at least a chance of bringing our law into the second decade of the 21st century, while still protecting all truly necessary secrets.

Such is the challenge for you, Honourable Members. British Columbia is reputed to be a land of visionaries and pioneers. The government letterhead proclaims that B.C. is “the Best Place on Earth.” To conform to this bold (and to some contentious) statement, as Vancouver welcomes the world to the city this month for the 2010 Olympics, why not “think big,” take an overarching global vision, and implement the Best FOI Act in the world?

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We have already moved part way toward that goal by passing the best law in Canada - why not finish the task that was begun in 1992? Why should B.C. accept being second-best to any other jurisdiction on any FOI related matter, and not become a province that others can look to for leadership on this vital subject? There can be no real accountability without transparency: by raising up our law you can also greatly enhance our own democracy, and create a lasting legacy for your constituents.

Most respectfully yours,

Stanley Tromp

FOI caucus coordinator, Canadian Association of Journalists (CAJ)

Vancouver, B.C., January 2010

stanleytromp@gmail.com
**THE ROAD FORWARD: A PLAN FOR REFORM**

**The Act’s Title**

The London-based human rights organization Article 19 proposes that a model FOI statute be called *The Right to Information Act*. Such is the name of India’s FOI law, one of the world’s very best. This title should be a model for British Columbia, as it asserts the public’s basic “right” to information, beyond a vague “freedom” of it.

**Recommendation No. 1**

Change the Act’s title to the *BC Right to Information and Protection of Privacy Act*

**Section 2 - The Act’s Purpose**

A purpose section in a freedom of information law is extremely important; more than just political rhetoric, the stated principles can provide guidance to commissioners or judges in making their rulings. In the global context, the scope of B.C.’s *FOIPP Act* is comparatively limited:

**Purposes of this Act**

2 (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

(a) giving the public a right of access to records,
(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
(c) specifying limited exceptions to the rights of access,
(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
(e) providing for an independent review of decisions made under this Act.

(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.
Within Canada, the best purpose section is found within Nova Scotia’s FOI statute (1977), the first to be passed in this country:

2. The purpose of this Act is […] (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to (i) facilitate informed public participation in policy formulation, (ii) ensure fairness in government decision-making, (iii) permit the airing and reconciliation of divergent views.

Other nations go much further than B.C. There are very strong purpose statements in the FOI laws of New Zealand, Kosovo, Japan, Moldova, and the draft FOI bills of Bangladesh and Malaysia.

The overall purpose statement of Finland’s freedom of information law is amongst the world’s best, emphasizing democratic powers, and would enhance Canada’s FOI laws:

Section 3. Objectives. The objectives of the right of access and the duties of the authorities provided in this Act are to promote openness and good practice on information management in government, and to provide private individuals and corporations with an opportunity to monitor the exercise of public authority and the use of public resources, to freely form an opinion, to influence the exercise of public authority, and to protect their rights and interests.

The purpose of the draft FOI bill of Sierre Leone, stated in Sec. 1.2, is to “(ii) give effect to the fundamental Right to Information, which will contribute to strengthening democracy, improving governance, increasing public participation, promoting transparency and accountability and reducing corruption.” What arguments could be made against such goals? Finally, let us regard the preamble of Indonesia’s FOI law passed in 2008:

Considering: a) that information is a basic need of every person to develop their personality as well as their social environment, and is a significant part of the national security; b) that the right to obtain information is a human right and transparency of public information is a significant characteristic of a democratic state that holds the sovereignty of the people in high esteem, to materialize good state management; […]

In Appendix 5 of this report, I discuss the proposal to add a clause to Section 2 to state that access to government information is to be regarded in British Columbia as “a basic human right.”
Recommendation No. 2

Amend Section 2 to state that the B.C. FOIPP Act’s purposes include increasing public participation in policy making, scrutinizing government operations, and reducing corruption and inefficiency; and add phrases on the models of purpose clauses in the FOI laws of Nova Scotia or Finland.

Recommendation No. 3

Add a clause to Section 2 to state that access to government information is to be regarded in British Columbia as “a basic human right.”

Section 3 - The Act’s Scope

When is a public body not “a public body”? Which public records are “public records”? How should these concepts be legally defined for freedom of information purposes?

When a private sector or non-profit entity performs public functions, should its records also be open to public scrutiny? All of its records, or just some? Must a company prove that it would suffer injuries resulting from FOI disclosures, or just assert that it would, and prove it how? Even if harms might result, should the public’s right of access be absolute, or must it be balanced against the company’s interests?

These and many other questions have arisen in the past two decades, and the new reality of government restructuring invokes serious doubts as to the viability of the FOI system.

One problem is that there is a growing trend in Canada towards contracting out public functions to “private” entities that are not covered by FOI laws. I emphasize that I do not oppose privatization, per se, only the loss of public transparency that often accompanies it, but should not.

On this topic, Canada has fallen farthest behind the world FOI community. The FOI laws of 29 nations cover legal entities performing ‘public functions’ and/or ‘vested with public powers.’ (The statutes of the United Kingdom, India, and New Zealand provide good models.) But B.C.’s FOIPP Act does not - it merely lists such entities in Schedule 2 at the end of the Act; the government can add or
subtract such entities purely at its own whim and leisure, and the list is incomplete. Here the matter stands in our FOIPP Act:

Scope of this Act

3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following: [describes records of courts, officers of the legislature, local elected officials, et.al.]

(2) This Act does not limit the information available by law to a party to a proceeding.

[Definitions section]

“public body” means

(a) a ministry of the government of British Columbia,
(b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, or
(c) a local public body, but does not include
(d) the office of a person who is a member or officer of the Legislative Assembly, or
(e) the Court of Appeal, Supreme Court or Provincial Court;

In regards to Section 76, “Power to make regulations,” the 2004 legislative FOIPP review committee recommended “...that public bodies and local public bodies be brought into Schedules 2 or 3 of the FIPPA, respectively, as they are established...” Sadly, this recommendation was not fully implemented.

As noted by the B.C. Freedom of Information and Privacy Association (FIPA), the repeal of section 76 (3) and (4) and their replacement by section 75 (1) shifts the power to add new bodies to the schedules of those covered by the FOIPP Act from the Lieutenant Governor in Council to the Minister responsible for the Act:

This is certainly an improvement, although it falls short of what FIPA has advocated, which is the automatic inclusion of all new public bodies under the Act. In our opinion, it would be more in the spirit of the Act if inclusion were the “default setting” and a special case had to be made to the Minister for excluding any new public body.14

14 FIPA letter to Hon. Sandy Santori, Minister of Management Services, July 2, 2002
In 2004 the B.C. Information and Privacy Commissioner, David Loukidelis, raised the serious concern that “outsourcing” initiatives by the B.C. government were eroding the B.C. FOIPP Act. He recommended that the law be amended to clarify that records created by or in the custody of any service-provider under contract to a public body remain under the control of the public body for which the contractor was providing services. The Special Committee of the B.C. Legislature reviewing the FOI law in 2004 unanimously agreed. Nothing on this was done by the government.

In practice, entity coverage in this province is indeed quite extensive. For example, one day in March 2000, the B.C. government added 97 public bodies to the Act’s scope, bringing coverage to over 2,000 organizations. Notably, a non-profit corporation that was created to counsel consumers and license certain industries – the Business Practices and Consumer Protection Authority (BPCPA), which is unique in Canada – is covered.

The government legislated that all companies owned by the Vancouver School Board must be subject to the law as well. B.C. is also the only jurisdiction in the world (so far as I know) that covers self-governing professional associations in its FOI law. But that is to miss the key principle, for such entities can be added or subtracted from Schedule 2 by the state’s caprice of the day.

In a response to a FIPA questionnaire on this topic to party leaders in May 2009, the Liberal party stated: “The Act now covers over 2,000 bodies, more than any other similar act in the country. Future additions will always be considered under the guidelines for eligibility described under the Act.” But what “guidelines for eligibility”? There are no adequate ones in the Act.

Essentially, my position is that any public body, any corporate subsidiary of a public body, and any organization that is controlled by a public body and/or receives its funding primarily from public sources and for delivering a public service should be covered by the B.C. FOIPP Act. These entities should be covered by the Act but are not:

- BC Ferries. The loss of FOI access to records such as internal ferry safety and financial audits obviously runs deeply contrary to the public interest. Transparency is urgently needed here, after an independent report released in Nov. 2009 by the Comptroller General found that, since the Liberals privatized it, the corporation had lost accountability, costs have increased,

and executive pay has skyrocketed to unprecedented levels. The Corporation receives over $130 million from B.C. taxpayers every year.

- BC Hydro’s two wholly owned “private” entities – Powerex (established in 1988 as the wholly-owned power marketing and trading subsidiary of BC Hydro); and Powertech (Hydro’s research and testing branch, whose website notes that “Powertech's Directors are appointed by our shareholder, BC Hydro.” [http://www.powertechlabs.com](http://www.powertechlabs.com))

Although those two entities are not listed in the schedules to the B.C. FOIPP Act, I have been told that some of records might be obtainable through an FOI request to BC Hydro, only if Hydro considers it has “custody or control” over those records – some may be accessible, yet some not.

This is too confusing, for these two entities hold thousands of records and, for an FOI request, each such record would have to be considered on a case-by-case basis. Yet even the government of Steven Harper – the most secretive Prime Minister in living memory – amended the Access to Information Act to cover all subsidiaries of all crown corporations (i.e., the federal equivalents of these two BC Hydro entities).

- VANOC, with its spending of millions of taxpayers’ dollars. (Yet the similar entity that manages the 2012 Olympic Games in Britain, the Olympic Delivery Authority, is covered by the British FOI law.) FOI advocates have been pleading for this measure for the past five years but of course, it will be a moot point after the Games are over.

- Companies wholly owned by B.C. universities. Shirley Bond when she was education minister made sure that subsidiary companies of school boards were covered by the Act. But subsidiary corporations of universities and other public bodies should be covered as well.

- All subsidiaries owned/controlled by public bodies listed in the Schedule to the B.C. FOIPP Act.

Some governments decide that most crown corporations will be covered, but not all, because they supposedly required “special protection” from their commercial competitors. (In the days it was under government control, BC Rail successfully argued for its own exclusion from the BC FOI law on these grounds.)

Such complaints of economic injury are illogical and spurious because our Act already contains ample protections - such as Sec. 17 and 21, which are often over-applied in practice - to prevent such harms.
Contracting out services can also lead to lost transparency. For example, in 2003, BC Hydro privatized the services provided by hundreds of its employees in its Customer Service, Westech IT Services, Network Computer Services, Human Resources, Financial Systems, Purchasing, and Building and Office Services groups.

These services are now provided under contract by Accenture, a private foreign company. Although the B.C. government obviously does not have the power to place a foreign company under our FOIPP Act, it should guarantee to the public that any of Accenture-held records regarding British Columbians will be accessible by FOI, or not enter into such a contract.

Yet another intransigent problem is that dozens of Canadian entities have a “shared jurisdiction” amongst federal, provincial and other governments; since it is claimed that these bodies do not fit the within scope of any one partner’s FOI laws, they fall between the cracks and are covered by none. (Examples include the Canadian Centre on Substance Abuse and the Canadian Energy Research Institute.)

If obtaining consent for FOI coverage from one partner is onerous enough, how much more so to gain it from several? Which partner has legal “custody” or “control” of the information? There are solutions, though: the B.C. government should not be able to enter into such arrangements unless it ensures that the records are available under either its FOI law or that of the federal government, or both.

Worst of all, when quasi-governmental entities do business amongst themselves, the opacity can be absolute. In March 2008, the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (VANOC) contracted the Vancouver International Airport authority (YVR) to be an official supplier. Both of these entities are not covered by FOI laws, provincial or federal, and so their contract can be secreted.

**Recommendation No. 4**

Amend the Act so that the B.C. government may not enter into a “shared jurisdiction” arrangement or contract, or create a new institution with federal, provincial, municipal or other governmental partners, unless the records of that arrangement, etc., are available under a freedom-of-information law of at least one of the partners.
The basic statutory solution in many nations - and which the B.C. FOIPP Act would ideally follow - is not for the statute only to list named entities in schedules to the act, but rather to include precise and broader criteria of what kind of entities are covered.

Both options - definitions and listings - might be implemented; and it could then be noted in a reformed B.C. FOIPP Act that covered bodies are those “including but not limited to” those listed in schedules. Hence, when an entity claims not to be covered by the Act, an appellate body such as the information commission or a court could study the criteria and rule whether it should indeed apply or not in each case.

The very purpose of the Access to Information Act was to remove the caprice from decisions about disclosure of government records,” said former Information Commissioner John Reid. “Now we must remove the caprice from decisions about which entities will be subject to the Act.”¹⁶ The same principle applies to the B.C. FOIPP Act.

**Quasi-governmental entities, and “custody or control”**

An extremely serious problem has arisen – that of governmental agencies creating wholly-owned subsidiaries that they claim are exempt from the B.C. FOIPP Act. Three such entities are created and owned by UBC, and through FOI requests, I sought the annual report, salary of employees and meeting minutes for UBC Properties Investment Ltd., UBC Research Enterprises Inc. and UBC Investment Management Trust.

The most important is the first entity, one that which manages 1,000 acres of public land and $600 million dollars of construction on campus, and whose secrecy has been a source of bitter complaint by residents, neighbours and the UBC student society since the 1980s.

On April 21, 2009, the Commissioner’s adjudicator Michael McEvoy handed down the groundbreaking Order F09-06 on my FOI request for records of those entities.

He ruled that, although the entities themselves might not necessarily be defined as “public bodies” in the Act, their records should be accessible by FOI requests anyways, because Sec. 3 (1) states that “This Act applies to all records in the

¹⁶ Information Commissioner John Reid, A Commissioner’s Perspective – Then and Now. Toronto. Nov. 6, 2005
custody or under the control of a public body”; an indisputably public body, UBC, has “control” over those records of its entities.

He pointed out that the three organizations were incorporated by UBC, 100% owned by UBC, must report to UBC administration and/or the Board of Governors, and most if not all of their directors are UBC employees or BoG members. That constitutes “control.”

Because the adjudicator had settled the issue of control, he remained silent on the question of “custody.” He rejected all UBC arguments as being irrelevant, contrary to the spirit of the law, or inconsistent with precedent. UBC argued that it does not control the records, for the entities are legally “private” companies; it has appealed this ruling on technical points, and a new OIPC inquiry will be held.

(One might wonder if this principle could be extended, i.e., to what extent the records of BC Hydro’s two subsidiaries are in the “control” of Hydro, or even if BC Ferry’s records are ultimately in “control” of the BC government, for B.C. FOIPP Act purposes. Unfortunately this would likely not apply to VANOC, which is accountable to the International Olympic Committee in Switzerland.)

One problem noted in the ruling is the terms “custody” and “control” are not defined in the Act, hence legal disputes arise over the terms’ interpretations. (Case law helps to elaborate on the terms, but not enough.) They need to be. But even if the wording is more detailed, the term “custody or control” over records, while a good beginning, is insufficient by itself. The phrase should be retained, while a broader description of what forms of entities is covered is added to the Act.

**Recommendation No. 5**

Retain the terms “custody or control” in Sec. 3, but add definitions of the terms.

Meanwhile, at Simon Fraser University, an FOI request for records of SFU’s wholly owned companies was refused, the Commissioner’s office ordered them opened in Order F08-01, and SFU appealed the order in B.C. Supreme Court. Most unfortunately, last fall Justice Peter Leask ruled in favour of SFU, and UBC is also relying upon that ruling to support its own FOI arguments.

FOI advocates plan to appeal that latest ruling to the B.C. Court of Appeal, and the principle is so essential that they are prepared to appeal these cases up to the
Supreme Court of Canada if necessary - a long enervating battle with large legal costs for all sides plus the expense of court time.

But is all this necessary? Not at all. The B.C. legislature has the power to resolve this dispute by amending the B.C. FOIPP Act to remove such interpretive ambiguities and escape hatches in a far more carefully worded section 3, and render it crystal clear that all such entities are covered by the Act. The recommendations in this report make that goal possible.

On the potential for such entities to multiply (as a result of a possible SFU and UBC legal victory), the lawyer acting on behalf of FIPA told the media: “When you think about it, the potential for abuse is huge. It could be the black hole that swallows up FOI.” One expects that B.C. legislators in passing the Act in 1992 did not foresee the creation of what are sometimes, in effect, puppet shell companies circumventing the Act’s letter and spirit.

### Canadian provinces

Some provinces contain much broader definitions of what is a “public body” for FOI purposes than is found in the B.C. FOIPP Act, although they also list many of their entities by name in schedules as well. B.C. should amend its Act to follow their examples.

Sometimes funding is one criteria for inclusion. In New Brunswick’s FOI law, a public body means “any body or office, not being part of the public service, the operation of which is effected through money appropriated for the purpose and paid out of the Consolidated Fund, as set out in the regulations.”

Control over appointments can also be a factor. In Nova Scotia’s FOI law, a public body includes:

- a Government department or a board, commission, foundation, agency, tribunal, association or other body of persons, whether incorporated or unincorporated, all the members of which or all the members of the board of management or board of directors of which (A) are appointed by order of the Governor in Council, or (B) if not so appointed, in the discharge of their duties are public officers or servants of the Crown.

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Manitoba’s law has similar provisions. Both factors are present in Quebec’s FOI law.\textsuperscript{18}

Government agencies include agencies not contemplated in sections 5 to 7 to which the Government or a minister appoints the majority of the members, to which, by law, the personnel are appointed in accordance with the Public Service Act (chapter F-3.1.1), or whose capital stock forms part of the domain of the State.

Automatic coverage of all present and future governmental foundations (and others such as university foundations) is needed for the B.C. \textit{FOIPP Act}, and a model can be found in Yukon’s FOI law, wherein a public body is defined as “each board, commission, foundation, corporation, or other similar agency established or incorporated as an agent of the Government of the Yukon.”

**Global Commentary**

- **Article 19, \textit{Principles of Freedom of Information Legislation, 1999}, endorsed by the United Nations:**

  'For purposes of disclosure of information, the definition of ‘public body’ should focus on the type of service provided rather than on formal designations. To this end, it should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines).

  Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health. . .’

- **Article 19, \textit{Model Freedom of Information Law, 2001}:**

  ‘6. (1) For purposes of this Act, a public body includes any body: (a) established by or under the Constitution; (b) established by statute; (c) which forms part of any level or branch of Government; (d) owned, controlled or substantially financed by funds provided by Government or the State; or (e) carrying out a statutory or public function, provided that the bodies indicated in sub-section (1)(e) are public bodies only to the extent of their statutory or public functions.

  __________________________
'(2) The Minister may by order designate as a public body any body that carries out a public function. (3) For purposes of this Act, a private body includes any body, excluding a public body, that: – (a) carries on any trade, business or profession, but only in that capacity; or (b) has legal personality.'

**Commonwealth Parliamentary Association, Recommendations for Transparent Governance, 2004:**

‘(2.1) The obligations set out in access to information legislation should apply to all bodies that carry out public functions, regardless of their form or designation. In particular, bodies that provide public services under public contracts should, to that extent, be covered by the legislation. The Group commends the situation in South Africa, whereby even private bodies are obliged to disclose information where this is necessary for the exercise or protection of any right.'

**Other nations**

The public and media of most other nations would not abide the limited scope of entity coverage found in some of Canada’s FOI laws. Other statutes and practices serve as living examples to be studied for the answer to a fair and essential question: did their broader coverage of entities actually cause the myriad “harms” that opponents of FOI reform in Canada so direly warn of?

The opponents could also be reminded that coverage of an entity does not mean that all of its records can then be revealed; many FOI statutory exemptions can still apply, e.g., to prevent harms to commercial interests, privacy, law enforcement.

The following are valuable features of other transparency statutes, most of which appear in the “definitions” or “interpretation” sections, and some of which might be welcome in a revised B.C. FOIPP Act.

- The law explicitly covers organizations financed in part or full by government (i.e., operating costs, not business partnerships, per se), entities more independent than crown corporations

In the FOI laws of six nations (one of these Commonwealth)

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19 Several of the provisions cited here overlap with others, and are difficult to neatly categorize; some nations include coverage for private entities funded by the state budget and exercising public functions, whereas others use the connective or. Some of the intents are not entirely clear, even in English originals, and translations can compound ambiguities. Yet this list could serve as a beginning for discussion purposes.
In the draft FOI bills of nine nations (eight of these Commonwealth)

• The law explicitly covers a “crown corporation,” or a “public services corporation” owned in full or part by government; or a “statutory corporation,” or a corporation “established by constitution,” or “controlled by government” (sometimes by political appointments to their boards)

In the FOI laws of 19 nations (seven of these Commonwealth)
In the draft FOI bills of 14 nations (ten of these Commonwealth)

• The law explicitly covers legal entities performing “public functions” and/or “vested with public powers”

In the FOI laws of 29 nations (four of these Commonwealth)
In the draft FOI bills of nine nations (three of these Commonwealth)

• The law explicitly covers records of a private body, if access to these records is necessary to protect “a human right”

In the FOI laws of two nations (one of these Commonwealth)
In the draft FOI bills of three nations (all Commonwealth)

COMMONWEALTH NATIONS

British Columbia has fallen behind its Commonwealth partners on entity coverage. Even one of the most conservative FOI statutes, that of Australia, includes a fuller description of entities to be covered than does our FOIPP Act in which explicit mention of “a public purpose” is absent. In the Australian act’s interpretation:

**prescribed authority** means: (a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council, other than: (i) an incorporated company or association; or (ii) a body that, under subsection (2), is not to be taken to be a prescribed authority for the purposes of this Act […]

• New Zealand prescribes coverage for official information held by public bodies, state-owned enterprises, and bodies which carry out public functions.

• The FOI law of India explicitly covers all public authorities set up by the constitution or statute, as well as bodies controlled or substantially financed by the government, and non-government organizations which are substantially funded by the state.
• As might be expected, entity coverage in the FOI law of the United Kingdom is not so broad as those above, but it does include companies “wholly owned by the Crown,” and a to right to access records that are held elsewhere: “3 (2) For the purposes of this Act, information is held by a public authority if (a) it is held by the authority, otherwise than on behalf of another person, or (b) it is held by another person on behalf of the authority.”

• Most remarkably, the FOI law of South Africa includes a provision unique in a Commonwealth statute - and also noted in that nation’s Constitution - that allows individuals and government bodies to access records held by private bodies when the record is ‘necessary for the exercise or protection’ of people's rights.

**Commonwealth Draft FOI Bills**

The Commonwealth nations’ newer generation of draft FOI bills is generally – and expectedly - broader on entity coverage than are the existing FOI laws.

• Mozambique has the broadest coverage, as expressed in its draft bill, Art. 2.2 (Object): “Private sources shall be equivalent to official ones whenever they contain informative material of public interest.”

• Bangladesh prescribes, in its draft FOI bill’s definitions, that “private bodies where the information is necessary for the exercise or protection of a human right” are covered.

• The draft FOI bill of Sierra Leone helps illustrate an important distinction that can easily be misunderstood: truly “private” entities need not worry that all of their records would be opened to public scrutiny, for only some might be. In the Sierra Leone bill, for instance, Clause 6 prescribes that a “public body” is defined

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20 UK Ministry of Justice, *Freedom of Information Act 2000: Designation of additional public authorities*. Consultation Paper CP 27 Published on 25 October 2007. The consultation paper can be downloaded from [http://www.justice.gov.uk/publications/cp2707.htm](http://www.justice.gov.uk/publications/cp2707.htm) It notes: “Some non-public authorities consider that they carry out work of a public nature and would readily accept that they should be included within the scope of the Act.” Such a “ready acceptance” from similar entities in Canada that have so long tenaciously opposed FOI coverage would be astonishing but always welcome.

21 Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age*. New York: Cambridge University Press, 2006. He adds that, due to intense and well-funded opposition from the private sector, “We know that any attempt to introduce comparable legislation in an established democracy would be doomed to failure.”
as, amongst other things, “(e) carrying out a statutory or public function, provided that the bodies indicated in sub-section (1)(e) are public bodies only to the extent of their statutory or public functions.”

The organization Article 19 points out that pursuant to this definition, a private security firm that guards a prison is to be regarded a “public body” only to the extent of its public activity, but not when it guards private property.

This means that anyone can submit an information request that is related to its public activity without having to show that the information is needed to enforce a right, as is the case in relation to information requests submitted to an “ordinary” private body. The latter is defined in Clause 6 as any body that “(a) carries on any trade, business or profession, but only in that capacity; or (b) has legal personality.”

“This is a broad definition that ensures that access can be gained to information held by a corporate body or any business undertaking whenever this is necessary to enforce a right. This may be used, for example, to obtain access to information from factory concerning dangerous substances it emits into a river from which drinking water is taken.”

**Non-Commonwealth Nations**

Entity coverage is generally much wider in the FOI statutes of non-Commonwealth nations, particularly Eastern European. The FOI statutes of France and Germany are amongst the least open in Europe, yet even they exceed Canada’s in coverage of private entities. The French law allows access to records from “public institutions or from public or private-law organizations managing a public service.” The German law prescribes:

1.1. This Act shall apply to other Federal bodies and institutions insofar as they discharge administrative tasks under public law. For the purposes of these provisions, a natural or legal person shall be treated as equivalent to an authority where an authority avails itself of such a person in discharging its duties under public law.

• Poland’s FOI law adds another dimension, that of consumer rights, for its act covers “legal persons, in which the State Treasury, units of local authority or

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22 *Sierra Leone’s draft Access to Information Bill Statement of Support*, by Article 19, London, 2005
economic or professional local authority hold dominant position in the understanding of the provisions of competition and consumer protection.”

- Armenia’s FOI law applies to: “Organizations of public importance - private organizations that have monopoly or a leading role in the goods market, as well as those providing services to public in the sphere of health, sport, education, culture, social security, transport, communication and communal services.”

- The draft FOI bill of Palestine grants powers to a commissioner to extend coverage. The law would cover “private institutions that manage a public facility, or perform public works, or maintain information related to the environment, health, or public safety, or any other institution considered by the Public Commissioner for Information as a public institution for the purposes of this law.”

- Argentina’s FOI law applies to companies that have received funds from the government.

- Overall, Ukraine’s FOI law appears the most conceptually ambitious, but most unclear: “Article 3. Scope. This Law shall apply to information relationships in all spheres of life and activities of society when receiving, using, disseminating, and storing information.”

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**THE TIDE TURNING?**

Around the world, there are a few signs that the tide of opinion may be slowly turning against the unchecked spread of quasi-governmental secrecy. Even in the United States, president Bush passed amendments to the *FOI Act* in December 2007 to ensure that information records held by private government contractors can no longer be kept off-limits to *FOIA* requestors.

- In Ireland, new state bodies should be automatically required to comply with the *Freedom of Information Act*, Information Commissioner Emily O'Reilly said in her annual report. The Department of Finance has told her that it is willing to bring in regulations to make the Road Safety Authority and other excluded agencies under the FOI net, though she wondered why they were not covered from the start: ‘Given the number of new bodies established each year . . . I consider it urgent that this matter be addressed.’

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23 Automatic FOI compliance recommended, by Mark Hennessy. The Irish Times, May 2, 2008
In the Australian state of Queensland, private companies doing business with the government may be forced to reveal previously secret information, under changes proposed in a new report. One of its recommendations is to extend FOI laws to private bodies ‘performing functions or engaging in activities which, although private in character, are also of public interest and concern’ and are taxpayer-funded.\(^{24}\)

The move followed criticism by Queensland Ombudsman David Bevan that the government made commercial-in-confidence clauses in contracts too broad, which had ‘the potential to unnecessarily restrict access to information that ought legitimately to be available to ... the public.’ The report also called for annual reporting of contracts, including those with commercial-in-confidence clauses, entered into by government entities.

**Canadian commentary**

*Open and Shut*, report by MPs’ committee on Enhancing the Right to Know, 1987:

‘2.7. That ‘if the Government of Canada controls a public institution by means of a power of appointment over the majority of the members of the agency’s governing body or committee, then both the Access to Information Act and the Privacy Act should apply to such an institution.’

*A Call for Openness*, report of the MPs’ Committee on Access to Information, chaired by Liberal MP John Bryden, 2001:

‘5. We recommend that the Access to Information Act be amended to include within its scope any institution that is: established by Parliament; publicly funded; publicly controlled; or that performs a public function. . . .’


‘3-3. That 'the government’s Policy on Alternative Service Delivery be amended to ensure that arrangements for contracting out the delivery of government programs or services provide that: records relevant to the delivery of the program or service that are either transferred to the contractor, or created, obtained or

\(^{24}\) *Queensland: Report flags changes to freedom of information*, by Paul Osborne. AAP Newsfeed, April 16, 2008
maintained by the contractor, are considered to be under the control of the contracting institution; and the Act applies to all records considered to be under the control of the contracting institution, and the contractor must make such records available to the institution upon request.


‘Since the Act came into force, government functions have been increasingly outsourced to consultants or contractors, or assigned to alternate service delivery organizations, such as NAVCAN. This suggests that improvements should be made to the federal access to information system to ensure that more entities that perform government-like functions are accountable under the Act.’

**Recommendation No. 6**

Amend Sec. 3 of the Act to state that the law’s coverage extends to any institution that is established by the Legislature or by any public agency - that is publicly funded; publicly controlled; wholly owned; performs a public function and/or is vested with public powers; or has a majority of its board members appointed by it. This includes public foundations and all crown corporations and all their subsidiaries.

Both options - definitions and entity listings in a schedule - could be implemented; and it would be noted that covered bodies are those “included but not limited to” those listed in schedules.

**Public - Private Contracts**

Although the right to access records of quasi-governmental bodies can be prescribed in principle, it must be admitted that it is not always clear how such rights would operate day to day; much of this would be worked out in regulations and practice. For the applicant, the first and often most important challenge is that of obtaining the partnership contract itself through an FOI request.

Prof. Alasdair Roberts notes that the contract is “unambiguously a government record” and not a private one, yet both parties often work to keep the contracts secret, governments to avoid scrutiny of how well the contracted process really

25 Roberts, *op. cit.*
works, and companies to shield their data from their competitors. (Indeed, in some years in Canada, businesses account for about half of FOI requestors, many of them seeking records on their rivals.)

Practices are widely varied, and evolving. Shared records are difficult enough to obtain by FOI, but when information is held by contractors alone, more often there are no rights to such records at all. Another question arises: Should it matter where the records are stored? In Canada provincial disputes have arisen over who has both the essential and legally defined “custody” or “control” over “shared” public-private records, and these factors can determine an FOI applicant’s access rights.

Governments can legislate practices but not attitudes. In Canada, many companies simply express zero tolerance for the idea of any of “their” information being released, even the amounts they are paid from taxpayer’s funds, more often from reflex than reasoned consideration. (In B.C., one company even wanted to keep private the title page of its government contract, as a “trade secret.”)

Lengthy and very expensive court actions mounted by the corporate sector for this purpose are by now familiar. From longstanding tradition, many companies have come to expect such corporate confidentiality as their right, and some FOI directors too readily defer to their objectives, although this attitude may be gradually diminishing.

Free access to such partnership contracts is essential to the public interest. I know this topic, after waging a five-year legal battle to see the 1995 UBC-Coca Cola exclusive marketing contract (while I was working at the Ubyssey student paper). The case for FOI was won when the newspaper’s lawyers demonstrated in B.C. Supreme Court that at American universities, unlike those in Canada, such contracts are freely publicized even without FOI requests, and with no demonstrable harms incurring.

In his influential ruling of 2001, the B.C. Information Commissioner wrote the contract should be released because it contained information not supplied in confidence, but only negotiated in confidence between UBC and the company. He also insisted on specific evidence for potential harms – of which none was produced - whereas his predecessor had just accepted broad assertions of harm from the company.26

26 Yet the ever intransigent UBC later refused my FOI requests to see similar UBC supply contracts with a bank, an airline, and an internet provider, until the Commissioner ordered those contracts opened also.
Moreover, various applicants have been struggling for years to obtain the B.C. government’s non-redacted contracts with IBM (see box below), with Maximus Ltd., a Virginia-based company that received $324 million to manage the province’s health records, with EDS, the government’s controversial Texas-based debt collector, and others.

In spring 2006, the B.C. government tried to pass section 9 of Bill 30 - which stated that agencies must (not may) refuse to release information, for 50 years, that is ‘jointly developed for the purposes of the project,’ amongst other new disclosure restrictions. Vocal protests compelled it to drop the plan, as they scuttled a similar bill in 2008 regarding companies’ work on the climate change issue.  

In 2008 the government tried it again in two bills relating to corporations the government would have dealings with respecting its initiatives on greenhouse gas emissions and carbon credit trading – but backed down under protests.

Some of the origins of such proposals are evident. In 2004 the B.C. bureaucracy complained to the provincial legislative FOI law review committee that the Commissioner's rulings which had opened up public-private business contracts “undermined fair and open procurement processes that will result in the best deal for the province.” The Commissioner’s aide countered, “This serious allegation is a calculated appeal to politics, and we note that no particulars or evidence have been provided to support this sweeping claim.”

One major problem is that some officials in crown corporations have been appointed due to their business expertise in their private sector work, but unfortunately some cannot accept nor even understand that the same degree of confidentiality should not apply in the governmental sector, a cultural disconnect that often leads to bitter conflict with the media and other external information seekers.

27 My article on this topic is posted at:  
http://thetyee.ca/Views/2006/05/09/LibsPoisedSlamLidSecrecy/

28 http://thetyee.ca/Mediacheck/2007/05/08/FOI/ A pattern is evident: whenever I make an assertion about an FOI matter, I try to support it with real life examples; it appears the B.C. bureaucracy does not, but merely presumes that its claims will be taken on faith.
B.C. GOVERNMENT – IBM CONTRACT STILL SECRET

Fresh from a victory in BC Supreme Court that ordered most of the $300 million IBM Workplace Support Services contract with the province released over the objections of IBM and the B.C. government, the Freedom of Information and Privacy Assoc. (FIPA) held a birthday party to mark the five years since filing the B.C. FOIPP Act request for the contract.

The cake-cutting media event at the People’s Law School in Vancouver on December 16, 2009, was co-sponsored by FIPA, the BC Civil Liberties Association, and the Canadian Taxpayers Federation.

In a decision handed down on December 10, 2009, Justice Christopher Grauer of the BC Supreme Court ruled that the government has to release parts of the contract with IBM that are not subject to claims of exceptions under the FOI law.

FIPA had filed an FOI request for the Workplace Support Services contract with IBM in December 2004. Both the government and IBM insisted that non-controversial parts of the contract could not be released until every objection to release was dealt with. Information and Privacy Commissioner David Loukidelis disagreed, and ordered the release of the non-controversial records in July 2008.

The government then went to BC Supreme Court for judicial review of that decision, and was resoundingly refused. Justice Grauer said the Commissioner’s decision was not only reasonable, it was also correct. As he so well put it: "All else being equal, the interpretation that would allow for prompt access to uncontroversial information should be preferred over the interpretation that would delay all access to the very end of the process."

"Even if the government sees reason and decides not to appeal Justice Grauer’s decision, this request still has a long way to go before it’s completed," said FIPA director Vincent Gogolek. "I fully expect that we will be back next year for a sixth birthday party for this FOI request unless there is a dramatic change in attitude by the government and IBM."

(The B.C. FOIPP Act could be amended to prevent the government refusing disclosure of such separated “uncontroversial” material in such cases.)
**Posting P3 Contracts Online**

The B.C. government is proud that it has post several P3 contracts at its Partnerships BC website ([http://www.partnershipsbc.ca/](http://www.partnershipsbc.ca/)). This is indeed a good start. Yet there are at least three serious problems with the process.

(1) The process is voluntary and erratic, and could be stopped any day, thus it needs to be made mandatory and systematic in an amended B.C. *FOIPP Act*.

(2) Too many sections are deleted with the claims of Sec. 17 and 21 potential commercial harms, yet are released only upon appeal to the Commissioner. If they can be later released upon appeal without harms, then they might as well be released proactively in the first place (and save the public expense and labour of the OIPC appeal process).

(3) There are several aggressive and troubling legal “conditions” posted as a guardhouse upon entry to the websites (similar to the discredited “crown copyright” warnings), conditions that should be prohibited in the *Act*.

Below are contracts from a page from the Partnerships BC website (of Jan. 16, 2008)

*Click on the name of the project below for more detailed information.*

**PROJECTS IN PROCUREMENT**

- Port Mann/Highway 1 Project
- Royal Jubilee Hospital Patient Care Centre Project
- Kelowna and Vernon Hospitals Project
- Surrey Outpatient Facility

**PROJECTS UNDER CONSTRUCTION OR OPERATIONAL**

- Abbotsford Regional Hospital and Cancer Centre (View a one-page project case study)
- Gordon and Leslie Diamond Health Care Centre - Operational (View a one-page project case study)
- Britannia Mine Water Treatment Plant - Operational (View a one-page project case study)
- Canada Line (View a one-page project case study)
- Golden Ears Bridge (View a one-page project case study)
- Kicking Horse Canyon (Phase 2) (View a one-page project case study)
• Charles Jago Northern Sport Centre - Operational (View a one-page project case study)
• Pitt River Bridge & Mary Hill Interchange Project (View a one-page case study)
• Sea-to-Sky Highway Improvement Project (View a one-page project case study)
• Sierra Yoyo Desan Road - Operational (View a one-page project case study)
• Vancouver Coastal Health (VCH) Primary Health Care Access Centres
• Vancouver Island Health Authority (VIHA) Residential Care & Assisted Living Capacity Initiative (View a one-page project case study)
• William R. Bennett Bridge (View a one-page project case study)

The listings are highly erratic, with some posting only summaries, some contracts, while some page shave legal conditions for readership and some not. More consistency is required here.

Laudably, several contracts are posted online in full, for instance, the Vancouver Coastal Health (VCH) Primary Health Care Access Centres, Strategic Partnering Agreement, and Agreement to Lease.

Yet consider the example of Abbotsford Regional Hospital and Cancer Centre Project. This was planned as a state-of-the-art 300-bed replacement for the aging MSA acute care hospital in Abbotsford, and will provide enhanced and specialized health services to more than 150,000 people in the greater Abbotsford area, and up to 330,000 in the Fraser Valley region. The facility will be three times the size of the current MSA hospital, measuring approximately 60,000 square metres. The hospital will integrate a new cancer treatment centre.


The full 217 page contract of the Abbotsford is online, stamped “Confidential” (why Confidential?). But portions of some pages were deleted (pages 49, 109, 110, 113, 118, 122, and in Schedule 1 - page 10, 21, 26, 27), on potential “commercial harms” grounds.
To gain access to these deleted portions, I had to appeal to the Information Commissioner. After many months of negotiations (thankfully not needing a full inquiry), the government gave up these portions to me.

But before taxpayers are permitted to read some of these contracts, courtesy of the “most open government in Canada,” they must first endure this most arrogant piece of online legal bullying:

TO ACCESS THIS DOCUMENT, YOU MUST AGREE TO THE FOLLOWING:

The document you selected is proprietary and subject to copyright and other restrictions on its use and reproduction. To view, you must acknowledge that you have read, understand and agree to the following terms and conditions:

1. The document(s) is the property of Abbotsford Hospital and Cancer Centre Inc (“AHCC”).

2. Copyright and all intellectual property, moral and other rights are expressly reserved to AHCC. Other than being permitted to view this document on screen and to print out one copy for personal use only, no permission, express or implied, is granted to reproduce or distribute this document in whole or in part, in any manner or form whatsoever. No licence of any kind is hereby granted to you.

3. This document may only be viewed on screen or printed for personal use and shall not be downloaded. You may print out no more than one copy of this document, which must remain within your possession and control at all times. You may not make any changes or modifications to the document.

4. You may reproduce no part of this document in any form, including by scanning some or all parts of the printed document onto magnetic, digital or other media.

5. No commercial use by you of any part of this document is permitted in any way, including particularly for use on any other project. [. . . . ]

9. Prior to allowing anyone else access to your printout of the document you will obtain their agreement to all of the above terms and conditions.
10. By clicking below and gaining access to the document, you confirm that you are an adult of at least 18 years of age, and further confirm that you agree to all of the above terms and conditions.

Under these terms, an adult taxpayer (17-year-old student readers not allowed) could be sued as a lawbreaker for downloading the contract to his/her own harddrive, printing out a second copy, or leaving his/her own single copy at a cousin’s house, not compelling his reader-friend to follow the same conditions, and so on and on. Such prohibitions are almost unbelievable in a democracy.

**Recommendation No. 7**

Amend the Act so that government and public agencies must post all P3 partnership and large supply contracts on their websites within one week of their finalization, subject only to *FOIPP Act* exemptions (which may be appealed to the OIPC).

Amend the Act to prohibit *any* restrictions on readership of these records. Copying or redistribution rights should conform to the terms of the “Crown copyright” Recommendation No. 10 in this report.

I also endorse Recommendation No. 4 of the 2004 legislative review: “Amend section 3 to clarify that records, including personal information, created by or in the custody of a service provider under contract to a public body are under the control of the public body for which the contractor is providing services.”

Regarding the addition of entities, Section 76.1(1) permits but does not prescribe:

76.1(1) The minister responsible for this Act may, by regulation, amend Schedule 2 to do one or more of the following:

(a) add to it any agency, board, commission, corporation, office or other body

(i) of which any member is appointed by the Lieutenant Governor in Council or a minister,

(ii) of which a controlling interest in the share capital is owned by the government of British Columbia or any of its agencies, or
(iii) that performs functions under an enactment; [. . . . ]

Recommendation No. 8

If recommendation No. 6 is not followed, there is an interim measure: To ensure better FOIPP Act coverage, regarding the addition of entities, amend Section 76.1(1), “The minister responsible for this Act may, by regulation, amend Schedule 2 to do one or more of the following […]” by changing “may” to “must.”

Summary

This subject ideally requires an entire report, because the dilemma of determining which entities or their records should be covered by freedom of information laws is the most complex, amorphous and perplexing topic in FOI theory and practice. In Canada, this problem was, and still is, so serious that it was the only one of its eight Access to Information Act reform election promises that the incoming Conservative administration partially kept upon assuming office in 2006.

If a quasi-governmental entity is excluded from the Act’s scope, one may not apply for its records at all, nor obtain them in full or censored forms, at any price, after any time delay, nor appeal the situation with any prospect of success to any appellate body. The other chapters discuss the statutory rules of the FOI “game” (which indeed it is), but in this case those rules are irrelevant, for these entities simply stand outside the ballpark and are not part of the game at all.

The process of government restructuring is underway, says Professor Alasdair Roberts, who has written most extensively and perceptively on this topic:

When it is done, the public sector will look radically different than it did 20 or 30 years ago. Indeed, it may be difficult to speak intelligently about a ‘public sector’ at all …. This process of restructuring has already posed a substantial threat to existing disclosure laws, and this threat will grow in coming years.29

When U.S. President Bill Clinton announced in 1996 that “the era of big government is over,” the trend towards privatization, reduced or self-regulation, stymied in their FOI requests to view private-public contracts.

29 Alasdair Roberts, op.cit. Chapter 7, The Corporate Veil, is the most interesting for journalists stymied in their FOI requests to view private-public contracts.
and non-profit entities performing governmental tasks had been growing for two decades. Policymakers still steer the ship of state but care less about who “rows,” that is, who delivers the services; the British term this policy “the third way”; Roberts calls it “structural pluralism.”

When writing on the draft FOI bill of Nepal, the organization Article 19 observed that:

> Modern governments privatise a wide range of services, even if they are clearly public in nature. Such privatisation should not, of itself, take the activity outside of the scope of a right to information law. Furthermore, if it did, this would be an additional, and clearly illegitimate, motivation for governments to privatise.\(^3\)\(^0\)

Some claim that access to government records is a basic “human right,” but not all agree (such as former Canadian Privacy Commissioner George Radwanski, who called FOI a mere “administrative right”). For Roberts, FOI is a “derivative right,” that is, a necessary tool with which to protect human rights. The same principle could be applied, say, to the internal safety audits of B.C. Ferries, which ferry passengers have a basic human right to access for their own and families’ wellbeing.

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**Section 4 - Severability**

For years, in response to many of my (and others’) FOI requests, large sections have been sent to me whited out, with a little "o/s" handwritten upon the blanks. This is meant to denote "out of scope."

In one case, a ministry denied me access to some parts of a minister’s daytimer book, with an out of scope claim. The FOIPP director later explained to me that the deleted sections included private meetings with constituents, and because the minister was here acting as an MLA instead of a minister, such meetings stood outside of the scope of the Act (i.e., MLAs’ records are not covered by the law).

I agree that such deletions might indeed be somehow justifiable, but if they are, the agency should do so only by invoking a real exemption (such as Sec. 22, privacy, in this case), not a new, self-invented “out of scope” restriction. The practice appears to violate the principle of Sec. 4:

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(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

It cannot be calculated how much vital public information has been concealed over the years in this way. We do not know just who in government (e.g., the FOI director, deputy minister) is making these erratic and unregulated "o/s" decisions, but this practice is of highly dubious legality, for withholding records as "out of scope" is clearly not an exemption in the B.C. FOIPP Act.

Of course, being unable to see the "o/s" parts, the applicant has no way of knowing if the deleted portions were truly "out of scope" or not, unless he/she appeals to the commissioner, which few do. The B.C. FOIPP Act should define the term “out-of-scope” and its permitted usage. Alternatively, state that government and agencies may not invoke the concept of “out of scope” (or any equivalent term) to withhold parts of records, and make it clear that a record must be released entirely, barring some legitimate existing FOI exemption.

Recommendation No. 9

Insert a section in the B.C. FOIPP Act to define the term “out-of-scope” and its permitted usage. Alternatively, state that government and agencies may not invoke the rationale of “out of scope” (or any equivalent term) to withhold any part of any record requested under the FOIPP Act. Records or parts of records may only be withheld if they fall under an exemption in the FOIPP Act, not if the government asserts that they fall outside the Act’s scope.

Section 6 – Duty to Assist Applicants vs. “Crown Copyright”

Governmental fertility in creating new methods of undermining an FOI law’s intent is impressive. For years, several ministries mailed me warnings of "Crown Copyright" accompanying the records they sent in reply to my B.C. FOI requests. They warned me that the records were state property, and I could not legally reproduce them without their express permission, and also by paying a copyright fee. I believed such implicit threats of being sued, which could be used for political censorship, violated the principle of Sec. 6:
6 (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

The outrageous concept was scathingly derided by former federal information commissioner John Grace in his 1991-92 annual report, who called Crown copyright "something ironic, if not repugnant, and perhaps even unconstitutional." He added "the whole quaint notion has been all but dormant, ignored under the reasonable assumption that what the government produces for the public with public funds is in the public domain. . . Thus does common sense make mockery of an unenforceable concept. In the context of Crown copyright, who is the 'Crown' if not the people?"

Such copyright threats might violate the Canadian Charter of Rights and Freedoms’ Section 1 guarantee of free speech. As well, the Australian Copyright Law Review Committee report of 2005 stated: "There is great danger in the possibility of government using copyright as an instrument of censorship."

This practice, which began in 2000, appeared to be a made-in-B.C. innovation, for the federal information commissioner's office in Ottawa said it had never heard of such letters being sent out under Canada's Access to Information Act. Nor have any of the provincial commissioners under their provincial access laws. Indeed, Section 105 of the U.S. Copyright Act says that copyright protection is not available for any work of the United States government.

So I complained to the B.C. Information and Privacy Commissioner, and awaited a ruling. The Attorney General’s ministry initially challenged his authority to investigate the matter, because it claimed that the dispute was only a federal copyright subject and not a provincial FOI issue at all. The matter was eventually resolved, as the Commissioner wrote to me in a letter of June 1, 2009:

As part of our investigation of your complaint, I had discussions with the ministry responsible for intellectual property within government, the Ministry of Labour and Citizens’ Services. Government has decided to cease including copyright notices in access to information disclosures and has confirmed that, effective immediately and government-wide, copyright notices will no longer be issued in conjunction with disclosure of records in response to access requests under FIPPA.

The Province has advised us, for clarity, that the fact that it will no longer include copyright notices in FIPPA disclosure packages does not change the fact that it “reserves the right to assert and/or enforce copyright in its
materials in appropriate cases, including situations where such material is subject to an existing legal obligation of the Province (i.e., a licence) or someone makes copies of something purporting to be the official version of Provincial material, but which is out of date, and distribute those copies to others, thus creating the potential for inconvenience, or worse, to third party recipients of that material.³¹

The B.C. FOIPP Act should be amended to make it explicitly clear that the government cannot invoke “Crown copyright” on records released in reply to FOI requests, and the Commissioner be empowered to investigate and rule on these questions. While I am pleased the practice has been stopped for now, there is no guarantee that it could not arise again in future, and therefore the FOI applicant’s right to be free from “Crown copyright” harassment needs to be formally enshrined in law.

Recommendation No. 10

Add a clause to the B.C. FOIPP Act to state that government and agencies may not assert “crown copyright” regarding records released in response to FOIPP Act requests.

The only exceptions to this clause would be very limited and must be detailed in the FOIPP Act (not regulations), and could include situations where “such material is subject to an existing legal obligation of the Province, i.e., a licence, or someone makes copies of something purporting to be the official version of Provincial material, but which is out of date, and distribute those copies to others, thus creating the potential for inconvenience, or worse, to third party recipients of that material.”

Applicants would retain the right to appeal a wrongful or overly broad assertion of “crown copyright” in regards to FOIPP Act responses to the Commissioner, who could prohibit the government from asserting copyright claims in cases where such assertions do not conform to this relevant section of the Act.

³¹ The letter is posted at my website - http://www3.telus.net/index100/crownc - along with a link to an article I wrote on this topic for the Vancouver Sun.
I also endorse this advice of the 2004 legislative review:

Recommendation No. 1 – Change the administrative policy and practice regarding the sensitivity ratings process used in the corporate records tracking system to ensure that complexity becomes the sole criterion for classifying formal requests for public records, and that the new complexity ratings process treats all requesters equally and impartially and protects their personal identity.

**Section 7- Response Times**

If “justice delayed is justice denied,” than news delayed is news denied. By deferring the release of records through the FOI system long enough, officials calculate - often correctly, sadly enough - that editors will spurn them as “old news” and therefore not worth publishing. This has surely led over the years to the loss of countless potential news articles in the public interest that were essentially “spiked” - a news industry term - by the state.

No FOI applicant without an uncommon degree of patience and endurance can prevail, and the legal odds are always stacked against him or her. For example, the applicant has just 30 working days to appeal a B.C. *FOIPP Act* refusal, and if that deadline is missed there is no second chance. By contrast government routinely breaks its own deadlines with impunity; there are no penalties for delays, as there needs to be, which stands at variance with other nations’ FOI laws (see below).\(^3\)

Under the B.C. *FOIPP Act*, agencies must respond the requests within 30 days, a deadline which can be extended by itself for another 30 days, which is then often delayed further. FOI laws of most other nations take a very different approach - a response time of *two weeks is the global average*. I cannot say exactly how well such laws are followed in practice, but the public and media in other states would likely not tolerate the delays of many months that polite British Columbians have passively come to accept as inevitable.

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\(^3\) There are surely other options. ‘An interesting phenomenon to observe in countries where access to information legislation is firmly established, such as the Netherlands or Sweden, is that government officials act in the spirit as well as the letter of the law. In practice, the formalities for requests for information are often waived and the information provided without delay.’ - *Public Access to Environmental Information*, by Ralph E. Hallo, Netherlands Society for Nature and Environment. Report for the European Environment Agency (EEA), 1997. [http://reports.eea.europa.eu/92-9167-020-0/en/page001.html](http://reports.eea.europa.eu/92-9167-020-0/en/page001.html)
TWO JURISDICTIONS – NIGHT AND DAY

The starkest contrast in response times can be found by those who make information requests using both the B.C. and Washington state FOI laws.

The American public and media would not tolerate the service found in the B.C. FOI system. I have had records emailed to me by the American government, in full, within three days (and one time overnight), that would likely have taken months under our law and have been littered with deletions.

Journalist Sean Holman reported the same results in his work, obtaining much fuller and faster replies from the Washington state FOI system than the B.C. one, regarding records of lobbyist Patrick Kinsella’s activities.

Similarly, in April 2009, FIPA filed two identical FOI requests on the same day with the offices of Washington Governor Christine Gregoire and B.C. Premier Gordon Campbell got very different results. FIPA asked for information about intergovernmental meetings related to the new RFID-equipped drivers’ licences. Governor Gregoire’s office responded in full in less than a month, with copying costs of US $5.30. The Office of the Premier did not provide an initial response until after the Washington office had sent all the requested documents, but did send a bill for C. $620.

While on the subject of cross-border comparisons, consider the B.C. – American partnership for a regional system to trade greenhouse gas emissions. The Americans published responses to the proposal for emissions trading. Some 90 submissions from corporations, non-profits, interest groups and individuals can be read online at the Western Governors Association website.

By contrast, the B.C cabinet committee for climate action fielded submissions from more than 170 "interested parties" – all were strictly confidential; even a list of who addressed cabinet was not released. New Mexico, California and Washington State have posted vast amounts of material on climate change discussions online – all types of records withheld in B.C. 33

On such grounds in fact, Canadians often use American FOI laws to find records on Canadian affairs that they cannot obtain here. I have heard visiting American journalists deride Canada’s FOI laws as “pathetic” in comparison to their own, and the process of trying to obtain information from Canada on cross-border issues as “shockingly bureaucratic,” and I was unable to contradict them.

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The B.C. Liberals stated in their 2009 election platform that: “Since 2001, we have dramatically improved response times, cutting the wait by more than 50 per cent from an average of 71 business days in 2001 to just 34 business days today.” They did not mention here that these reply rates are much faster for personal records requests than for general information requests (especially political sensitive ones).

Some applicants might inaccurately attribute delays to overworked FOI staff, who generally try their best, but more often the problem originates elsewhere, such as with the “program area” in which the records must be found, which can be located in another office or city. The final and worst bottleneck is usually the official - sometimes the deputy minister, as the “head of the public body” - who must “sign off” on the records before they can be sent out, whenever he/she can find the time to do so. “We're too busy” is the general excuse.

B.C. officials also claim they need to consult with multiple departments before releasing material, which further extends the process, and there can be disputes over who “controls” a document. The government can then improperly delay the FOI reply for weeks longer as its public relations branch toils on a pre-release “issue management” (that is, a political spin control) plan. Public relations staff need not be prohibited from being informed about FOI requests, per se - in reality this could likely not be stopped anyways - but only if this process does not cause delays.

A positive idea: As Prof. Alasdair Roberts inquired, “Customers can now track the progress of their UPS parcel deliveries online, so why not their FOI requests too?” Perhaps this could be done by allowing applicants (with their own password) access to only the small part of the CRTS governmental FOI tracking system that deals with the processing of their own request.

**Global Commentary**

- **Article 19, Model Freedom of Information Law, 2001:**

‘9. (1) Subject to sub-section (3), a public or private body must respond to a request for information pursuant to section 4 as soon as is reasonably possible and in any event within 20 working days of receipt of the request.


(2) Where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, a response must be provided within 48 hours.

(3) A public or private body may, by notice in writing within the initial 20 day period, extend the period in sub-section (1) to the extent strictly necessary, and in any case to not more than 40 working days, where the request is for a large number of records or requires a search through a large number of records, and where compliance within 20 working days would unreasonably interfere with the activities of the body.

(4) Failure to comply with sub-section (1) is deemed to be a refusal of the request.’

• Organization for Security and Co-operation in Europe (OSCE), Access to information recommendations, 2007:

‘Public bodies should be required in law to respond promptly to all requests for information. Requests for information that are time-sensitive or relate to an imminent threat to health or safety should be responded to immediately.’

Other nations on response times

At least 60 other FOI jurisdictions in the world mandate shorter timelines than in British Coumbia. For the journalist awaiting FOI responses seemingly forever, receiving records in legislated deadlines of seven or 10 days would be a utopian dream.36

In Norway, internal guidelines issued by the Ministry of Justice say that requests should be responded to in three days. The Norwegian Ombudsman in 2000 ruled, “It should be possible to decide most disclosure requests the same day or at least in the course of one to three working days, provided that no special, practical difficulties were involved.”37 Why should such a time in theory be less possible in

36 For instance, when regarding the draft FOI bill of Kyrgyzstan with its deadline of 30 days to respond to a request, which can be extended for another 30 days (the same limit in most Canadian FOI laws), the organization Article 19 noted that “this time frame is far longer than international standards.” - Comments on the Kyrgyz Republic Draft Law on the Freedom and Guarantees of Access to Information, by David Banisar, director, Freedom of Information Project of Privacy International, 2005 http://www.article19.org/pdfs/analysis/kyrgyzstan-foi-06.pdf

37 http://freedominfo.org/countries/norway.htm
many other nations for an initial FOI determination (although not necessarily a full reply)?

FOI delays have been a problem in the United States as well, but the issue has been tackled. There, the Senate passed Bill S.849, the Open Government Act of 2007, which puts some teeth into the statutory mandate that an agency must respond to a FOIA request within 20 days; in the U.S. there had previously been no statutory penalty for agency delay in responding to a request, and B.C. still lacks one.

Because the wording in some foreign FOI statutes is ambiguous (e.g., on the distinction between a request being “answered” or “processed”), I just cite them below as printed from the best available translations:

• FOI requests must be ‘processed’ in seven days in Iceland, 10 days in Columbia

• Requests must be ‘complied with’ in five days in Estonia; and ‘acted on’ in 15 days in the Philippines, and 20 days in Lithuania.

• Information must be ‘provided’ in three days in the draft FOI bills of Guatemala and Paraguay\(^{38}\); five days in Armenia; 10 days in Chile’s draft FOI bill; 14 days in Belize and Bulgaria; 20 days in Antigua; 30 days in Albania, Belgium and Germany; 60 days in Austria.

• Requests must be ‘decided’ in eight days in Montenegro, and 15 days in South Korea and the Guangzhou municipality of China.

The public body must ‘answer’ or ‘respond to’ or ‘reply to’ a request:

• seven days in Peru and the draft FOI bill of Nigeria

• 10 days in Argentina, Denmark, Ecuador, Macedonia, Portugal, Romania, Slovakia, Ukraine, and the draft FOI bill of Indonesia

• 14 days in Finland, the Netherlands, Poland, Mongolia, and the draft FOI bills of Sri Lanka and St. Kitts and Nevis

• 15 days in Bosnia and Herzegovina, China, Shanghai municipality, Croatia, Czech Republic, Hungary, Kosovo, Latvia, Moldova, Serbia, Turkey, and the draft FOI bills of Kenya and Palestine
• 20 days in Antigua, Mexico, New Zealand, Slovenia, Switzerland, Tajikistan, the United Kingdom, the United States, and the draft FOI bills of Bolivia, the Cook Islands and Sierra Leone

• 21 days in Pakistan, Uganda, and the draft FOI bills of Nepal and Tanzania

In most of these FOI laws, short extensions are allowed for processing complex requests.

There are other time response features in FOI laws, several of which could be considered for a reformed B.C. FOIPP Act, perhaps in modified forms:

• In at least nine countries, the public body must provide information within 48 hours ‘to safeguard the life or liberty of a person’ (or some variant of this phrase) - in the FOI laws of Antigua, India, Montenegro and Serbia; and the draft FOI bills of Guatemala, Kenya, Maldives, Mongolia, and Sierra Leone.

To that term, the Mongolian bill in Sec. 14.3 adds the protection of ‘the legitimate rights and interests of a person.’ In Nepal, there is an obligation on public bodies to provide information relating to the defence of human life within 24 hours.

• In Belgium, the law also includes a right to have the document explained.

• In the Netherlands, recommendations of advisory committees must be made public within four weeks.

• In Romania, “The information of public interest requested verbally by the mass media shall be communicated, as a rule, immediately, or in maximum 24 hours’ time.”

• In Mexico, agencies must respond to requests in 20 working days, which may be extended for another 20. Then, in Art. 53:

   Lack of response to a request for access within the time limit indicated in Art. 44 will be understood as an acceptance of the request, and the agency or entity is still required to provide access to the information within a time period no greater than ten working days, covering all costs generated by the reproduction of the responsive material, except when the Institute determines that the documents in question are classified or confidential.

• In Mozambique’s draft FOI bill, Sec. 8 prescribes that requests shall be fulfilled within 10 days. If not, the applicant may complain to the ombudsman, who can
choose to order the agency to grant the record within another 10 days. Then, if that
does not succeed, in Sec. 8(4), “Failure to satisfy the request within the deadline
set in the previous paragraph shall constitute the crime of qualified disobedience,
and the Ombudsman shall institute the relevant criminal proceedings.”

**Canadian commentary**

• *Open and Shut*, report by MPs’ committee on Enhancing the Right to Know, 1987:

‘6.12. The Committee recommends that the initial response period available to
government institutions be reduced from 30 days to 20 days, with a maximum
extension period of 40 days, unless the Information Commissioner grants a
certificate as to the reasonableness of a further extension. The onus for justifying
such extensions shall be on the government institution.’

• Information Commissioner John Grace, *Toward a Better Law: Ten Years
and Counting*, 1994:

‘It is as if government has decided that the right to a timely response is not an
important right and can be ignored with impunity. . . . One remedy is to ensure that
when a department's response falls into deemed refusal (i.e., failure to meet lawful
deadlines) there are real consequences. One consequence might be loss of the right
to collect fees (including application fees and any search, preparation, and
photocopying charges). . . . There is no reason why requesters should pay anything
for poor service.

[FIPA and the first B.C. legislative FOIPP review committee of 1999, in its
Recommendation #3, agree with this basic point regarding a waiver of fees upon
response delays.]

‘Perhaps a more mind-focusing sanction would be to prohibit government from
relying upon the Act's exemption provisions to refuse access if the department is
in a deemed refusal situation.’

• Information Commissioner John Reid, *Blueprint for Reform*, 2001:

‘It is recommended, therefore, that section 72 be amended to require government
institutions to report each year the percentage of access requests received which
were in “deemed refusal” at the time of the response and to provide an explanation
of the reasons for any substandard performance.’
Canadian provinces

A reformed B.C. FOIPP Act would do very well to follow the FOI law of Quebec, where the public body has 20 days for an initial reply, with the right to extend for 10 days more. Then, in the Quebec law’s Sec. 52, “On failure to give effect to a request for access within the applicable time limit, the person in charge is deemed to have denied access to the document.”

In November 2006 the B.C. information and privacy commissioner created a superb, creative new “consent order” and “expedited inquiry” process to curtail delays, which works effectively today, and this process should be enshrined in the B.C. FOIPP Act. (In the new process, both applicant and agency voluntarily sign a binding “consent order,” and if the latter breaches the time deadline, that is a serious “deemed refusal.” I have found the process has quickened replies to my requests.)

As well, two provincial FOI laws, those of Ontario and Alberta, permit so-called “standing” or “rolling requests,” which is helpful for, say, a journalist who would file quarterly requests for the minutes of closed meetings at city hall. These provisions of Alberta’s law, below, would be advisable for the B.C. FOIPP Act:

Continuing request. 9(1) The applicant may indicate in a request that the request, if granted, continues to have effect for a specified period of up to 2 years.

(2) The head of a public body granting a request that continues to have effect for a specified period must provide to the applicant (a) a schedule showing dates in the specified period on which the request will be deemed to have been received and explaining why those dates were chosen, and (b) a statement that the applicant may ask the Commissioner to review the schedule.

(3) This Act applies to a request that continues to have effect for a specified period as if a new request were made on each of the dates shown in the schedule.

One other matter: In Section 11, “Transferring a request,” the B.C. FOIPP Act was amended in 2002 so that the allowable time for a transfer was doubled to 20 days, a change which lawyer Michael Doherty called “an extraordinary

acknowledge-ment of bureaucratic delay and incompetence." The Act’s original 10 day limit to transfer requests should be restored.

One recent step might be helpful: In January 2009, the Liberals moved to centralize all incoming FOIPP requests into one ministry (Citizens Services), saying it is an attempt to address chronic complaints about delays. This move was endorsed by the Commissioner, but it remains to be seen what results it will bring.

**Recommendation No. 11**

Amend the Act to mandate an initial reply in 20 days (instead of the current 30 days), extendable for another 20 – the standard in the FOI laws of Quebec, New Zealand, the United Kingdom and the United States.

**Recommendation No. 12**


**Recommendation No. 13**

Amend the Act to mandate that when a department's response falls into deemed refusal (i.e., failure to meet lawful deadlines), it loses the right to collect fees (including application fees and any search, preparation, and photocopying charges).

**Recommendation No. 14**

Amend the Act to implement the approach in some laws (e.g. Mexico), so that if an agency is in a deemed refusal situation, it is required to gain the approval of the Commissioner before withholding information under any exemption.

**Recommendation No. 15**

Amend the law to mandate that where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, a response must be provided within 48 hours (a model found in many other FOI laws).
Recommendation No. 16

Restore the term “calendar days” – as it was initially – in place of “business days,” in regards to B.C. FOIPP Act response and appeal times.

Recommendation No. 17

Amend the Act to mandate that FOIPP performance measurements including response times will be recorded, and that these measurements shall be published online in an annual FOI report card of all public bodies.

Recommendation No. 18

Amend the Act to mandate that failures to respond would be reflected in the reduced bonuses of the “head of the public body” on FOIPP issues (such as deputy ministers in ministries).

Recommendation No. 19

To reduce delays, “sign off” authority levels and processes must be streamlined and simplified. Consider vesting such authority at the lowest reasonable level, normally with the information officer if there is one.

Recommendation No. 20

To lessen overall response times, public bodies must give records to the applicant in staged releases if he or she requests it.

Recommendation No. 21

Amend the Act to permit “continuing” or “rolling requests” on the model of Alberta’s FOI law Sec. 9.

Recommendation No. 22

In Section 11, “Transferring a request,” restore the original 10 day limit (not 20 days).
General Comments on Harms Tests and Time Limits

In the next pages, we will consider several sections of the B.C. FOIPP Act that lack injury tests yet need them:

• Sec. 12. Cabinet and local public body confidences (with a 15 year time limit)

• Sec. 13. Policy advice, recommendations or draft regulations (with a 10 year limit)

• Sec. 14. Legal advice, solicitor client privilege (with no time limit)

• Sec. 16(1)(b). Intergovernmental relations (with a 15 year time limit)

The basic purpose of including exemptions to disclosure in a freedom of information statute is to avert some sort of harm or injury. Therefore it is illogical and indefensible to simply exclude entire record topics from the statute’s coverage, because if harm could have been caused by the release of such records, they could have been withheld under the law’s exemptions anyway.

Access should be denied only when disclosure would pose a serious risk of harm or injury to a legitimate aim, with the harms explicitly described. Unfortunately, some FOI laws include exemptions that are not subject to harm tests, which are often referred to as “class exemptions.”

Sometimes this occurred because parliamentarians who passed the law did not consider the harms test issue thoroughly enough, or perhaps regarded the supposed harms occurring from the release from certain record types as being too self-evident to bother describing.

Some who drafted the laws may also have lacked faith in the ability of FOI officials and appellate bodies as “non-specialists” to judge the potential for harms in a certain field of activity accurately enough (such as for national security), and they so wished to create an extra wall of protection around these record types.

An FOI statute should define potential harms with as much clarity and precision as possible, although appellate bodies would help shape a definition in their rulings. As we shall see, the FOI laws of some nations mandate that the potential harms be ‘serious’ or ‘grave,’ (as distinct from minor or remote).

In a statute, of course, every word can count and such stricter definitions are needed in a reformed B.C. FOIPP Act. There would ideally be a “reasonable” possibility of harms, based on a balance of probabilities, and real evidence for
injury produced by public bodies and third parties, not mere assertions or speculations. (Have we not enough real concerns to deal with today without conjuring up imaginary ones?)

Article 19 notes that the international FOI standard allows for refusal only if disclosure “would or would be likely to” cause “substantial harm” to a protected interest, adding that “this is a higher standard than causing prejudice to an interest, since ‘prejudice’ may have a much wider interpretation, contrary to the requirement that exceptions be as narrow as possible.”

An important related concept, which merits a chapter itself, is that of time limits for FOI exemptions; this is itself a sort of harms test, because the potential for harm generally diminishes with the passage of time. This is true even for older defense and intelligence records - as witness their recent massive declassification in the United States and elsewhere (which can provide startling reassessments of history); and yet in the B.C. FOIPP Act, some kinds of records can be sealed forever.

The broadly sweeping Sec. 12 and 13, for cabinet records and policy advice, were presumably added to prevent some sorts of harm. Our problem is that these (supposed) harms as they stand in our FOI law are implicit and undefined, whereas they need to be made explicit and detailed (and in terms understandable to the general public beyond FOI experts); only in this way can we separate the cabinet and policy records whose release might cause such harms and those that would likely not, and release the latter. I believe this was the intent of the legislature in 1992 when it passed the Act.

In a response to a FIPA questionnaire on this topic to party leaders in May 2009, the Liberal party stated: “Sections 12 and 13 are used in strict accordance with the Act and the rulings of the Commissioner, and in consultation with Ministry FOI officers. Government will continue to be guided by that framework.” This claim is incomprehensible, since (as is shown throughout this report), the government at every level grossly misapplies those two sections, and fights to overturn the Commissioner’s rulings on those sections in court.

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Global Commentary


‘Principle 4. Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests. All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test.

‘The three-part test: (1) the information must relate to a legitimate aim listed in the law; (2) disclosure must threaten to cause substantial harm to that aim; and (3) the harm to the aim must be greater than the public interest in having the information’

• Commonwealth Parliamentary Association, *Recommendations for Transparent Governance*, 2004:

‘(6.2) Exceptions should apply only where there is a risk of substantial harm to the protected interest, and where that harm is greater than the overall public interest in having access to the information.’

Other nations

On the matter of time limits for all exemptions, the FOI laws of Croatia (Sec. 3) and the Czech Republic have interesting examples. In the latter statute, Sec. 12: “The right to refuse information only lasts for the period, in which the reason for refusal lasts. In justified cases the subject will verify if reason for refusal still lasts.”

Similarly in the FOI law of Antigua, Sec. 34. (1), “The provisions of sections 27 to 32 apply only to the extent that the harm they seek to protect against would, or would be likely to, occur at or after the time at which the request is considered.” (Those sections 27 to 32 deal with legal privilege, commercial records, law enforcement, defense and security, and policy creation.)

In the Mexican FOI statute, all information except the personal may only remain classified for 12 years, and in the law of Georgia, all public information created before 1990 is open.  

42 [http://www.freedominfo.org/countries/georgia.htm](http://www.freedominfo.org/countries/georgia.htm)
Overall, the best draft FOI bill is Kenya’s, in which all exemptions are discretionary, with harms tests and time limits – a combination unprecedented for a Commonwealth nation, and worth considering for the B.C. FOIPP Act.

Of course once harms tests are added, they need to be followed in practice. Unfortunately, many B.C. agencies seem to disregard the government's written policy on disclosure: “In every case the public body must be able to provide facts to support a claim that it is reasonable to expect harm.”

Section 12 - Cabinet Records

Probably as a consequence of the power it wields, the documents of a cabinet or a governing council are often the most important, the most controversial, the most sensitive, and the most sought after type of records in any freedom of information system. For centuries, cabinet secrecy in Commonwealth nations has imposed a unique internal dynamic, one either defended as indispensable to the public interest, or deplored as needless and self-serving.

Moreover, due to the power it wields, the cabinet realm is one area where the consequences of poor analysis and factually incorrect background papers are most perilous, and where the analytic ability of outside experts is most badly needed. (The same argument could be made about the Sec. 13 policy advice exemption.) Anyone can err, and an insular “groupthink” policy enclosure in cabinet can lead to grievous mistakes that even a small degree of external scrutiny and feedback might have averted. A good deal of existing cabinet confidentiality is indeed necessary and justifiable - but exactly how much?

Most FOI exemptions, such as for privacy and law enforcement records, can be readily justified. Yet the exemptions for policy advice and cabinet records - at least as they are currently are worded in the B.C. FOIPP Act - may be far less obvious to the general observer, and sometimes appear more self-interested than public spirited. In fact, as with all Canadian transparency laws, these two innocuous-seeming sections too often overlap and work in tandem like weeds to choke the living plant of FOI.

Cabinet and local public body confidences

12 (1) The head of a public body must refuse to disclose to an applicant information that 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.

(2) Subsection (1) does not apply to

(a) information in a record that has been in existence for 15 or more years,

(b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or

(c) 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.

[ . . . . ]

[Amendment Nov. 01/02] (5) The Lieutenant Governor in Council by regulation may designate a committee for the purposes of this section.

(6) A committee may be designated under subsection (5) only if

(a) the Lieutenant Governor in Council considers that
   (i) the deliberations of the committee relate to the deliberations of the Executive Council, and
   (ii) the committee exercises functions of the Executive Council, and

(b) at least 1/3 of the members of the committee are members of the Executive Council.

**Sec. 12 needs a harms test**

In the FOI statute of the United Kingdom, policy advice and cabinet confidences appear in sections 35 and 36. In Sec. 36, prejudice to effective conduct of public affairs, there is a harms test.

36. […] (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the
information under this Act (a) would, or would be likely to, prejudice (i)
the maintenance of the convention of the collective responsibility of
Ministers of the Crown [...]

Scotland’s FOI law expresses similar concepts on cabinet solidarity as the
Canadian rationale, and yet unlike Sec. 12 of the B.C. *FOIPP Act*, it contains a
harm test, and Sec 30 (c) has a generous escape clause.

30. Prejudice to effective conduct of public affairs. Information is exempt
information if its disclosure under this Act

(a) would, or would be likely to, prejudice substantially the maintenance of
the convention of the collective responsibility of the Scottish Ministers;

(b) would, or would be likely to, inhibit substantially (i) the free and frank
provision of advice; or (ii) the free and frank exchange of views for the
purposes of deliberation; or

(c) would otherwise prejudice substantially, or be likely to prejudice
substantially, the effective conduct of public affairs.

In Australia, recommendations from David Solomon - a lawyer, journalist and
political scientist - have delivered the revolution in FOI law that Queensland
Premier Anna Bligh, asked for during her first days in office. One of Dr.
Solomon’s recommendations was to scrap the automatic exemption for cabinet
documents; instead they would be exempt only if their release would adversely
affect the principle of collective ministerial responsibility.43

• Justice Gomery report, *Restoring Accountability, 2006:*

‘At present, the Act gives the Government the discretion to withhold records if
they fall within certain categories of documents listed in the Act. The Commission
supports a different approach, whereby the first rule would be that records must be
disclosed, unless their disclosure would be injurious to some other important and
competing interest (in other words, an “injury test” applies). Similarly, the
Commission supports amendments that would substantially reduce the kinds of
records that the Government may withhold on the basis of the injury test, such as
[. . . . ]

43 The way to free up Fol. Editorial. Sydney Morning Herald (Australia), June 12, 2008
‘The section 69 category of records considered to be confidences of the Privy Council; in addition, there should be a list of records that would not be considered confidences of the Privy Council; the 20-year rule should be shortened to no more than 15 years; the definition of “discussion papers” should be considerably broadened (since the shorter four-year rule applies to such records); and the rule of nondisclosure should not apply where the decision to which the confidence relates has been made public.’

Recommendation No. 23

Add a harms test for the Sec. 12 cabinet records exemption, modeled upon the terms used in Scotland’s FOI law Sec. 30.

Subject headings are not “the substance of deliberations”

Over the years I have been filing requests for the agendas of the cabinet, its committees and related committees of the government caucus, in the belief the public has the right to know at least the headings of what topics are raised in cabinet.

Some headings were released, yet others (with no apparent pattern or consistency in the choice) came back with whiteouts, on the peculiar claim they would reveal “the substance of deliberations.” These included such headings such as "items for discussion" and "legislation review." I appealed to the OIPC.

In a landmark Order, F08-17 (http://www.oipcbc.org/orders/2008/OrderF08-17.pdf), the Commissioner’s office said that Sec. 12 had been overapplied:

The severed information does not consist of ‘descriptions’ of the issues or topics of discussion. The severed portions are, rather, a barebones series of subjects or agenda items, each item consisting of only a few words. . . . The Premier’s Office’s attempt to equate “subject of deliberations” with “substance of deliberations” is not persuasive. . . . There is no substance to them and they reveal no deliberations.

But, as Vaughn Palmer noted, the office of the premier, like the premier himself, does not respond well to challenges to its authority on this issue, and will be disputing that Order in a judicial review. The Act should be clarified to resolve this dispute.
It is crucial to recall that the government need not overly worry because even if Sec. 12 coverage is removed, topic headings could still be withheld under other sections of the Act. In fact the government did so in this case, invoking Sec. 14, 21 and 22 – and I did not object to these applications of exemptions when making my final arguments.

On this question, it is really hopeful to see that progress is possible, as the following example will attest. In 1999, I made a request to the Vancouver Police Board for the agenda and minutes of its in-camera meetings. It was denied in full, with the Sec. 12 “substance of deliberations” claim. I appealed, and in Order 00-14, the Commissioner rejected the VPB claim and ordered many of the records opened, including agenda headings.

The Board later explained that it had inherited its traditions on meetings from years past, and had simply followed them without reflection. Then, after its careful consideration of the Order, everything changed. Fewer issues were placed into closed session discussions and more into open meetings, and today the Board even proactively posts portions of all its closed meeting agendas online (http://vancouver.ca/police/policeboard/Meetings.htm)

I have never before in B.C. seen such a major reversal in attitude and practice on an FOI issue than this - one that I wish all public bodies would follow.

Some do (though expectedly not UBC): Simon Fraser University posts quite detailed “summaries” of its closed session meetings minutes online (http://www.sfu.ca/bog/summaries/2009/september.html); and full minutes of the Langara College Board closed meeting are posted online, after a “Confidentiality Lifted” motion for them is passed at the subsequent meeting. (http://www.langara.bc.ca/about-langara/collegeboard/minutes/09June25.final.confiiifted.pdf)

While I am aware that cabinet deals with topics on a higher level than those entities above, dare we hope cabinet could one day do likewise, after the right time passage? Defenders of the status quo will point to centuries of tradition to quash the very idea. Yet while precedents may be binding for legal questions, for some political traditions - such as refusing to reveal the mere topics raised in cabinet, or the decisions taken - one can wonder if there is any more valid reason to permit the past to bind the present than it is for the dead to bind the living.

It is also essential to note that in Order 08-18, para. 49, the OIPC also ordered parts of the minutes of several Government Caucus Committee meetings disclosed in reply to my request, because they would not reveal the substance of deliberations. Why, in principle, could such records - after being severed for B.C.
FOIPP Act exemptions - not be routinely released on the cabinet website? (Later in this report I advise that all cabinet minutes be proactively published 20 years after their creation, yet sooner would be even better.)

**Recommendation No. 24**

Amend Sec. 12(2) to state that the Sec. 12 exemption does not apply to agendas or topic headings, including such examples as "items for discussion" and "legislation review." Such records could still be withheld under other sections of the Act.

**Recommendation No. 25**

Consider posting the cabinet meeting topic headings on the internet - as several public bodies’ boards do, subject to an exception for emergencies.

**What is a “cabinet committee” for FOIPP purposes?**

Some background to this question is necessary. In OIPC Order 02-38, the Commissioner concluded that a Cabinet committee had to be made up of ministers (members of the Executive Council). He found that the committee in that case, the Communities and Safety Committee, was not a Cabinet committee, as it was made up of both ministers and MLAs.

In October 2002, quietly inserted into a miscellaneous statutes amendment act, was a move to amend the B.C. FOIPP Act to mandate that if any “government caucus committees” or any other committee had a single cabinet minister sitting on it, that committee could now be accorded the same FOI exemption of Sec. 12, “cabinet confidences.” The plan was believed to be prompted in reaction to Order 02-38.

This move dismayed FOI advocates, with FIPA calling it the worst attack on the B.C. FOI process ever. “This is hypocrisy at its worst,” editorialized the Vancouver Province, and B.C. FOIPP Act architect and lawyer Robert Botterall was quoted in the media: "I read it and just about fell off my chair."

After much protest, the government scaled back the plan a bit: the changes required that at least a third of cabinet committee members be members of cabinet itself, and that these committees be designated by regulation, and so the law stands today.
As a journalist, I believed the public has the right to know about the momentous changes to health and education the government has implemented, and which were raised in these committees. Since my FOI requests, a new cabinet committee, exempted from the law, was created on Climate Change, an issue that effects every living person.

This is a major problem, since the Liberal government has substituted caucus committees for many Legislature committees that traditionally have had important review and oversight roles. In my appeal at the inquiry on this dispute, I with the aid of FIPA argued:

The caucus committees are not really cabinet committees, and therefore are not covered by the exemption. Peter Hogg's text on constitutional law (and other authorities), speaking on the nature of cabinet and cabinet confidences, highlight that cabinet is made up of ministers and not ordinary MLAs.

There is another dimension to this problem. On the question of the “one-third membership” being cabinet ministers in order to qualify, this is an objective standard, and I would argue that membership must be active, not just having a third of the names on the caucus committee list being cabinet members who seldom if ever take part. Otherwise, hypothetically, half of the cabinet could be placed on a committee membership list, on paper for decorative purposes - to claim Sec. 12 coverage - but rarely or never attend a meeting. If this was done, what is the ultimate meaning or value of such a putative “membership”?  

The cabinet office also told me that parliamentary committees do not fall within the scope of the B.C. FOIPP Act; yet they should. In 2004, NDP house leader Joy MacPhail, a member of the committee reviewing the BC FOIPP Act, decried what she believed was a growing tendency for the B.C. Liberals to conduct public business behind closed doors:

The government caucus Liberal backbenchers are increasingly wanting to do their business in camera. These committees go in camera when it's not necessary. In fact, I've been completely beaten down on this issue," she said. "I'm just one opposition member in a room with nine or 10 Liberals and

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44 The Liberal party stated in its 2009 election platform: “We activated dormant Select Standing Committees and struck Government Caucus Committees ensuring all MLAs have a voice in decision-making. We fulfilled our promise to allow free votes for all MLAs on all matters not designated as confidence votes.”
they seek every opportunity to go in camera to avoid public scrutiny. That was not the intent of the legislative committees.45

Some may counter that because parliamentary committees only recommend and do not make decisions, there is little need to include them in the Act’s scope. I disagree. The in-camera minutes and private reports of parliamentary committees, and what was urged in-camera, may be extremely important, even if they only give advice; for the advice could ultimately be influential on law-making. I also believe the addition would not be confusing for MLAs – one duty is to the committee, the other to constituents; the former duty would be subject to FOI, while the latter not.

As well, the exclusion of the legislative assembly management committee is incomprehensible and indefensible, due in part to its large spending of taxpayers’ funds; in another regard it could entail a risk to public health and safety. As a newspaper story noted this year:

British Columbia's legislative buildings, one of the most important historic sites in the province and the seat of political power for government, would likely collapse into rubble during an earthquake, according to two studies. The first, in 1998, warned of weak walls with insufficient strength to withstand seismic forces. The second study, in 2006, has never been seen by the public because government labelled it confidential.

Seismologists have long said a significant earthquake is inevitable for Vancouver Island. . . . Why the provincial government has not paid for the critical seismic upgrades remains unknown. Repairs are handled by MLAs who sit on the legislative assembly management committee, but the committee doesn't discuss its decisions or release its reports. It is not subject to freedom of information laws.

A partial collapse of the legislature when it is in session could be catastrophic for the more than 500 people who work in the buildings. There was $2 million in non-structural work done in 2006 and 2007 to address falling hazards, such as loose gargoyles, that could crush bystanders.46


This committee must be covered by the law. Moreover, if these earthquake related records are in the “custody or control” of any other entity that is covered by the B.C. FOIPP Act, e.g. cabinet, this would obviously be an ideal time to apply Section 25 (public interest override on health and safety matters), both in reply to an FOI request, or better yet, to compel proactive release without FOI.

The Commissioner advised extending the Act to the Legislative Assembly. In 2001, FIPA asked the Liberal caucus: “Do you favour including the Legislature itself (eg. Clerks and MLAs' offices) in the coverage of the FOIPP Act?” The response of the caucus was an idea long overdue:

We will undertake a review of the issue whether, consistent with the principles of parliamentary privilege, the administrative operations of the Legislative Assembly can be made subject to disclosure under the FOIPP Act in order to ensure that the Legislative Assembly is accountable to taxpayers, and to thereby enhance public confidence in the institution of parliament.47

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**Recommendation No. 26**

Amend the Act to state that “government caucus committees” are not committees for the purposes of Sec. 12.

**Recommendation No. 27**

If the recommendation above is not accepted, there is a second option: Amend Sec. 12 to state that at least 2/3 of the members of any committee covered by this exemption must be members of the Executive Council (not 1/3), and the cabinet members of the committee must have attended at least 50 percent of the meetings in the calendar year in order for the committee records to qualify for Sec. 12 coverage. Include all cabinet or caucus committees dealing with climate change.

As well, state that parliamentary committees (including the legislative assembly management committee) fall within the scope of the B.C. FOIPP Act, and are excluded from the Sec. 12 exemption.

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47 Quoted in FIPA letter to Honourable Sandy Santori, Minister of Management Services, July 2, 2002
Other Section 12 recommendations

Within Canada, Nova Scotia’s FOI law is the only one in which records of cabinet deliberations “may” (not must) be withheld - an example B.C. should consider. In Manitoba, the cabinet exemption is mandatory, but contains a clause to allow cabinet to release its records if it consents. In many other nations, such as the United Kingdom, the cabinet records exemption is discretionary. So it could be in British Columbia. (It is still worth recalling that the Commissioner could order cabinet records released under Section 25, the Public Interest Override.)

Recommendation No. 28

Change Sec. 12 from a mandatory exemption to a discretionary one, whereby deliberative records may be released if cabinet consents.

In Sec. 21(1), records prepared by others, such as ministry employees, for cabinet consideration are exempted from FOI requests even if they were not actually presented to cabinet in the end. This can send a chilling tone throughout the public service. But logically how can a record reflect the “subject of deliberations” if it was never even deliberated upon by cabinet, and what possible harms to cabinet could its publication actually cause?

In Australia, political commentator Dean Jaensch pointed to the “cunning” use of the Cabinet exemption clause, whereby the Advertiser newspaper had several FOI applications refused because documents were “prepared for submission to Cabinet whether or not it has been so submitted.” This exemption is simply too broad, and at odds with the intent of the FOI law.48

Recommendation No. 29

Delete clause “or prepared for submission” from Sec. 12(1). Records can only be withheld under Sec. 12 if they were actually submitted to and considered by cabinet, not if they were “prepared” to be but never were. (They could still be withheld under other exemptions.)

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48 Public's right to know is kept in the dark, by Michael Owen. The Advertiser (Australia), July 22, 2008
As I read cabinet meeting minutes of the 1980s that I had obtained through the B.C. FOIPP Act (for under the Act they may only be seen after 15 years have passed), records of many of the discussions appeared so familiar and innocuous – even when I recalled the historical context - that I tried unsuccessfully to conceive of what actual harms could have resulted from most of these being published much sooner afterwards than 15 years.

In 2004, FIPA and the Commissioner agreed, as I do, that parts of Section 12 should be made discretionary and that the time limit for withholding records should be reduced to 10 years. (In Ottawa, cabinet minutes and other records older than 30 years are systematically released to the National Archives for the public to view; so it could be here too, to the B.C. Archives.)

**Recommendation No. 30**

Amend Section 12 to state that the cabinet records exemption cannot be applied after 10 years (as in Nova Scotia’s FOI law), instead of the current 15 year time limit.

Consider proactively releasing cabinet minutes on a government internet page 20 years after their creation (subject to FOIPP Act exemptions, other than Sec. 12), eventually moving to 10 years after their creation. (See Recommendation No. 53.)

On another matter, in the B.C. FOIPP Act, background papers to cabinet are separated out from cabinet minutes, and may be released much earlier. Yet, as two commentators on the federal ATI Act have noted,

> Unfortunately, many documents labeled ‘discussion paper’ are not cabinet discussion papers and therefore will not lose their excluded status,” and “the section excluding cabinet records can be abused if, for example, senior officials launder politically sensitive non-cabinet records through the exclusion by labeling them ‘cabinet proposal’.  

The federal government once endorsed publicity for such records, and ideally would again.

> A special rule applies to cabinet discussion papers [in Ottawa]. These date from 1977. The original intention was to provide information to the public

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about alternatives the government was considering. Some helpful discussion papers were released in the later 1970s, but since then the idea of public consultation about alternatives has fallen out of favour.  

Why not implement such public discussion on cabinet discussion papers in British Columbia?

**Recommendation No. 31**

An amendment to the B.C. *FOIPP Act* should remove all potential uncertainties in the wording around cabinet documents, making it clear that they are defined solely by their substance, not by their titles.

**Recommendation No. 32**

As FIPA advised in 2004, amend the Act so that Section 12(3), which applies to local public bodies, has parallel provisions to s. 12 (2)(c) which applies to Cabinet confidences. The lack of similar qualifying language in 12(4) allows local public bodies to withhold background materials or analysis in conditions not allowed to Cabinet, and this omission should be corrected.


‘Section 33(2) which attempts to exempt Cabinet documents should be deleted because Cabinet documents can be protected under other exemptions clauses as necessary, for example, national security or management of the national economy.

‘At the very least, all of the Cabinet exemptions need to be reviewed to ensure that they are very tightly drafted and cannot be abused. Currently, the provisions are extremely broadly drafted, with section 33(2)(b) protecting even documents simply prepared for the purpose of submission to Cabinet or which was considered by Cabinet and which is related to issues that are or have been before Cabinet.

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\(^{50}\) Mitchell and Rankin, ibid


Practically every government document could be said to be related to issues that have been before Cabinet at some time or the other!

‘It is notable that some MPs in some other jurisdictions have complained that broad Cabinet exemptions have been abused because Cabinet members simply take documents into Cabinet and then out again and claim an exemption.

‘At the very least therefore, a provision should be added that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public after the decisions have been taken and the matter is complete. Section 8(1)(i) of the Indian Right to Information Act 2005 provides a good example of such a clause.’

RecommendaOn No. 33
Add a provision to the B.C. FOIPP Act Sec. 12 to state that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public within five years after the decisions have been taken and the matter is complete.

Other nations
Of 68 national FOI statutes, I counted just 17 with a cabinet records exemption. One good Commonwealth example is that of India, where:

8(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen [……]

(i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers: Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over: Provided further that those matters which come under the exemptions specified in this section shall not be disclosed.

• In the Australian FOI law, there is some discretion for individual ministers and departments to decide whether or not to release draft cabinet submissions and briefing materials for use by ministers in cabinet.
In Australia, if the agency is able to delete the cabinet references in a document, access must be granted to the remainder of the record (unless that remainder itself is exempt under another section of the law). Internal working documents are not automatically exempt under Sec. 36; to justify withholding these, the agency must consider if release would be contrary to the public interest and explain why.

Amongst non-Commonwealth nations, I found just six with FOI statutory exemptions that permit agencies to withhold cabinet records: Greece, Norway, Panama, Denmark, Ireland, and the United States. Of these, the first three exemptions are discretionary, the others mandatory. Three of these six allow for the release of factual papers, and in Panama, cabinet records can only be withheld for 10 years.

In Thailand’s FOI law, Sec. 7 (4), the state must publish “resolutions of the Council of Ministers” in the Government Gazette. It is also interesting to note that although South Korea’s FOI statute does not mention cabinet records per se, the government has resolved to release many of these proactively.

Again, I am not calling for an end to all cabinet record confidentiality in British Columbia. Still, if B.C. officials still assert that a mandatory exemption for cabinet records in Sec. 12 is indispensable to the province’s wellbeing, they might reflect upon the examples of roughly 50 national governments that have no explicit exemption for cabinet records in their FOI laws at all and yet appear to be somehow functioning nonetheless, as far as I know.

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52 statutes. [http://freedominfo.org/countries/united_states.htm](http://freedominfo.org/countries/united_states.htm)

53 Government to Release Portions of Cabinet Meetings, April 3, 2003: ‘The Seoul Yonha, a Semi-official news agency in the Republic of Korea, reports that the Government Administration and Home Affairs Ministry will begin to make sections of the minutes of Cabinet meetings available to the public. Kim Doo-kwan, the Home Affairs Minister, said in 2003 that ‘the general trend will be to move toward giving the public more access to information on the details of Cabinet meetings.’ [http://freedominfo.org/countries/south_korea.htm](http://freedominfo.org/countries/south_korea.htm)

54 This is hardly a singular viewpoint, even in the Commonwealth. One Australian newspaper editor opined that ‘The notion that every document prepared for cabinet needs to be exempt is ridiculous. Freedom-of-information laws in Zealand allow cabinet documents to be routinely made public and no one suggests that that is harming the country.’ - The law needs fixing, and so does the culture, by Matthew Moore, Herald Freedom-of-Information Editor. Sydney Morning Herald, Australia, Nov. 30, 2007
**A More Open Cabinet?**

The premier’s one public gesture towards cabinet openness appears to be the idea of “open cabinet meetings.” - "Trust and confidence start with transparency," he declared. "We want to lift the veil on cabinet secrecy forever by holding full cabinet meetings at least once a month in public."

A few were held in 2001-03, but no more. These televised meetings were mocked in the press as “a sham they'd staged for public consumption” and bearing “no resemblance to a full cabinet meeting” and “pure infomercial.”

In the early 1970s, Prime Minister Trudeau experimented with the practice of allowing his ministers to disagree publicly over policy options in advance of government stating its official position, although not afterwards. Some transparency advocates might be nostalgic for that practice, and ask “Why not again in Ottawa, and in British Columbia too?”

Yet cabinet accountability can take several forms: In 2007, for instance, Australian Prime Minister Kevin Rudd pledged that cabinet would travel the country on a monthly basis to listen to the people, and the press would be briefed on the proceedings of cabinet.

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**POSTSCRIPT - BRITISH CABINET OPENING UP?**

In February 2008, Information Commissioner Richard Thomas ordered cabinet to release minutes of two cabinet meetings before the Iraq war in reply to an FOI request.

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57 There was some gesture on input noted by the BC Liberal party in its 2009 election platform: “We enabled the public to submit written questions to Ministers to be asked in the Legislature.” Yet obviously, the government retains the power to screen out any questions it does not wish to answer.
Mr. Thomas's unprecedented edict covers two meetings in March 2003, the first when former attorney general Lord Goldsmith presented his original legal advice that an invasion might be illegal without an explicit United Nations resolution, and the second when Lord Goldsmith presented his final advice that an invasion was lawful.

The commissioner, who was allowed to inspect the minutes as part of his deliberations, said that while he respected the government's position, “arguments for the withholding of the information are outweighed by the public interest in its disclosure.”

He argued that the cabinet records exemption must be balanced against a public interest test. In this case the information available so far was not enough to allow scrutiny of how decisions were taken. Disclosure would “therefore serve the public interest in respect of transparency and public understanding.” He maintained that his ruling would not undermine the convention of cabinet collective responsibility, nor would it “set a dangerous precedent in respect of other cabinet minutes.”

*The Times* reported that the ruling would almost certainly be appealed by the Cabinet Office to the Information Tribunal, and there is then a ministerial veto: “It is hard to see Mr. Thomas and the complainant winning.”

In Britain, standard practice is to release cabinet minutes 30 years after they have been taken. “The fear is that by allowing the minutes to be released now, ministers will be much less willing to express frank views in Cabinet in the future,” wrote a journalist for *The Independent*.

“With some believing that the Cabinet already holds far less sway than in the past, it could cause a further erosion of its power. The really juicy discussions could end up happening outside the Cabinet, during informal and un-minuted meetings. If that happens, we will have ended up with less transparency rather than more.”


**AUSTRALIAN CABINET FOI RULES MISUSED**

In March 2008, Australian opposition leader Lawrence Springborg said there was a need to end the practice of ministers being warned about potentially embarrassing FOI requests by public servants, allowing them to take documents to cabinet to prevent their release. He said that, if the cabinet-exemption rule...
could not be sufficiently tightened, guidelines should be put in place limiting communication between the minister and the department about the request. One newspaper inquired aloud, “What was in the almost 11,000 documents *The Courier-Mail* reported were exempted from FOI searches last year [2007] because they were taken to cabinet?”


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**Section 13 - Policy Advice**

The most widely abused section of the B.C. *FOIPP Act* is surely unlucky number 13, for it creates an omnivorous yawning vacuum of secrecy for "policy advice or recommendations developed by a public body or for a minister."

How did we arrive at this point? The B.C. Court of Appeal set a dangerous precedent in 2004 when it ruled on an FOI request dispute: the "Dr. Doe" case of the B.C. College of Physicians and Surgeons. The court held that Section 13 of FOIPP was not limited to recommendations. Instead, the investigation and gathering of facts could be exempted from access pursuant to Section 13, regardless of whether or not any decision or course of action was actually recommended.58

As the B.C. Commissioner wrote to the FOI law review committee in 2004, “a surprising decision of the British Columbia Court of Appeal has interpreted s. 13(1) so broadly that it threatens to swallow several of the Act’s other exceptions whole and unduly diminish accountability through access to information.” In April 2007, the Commissioner wrote to then Minister of Labour Olga Illich to plead for needed reforms to Section 13, without success.

Later, some other courts disagreed with the "Dr. Doe" ruling, for in the FOI law, Section 13 must not be used to withhold background explanatory papers. Mr. Loukidelis tried to appeal to the Supreme Court of Canada to overturn the Dr. Doe ruling, but he was denied leave to appeal, without explanation.

But despite those rulings and the information commissioner's urging, reform seems a forlorn hope. *The Richmond News* reported in May 2007 that "Illich said

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58 See FIPA’s report *A Prescription for Dr. Doe*, [http://fipa.bc.ca/library/Reports_and_Submissions/A_Prescription_for_Dr_Doe.doc](http://fipa.bc.ca/library/Reports_and_Submissions/A_Prescription_for_Dr_Doe.doc)
the government disagrees with him, and agrees with a court decision that upholds
the government's right to deem policy advice confidential." Here is how the law
stands today:

13 (1) The head of a public body may refuse to disclose to an applicant
information that would reveal advice or recommendations developed by or
for a public body or a minister.

(2) The head of a public body must not refuse to disclose under subsection
(1)

(a) any factual material,
(b) a public opinion poll,
(c) a statistical survey,
(d) an appraisal,
(e) an economic forecast,
(f) an environmental impact statement or similar information,
(g) a final report or final audit on the performance or efficiency of a public
body or on any of its programs or policies,
(h) a consumer test report or a report of a test carried out on a product to
test equipment of the public body,
(i) a feasibility or technical study, including a cost estimate, relating to a
policy or project of the public body,
(j) a report on the results of field research undertaken before a policy
proposal is formulated,
(k) 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,
(l) a plan or proposal to establish a new program or to change a program, if
the plan or proposal has been approved or rejected by the head of the public
body,
(m) information that the head of the public body has cited publicly as the
basis for making a decision or formulating a policy, or
(n) 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.

(3) Subsection (1) does not apply to information in a record that has been in
existence for 10 or more years.

In regards to the need to better define “background papers” as opposed to “policy
advice” (i.e., responding to the “Dr. Doe” ruling), I defer to and endorse the astute
recommendations made by the Commissioner, and by the B.C. Freedom of
Information and Privacy Association (FIPA). I also endorse Recommendation #11 of the 2004 Legislative committee:

Amend section 13(1) to clarify the following:

(a) “advice” and “recommendations” are similar terms often used interchangeably that set out suggested actions for acceptance or rejection during a deliberative process,

(b) the “advice” or “recommendations” exception is not available for the facts upon which advised or recommended action is based; or for factual, investigative or background material; or for the assessment or analysis of such material; or for professional or technical opinions.

Yet there are also other needed amendments for Sec. 13, as noted below.

**Time Limit for the Policy Advice Exemption**

The Quebec FOI law - as a reformed B.C. *FOIPP Act* could do - includes an enlightened feature in one portion of its policy advice exemption, one that acknowledges how publicity can reduce record sensitivity:

38. A public body may refuse to disclose a recommendation or opinion made by an agency under its jurisdiction or made by it to another public body until the final decision on the subject matter of the recommendation or opinion is made public by the authority having jurisdiction. The same applies to a minister regarding a recommendation or opinion made to him by an agency under his authority.

One province has a shorter time limits for withholding records under the policy advice exemption than the 10 years prescribed in the B.C. *FOIPP Act* – Nova Scotia’s FOI law in Sec. 14 permits the records’ release in 5 years, and this is advisable for a reformed B.C. *FOIPP Act* also.

Some other nations’ examples are worth noting (if not necessarily emulating). Regarding time limits, interesting sections can be found in the FOI statutes of Latvia, Mexico, Peru, and the draft FOI bills of Tanzania and Sierra Leone, all in which the use of the exemption ends when the policy topic is decided, not 10 years after the fact as in the B.C. *FOIPP Act*. In Latvia’s act, Sec. 6(3):

The status of restricted access information may be applied to information for the internal use of institutions during the process of preparation of
matters only up to the time when the institution takes a decision regarding the particular matter [..] 

Peru’s law, Art. 15B adds a further deciding element for policy openness - publicity:

The right to access to information shall not include the following: 1. Information that contains advice, recommendations or opinions produced as part of the deliberative or consulting process before the government makes a decision, unless the information is public. Once that decision is made this exemption is terminated if the public entity chooses to make reference to the advice, recommendations and opinions.

As a matter of principle - as in Peru law’s cited above - the fact of a policy decision being made public should greatly reduce or eliminate the waiting time for all policy records in an FOI law, for they generally become relatively less sensitive after such publicity.

In some other FOI statutes, time delays are present but short indeed. In Portugal’s transparency law, access to documents in proceedings that are not decided or in the preparation of a decision can be delayed until the proceedings are complete or up to one year after they were prepared. Bulgaria’s law mandates that policy advice records may not be withheld after two years from their creation.

Although ideally there would be no time delay for policy advice on concluded topics in the B.C. FOIPP Act, a two year limit would be a tolerable compromise for now.

**Recommendation No. 34**

Amend Sec. 13 to include a section on the model of Quebec’s FOI law Sec. 38, whereby the B.C. government may not withhold policy advice records after the final decision on the subject matter of the records is completed and has been made public by the government.

If the record concerns a policy advice matter that has been completed but not made public, the B.C. government may only withhold the record for two years.

If the record concerns a policy advice matter that has neither been completed nor made public, the B.C. government may only withhold the record for five years (on the model of Nova Scotia’s FOI law, Sec. 14).
A Harms Tests for the Policy Advice Exemption

On the matter of a harms test to the exemption, it is difficult to think of a persuasive rationale that could be raised against the addition of one to the B.C. FOIPP Act. Harms should be qualified as “serious” or “significant.” Such a test exists in the draft FOI bill of Kenya, Sec. 5. (1), wherein the release of policy advice records may be blocked if such would have the potential:

(f) to significantly undermine a public authority’s ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

At least three Commonwealth jurisdictions - South Africa, the United Kingdom and Scotland - do include a harms test in their FOI law’s policy advice exemption, and such a test, with “substantial” injury, could be included in the BC FOIPP Act. In South Africa’s statute, Sec. 44 (1), records of recommendations or consultations may be withheld:

(b) if —

(i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid—

(aa) communication of an opinion, advice, report or recommendation; or

(bb) conduct of a consultation, discussion or deliberation; or

(ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

The United Kingdom’s FOI law expresses similar concepts:

36. (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act […]

(b) would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation, or (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
Scotland’s exemption, in Sec. 30, echoes the terms of the U.K. one but is stronger; here, such release must “prejudice substantially” the effective conduct of public affairs.

In the early 1980s (and still in some forms recently), Canadian Treasury Board guidelines set a harms test for its ATIA policy advice exemption Sec. 21, stating that records which would otherwise be exempt under the section should only be withheld if their disclosure would “result in injury or harm to the particular internal process to which the document relates.”

Happily, a Canadian administration put a harms principle into writing. But such guidelines have not the legal force of a statute, of course, and could be annulled any day; hence an FOI law amendment to guarantee this right is essential. (It is always worth recalling that policy advice records could still be withheld under other exemptions of the Act, e.g., security, privacy.)

**Global Commentary on the Harms Test**

- **Article 19, Model Freedom of Information Law, 2001:**

  ‘32. (1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to: (a) cause serious prejudice to the effective formulation or development of government policy; (b) seriously frustrate the success of a policy, by premature disclosure of that policy; (c) significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; or (d) significantly undermine the effectiveness of a testing or auditing procedure used by a public body. (2) Sub-section (1) does not apply to facts, analyses of facts, technical data or statistical information.’

- **Commonwealth Secretariat, Model Freedom of Information Bill, 2002:**

  ‘Formulation of policy. 26.(1) A document is an exempt document if the disclosure of the document under this Act would prejudice the formulation or development of policy by government, by having an adverse effect on (a) the free and frank provision of advice; or (b) the free and frank exchange of views for the purposes of deliberation.

  ‘(2) Where a document is a document referred to in subsection (1) by reason only of the matter contained in a particular part or particular parts of the document, a public authority shall identify that part or those parts of the document that are exempt. (3) Subsection (1) does not apply to a document in so far as it contains publicly available factual, statistical, technical or scientific material or the advice
of a scientific or technical expert which analyses or gives an expert opinion of such material.’

• The Carter Center, *Access to Information, a Key to Democracy, 2002:*

Key Principles. ‘Does it provide access to some internal government policy advice and discussion in order to promote public understanding, debate and accountability around public policy-making? …. Another common exemption found in many acts is the “deliberative process”, which exempts from disclosure an official document that contains opinions, advice or recommendations and/or a record of consultations or deliberations.

‘However, this exemption should clearly link the type of document to any form of mischief. Where such clauses appear, such as in the U.S. or South African law, they are linked to the notion of candour; the idea is that policy-makers should not feel restricted in terms of their candour with each other during the decision-making phase. If release of the document would not have a chilling effect on deliberation, the document should not be exempt from disclosure.’

**Canadian commentary on the Harms Test**

(Regarding the federal *Access to Information Act*’s sec. 21, the equivalent of B.C. *FOIPP Act*’s Sec. 13, policy advice exemption, with same principles.)

• *Open and Shut*, report by MPs’ committee on Enhancing the Right to Know, 1987:

‘3.19. The Committee recommends that section 21 of the Access to Information Act be amended not only to contain an injury test but also to clarify that it applies solely to policy advice and minutes at the political level of decision making, not factual information used in the routine decision-making process of government.’

• John Reid, former Information Commissioner of Canada, model ATIA bill, 2005 (underlined parts are Mr. Reid’s amendments to the existing ATI Act):

‘17. Section 21 of the Act is replaced by the following:

21. (1) Subject to subsection (2), the head of a government institution may refuse to disclose any record requested under this Act that came into existence less than five years prior to the request if the record contains
(a) advice or recommendations developed by or for a government institution or a minister of the Crown and disclosure of the record could reasonably be expected to be injurious to the internal advice-giving process of the government institution;

(b) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown and disclosure of the record could reasonably be expected to be injurious to the internal decision-making process of the government; or

(c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto and disclosure of the record could reasonably be expected to be injurious to the conduct of the negotiations.

(2) Subsection (1) does not apply in respect of a record that contains [items (a) to (n) replicate those found in the B.C. FOIPP Act Sec. 13(2)]; or (o) a report or advice prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a minister of the Crown.

(3) For the purpose of this section, "advice" is an opinion, proposal or reasoned analysis offered, implicitly or explicitly, as to action.

**Recommendation No. 35**

Amend Sec. 13 to include a harms test, wherein a policy advice record can be withheld only if disclosing it could cause “serious” or “significant” harm to the deliberative process. The best models can be found in the FOI laws of South Africa (Sec. 44), the United Kingdom (Sec. 36), or Article 19’s *Model Freedom of Information Law* (2001).

**Other nations**

Amongst the FOI statutes of 68 nations, I counted 31 laws with an exemption for advice or recommendations, described in various terms, and they are most prevalent in Commonwealth nations.

I could find no such specific exemption in the FOI laws of these 18 nations: South Korea, India, Finland, Sweden, Croatia, Czech Republic, Georgia, Hungary, Lithuania, Slovakia, Slovenia, Macedonia, Moldova, Montenegro, Romania, Serbia, Uzbekistan, and Poland.
In the draft governmental FOI bills of 29 nations (or quasi-national jurisdictions), there are 13 with an exemption for advice or recommendations, known by various terms - mainly and expectedly in Commonwealth nations. There is no such specific exemption within the draft FOI bills of Bangladesh, Brazil, Indonesia and Paraguay.

Policy advice secrecy is not a tradition in non-Commonwealth nations’ FOI laws. In Poland’s statute, the transparency for policy records, is remarkable:

Art. 6.1. The following information is subject to being made available, in particular on: 1) internal and foreign policy, including: (a) intentions of legislative and executive authorities, (b) drafts on normative acts, (c) programmes on realisation of public tasks, method of their realisation, performance and consequences of the realisation of these tasks.

The Netherlands also has a most progressive FOI law, wherein some policy recommendations actually require proactive publication, a feature unimaginable in a Commonwealth transparency law.

9.1. The administrative authority directly concerned shall ensure that the policy recommendations which the authority receives from independent advisory committees, together with the requests for advice and proposals made to the advisory committees by the authority, shall be made public where necessary, possibly with explanatory notes.

9. 2. The recommendations shall be made public no more than four weeks after they have been received by the administrative authority. Their publication shall be announced in the Netherlands Government Gazette or in some other periodical made generally available by the government. Notification shall be made in a similar manner of non-publication, either total or partial [....]

This section’s openness, however, is limited by other clauses which, if included in the B.C. FOIPP Act, could relieve the fears of government analysts anxious of being identified:

11. 1. Where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information shall be disclosed concerning personal opinions on policy contained therein.

11. 2. Information on personal opinions on policy may be disclosed, in the interests of effective, democratic governance, in a form which cannot be traced back to any individual. If those who expressed the opinions in
question or who supported them agree, information may be disclosed in a form which may be traced back to individuals.

11. 3. Information concerning the personal opinions on policy contained in the recommendations of a civil service or mixed advisory committee may be disclosed if the administrative authority directly concerned informed the committee members of its intention to do so before they commenced their activities.

In the Netherlands, after ‘personal’ opinions are defined and redacted, much useful information could still be released.

**General Discussion on the Policy Advice Exemption**

Much commentary has been written on this topic by judges, information commissioners and academics. Yet the main points must be tackled here: why is the policy advice exemption necessary, and if it is indeed necessary, what form should it take?

To begin, whenever legislators raise the prospect of amending an FOI statute, senior officials regularly - and successfully - argue that the public’s access to records on policy development would inhibit decision-making, because the threat of public scrutiny would curb free and frank discussions, inhibit the candour of advice and therefore seriously hamper the smooth running of government.

In Britain, for instance, a former senior civil servant at the Treasury told the Financial Times that policy advice should stay private because the media would inevitably focus on the downsides identified in any policy; that would simply deter his ex-colleagues from putting their policy assessments in writing, further undermining conventional Whitehall procedures: “The more they get into the public domain, the more they compromise the internal policy debate.”

Yet Kenneth Clarke, a former chancellor who served at the Treasury in the 1990s, told the BBC that releasing internal documents carried “this bizarre assumption that you should always follow the advice you are given.” No sensible chancellor simply followed the advice of the Treasury bureaucrats, he said. “You have a look at it, consider it, treat it with respect and then make your own judgment.”

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60 ibid
In rejecting an access applicant’s challenge to the *ATI Act*’s policy advice exemption, one Canadian Federal Court ruling bordered on the apocalyptic:

> It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. . . . In the hands of journalists or political opponents this is combustible material liable to start a fire that could quickly destroy government credibility and effectiveness.\(^\text{61}\)

We ask lawmakers to consider the possibility that continuously reiterating such claims could result in a negative self-fulfilling prophecy. By doing so, some traditionalist bureaucrats who began their work in the pre-FOI age – and who quite frankly wish that transparency laws had never been passed – may help to induce fears of supposed harms in the new generation of public servant raised in the (relatively) stronger culture of openness.\(^\text{62}\)

But of course there are contrary viewpoints. “The argument that the fear of advice becoming public would constrain public servants from giving frank and fearless advice is rubbish,” wrote one Canberra journalist with refreshing Australian candour. “The contrary is being proved. If public servants think advice will remain secret for 30 years, they will dish up any amount of career-saving tosh that their masters want to hear.”\(^\text{63}\)

In one Australian FOI legal dispute on policy records, as an Australian press report summarized it: “the [government] arguments that the Court of Appeal overturned had rested on the claims that public servants have to be secretive or they can’t work; or that the public is too stupid to understand anything complex and would be confused by the truth held in government documents.”\(^\text{64}\)


\(^{63}\) *FOI process needs urgent overhaul to halt needless secrecy*, by Crispin Hull. Canberra Times (Australia), Nov. 10, 2007. Mr. Hull sensibly added: ‘If there is no significant change the losers will be the public and, indeed, the politicians. Sure, some things have to remain secret for a while matters of public security, properly and narrowly defined. But lots of innocuous material would be better in the public domain. We can learn from past mistakes. And the prospect of later publicity would add greater rigour to political and administrative processes.’

In Scotland’s FOI law, there are harms tests in Sec. 30, regarding “prejudice to effective conduct of public affairs.” Yet it is reported that many senior Scottish civil servants had hoped for an automatic presumption that it would be harmful to release information no matter what advice was given (not unlike the Canadian outlook). Scotland’s Information Commissioner Kevin Dunion countered that such an outlook must change: “The act should not be bent to meet civil servants' sensitivities - they've got to toughen up.”

As James Travers of the Toronto Star put it: “the assumption that the actions and decisions of a democratic government can't withstand too much exposure demeans voter intelligence and the institution of Parliament.” Even in Canada, hopefully, attitudes may be changing on this question.

Governments speak mainly of the supposed harms sand not the potential benefits of public transparency for policy advice. The latter, in fact, are more numerous.

The Commonwealth Human Rights Initiative considered the traditional claims on policy advice, and concluded:

The area of official decision-making – how criteria are applied, assessments made, contracts awarded, applications rejected, budgets prepared, or benefits distributed, whose advice counts and whose is ignored – is traditionally an area prone to bias and abuse of power. Without the possibility of disclosure, there is little possibility of checking these tendencies. Conversely, it has been shown that just the threat of disclosure improves the quality of government decision-making.

http://www.alliance.org.au/resources/


66 Harper: Do as I say, not as I do, by James Travers, The Toronto Star, April 13, 2006

67 One Australian newspaper put it: ‘The public service, both state and federal, degrade its [FOI law] intent in a far more banal manner. Releasing information could "inhibit an officer's ability to provide frank and candid advice in the future". Does this mean the converse is less important - that not releasing information could inhibit the public's ability to assess the issue at hand?’ - Damming the flow of information is to damn voters to ignorance. Editorial. The Age (Melbourne, Australia), July 24, 2008

As well, a 1995 report of the Australian Law Reform Commission found that: “the FOI Act has focused decision-makers’ minds on the need to base decisions on relevant factors and to record the decision-making process. The knowledge that decisions and processes are open to scrutiny... imposes a constant discipline on the public sector.”

Even some of those who insist that advice must be secreted before or during active consideration of an issue may find themselves at loss to assert why it must also remain so after the issue has been decided. (As well, it is always worth bearing in mind that policy advice records could still be withheld in whole or in part due to other FOI exemptions, e.g., if such a document contained someone’s personal information, or on law enforcement grounds.)

Why, for example, must such historical records be withheld for 10 years in the BC FOIPP Act’s Sec. 13? As the Commonwealth Initiative put it: “While it may sometimes be necessary to protect official information from disclosure at certain stages of policy-making, the same degree of confidentiality is hardly necessary once the policy has actually been agreed.”

Recognizing this, in 1994 the United Kingdom Government decided to release the minutes of the monthly meetings between the Chancellor of the Exchequer and the Governor of the Bank of England – information that had previously been kept a closely guarded secret – six weeks after each meeting. (This appears the more surprising for the U.K.’s position as this country’s model for governmental secrecy, passing an FOI law nearly two decades after Canada did.)

“Initial fears that the policy would create self-censored and bland discussions proved ill-founded. The London Times has commented: ‘Instead of papering over disagreements with platitudes, the minutes are impressively clear and sharp.’

But there is a more pressing and personal motive for wishing to proffer advice only in private. It is reported that some policy analysts and other writers (particularly junior level) dread being identified as the one pointing out flaws in the sometimes well-meaning but misguided policies of politicians or senior bureaucrats. In the Canadian public forum at least, “Civil servants who


70 Commonwealth, op.cit.

71 Commonwealth, op.cit.
inadvertently or otherwise say thing that contradict, or even cast the slightest
doubt on, the wisdom of the government’s policy are severely reprimanded.”

For this reason and others, a strong general whistleblower protection statute is
essential. I am aware that this measure might never be enough to ease some public
servants’ disquiet, but it might help enable others to “speak truth to power.”

Positively, the Commonwealth Initiative suggests that publicity on police advice
could serve as an antidote to backroom pressures from lobbyists and others:
“Doing public business in public also ensures that honest public servants are
protected from harassment and are less liable to succumb to extraneous
influences.”

Most FOI advocates and I do not call for the deletion of the policy advice
exemption entirely. Rather, we urgently call for strong new provisions for
transparency. (See Appendix 1, The Section 13 Policy Advice Exemption in
 Interpretation and Practice.)

Section 14 - Legal Advice

Section 14 of the B.C. FOIPP Act reads: “14. The head of a public body may
refuse to disclose to an applicant information that is subject to solicitor client
privilege.” Unfortunately, this section has no harms test, and no time limits.

Here, one professional group is mandated to draft, interpret and apply the one FOI
exemption that could most benefit itself, a privilege extended to no other sector of
society, a situation that some could perceive as an inherent conflict of interest.

Hence it comes as no surprise to note that Section 14 is so overbroadly worded
and so overapplied in practice. Obviously lawyers are often most qualified for
these tasks, and this observation is not a call for change nor even a complaint, per
se, just a request for the state to recognize the situation for what it is.

For instance, politicians sometimes call in a lawyer to merely sit in on a closed
door meeting to listen and then term his or her presence “legal advice;” lawyers
also fight to keep secret their taxpayer-funded legal billing figures even after all
appeals are finished.


73 Commonwealth, op.cit.
If such outcomes were not the intent of parliament, then the BC FOIPP Act should be amended to render the solicitor-client privilege much more narrow and specific, to settle such disputes before they arise. (The exemption also overlaps with that for “policy advice,” which can sometimes include legal advice, and this needs better demarcation.)

The lack of any time limit, conceivably even for centuries, for legal advice in B.C.’s FOIPP Act is simply indefensible (e.g., it could in principle be applied to a solicitor’s advice written in 1871 regarding B.C.’s entry into Confederation). This concept was rebuked by former federal Information Commissioner John Reid, on the national Access to Information Act’s similar legal advice exemption (ATIA Sec. 23):

It has been obvious over the past 22 years that the application and interpretation of section 23 by the government (read – Justice Department) is unsatisfactory. Most legal opinions, however old and stale, general or uncontroversial, are jealously kept secret. Tax dollars are used to produce these legal opinions and, unless an injury to the interests of the Crown can reasonably be expected to result from disclosure, legal opinions should be disclosed.\(^74\)

Yet in the FOI law of the United Kingdom, a record cannot be withheld after 30 years under its Sec. 43, Legal professional privilege. This time limit is advisable for Sec. 14 of the B.C. FOIPP Act. What is done in the U.K. – British Columbia’s parliamentary model – would surely be workable for B.C.

The solicitor-client exemption as described in the ATIA is present in many FOI laws, but not all; absent for example in the United States, India, Poland, and the Netherlands. Even where does occur in some form, however, it is often far more narrowly defined than in the ATIA, with language indicating what harms could occur from record release.

In Mexico’s statute, Art. 13, information is “classified” if its disclosure could impair “procedural strategies in judicial or administrative processes that are ongoing.” In Peru’s law, ‘exempt’ records in Sec. 15.B include:

4. Information prepared or obtained by the Public Administration’s legal advisors or attorneys whose publication could reveal a strategy to be adopted in the defense or procedure of an administrative or judicial process,

\(^{74}\) John Reid, The Access to Information Act - Proposed Changes and Notes. Ottawa, 2005

or any type of information protected by professional secrecy that a lawyer must keep to serve his client. This exemption ends when the process finishes.

**Justice Gomery report, Restoring Accountability, 2006:**

“The Commission supports amendments that would substantially reduce the kinds of records that the Government may withhold on the basis of the injury test, such as [. . . . ] the [ATI Act’s] section 23 category of records where solicitor-client privilege is claimed.”

**Recommendation No. 36**

Amend Section 14 (legal advice) to state that the exemption cannot be applied to records 30 years after they were created (per the model of the UK FOI law’s Sec. 43). As well, add a harms test, to state the exemption can only be applied to withhold records prepared or obtained by the agency’s legal advisors if their release could reveal or impair procedural strategies in judicial or administrative processes, or any type of information protected by professional confidentiality that a lawyer must keep to serve his client.

The 1999 legislative review committee was concerned about the overly broad scope of Sec. 14:

Members debated the rationale for keeping such documents permanently exempt from disclosure. It was also considered that solicitor-client privilege, in terms of legal advice to public bodies in their policymaking role, was not intended to be protected to the same degree as solicitor-client privilege in law enforcement matters by the FIPPA. It was noted that solicitor-client privilege can be waived, and that if government is the client in cases of legal advice, government has the option of waiving its right to exemption under the FIPPA.

The Committee agreed to recommend that this issue should continue to be examined, with a view to public bodies’ gradual adoption of the latter practice. . . . The Committee also agreed that it is in keeping with the spirit of the Act that documents containing legal advice on policy issues be subject to severing procedures.

I also endorse the 2005 advice of FIPA, who recommended Section 14 be narrowed so that:
(a) The exception should apply to legal advice only as originally intended.
(b) Documents must be released after information subject to solicitor-client privilege and other applicable exceptions is severed.

Section 15 – Law Enforcement

The Commissioner advised that the current definition of “law enforcement” is far too broad: “The current definition is so expansive as to allow public bodies to protect almost any activity.”

I endorse FIPA’s 2005 recommendation No. 10, which bears reiterating:

> We believe this section should be limited, along the lines of Section 16 of the Federal Access to Information Act, to proceedings or investigations which could result in penal sanctions. We also recommend that the definition of ‘law enforcement’ be amended to apply in proceedings which lead or could lead to ‘an offence under an enactment of BC or Canada’ and ‘that relate to an investigation in regard to imminent criminal charges.’

Section 16 – Intergovernmental records

Here is one of the most difficult and complex FOI questions to resolve. In FOI law, the calculation of potential “harms” is usually speculative and unpredictable, but even more so in intergovernmental relations, which can lead to a considerable gap between law and reality, for here one is dealing with another jurisdiction that might have very different and unfamiliar legal and cultural standards on transparency.

Some writers believe that on dealing with FOI requests for intergovernmental records, the state must always err on the side of caution, for revealing another jurisdiction’s sensitive records may lead to a rift or decline in relations, and a reluctance or refusal to share such records in future. Others dismiss this viewpoint as overanxious or too deferential.

International diplomats may regard themselves as more qualified to judge such potential harms than domestic FOI experts (and usually neither are usually expert in the other’s field), and believe that absolute principles should not apply in

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75 FIPA letter to Hon. Sandy Santori, Minister of Management Services, July 2, 2002
foreign relationships, and stress the importance of “comity.” (This term, also called comity of nations, is defined as “courtesy between nations, as in respect shown by one country for the laws, judicial decisions, and institutions of another”; as well, comity is a two-way street.)

When a state receives FOI requests for intergovernmental records, should it defer to the other’s FOI laws and culture, or they defer to ours in responding, should we move to the least or most open common denominators of two FOI laws, or try to find some middle ground between the two?

**Disclosure harmful to intergovernmental relations or negotiations**

16 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:

(i) the government of Canada or a province of Canada;
(ii) the council of a municipality or the board of a regional district;
(iii) an aboriginal government;
(iv) the government of a foreign state;
(v) an international organization of states,

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

(c) harm the conduct of negotiations relating to aboriginal self government or treaties.

(2) Moreover, the head of a public body must not disclose information referred to in subsection (1) without the consent of

(a) the Attorney General, for law enforcement information, or
(b) the Executive Council, for any other type of information.

(3) Subsection (1) does not apply to information that is in a record that has been in existence for 15 or more years unless the information is law enforcement information.

The fact that Sec. 16 is discretionary and subject to the Sec. 25 public interest override is an acknowledgement that another jurisdiction’s objections on FOI should not always be paramount.
I believe Sec.16 is too vaguely drafted; for example the term “relations” is far too broad. Some could also argue that, with its lack of a harms test, Sec. 16(1)(b) should be deleted entirely, because if “information received in confidence” from another government could produce harm if released, such disclosure would already have been blocked by Sec. 16(1)(a), which does have a harms test.

By this argument, Subsection 16(1)(b) is simply too broad, because not all information “received in confidence” from another government would necessarily produce harm if released - such as the draft luncheon menu or hotel budgeting for an upcoming interprovincial ministers’ conference.

But others might say that deleting Sec. 16(1)(b) would go too far, because it has more to do with the principle of “comity” amongst governments than in preventing “harm” – that all records received in confidence must be secreted, period, regardless of what they are, so as to both demonstrate and receive the respect and trust of the other state.

At the very least, I think Sec. 16 should be amended to make clear that, upon receiving an FOI request that might trigger the section, the B.C. government must consult with the other government to ask if it would object to disclosure of the records, as likely to cause “harm” to relations, and not just unilaterally presume that it might do so without inquiring. (On some occasions, which might surprise one, the other government might not object to disclosure at all. Hopefully, the inquiry to the other state would not be phrased in a manner likely to elicit a negative response.)

I also believe that adding a harms test to Sec. 16(1)(b) is somewhat preferable to eliminating it entirely. Similarly, John Reid supports adding a harms test to the equivalent section of the federal ATI Act, as noted below.

Lawyer and global FOI expert Toby Mendel, in correspondence with me last year on Sec.16, wrote:

Re. 16(1)(b), it should be deleted, but not just because it doesn't include a harm test (if that were the only problem, one could be added). I think there are serious problems with both this and 16(1)(a), as follows.

They assume that BC should defer to the secrecy claims/rules of other jurisdictions, either per se (b) or for purposes of good relations (a). If B.C. already protects all interests worthy of protection, there is simply no need for (b). There may be a need to consult with the providing jurisdiction to understand its grounds for classification so as to apply properly the B.C. exceptions. But there is no need for a separate exception.
Regarding (a), it is somehow an abdication of responsibility, because it uses the term 'relations' (e.g., instead of 'negotiations'). Jurisdictions should stand up and say that “we do business openly, subject to protecting legitimate interests. We will protect your legitimate interests, but don't expect us to be secretive beyond that.” If this is the accepted “business” model, then the conduct of relations is subject to it, rather than overrides it.

In other words, the government of Alberta has discussions with B.C. on the understanding that it cannot impose more secrecy than is allowed under the B.C. Act (just as businesses do). It cannot get upset if B.C. sticks to those rules.

I accept that the above is perhaps a bit theoretical given the real state of relations. I would at least like to add in qualifiers like causing 'serious harm' based on 'reasonable expectations of secrecy'.

As well, a definitional question arises: When can information be regarded as having been “received in confidence”? Commissioner Loukidelis very well answered the question in Order 331, and the principle needs to be added to our Act, in the Recommendation below.

Turning to s. 16 (1)(b), it is my view that - in almost all cases - the necessary element of confidentiality will not be established solely because the receiver of the information intends it to be confidential. . . .

In cases where information is alleged to have been "received in confidence", in my view, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information.

**Recommendation No. 37**

Amend Sec.16(1)(a) by changing the word “relations” to “negotiations.” Also change the term “harm” to “serious harm based on reasonable expectations of secrecy.”

**Recommendation No. 38**

Amend Sec. 16(1)(a) and (b) to state that, upon receiving an FOI request that might trigger this section, the B.C. government must consult with the other government to ask if it would object to disclosure of the records, as likely to cause
“serious harm based on reasonable expectations of secrecy” to negotiations, not just unilaterally presume that it might do so without inquiring.

**Recommendation No. 39**

Amend Sec. 16 (1)(b) to state that information may be withheld if it would “(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies” and add “where there is an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information, and where disclosure would cause serious harm based on reasonable expectations of secrecy.”

**Canadian Commentary**

- **John Reid, former Information Commissioner of Canada, model ATIA bill, 2005 (underlined parts are Mr. Reid’s amendments to the existing Act):**

  11. Section 13 of the Act is replaced by the following:

  13. (1) Subject to subsection (2), the head of a government institution may refuse to disclose any record requested under this Act if (a) the record contains information that was obtained in confidence from

  (i) the government of a foreign state or an institution thereof, (ii) an international organization of states or an institution thereof, (iii) the government of a province or an institution thereof, (iv) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government, or (v) an aboriginal government; and (b) disclosure of the information would be injurious to relations with the government, institution or organization. […]

- **Justice Gomery report, Restoring Accountability, 2006:**

  ‘[T]he Commission supports amendments that would substantially reduce the kinds of records that the Government may withhold on the basis of the injury test, such as [. . . .] the existing [ATI Act] section 13 category of records obtained in confidence from international, provincial or municipal government sources, including aboriginal governments.”

- **Bill C-554, introduced by MP Pat Martin, 2008:**

  Section 13 of the Act is replaced by the following:
‘(2) The head of a government institution shall disclose any record requested under this Act that contains information described in subsection (1) if the government, organization or institution from which the information was obtained (a) consents to the disclosure; or (b) makes the information public.’

Section 17 and 21

I believe Section 17 (Government Economic Interests) and Section 21 (Third Party Economic Interests) are valid and should remain unchanged, and the government should resist any ongoing efforts to weaken them.

As the commissioner wrote in his 2004 recommendations: “No further change to s. 21 should be contemplated at this time. Any further amendments would be a retrograde step and would run counter to the thrust of such provisions in almost all Canadian access laws and would run against the current of decisions under those laws.”

Section 20 – Publication within 60 Days

The B.C. FOIPP Act reads:

Information that will be published or released within 60 days

20 (1) The head of a public body may refuse to disclose to an applicant information (a) that is available for purchase by the public, or (b) that, within 60 days after the applicant’s request is received, is to be published or released to the public.

(2) The head of a public body must notify an applicant of the publication or release of information that the head has refused to disclose under subsection (1) (b).

(3) If the information is not published or released within 60 days after the applicant’s request is received, the head of the public body must reconsider the request as if it were a new request received on the last day of that period, but the information must not be refused under subsection (1) (b).
Recommendation No. 40

Amend Sec. 20 to state that if the government does not release requested information within 60 days if it promised to do so, then upon the 61st day, it must release all the sought information immediately, without exemptions or costs to the applicant, unless doing so would cause “grave harm” to the public interest.

Section 22 – Privacy

This section is generally well drafted, but there are a few features that could be added.

(1) The Act needs to state that the FOI applicant’s identity must not be revealed within government without a strict need to know (that is, mainly to locate the records being sought), a practice that has egregiously occurred and which violates privacy rights in the Act.

This topic was fully examined in a story by journalist Ann Rees (in TheTyee.ca, April 3, 2004): “The provincial Liberal government has put Freedom of Information under surveillance in order to protect its political image.” The problem dates back over a decade, as she noted:

Previous government disclosed FOIs, not names

Information and Privacy Commissioner David Flaherty first raised concerns about communications involvement in the FOI process in his 1996-1997 annual report.

Flaherty launched an investigation into such breaches of privacy following a complaint by FOI researcher and reporter Stanley Tromp. The then-NDP government assured Flaherty that requesters’ names were not disclosed to communications advisors.

"The Commissioner's Office investigation revealed that it was not the Ministry's practice to routinely disclose applicant's names. Further, although the Deputy Minister was routinely advised when a member of the media had made an access request, only the substance of the request was provided, not the name of applicant,” Flaherty concluded.

But that is no longer true. Today, names of applicants who request sensitive records are provided to communications spin doctors, when deemed politically necessary.
Tromp, whose complaint triggered the commissioner's investigation, was identified by name in a 2002 confidential communications memo written for the attention of Liberal cabinet minister Kevin Falcon. The minister's office did not respond to an emailed request for comment.

The memo is titled "Stanley Tromp's FOI request to Deregulation Office," and explains that the request has been delayed for almost a year and that the records had been heavily-censored because of cabinet confidentiality protections in the Act.

Even if the current government claims to have ceased this practice today, a prohibition of it must be enshrined in law – not just in regulation or policy - so it cannot be permitted again.

This principle also applies to the practice of political “sensitivity filters” for FOI requests; the B.C. Liberals stated in their 2009 election platform, “We have eliminated the use of ‘sensitivity ratings’ in request processing.” Yet such a termination had best be guaranteed in law.

**Recommendation No. 41**

Amend Sec. 22 to state that a FOIPP Act applicant’s identity must not be revealed within government without a strict need to know (which is, mainly to locate the records being sought).

(2) The Act needs to state that public sector bonuses are not “private,” any more than are the salaries and expenses that the B.C. government publishes online annually.

In April 2007 the Insurance Corporation of B.C. told the media that it would no longer release the figures of bonuses it paid to its senior officials. The reason given me by the ICBC public relations branch? "We just didn't like the way the media reported on the bonuses last year." I countered that such an excuse was not an exemption listed in the FOIPP statute, to no avail.

So I was compelled to file an FOI request to ICBC, who rejected it on Sec. 22 grounds, with the novel argument that the bonuses are private "work history," i.e., an indictor of how well they performed that year, or not. I appealed to the OIPC, and a ruling is pending on the dispute.
Recommendation No. 42

Amend Sec. 22 to state that bonuses of named officials and employees of all entities covered by the FOIPP Act are not the private information of individuals, and encourage the government to post them online, as it does for salaries and expenses.

(3) In 2007, B.C. municipal police departments began refusing to routinely release the salary and expense figures for their senior officers (which they had always released before), with new “privacy” arguments. This occurred despite that the Act’s Sec. 22 (4) reads:

A disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy if … (e) the information is about the third party’s position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister’s staff.

So I had to file FOI requests to each department for the figures. Such is an absurd waste of public resources, to process FOI requests and appeals. The refusals may have ceased for now, but routine disclosure of such amounts (paid for by taxpayers), without FOI requests, should be guaranteed in the FOIPP Act so such refusals can never reoccur.

Recommendation No. 43

Amend the Act to state that all salaries and expenses of officials and employees of all entities covered by the FOIPP Act must be available for routine release, without an FOI request, and encourage all such entities to publish such figures online annually, as the B.C. government does for ministries for salaries over $75,000.

(4) Consider releasing the premier’s telephone phone records in reply to FOI requests. In 1994-95, Premier Mike Harcourt did voluntarily release hundreds of pages of his fax and telephone records in reply to FOI requests (which prompted many news stories at the time).

I presumed what had been done before could be done again, but when I applied for similar phone records of Premier Campbell in 2004, the request was denied on Sec.
22 privacy grounds. I appealed, but the Commissioner agreed with the government, in Order 04-17.

Yet email and letter correspondence between the premier and institutional contacts (e.g., other governments, corporations, associations, lobbyist companies) are accessible under FOI, subject to some deletions. The same principle should apply no less to phone contact numbers - in fact it is even less intrusive because the phone messages’ content is missing.

I have absolutely no interest in records that are genuinely private; perhaps two phone numbers could be utilized by the premier - one public (subject to FOI) for institutional contacts, and one private (not subject to the law) for personal and constituency contacts. I will not press hard on this point, but just request the government to consider it.

**Recommendation No. 44**

Consider amending Sec. 22 to permit the release of the premier’s telephone records, for institutional but not personal contacts, in reply to FOI requests.

(5) Delete Sec. 22.1. Disclosure of information relation to abortion services. This subsection is unique amongst the world’s FOI laws and unnecessary, because if in the unlikely event that harms could result from the disclosure of such information, release could already have been blocked by other exemptions in the *FOIPP Act*, e.g., Sec. 15, Sec. 22.

**Recommendation No. 45**

Delete Sec. 22.1. Disclosure of information relation to abortion services. Such information is already protected by other exemptions.

(6) Political, Employment and Educational History

Lawyer and FOI expert Roger McConchie strongly objected that “this Act goes overboard by defining ‘presumed’ invasions of personal privacy in extremely broad terms,” noting that Sec. (22)(3)(i) states that information on “political

76 *Constant scrutiny by public a must.* By Roger McConchie. The Vancouver Sun. Oct 30, 1993
beliefs or associations” can be withheld on privacy grounds, and so the Act would entitle the government to withhold documents concerning political patronage such as:

- A party worker's letter to a cabinet minister demanding a job or a research grant because of his or her membership in the governing party.
- A cabinet minister's recommendation that a loyal party worker be given a job or research grant because of party affiliation.
- A negative evaluation of the patronage appointee's job performance or research project.

Similarly, Vaughn Palmer complained that the minister of advanced education denied opposition requests for the curriculum vitae of college board appointees (patronage was the issue at stake here). The minister cited the principle that "board members are entitled to their privacy," and the privacy section of the new FOIPP Act. Mr. Palmer responded:

The first line of defence strikes me as patent nonsense. Privacy is for individuals in private life. Individuals who enter public life, even at the level of a college board, should expect some measure of disclosure. Political activity will often be relevant in considering a person's appointment to a government board or commission. The politicians will consider it. Why shouldn't the public be aware of it as well?

[. . . . ] Fortunately, there is another clause, which says that before withholding personal information, the government has to consider whether disclosure would assist in "subjecting the activities of the government or a public body to public scrutiny."

On that basis, I would argue, some personal information about government appointees ought to be disclosed in order to permit adequate scrutiny of the appointment process itself. Lacking certain personal information, how can one answer such obvious questions as: Are these appointees mainly party hacks? Is the government keeping its promise to appoint representatives of racial minorities? Is there any discrimination against disabled persons? and so on.

As well, I believe the Committee might consider applying the same suspension of Sec. (22)(3)(d) so that the term “personal information relates to employment, occupational or educational history” cannot be applied to FOI requests for
information about a senior public servant’s former or current corporate associations.

For instance, does the public not have the right to know if a senior public servant privately urged regulatory lenience, or granted a government loan or loan forgiveness, for a company that he/she once worked for?\(^77\)

Regarding educational history, do student journalists not have the right to know if a college academic vice-president obtained his PhD from a mail-order diploma mill in Aruba, or even more importantly, patients know of the medical education of their physician?

**Recommendation No. 46**

Amend Sec. (22)(3)(i) to state that information on political memberships or associations cannot be withheld as private in regards to FOI requests about the governmental appointments and employment of senior named persons.

**Recommendation No. 47**

Amend Sec. (22)(3)(d) so that the term “personal information relates to employment, occupational or educational history” cannot be withheld as private in regards to FOI requests about the governmental appointments and employment of senior named persons.

\(^77\) Indeed, on the same principle, some have advised the B.C. conflict of interest Commissioner’s mandate be extended beyond MLAs to include public servants. Advisably for B.C., the federal Ethics Commissioner has just such a power, beside the mandate to investigate ethical breaches beyond conflict of interest.
Section 25 - The Public Interest Override

The most important and elusive concept in the theory of government transparency, and in fact the *raison d’être* of most freedom of information statutes, is based on this question: What, exactly, does “the public interest” mean in the law?

It is an idea with which courts, legislators and commentators around the world have struggled for decades without agreeing upon one conclusive definition, if indeed one exists. Yet however the public interest is defined is a fair measure of the values and political culture of a nation at the time.

All Canadian provinces and territories (except New Brunswick) have public interest overrides in their FOI statutes, and the strongest one is found in British Columbia’s *Act*, Sec. 25, one that was virtually reproduced in the laws of Alberta and Prince Edward Island.

The override in B.C. is general, mandatory, and remarkably broad in the sense it could be applied for *any other* reason - beyond those described here - if the public body or Commissioner sees a need to do so:

Sec. 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.

As FIPA observed, “Section 25 should be amended to include a clear set of factors to define and determine ‘public interest.’” I believe the phrase “for any other reason” is welcome and should be retained; but it would be aided by several examples to help partially flesh it out (although I would emphasize that these are not exhaustive); several of the terms noted below could be added to Sec. 25.

- **Commonwealth Secretariat, *Model Freedom of Information Bill, 2002***:

  “Notwithstanding any law to the contrary, a public authority shall give access to an exempt document where, in all the circumstances of the case, to do so is in the public interest, having regard both to any benefit and to any damage that may arise from doing so in matters such as, but not limited to - (a) abuse of authority or neglect in the performance of official duty; (b) injustice to an individual; (c) danger to the health or safety of an individual or of the public; or (d) unauthorised use of public funds [...]”
(Elsewhere, the CHRI advised that an FOI public interest override be applied to both public and private bodies.\textsuperscript{78})

**Other nations**

Of the 68 jurisdictions with freedom of information statutes, I counted 38 with some form of public interest override. A form of public interest override appears in 20 of 29 draft FOI bills:\textsuperscript{79}

The term “for any other reason” in the B.C. FOIPP Act could benefit from the addition of several of the examples noted below, particularly those found in the superb draft FOI law of Kenya:

\begin{verbatim}
5(4) Notwithstanding anything in sub-section (1), a public authority shall disclose information where the public interest in disclosure outweighs the harm to protected interests.
(5) For the purposes of sub-section (4), in considering the public and democratic interest, particular regard shall be had to the need to
(a) promote accountability of public authorities to the public;
(b) ensure that the expenditure of public funds is subject to effective oversight;
(c) promote informed public debate;
(d) keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and
(e) ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.
\end{verbatim}

\textsuperscript{78} *St. Kitts and Nevis Freedom of Information Bill 2006*, analysis by Cecelia Burgman, CHRI (2007)

\textsuperscript{79} The exact number of public interest overrides is not perfectly clear, due to translation issues, and by the fact that some clauses resemble such overrides by description, but they are not explicitly named as such. An example might be Sec. 14 of Mexico’s FOI law which states: ‘Information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake.’
Other FOI statutes have points in their public interest overrides worth contemplating for an amended B.C. *FOIPP Act*:

- Several statutes have overrides that go far beyond health, safety and the environment, to consider problems in governmental management. In Montenegro’s FOI law, for instance, “Information cannot be withheld if it relates to ignoring regulations, unauthorized use of public resources, misuse of power, criminal offenses and other related maladministration issues.”

- In Belize’s FOI law, Article 9(2), public bodies must consider a public interest release for information on “any failure to comply with a legal obligation, the existence of any offence, miscarriage of justice, abuse of authority or neglect in the performance of an official duty.”

- In several FOI statutes, proactive broadcasting is mandated. In Estonia’s law, Sec. 30 (4), “State and local government agencies are required to communicate information concerning events and facts and which is in their possession to the broadcast media and the printed press for disclosure if public interest can be anticipated.”

- The overrides of several FOI acts cover the corporate sector. In South Korea’s law, Sec. 7(1)(b), there is an override on trade secrets for “Information which must be disclosed for the protection of the property or everyday routines of individuals from unlawful or improper business operations.”

- In the FOI law of Trinidad and Tobago, Sec. 31(2)(d), a public body may consider:

  (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of regulation by a public authority of corporate practices or environmental controls.

- The draft FOI bill of Sierra Leone states in Sec. 21(1) that the government may not refuse to provide access to information that would (amongst other topics) “contribute to improved public participation in, and understanding of, public policy-making,” and also “prevent or expose a miscarriage of justice.”

Incidentally, it is also positive that several federal and provincial statutes aside from FOI laws – such as the federal *Fisheries Act* and the *Canadian Environmental Protection Act* - mandate pro-active publication on public interest
matters such as environmental protection health and safety. More British Columbia statutes other than the FOIPP Act could do likewise.

**Recommendation No. 48**

Retain the term “for any other reason” in Sec. 25, but add further illustrative examples to it, such as those noted in this report from other nations.

**Sec. 25 and the obligation of proactive publication**

After working through the Act for 15 years, I belatedly came to realize that a pattern was emerging, one that I should have noted much earlier. While the passage of Sec. 25 was a most valuable political accomplishment, a gap appears to have opened up, unsurprisingly, between its principle and practice. As FIPA said in 2002:

> Section 25 makes a bold statement, but of all the provisions that freedom of information advocates fought for in the early 1990s, it has been the biggest failure in implementation. The Public Interest Override should be the strongest and most compelling section of the Act. It has turned out to be the weakest and least invoked. More than any other flaw in the act, this cries out for a remedy.⁸⁰

As with a muscle, Sec. 25 requires exercising so it will not wither from disuse. Yet it could be argued that the provincial government may have violated Sec. 25 at least several times each year, when it had a duty to proactively release vital information in the public interest, but did not do so.

Let us examine the terms of Sec. 25 closely: *Whether or not a request for access is made*, the head of a public body must (not may), 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.

In the introduction to this report, I provide summaries of 18 news stories; without media FOI requests for the records to produce the stories, it seems very doubtful the topics would ever have reached the public eye.

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⁸⁰ FIPA letter to Hon. Sandy Santori, Minister of Management Services, July 2, 2002
The examples cited below are clearly examples of disclosures in the public interest. Even if in some cases, there might not be evident an immediate or urgent risk to public health, safety or the environment, they would still reside well within the Sec. 25 net of “any other reason.” If so, then why did the government not proactively release this information, as Sec. 25 obliges it to do? Why must one resort to FOI requests for such records?

- Using FOI, the Vancouver Sun made detailed inspection data for all licensed care facilities in the Lower Mainland available online for the first time at www.vancouversun.com/care/ with some troubling findings of abuse, and nearly one in nine long-term care facilities in the Lower Mainland could be rated by the government as "high risk."\(^{81}\) The Sun has also used FOI to reveal serious problems at daycare centres.

  Did the potential clients of licensed care facilities and daycares, who are searching for an institution to place their loved ones in, not have the right be informed of this data proactively by government (without the media needing to resort to FOI), so they can choose a safe entity?

- A briefing note prepared for the B.C. Housing and Social Development Minister advised there would be “significant" fire safety concerns with five and six storey wood-frame buildings - yet the B.C. government still moved ahead with its plan to permit the construction of those buildings.\(^{82}\)

  Did potential home buyers and tenants not have the right be informed of such fire risk, proactively by government per Sec. 25?

- The B.C. Lottery Corp. has caught at least eight lottery retailers ripping off their customers over the past two years, including one employee from a Maple Ridge outlet who pre-scratched more than 100 scratch-and-win tickets before putting them up for sale.\(^ {83}\)

\(^{81}\) Why aren't inspection records public? Information scarce for facilities caring for most vulnerable members of society. By Chad Skelton, The Vancouver Sun, June 21, 2008

\(^{82}\) Briefing note: taller wood-frames have "significant" fire safety concerns. By Sean Holman, Public Eye Online, April 1, 2009

\(^{83}\) Getting lucky; The B.C. Lottery Corp. has beefed up security since an ombudsman's report in 2007 found problems in the system. By Michele Young, Kamloops Daily News, Feb. 28, 2009
Did lottery ticket buyers not have the right be informed of these risks, proactively by government per Sec. 25?

• Many of the trucks used to make B.C.’s highways safe are themselves unsafe. The violations committed by the private heavy commercial vehicles are the type of infractions targeted under a new safety program announced by the provincial government. 84

Did not B.C. drivers have the right be informed of these highway risks, proactively by government per Sec. 25?

If tragic mishaps ensued as a result of the internally known but unpublicized risks, one almost wonders if the government could be sued by impacted parties for neglecting its Sec. 25 duty. Let us re-emphasize the onus: i.e., the government must justify why it did not proactively release such public interest data per Sec. 25, not the public explain why the state should have done so.

Although the B.C. government may resist this concept, its long-term value will become evident; innovative ideas that we accept as routine today, and even express pride in, were considered unrealistic in their day. To some it may seem I am pressing overly hard on this Sec. 25 issue; but even if the goal is half achieved, or a serious public discussion ensues from this proposal, it could be a major step forward for the public interest. The Commissioner’s assistance is essential to realize this right.

Recommendation No. 49

Encourage the Commissioner to devote a chapter of his annual report to describe serious cases of failure (whether or not an FOI request for access was made) where the government and agencies had an obligation to proactively disclose information in the public interest per Sec. 25, but did not.

Seek and consider input on further measures to guarantee the Sec. 25 duty of proactive publication.

84 Many maintenance trucks unsafe, FOI inquiry shows. Nanaimo Daily News, April 9, 2009
Part 4 - Office and Powers of the Commissioner

There are a few amendments advisable for this part of the Act. Under federal *ATI Act* Sec. 30, applicants have within 60 days of receiving an unsatisfactory response from the public body, to appeal to the Commissioner about fees, delays, exemptions or any other issue. This was shortened in 2006, from a right to appeal within one year (a time limit that FOI applicants still retain in Saskatchewan).

Yet B.C. FOIPP applicants have only 30 days to appeal. Sixty days seems much more reasonable. As FIPA (who asks for 90 days) observed in 2005:

Many FOI requesters are unclear on their rights under the FOIPP Act, are confused and upset or do not possess the literacy and communication abilities needed to find their way efficiently through the FOI process. These and many other factors militate against requesters’ being able to meet the 30-day deadline for appeals.

Recommendation No. 50

The deadline to appeal to the Commissioner on a B.C. *FOIPP Act* related matter should be doubled to 60 days. The deadline to file an appeal of a FOIPP ruling to Judicial Review should also be doubled to 60 days.

In his last annual report, the Commissioner announced that he would begin issuing report cards on a ministry-by-ministry basis. “Each ministry will be rated at least annually according to published performance criteria, which will include compliance standards for timeliness.” Other criteria would include staffing levels, effectiveness of record-keeping, and degree of support for the spirit of information access.

As the Montreal Gazette noted, the federal commissioner's office issues regular "report cards" on agencies that have been conspicuously stubborn about divulging information, “and the net effect appears to be an improved response rate.”

Recommendation 20 – Section 42 should be amended to explicitly give the Commissioner the power to require public bodies to submit statistical and other information related to their processing of

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85 *Arsenal of tools can delay or block release of information.* Montreal Gazette, Sept. 22, 2007
freedom of information requests, in a form and manner that the Commissioner considers appropriate.

I also endorse the Commissioner’s Recommendation No. 23, from 2004:

Section 42 should be amended to require public bodies to provide draft legislation to the Commissioner before its introduction in the Legislature, so that the Commissioner may comment on implications for access to information or protection of privacy of that draft legislation.

**Global Commentary**


'Upon the conclusion of an investigation, the administrative body should have the power … to fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal.’


‘(12.2) The independent administrative body should have the power . . . to order the disclosure of information, and, where appropriate, to impose penalties.’

**Recommendation No. 51**

Amend the Act so that upon the conclusion of an investigation, the Commissioner’s office will have the power to recommend to the Attorney General’s office that it lay charges and fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal. These amounts will be set in further amendments or regulations.

On another topic, in 2002 the government amended Sec. 43, to allow the Commissioner to permit it to disregard so-called “frivolous or vexatious” requests (in addition to the current term “repetitious and systematic” in Sec. 43). Such a provision is far too subjective and easily abused, and so the 1999 legislative FOIPP review committee advised Sec. 43 remain unchanged, advice that was ignored. Those latter terms should be dropped. At the very least, these “frivolous or vexatious” terms should not be permitted to apply to situations where applicants request their own personal information.
Sections 70-71 - Duty to Publish, and Routine Release

The symbiotic interplay between freedom of information statutes and the proactive release of government information is intriguing, ever evolving, and seldom examined.

The passage of FOI laws has profoundly changed the political and journalistic dynamic on the free release of government information, and it has led some people to debate whether the effect of FOI statutes may be a double-edged sword, that is, whether the laws in practice have resulted overall in more freedom of information or – ironically – in less.

The B.C. legislature’s intent in the purpose clause of the *FOIPP Act* appears clear enough:

2. […] (2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

Unfortunately, using the FOI law to ‘limit access’ is exactly what many public servants in Canada and the world are now doing. Many applicants note that officials are, in effect, hiding behind an FOI statute even for the most banal records, telling information seekers they must use the law as their first option, not as the last resort that parliament had intended.

Then, illogically, some politicians and bureaucrats blame a surfeit of applicants for supposedly bloating the cost of the FOI system and so draining the public treasury, a situation that the government itself needlessly created by failing to allow routine release. The cost is raised further still when the state improperly delays the FOI reply for weeks or months as its public relations branch toils on pre-release ‘issue management’ program (effectively, a spin control plan).

Yet it is often forgotten that one may still request any records routinely, and sometimes receive them. On this matter, Ontario’s FOI law includes an enlightened provision, which could also be placed in the B.C. FOIPP Act:

Pre-existing access preserved. 63 (2) This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force.
**Recommendation No. 52**

Place a provision in the Act to preserve pre-existing access to information, on the model of Ontario’s FOI law Sec. 63 (2).

When announcing the passage of FOI statutes, some administrations declare the law is just a flagship of new general culture of open government, and this proclamation would seem to auger well for the concept of broader routine release. As new generations of public servants have come to acquire greater familiarity with the FOI process, the prospect seems brighter yet. Besides noting the potential for increased public trust and confidence in government, the organization Article 19 well summed up the need for broader publication:

> Although the main focus of any access to information law will be request-driven access, the proactive publication of information by public bodies is also a key element of a progressive access regime. Most people will never make a specific request for information, so that the system of proactive publication will effectively determine what public information they see.\(^{86}\)

In many jurisdictions, the presence of an FOI law has already leveraged the routine release of several types of record that one formerly had to request under FOI, such as lists of polluters (posted then regrettaibly withdrawn in British Columbia) and restaurant inspection reports. In B.C., the government has posted the texts of its P3 private-public partnership contracts on its website, although several of these agreements have large passages deleted, reportedly to shield commercial interests.

As most governments seem sensitive to their reputations for transparency, they often proudly announce such actions in press releases. Their hope is that such publicity can engender more public trust, demonstrating that government “has nothing to hide,” while conversely, withholding innocuous records solely by habit and for no sensible cause can provoke public suspicions when none need exist.

An additional benefit is that, as the state came to realize, releasing records routinely is far less labour-intensive and costly to taxpayers than the FOI process.

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\(^{86}\) Memorandum on a proposed draft Bill on Freedom of Information for Brazil. Article 19, London, 2005
In many nations and provinces, some proactive publication is also mandated in statutes other than the FOI law, e.g., B.C.’s *Financial Information Act*.

The B.C. Liberals stated in their 2009 election platform that “We will also continue to expand government’s ‘on-line’ presence to facilitate general disclosure of government documentation and information that would have previously required freedom of information requests for access.” Much more could be done on this pledge.

Yet such publication should never be solely internet-based because, even today, not all of the public has internet access or expertise. As Article 19 said: “It is not sufficient that the public bodies ‘make available’ the information, but should be obligated to ‘publish and disseminate widely’… We submit that simply publishing the information on its website does not satisfy this latter obligation.”

Obviously, real transparency entails more than just what a government chooses to release, and FOI laws are mainly designed for, and will always be necessary for, records that the state definitely does not want released. As Swedish philosopher Sissela Bok wrote, “if officials make public only what they want citizens to know, then publicity becomes a sham and accountability meaningless.” Some longtime FOI users frankly, and I believe not unreasonably, regard much of the information that governments are now placing on their websites as woefully incomplete, self-serving and vacuous.

Some such governmental transparency practices would always be welcomed, such as the systematic declassification of historical records in archives. Yet these practices and the routine release of certain record types should be guaranteed in law - and ideally should be continually expanded - so that the public is not left to depend on the uncertainties of regulations, and voluntary practices that could be curtailed any day.

For now, the main proactive publication mandated in the B.C. FOIPP Act is in Sec. 69 on personal information banks (which is most valuable), and the meager notation in Sec. 70, for “policy manuals.” In Sec. 71, the head of the public body

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may (not must) prescribe categories of records that can be released to the public without an FOI request. These two latter sections are entirely inadequate.

Amongst the most important records of political history are the minutes of cabinet meetings. In Ottawa, these are routinely released to the National Archives after 30 years. I suggest the B.C. cabinet minutes be routinely released onto government websites after 20 years, a period gradually moving to the 10 years I advised above for the termination of the cabinet records exemption.

Recommendation No. 53

Amend Sec. 70 to mandate that B.C. cabinet minutes be routinely released onto government websites after 20 years, a period gradually moving to the 10 years advised in this report for the termination of the cabinet records exemption.

I fully agree with these recommendations of the 2004 legislative review:

   No. 5. 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 Commissioner for the routine disclosure of electronic records, and to have them operational within a reasonable period of time.

   No. 12 — Amend section 13(2) to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public.

In 2004 the Commissioner rightly praised the framework of routine disclosure in the system of publication schemes under the United Kingdom’s FOI law, and features of 1996 amendments to the U.S. FOIA: “The UK system has many features that can and should be imported to British Columbia.” He advised, and I agree:

   Recommendation 1: Section 71 should be amended to require public bodies to make available to an individual his or her own personal information free of charge and without an access request, but subject to any access exceptions under the Act.

   Recommendation 2: The Act should be amended to require public bodies, at least at the provincial government level, to adopt and implement schemes approved by the OIPC for routine disclosure of information, with disclosure
of information under these schemes being by electronic means wherever possible.

Global Commentary

• Article 19, Model Freedom of Information Law, 2001

17. Every public body shall, in the public interest, publish and disseminate in an accessible form, at least annually, key information including but not limited to:

(a) a description of its structure, functions, duties and finances;

(b) relevant details concerning any services it provides directly to members of the public;

(c) any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body’s response;

(d) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;

(e) a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;

(f) any regulations, policies, rules, guides or manuals regarding the discharge by that body of its functions;

(g) the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and

89 Regarding one draft FOI bill, Article 19 asserts that, on the question of what counts as genuine access, ‘The mention in paragraph 4 that some of the material is available for a fee would seem to contradict the requirement to publish proactively. Either one has to request the material, and pay a fee to access it, or the public body should be required to publish it proactively, in which case it may not charge a fee.’ - Sierra Leone’s draft Access to Information Bill Statement of Support. Article 19, London, 2005.
(h) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body.’

- **Commonwealth Parliamentary Association, Recommendations for Transparent Governance, 2004:**

‘(3.1) Public bodies should be required by law to publish and disseminate widely a range of key information in a manner that is easily accessible to the public. Over time, the amount of information subject to such disclosure should be increased. (3.2) Public bodies should be required to develop publication schemes, with a view to increasing the amount of information subject to automatic publication over time. (3.3) Public bodies should make use of new information technologies so that, over time, all information that might be the subject of a request, and that is not covered by an exception, is available electronically [....] (3.4) Where information has been disclosed pursuant to a request, that information should, subject to third party privacy, be routinely disclosed.’

- **Organization for Security and Co-operation in Europe (OSCE), Access to information recommendations, 2007:**

‘Government bodies should be required by law affirmatively to publish information about their structures, personnel, activities, rules, guidance, decisions, procurement, and other information of public interest on a regular basis in formats including the use of ICTs and in public reading rooms or libraries to ensure easy and widespread access.’

**Other nations**

On the subject of pro-active publication and routine release, the rest of the world has left Canada far behind. Most nations from Albania to Zimbabwe prescribe the release of many vital types of information in sections of their FOI statutes and, unlike the B.C. FOIPP Act’s perfunctory Section 70 and 71, many of those are exhaustive, sometimes over 400 words each. (All of these can be read in my Global FOI Excel Chart, column X. See Appendix 4 for two superb examples.)

At a minimum, the B.C. **FOIPP Act** should be amended to more types of records that must be proactively published; there are many items noted below which could be added to our Act (as well as items from the Global Commentaries above).
• a stronger default right to records exists in Finland’s FOI law as compared to the B.C. law: “1.1 Official documents shall be in the public domain, unless specifically otherwise provided in this Act or another Act.”

• public bodies must make computers available to the public to facilitate access (Mexico, Poland, the Philippines)

• all statutes and internal regulations must be published (Columbia, and other nations)

• courts and other bodies are required to publish the full texts of decisions, and the Congress is required to publish weekly on its web site all texts of “projects of laws” (Ecuador)

• public bodies must publish information on a government activity’s influence on the environment (Armenia)

• there is a duty to publish draft legislation in Poland’s FOI statute90 (Such a record is strictly barred from disclosure in the FOI laws of most Commonwealth nations, e.g., B.C. FOIPP Act Sec. 12(1))

• public bodies are required to publish every six month all decisions, circulars, guidelines and any references for documents that have an interpretation of enacted laws or administrative procedures (Portugal)

• in Serbia, the National Council is required to publish the data of sessions, minutes, copies of acts and information on the attendance and voting records of MPs.

• the Swedish FOI law makes it possible for ordinary citizens to go to the Prime Minister's office and view copies of all of his correspondence.

• the state must publish contracts including a list of those who have failed to fulfill previous ones, budgets, results of audits, procurements, credits, and travel allowances of officials (Ecuador); and information relating to public tenders (Croatia)

• the state must publish a description of materials containing information relating to any grant or contract made by or between the institution and another

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90 Poland’s law, Chapter 2. Art. 6. 1. ‘Public information shall be accessed, in particular on: (1) internal and foreign policy, including on: a) intentions of legislative and executive authorities, b) draft legislation’
government and/or public institution or private organization (draft FOI bill of Nigeria)

• public bodies must publish the content of all decision and policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material (Antigua and Barbuda)

• national and local governments must post online: statistics on crime and economics; information relating to health or safety; budgets and draft budgets; information on the state of the environment; and draft acts, regulations and plans including explanatory memorandum. They are also required to ensure that the information is not ‘outdated, inaccurate or misleading’ (From the Estonian FOI law, which cites 32 types of public records in Sec. 28)

• information on the granting of special or exclusive rights to market operators, private organisations and private persons.’ (Hungary)

• in India, all public authorities must proactively publish and disseminate a very wide range of information, including their decision-making norms and rules, opportunities for public consultation, and recipients of government subsidies, licences, concessions, or permits. Public authorities must also maintain indexes of all records and over time computerize and network their records

• institutions are required to make documents available directly though an electronic register, especially legislative documents and those relating to the development of policy and strategy (Kosovo)

• government must produce an index of classified information (Ecuador)

• public bodies must disclose transactions involving acquisition and disposal of property and expenditures undertaken by a public body in the performance of its duties (Pakistan)

91 In Hungary, there have been several valuable amendments to the FOI statute. In 2003 the so-called "Glass Pockets Act" modified 19 different laws including the FOI to facilitate the transparency of the use of public funds by limiting business secrets, expanding disclosure requirements and requiring budget organizations to continually post updated financial information. Act XC of 2005 on the Freedom of Information by Electronic Means imposes E-FOI requirements for the law. It requires a number of public bodies to create home pages and sets out in an annex an extensive list of information that needs to be released. http://www.freedominfo.org/countries/hungary.htm
• public bodies must publish a description of the powers and duties of its senior
officers, and the procedure it follows in making decisions (Antigua and Barbuda)

• on the internet, the state must publish records on the acquisitions of goods and
services. The publication will describe transactions in detail – the promised
amount, the suppliers and the quantity and quality of the goods and services that
were acquired (Peru)

• a public authority shall publish details of any process that exists for consultation
with, or representation by, members of the public in relation to the formulation of
policy in, or the administration of, the public authority; or the exercise of the
powers or performance of duties, by the body; a description of all remedies
available in respect of an act or a failure to act by the body (Uganda)

• public bodies must publish any direct request or complaints mechanisms
available to members of the public regarding acts or a failure to act by that body,
together with a summary of any requests, complaints or other direct actions by
members of the public and that body’s response (Antigua and Barbuda)

• in Kenya’s draft FOI bill, the state must publish all relevant facts while
formulating important policies or announcing the decisions which affect the public;
provide to any person the reasons for any decision taken by it in relation to that
person:

before initiating any project, or formulating any policy, scheme,
programme or law, publish or communicate to the public in general or to
the persons likely to be affected thereby in particular, the facts available to
it or to which it has reasonable access which in its opinion should be known
to them in the best interests of natural justice and promotion of democratic
principles.

• in Palestine’s draft FOI bill, Art. 8 requires both public and private “industrial
institutions” to publish six-monthly reports providing information on the location,
nature and associated hazards of toxic materials used by them, the volume of
materials released into the environment as a result of manufacturing processes and
waste disposal methods and mechanisms used by them.

• with the publication of government structures, agreements, policies, etc., the
information released ‘shall be made in language easily understandable by the
public’ (Indonesia’s draft FOI bill)
Canadian commentary


‘Recommendation 19: Add a section to the Act which would place an obligation on government institutions to make accessible in open digital systems that majority of information that is not exempt and assure that any databases falling into categories one and two of the taxonomy are actively disseminated and are made available through public systems mandated by Act or consequent regulation.

‘Recommendation 35: The government should be encouraged to issue a policy which states that no exemptions will be applied to results of public opinion research; that a listing of such research, updated no less frequently than each two months (60 days), must be maintained in the office of each institution's Access to Information Coordinator; and that the listing and public opinion results must be provided upon informal request by the public.

• *Information Commissioner John Grace, Toward a Better Law: Ten Years and Counting*, 1994:

‘Recommendation 10. Government institutions be required to release routinely all information which describes institutional organizations, activities, programs, meetings, and systems of information holdings and information which tells the public how to gain access to these information resources.

‘Recommendation 11. Government's duty to disseminate should also extend to all information which will assist members of the public in exercising their rights and obligations, as well as understanding those of government.’

• *A Call for Openness*, report of the MPs’ Committee on Access to Information, chaired by MP John Bryden, 2001:

‘3. We recommend that the Access to Information Act be amended to include a ‘passage of time’ provision requiring institutions to routinely release records under their control thirty years after their creation. This provision would over-ride all exemptions from release contained in the Act.’

• *Treasury Board Secretariat, ATIA Review Task Force report*, 2002:

8-3. That 'government institutions more systematically identify information that is of interest to the public and develop the means to disseminate it proactively. These means should include regular publication, and the use of Web sites, or special arrangements or partnerships with the private sector, where appropriate.'
8-5. That 'government institutions: routinely release information, without recourse to the Act, whenever the material is low-risk, in terms of requiring protection from disclosure; and establish protocols for use in identifying information appropriate for informal disclosure.'

• John Reid, former Information Commissioner of Canada, model ATLA bill, 2005 (underlined parts are Mr. Reid’s amendments to the existing Act):

41. Paragraph 68(a) of the Act is replaced by the following:

(a) published material or material available for purchase by the public if such material is available at a reasonable price and in a format that is reasonably accessible;

**Canadian provinces**

Nearly every provincial and territorial FOI statute (except in New Brunswick and Prince Edward Island) cites several types of records that must be published, and these sections are almost as weak and limited as those of the B.C. FOIPP Act, at least when compared to other nations.

In Quebec’s FOI law, there is some mandatory release prescribed (for the internet no less), but only for records noted in regulations:

16.1. A public body, except the Lieutenant-Governor, the National Assembly or a person designated by the National Assembly to an office under its jurisdiction, must distribute through a web site the documents or information made accessible by law that are identified by regulation of the Government, and implement the measures promoting access to information enacted by the regulation.

In her 2007 annual report, Ontario Information and Privacy Commissioner Ann Cavoukian recommended the government publicly disclose both winning and losing bids for all contracts awarded by provincial organizations. Such a move would also be advisable for a reformed B.C. FOIPP Act as well.

**Recommendation No. 54**

Amend Sec. 70 to add a much longer list of records that must be routinely released or proactively published, on the examples of Article 19’s Model of Freedom of Information Law (2001), and those of many other nations and commentators noted in this report.
### Section 74 - Penalties

Although the topic of penalties may be the least agreeable in discourse on freedom of information issues, it must be faced directly.

The amendment passed in 1999 to the *Access to Information Act* that would penalize those destroy records was most commendable, and advisable for the B.C. law. Yet, as asserted in the commentaries below, transparency laws need to extend well beyond that problem, to as well discourage response delays and other means of obstructing the FOI process. The current penalties for obstructing the B.C. Commissioner are also too anemic.

As many longtime FOI applicants know, the response of several government agencies to FOI requests are determined not by their legal or ethical obligations, but instead cynical calculations of what one ‘can get away with,’ logistically, financially and politically.

Beyond statutory changes, a strong message to promote a culture of transparency must come from the top. This is an essential start but can only go so far. Although prison terms for some FOI offenses are indeed prescribed in several nations (see below), this might at times seem too severe.

Yet some means of deterrence is indispensable, beyond ineffectual means such as verbal reprimands or letters of rebuke placed on one’s personnel file. Apologists may plead that justice should be tempered with mercy and warn that any prison term can effectively ruin an official’s life. But to forgive everything afterwards is to permit everything in advance; those who deliberately choose to violate the law must accept some consequences, and others contemplating the same actions must be discouraged.

Here the matter stands in the B.C. *FOIPP Act*:

**Offences and penalties**

74 (1) A person must not willfully do any of the following:

(a) make a false statement to, or mislead or attempt to mislead, the commissioner or another person in the performance of the duties, powers or functions of the commissioner or other person under this Act;
(b) obstruct the commissioner or another person in the performance of the
duties, powers or functions of the commissioner or other person under this
Act;

(c) fail to comply with an order made by the commissioner under section 58
or by an adjudicator under section 65

(2) A person who contravenes subsection (1) commits an offence and is liable to a
fine of up to $5,000. [….]

(3) Section 5 of the Offence Act does not apply to this Act.

[See also ‘Privacy protection offences. 74.1(1)]

Yet this section 74 is inadequate, and requires an addition along the terms of the
following Canadian Access to Information Act, 1999 amendment:

Obstructing Right of Access

67.1 (1) No person shall, with intent to deny a right of access under this Act,

(a) destroy, mutilate or alter a record;

(b) falsify a record or make a false record;

(c) conceal a record; or

(d) direct, propose, counsel or cause any person in any manner to do
anything mentioned in any of paragraphs (a) to (c).

Offence and Punishment

(2) Every person who contravenes subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term not
exceeding two years or to a fine not exceeding $10,000, or to both; or

(b) an offence punishable on summary conviction and liable to
imprisonment for a term not exceeding six months or to a fine not
exceeding $5,000, or to both.
Recommendation No. 55

Amend the B.C. Act’s Section 74 to prohibit and penalize persons for the unauthorized record destruction and handling in the FOI process, with the wording of the Canadian Access to Information Act, Sec 67.1.

Global Commentary

• Article 19, Model Freedom of Information Law, 2001:

‘49. (1) It is a criminal offence to wilfully: – (a) obstruct access to any record contrary to Part II of this Act; (b) obstruct the performance by a public body of a duty under Part III of this Act; (c) interfere with the work of the Commissioner; or (d) destroy records without lawful authority.

(2) Anyone who commits an offence under sub-section (1) shall be liable on summary conviction to a fine not exceeding [insert appropriate amount] and/or to imprisonment for a period not exceeding two years.’

• Commonwealth Secretariat, Model Freedom of Information Bill, 2002:

‘44 (2) A person who wilfully destroys or damages a record or document required to be maintained and preserved under [sec.44] subsection (1), commits an offence and is liable on summary conviction to a fine of [........] and imprisonment for [……].

‘(3) A person who knowingly destroys or damages a record or document which is required to be maintained and preserved under subsection (1) while a request for access to the record or document is pending commits an offence and is liable on summary conviction to a fine of [........] and imprisonment for [……].’

• Commonwealth Human Rights Initiative, Open Sesame: Looking for the Right to Information in the Commonwealth, 2003:

‘The law should impose penalties and sanctions on those who wilfully obstruct access to information. Penalties for unreasonably delaying or withholding information are crucial if an access law is to have any real meaning.’
Recommendation No. 56

Regarding penalties, consider amending the B.C. Act’s Section 74 along the models of Article 19’s Model Freedom of Information Law (2001) and the Commonwealth Secretariat’s Model Freedom of Information Bill (2002).

Other nations

This could be the one FOI subject on which it might be the least necessary for Canada to follow the rest of the world closely. Corrective justice is culturally and political determined in each nation, and styles of judicial interpretation vary dramatically amongst domestic legal systems.

Several of the penalties in the FOI legislation of other nations may appear extreme or even unsettling to Canadian public servants. I would never suggest that the B.C law should replicate all of what appears below, but it is at least worthwhile to note the legal reality in the rest of the world.92

Other nations take the right to know much more seriously than in Canada. For example, in Uganda, public officers who conceal information will face prosecution, the Director of Information Kagole Kivumbi said in April 2008. Quoting section 46 of the Access to Information Act, he said a person who intends to deny anyone the right to information commits an offence and is liable to imprisonment.93

Out of 68 jurisdictions with freedom of information laws, 31 contain some kind of penalties for obstructing the FOI process (seven on this list are in the Commonwealth).

Forms of penalties:

• The law imposes fines for obstructing the FOI process.

  In the FOI laws of 20 nations (11 of these Commonwealth)
  In the draft FOI bills of 14 nations (nine of these Commonwealth)

• The law imposes prison terms for obstructing the FOI process.

93 Uganda: Officers to Face Court for Concealment. Africa News, April 29, 2008
In the FOI laws of 15 nations (eight of these Commonwealth)
In the draft FOI bills of ten nations (eight of these Commonwealth)

Breakdown of the ‘obstructionism’ concept into six rough categories (some nations appear in more than one category):

• The law imposes penalties for delaying replies to FOI requests.
  In the FOI laws of six nations (one of these Commonwealth)
  In the draft FOI bills of four nations (all Commonwealth)

• The law imposes penalties for unauthorized record destruction.
  In the FOI laws of 15 nations (11 of these Commonwealth)
  In the draft FOI bills of nine nations (seven of these Commonwealth)

• The law imposes penalties for altering records sought by FOI applicants.
  In the FOI laws of nine nations (six of these Commonwealth)
  In the draft FOI bill of one Commonwealth nation

• The law imposes penalties for interference or non-cooperation with an information commissioner or equivalent.
  In the FOI laws of five nations (three of these Commonwealth)
  In the draft FOI bills of five nations (four of these Commonwealth)

• The law imposes penalties for concealing records sought by FOI applicants.
  In the FOI laws of 11 nations (five of these Commonwealth)
  In the draft FOI bill of one Commonwealth nation

• The law imposes penalties for general unspecified obstructionism or other actions not cited in the above categories.
  In the FOI laws of 18 nations (two of these Commonwealth)
  In the draft FOI bills of 14 nations (eight of these Commonwealth)
**Canadian commentary**

*Bill C-201*, introduced by MP Pat Martin, 2004:

‘67.2 (1) A person who wilfully obstructs any person’s right of access under this Act to any record under the control of a government institution is guilty of an offence.

(2) No person who destroys information in accordance with the Library and Archives of Canada Act commits an offence under subsection (1).

(3) Every person who contravenes subsection (1) is guilty of an offence and liable (a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine not exceeding ten thousand dollars, or to both; and (b) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding five thousand dollars, or to both.’

*Justice Gomery report, Restoring Accountability, 2006:*

‘Recommendation 16: The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions.’

**Canadian provinces**

The FOI laws of all provinces and territories – except for Nova Scotia and New Brunswick – have penalties for obstructing or misleading the information commissioner. These range from fines of $200 to $2,500 in Quebec (or $50 per day); $1,000 in Saskatchewan, $5,000 in Newfoundland, the Yukon, Ontario, British Columbia, and the Northwest Territories; $10,000 in Alberta and Prince Edward Island; and a daunting $50,000 in Manitoba.

For this offense, wrongdoers can be imprisoned in two provinces - for three months in Saskatchewan, and six months in Newfoundland.

**Recommendation No. 57**

Amend Section 74 to double the fine for obstructing the Commissioner to $10,000. Consider the advisability of prison terms for the same offense.
(Much of the following matter is covered by my recommendation above to amend the B.C. *FOIPP Act’s* Section 74 to prohibit and penalize persons for the unauthorized record destruction and handling in the FOI process, with the wording of the Canadian *Access to Information Act*, Sec 67.1.)

In regards to not preserving records sought by FOI applicants, the access statutes of eight provinces and territories contain penalties: Nova Scotia, Newfoundland, Quebec’s statute has the broadest scope and Labrador, Quebec, the Yukon, Manitoba, Alberta and Prince Edward Island.

Quebec’s statute has the broadest scope, insofar that Sec. 158 prescribes that: “Every person who knowingly denies or impedes access to a document or information to which access is not to be denied under this *Act* is guilty of an offence [...]” (Yet fines are picayune, ranging from $100 to $1,000; perhaps bad publicity could aid as a deterrent.)

Positively, the Quebec law extends beyond record alteration or destruction, to potentially cover a wide range of obstructionist practices. The Commissioner may institute penal proceedings for an offence under the law. Yet there is a potential escape cause in the Quebec law: “163. An error or omission made in good faith does not constitute an offence within the meaning of this *Act.*”

The two most recently-passed FOI laws, those of Alberta and Prince Edward Island (which were heavily influenced by the B.C. law) have nearly identical records preservation sections; these are the next broadest in scope after Quebec, as being the only laws that forbid agencies to “conceal” sought records. The PEI statute prescribes a $10,000 fine for those who “alter, falsify or conceal any record, or direct another person to do so.”

Only Nova Scotia and Newfoundland prescribe jail terms (both six months), for record alteration in the former, destruction in the latter. In the provinces, fines for record management wrongdoings range from $100 in Quebec, $2,000 in Nova Scotia, $5,000 in Newfoundland, $10,000 in Alberta and PEI, and the stiff penalty of $50,000 in Manitoba.

Most provincial FOI laws also have penalties for improperly disclosing or otherwise misusing personal information.

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Section 75 - Fees

I have only three points to make regarding this section.

75 (1) The head of a public body may require an applicant who makes a request under section 5 to pay to the public body fees for the following services:

(a) locating, retrieving and producing the record;
(b) preparing the record for disclosure;
(c) shipping and handling the record;
(d) providing a copy of the record.

(2) An applicant must not be required under subsection (1) to pay a fee for
(a) the first 3 hours spent locating and retrieving a record, or
(b) time spent severing information from a record.

Several years ago, Vancouver city's FOI branch became the only (so far as I know) public body in B.C. to start charging fees for "reviewing" records to see if they should be severed due to FOI exemptions (though not charging for the physical severing itself), despite the B.C. government's own FOI Policy and Procedures Manual that clearly states public bodies "cannot charge fees for reviewing records."

A Vancouver FOI official said “if someone asked by FOI for the whole contents of our vaults, with thousands of records, it would take a vast time to ‘review’ them for possible severing – why should we not be able to charge anything for all that time spent?”

He also claimed the Manual's interpretation of the B.C. FOIPP Act is wrong, and the Manual has no legal force anyways, and so the city has no duty to follow it. This matter was never clearly resolved. I believe charge fees for “reviewing” records violates the intent of the Act, and the Act should be amended to explicitly prohibit this practice.

Recommendation No. 58

Amend Sec. 75 (2)(b) to change the wording from “time severing…” to “time reviewing the record and severing information from a record.”
Recommendation No. 59

Consider extending the free time “spent locating and retrieving a record” from the current 3 hours up to 5 hours (which is the standard in the federal Access to Information Act, Sec. 11).

Section 79 – FOI and Other Laws

The relationship of a transparency statute to other laws is a complex topic that can easily elude the radar, for when a conflict of laws arises on such a score, it may appear as an obscure, unimportant technicality. FOI laws are designed to contain enough exemptions to prevent the harms that the secrecy clauses in other laws profess to avert, making those other laws’ provisions redundant and illogical at best, deleterious at worst.

Passing secrecy provisions in other acts to override an FOI statute can give rise to a confusing patchwork of laws, for in such provisions, the withholding of the information might be mandatory or discretionary; with a harms tests, time limits, a public interest override and appeal routes – or, more often, without any of these features.

The problem really is acutely important, for Sec. 79 of the British Columbia FOIPP Act prescribes that an agency must refuse to disclose any information requested under the FOIPP Act that is restricted by many other statutes, as set out in a schedule to the Act.

Relationship of Act to other Acts

79 If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

Unchecked, the number of listed statutes could grow still further today, a that practice former federal Information Commissioner John Reid has well described

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94 In British Columbia, for example, aware that amending the FOI law directly would alert the media and FOI advocates, the government sometimes quietly inserts new secrecy provisions (consequential amendments) that override the FOI law to other statutes in a Miscellaneous Statutes Amendment Act, an old legislative ruse to evade notice that is less successful today.
as “secrecy creep,” while his predecessor the late John Grace called Sec. 24 of the federal *ATIA* (the equivalent to B.C.’s *FOIPP Act* Sec. 79) “the nasty little secret of our access legislation.”

Sec. 79 violates the stated goals of the B.C. *FOIPP Act*, which is to make government more accountable to the public and to provide a right of appeal. It is a mandatory and so-called “class” exemption: once the government decides that a record contains information of a kind contemplated in one of those other provisions, the agency has no choice but to refuse its release. However, very few of the other provisions by their own terms absolutely bar disclosure; they usually only “restrict” it in some way.

Indeed, most grant some measure of discretion to an official to determine whether to release information - usually to other government officials or to the person who provided the information. As one expert notes, “This varying degree of discretion fits awkwardly within a mandatory class exemption.”

Sec. 79 also violates the principle of independent review. The scope of the Information Commissioner’s review of government refusals to release records under this exemption is quite narrow. In investigating this refusal, all the Commissioner can do is to determine whether or not the disclosure is subject to some other statutory restriction. If it is, then even if the disclosure would likely cause no identifiable harm, it must be withheld nonetheless. This prescription must be followed even if the other statute merely restricts, but does not categorically bar, disclosure. As FIPA noted in 2005:

> FIPA and the BC Civil Liberties Association have urged the government to conduct a rigorous review of all the statutory exemptions that have been passed over the last decade that exclude Ministry records from the ambit of the *FOIPP Act*. It is our joint submission that there are no legitimate grounds for such exclusions.

The Act was carefully crafted with all the checks and balances necessary to fulfill its purposes while protecting important interests. Both organizations see statutory overrides as one of the greatest threats to FOI and privacy rights.

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Resolving this problem seems not a high priority in Canada because statesmen perceive that there will always be other far more urgent political priorities than the harmonization of principles in domestic statutes, to avert conflict of laws disputes that might never arise in practice. But Sec. 79 is entirely unnecessary because exemptions in the B.C. *FOIPP Act* already provide ample protection for legitimate interests.

One pernicious example: Vancouver was the only municipality that barred citizens from photocopying lists of the donors to civic election campaigns. My FOI request in 2004 for copies of these records was denied, so I was compelled to sit in the city clerk's office for hours to hand-write them all.

I appealed, but the Commissioner ruled that these rules of the Vancouver Charter’s Sec. 65 overrode rights in the B.C. *FOIPP Act*, as Sec. 79 specifically allowed. (See Order 04-01, [http://www.oipcbc.org/orders/2004/Order04-01.pdf](http://www.oipcbc.org/orders/2004/Order04-01.pdf) ) Other overrides to the B.C. *FOIPP Act* are found in Sec. 74 of the *Child, Family and Community Service Act*, and Sec. 40 of the *Human Rights Code*.

The United Kingdom also allows the provisions of several other statutes to override its FOI law. Yet in one recent report, the UK’s Department of Constitutional Affairs (in charge of implementing the law) identified 381 other pieces of legislation that limit the right of access under the FOI act, and it has committed to repealing or amending 97 of those laws and reviewing a further 201. 96

British Columbia should do likewise with the B.C. *FOIPP Act*. Yet as FIPA sadly noted in its 2005 recommendations report:

> We were pleased to receive the assurance of BC’s Minister of Management Services, in a letter of December 10, 2001, that such a review of statutory exemptions would be undertaken as part of the legislative review of the Act. The government never followed through on this promise.

**Recommendation No. 60**

First option: Repeal B.C. *FOIPP Act* Sec. 79 and its related schedule.

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96 [http://www.freedominfo.org/countries/united_kingdom.htm](http://www.freedominfo.org/countries/united_kingdom.htm)
If that is not accepted, there is a secondary option (which was FIPA’s recommendation in 2005): Extend coverage to categories of records exempted by “notwithstanding clauses” in other statutes.

**Global Commentary**

• **Article 19, *Principles of Freedom of Information Legislation, 1999*, endorsed by the United Nations:**

'Principle 8 - Disclosure Takes Precedence. Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed. The regime of exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it. In particular, secrecy laws should not make it illegal for officials to divulge information which they are required to disclose under the freedom of information law.

‘Over the longer term, a commitment should be made to bring all laws relating to information into line with the principles underpinning the freedom of information law.'

• **The Commonwealth Parliamentary Association, *Recommendations for Transparent Governance, 2004***:

‘(7.1) Where there is a conflict between the access to information law and any other legislation, the access to information law should, to the extent of that inconsistency, prevail.

‘(7.2) Urgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information.

‘(12.4) The independent administrative body should also play a role in ensuring that other legislation is consistent with the access to information law. This should involve reviewing existing legislation and making recommendations for reform of any inconsistent laws, as well as being consulted on whether or not proposed legislation would impede the effective operation of the access to information regime.’
Other Nations

Consider Sec. 5 of South Africa’s FOI statute:

5. This Act applies to the exclusion of any provision of other legislation that (a) prohibits or restricts the disclosure of a record of a public body or private body; and (b) is materially inconsistent with an object, or a specific provision, of this Act.

India’s FOI law contains a similar provision in Sec. 22. On this subject, Thailand’s FOI statute is most concise, in Sec. 3: “All other laws, by-laws, rules and regulations, insofar as they deal with matters provided herein or are contrary hereto or inconsistent herewith, shall be replaced by this Act.”

In the draft FOI law of St. Kitts and Nevis, Sec. 6(1) states that the bill will apply to the exclusion of other legislation in force. For the Commonwealth Human Rights Initiative, although the intent is positive, such a wording is not explicit enough; the CHRI added: “At the very least, consideration should be given to amending the wording of Sec. 6(1) to account for the possibility of another law, policy or practice developing in the future.”

Canadian Commentary

(Re: ATI Act Sec. 24 – the equivalent of B.C. FOIPP Act Sec. 79)

• Open and Shut, report by MPs’ committee on Enhancing the Right to Know, 1987:

‘The Committee is concerned about a “slippery slope” effect should the current approach of listed other statutory provisions in Schedule II be retained…. The impact of permitting wholesale additions to the list of other statutory exemptions

97 Yet there is a qualifier in Thailand’s act: ‘Section 43. The Rule on the National Security Protection, B.E. 2517 (1974), insofar as it deals with the official information, shall continue to be in force to such an extent as not contrary to or inconsistent with this Act, unless otherwise provided in the Rule prescribed by the Council of Ministers under section 16.’

contained in the *Access Act* is obvious: the spirit of the legislation could readily be defeated. The *Access Act* would not be a comprehensive statement of our rights to the disclosure of government records. Instead, it would be amorphous. One of the benefits to be derived from listing all exemptions in the *Access Act* is that, in effect, the complete Act is brought under one roof. No longer would other legislation need to be consulted in order to determine one’s rights in this vital area. The Committee recommends that the *Access Act* be amended to repeal section 24/Schedule II […]

- **Information Commissioner John Grace, Toward a Better Law: Ten Years and Counting, 1994:**

  ‘The question must be asked: Why was it necessary to put section 24 in the Access Act? After all, there are substantive exemptions to cover any conceivable legitimate need for secrecy. The standing committee [in 1987] concluded there was no such need. The fact is, section 24 allows the government to keep information secret even when there may be no reasonable justification for secrecy. [. . . . ] Yet all the provisions listed in schedule II are accorded mandatory secrecy forever. This provision is the nasty little secret of our access legislation and it has no place at all in the law.’

- **Justice Gomery report, Restoring Accountability, 2006:**

  ‘The Commission favours the deletion of section 24, which says that if some other federal Act states that certain records/information must not be disclosed, then the *Access to Information Act* adopts that prohibition as part of the access to information regime.’

### Education and Promotion

In the B.C. *FOIPP Act* Sec. 42, the Commissioner “may” monitor and “inform the public about the Act,” but this is not mandatory. To make it an obligation might place too much of a burden on the OIPC, and so a duty could be placed upon the ministry that administers the FOI system instead.

Alternatively, the Commissioner could be encouraged to educate and promote the FOIPP process to the general public. If so, government must provide adequate funds for this task, and it would be a dedicated, stand-alone part of the Commissioner’s budget.

The hoped-for empowerment of the people by means of the passage of the B.C. *FOIPP Act* in 1992 can only be achieved if the public is aware of its rights and
knows just how to exercise them in practice. Yet, as former federal information commissioner John Grace wryly reported in 1994:

Another early victim of government timidity in facing up to the rigors of openness was a public education program which might have better informed the public of its new access rights, ‘This task was to be Treasury Board's.

The government decided, however, that it could not be undertaken because the risk was too great. Horror of horrors, the campaign might be successful! More Canadians might use the Act to the greater irritation or embarrassment of members of the government.99

No statute, unfortunately, can legislate a change in attitude. But still, at a minimum, the FOI law could mandate what specific educational measures must be taken to inform the public of its legal rights of access.

For some journalists who have been reading access laws for decades and have made hundreds of FOI requests, it is easy to forget how difficult the process can be for one just beginning in the ‘game’ (for such it is), and who has been taught nothing of this democratic right that should be considered as fundamental as voting.

The challenge can be daunting indeed for even experienced applicants to identify the type and location of the needed records, to write and send request letters, and then to follow through, i.e., fight upstream against fees, delays, complex exemptions, and then navigate the appeal routes for months or years, all for the types of records that the citizens have already paid for with their tax dollars and most of which should be routinely releaseable.

The British Columbia Freedom of Information and Privacy Association FIPA – the only Canadian organization working full time on FOI advocacy - regularly receives calls from members of the public asking how to exercise their information rights.

Some questions recurred frequently, such as: Do I request my personal records under the B.C. FOIPP Act or the PIPA Act or PIPEDA Act? Is that public or private body covered under the FOI law? Who is the FOI director, and how do I contact him or her? How do I appeal against exemptions, high fees, long delays?

Must I use an official form to send in a request (which I never do), or is a letter enough? Can I make a request orally, by fax or email?

In critiquing the draft FOI bill of Mozambique, Article 19 notes that:

Informing the public of their rights and promoting a culture of openness within government are essential if the goals of freedom of information legislation are to be realised. In our experience, a recalcitrant civil service can undermine even the most progressive legislation. Promotional activities are, therefore, an essential component of a freedom of information regime.\(^{100}\)

This is a largely overlooked but essential need, for the better-known Canadian users of FOI statutes are more educated, e.g., lawyers, journalists and academics. (Is this situation not true to some degree in most nations?)

But what of the others? One original purpose of transparency laws was to enable the less advantaged potential FOI applicants to help themselves and not need to depend mainly upon well-meaning intermediaries acting on their behalf.

The FOI process as noted above is arduous enough for most people. But when barriers of education, disability, and foreign language are added, the goal can become simply insurmountable; here, FOI education and promotion are essential.

To this end, public promotions are necessary in radio and television advertisements, and more detailed ‘how-to’ guides require publication in newspapers and government websites, such as that of Scottish Information Commissioner Kevin Dunion who ran a strong advertising campaign just before Scotland's *Freedom of Information Act* came into effect in 2005, declaring “I made sure the public was aware of its new rights.”\(^{101}\)

\(^{100}\) *Note on the draft Law of Mozambique on Access to Official Sources of Information*, by Article 19, London, 2005. Elsewhere, the same group also noted that, ideally, these tasks should be undertaken by the public authorities themselves, as well as by an independent oversight body with specific responsibility for ensuring adequate attention and resources are directed towards these tasks. - *Memorandum on the Law Commission of the Republic of Bangladesh Working Paper on the Proposed Right to Information Act 2002*, by Article 19, London, 2004

\(^{101}\) *Firm hand with a big stick*. The New Zealand Herald, December 22, 2007
In the Republic of South Africa, the Promotion of Access to Information Act No 2 of 2000 (PAIA) is the only FOI statute in the world that applies to both public and private bodies, and has many exemplary features for Canadian lawmakers to consider. In the RSA, the first FOI users’ manual in the African continent was published in 2007, and translated into the nation’s 11 official languages.

In his memorable Foreword to the guidebook, S.A. Information Commissioner Dr. Leon Wessels – a former deputy law and order minister in the apartheid regime, and later a police officer, lawyer, and human rights commissioner – observed that:

> It is of critical importance that the citizens be informed about PAIA and how the right of access to information can work for their benefit. Participation in democratic processes can only be effective if it is informed participation. Many of the tragedies in South African history could have been prevented had there been an access to information regime in operation.

> It is however important that PAIA reaches far beyond the traditional political civil rights and that it adds a new dimension to public debate on everyday issues that citizens have to face. . . . We will rejoice if ordinary citizens of our country use this Guide and thereby give more meaning to their freedoms for which they have fought so hard.102

The education and promotion task is within the government’s mandate, and should not fall just to information commissioners and non-governmental organizations, whose financial and human resources are limited (although the commissioner could well take the lead role in practice).

Better yet, one might task the ministry of education to include modules on FOI in school curricula, as part of citizenship training. This has been done, for example, in countries such as Nicaragua, Honduras and Ecuador.

### Recommendation No. 61

Consider a policy directive for the ministry that administers the FOIPP system to educate and promote the FOIPP process to the general public.

Alternatively, the Commissioner could be encouraged to educate and promote the FOIPP process to the general public. If so, government must provide adequate funds for this task, and it would be a dedicated, stand-alone part of the Commissioner’s budget.

**Global Commentary**

- **Article 19, *Principles of Freedom of Information Legislation, 1999*, endorsed by the United Nations:**

  ‘Principle 3. Promotion of Open Government. - Informing the public of their rights and promoting a culture of openness within government are essential if the goals of freedom of information legislation are to be realized. […]

  ‘As a minimum, the law should make provision for public education and the dissemination of information regarding the right to access information, the scope of information which is available and the manner in which such rights may be exercised. In countries where newspaper distribution or literacy levels are low, the broadcast media are a particularly important vehicle for such dissemination and education.

  ‘Creative alternatives, such as town meetings or mobile film units, should be explored. Ideally, such activities should be undertaken both by individual public bodies and a specially designated and adequately funded official body – either the one which reviews requests for information, or another body established specifically for this purpose.’


  ‘(11.1) Public education campaigns should be undertaken to ensure that the public are aware of their right to access information.’

  ‘(11.2) Parliamentarians have an important role to play in this process by making sure that their constituents are aware of their rights. A range of other bodies also have a role to play here, including the independent administrative body that is responsible for implementation of the law, human rights groups, the media (and the broadcast media in particular), public bodies themselves and civil society generally. Use should also be made of regular educational systems, including universities and schools, to promote civic understanding about the right to access information.’
Other nations

Several nations thought it important enough to mandate these activities in statutes, and this is advisable for an amended B.C. FOIPP Act. India’s transparency law imposes duties to monitor and promote the act. In the FOI law of Slovenia, “The Ministry shall perform promotional and developmental tasks in relation to access to information of public character….,” Moreover, in Ecuador’s FOI law:

Bodies are required to adopt programs to improve awareness of the law and citizen participation. University and other educational bodies are also required to include information on the rights in the law in their education programmes.

The Mexican FOI law charged the Federal Institute for Access to Public Information - a body of the Federal Public Administration which is independent in its operations, budget and decision-making - with promoting and publicizing the exercise of the right of access to information. In the impressive draft FOI bill of Kenya,

28. The Information Commissioner shall - (a) develop and conduct educational programmes to advance the understanding of the public, and in particular, of disadvantaged communities, of this Act and of how to exercise the rights contemplated in this Act […]

Canadian commentary

• Open and Shut, report by MPs’ committee on Enhancing the Right to Know, 1987:

‘2.2. The Committee further recommends that the Treasury Board undertake a public education campaign in conjunction with the proclamation of any amendments to the Access to Information Act and the Privacy Act and also consider printing notices about individual rights under both the Access to Information Act and the Privacy Act to be included in standard government mailings.’
APPENDIX 1

The Sec. 13 Policy Advice Exemption in Interpretation and Practice

Below are just several abuses of Section 13 (and many more could be cited):

* Keeping secret a secrecy review. The B.C. government hired a consultant to do a highly secretive review of the B.C. FOIPP Act in 2005. So secretive that the government even refused to tell me how much it paid the consultant, George Macauley, citing section 17, harm to his financial interests. In the process of the review, 27 public and private entities sent submissions on their preferred FOI reforms to Mr. Macauley.

In 2006, FIPA made an FOI request for these texts. After eight months of delays, FIPA was told half of the public bodies' submissions would not be disclosed, due to section 13. (These include BC Hydro, ICBC, the Attorney General, the B.C. College of Physicians and Surgeons, three health authorities and the B.C. Association of Municipal Chiefs of Police.)

FIPA pleaded in vain that because laws and public policy can ultimately affect us all, then we all have a fundamental right to know about the influences exerted in their creation. To highlight the absurdity, FIPA had been given the full texts of all submissions to the 1999 and 2004 legislative reviews of the B.C. FOIPP Act - the same type of records FIPA was seeking here, although the process was somewhat different - without even making FOI requests for them.

After holding an inquiry, the Commissioner’s office said Sec. 13 been overapplied, and ordered some of the records opened in Order F09-02. "Many of the comments are brief and innocuous. Even the more substantive comments are not controversial or earth-shattering," he wrote. Plus, most were out of date, the ministry having fought the request for a number of years by that point.

Nor could the office of the commissioner resist noting the "irony" in the "ministry's use of the freedom of information legislation to withhold stakeholders' comments on potential amendments to the legislation itself." This Order is now the subject of judicial review, a dispute that Vaughn Palmer called “a colossal waste of court time.”103

* Veiling reaction to newsworthy reports. Under sections 12 and 13, the Agricultural Land Commission rejected my FOI request for its internal reviews of

the April 2006 report Farmland Forever by Charles Campbell writing for the David Suzuki Foundation. The problem is growing now because similar internal reviews on reports have been released to me in the past, such as one about offshore drilling, and one about the B.C. Federation of Labour's report of 2004 on farm labourers in the Fraser Valley.

* Censoring resignation letters. The Health Ministry used section 13 to censor Fraser Health Authority chairman Keith Purchase's resignation letter. Purchase resigned in January, expressing frustration with inadequate funding for the health authority and the minister's firing of the Vancouver Coastal chairman.

But Vancouver Sun columnist Vaughn Palmer got the uncensored version of the letter, and wrote that the cuts "utterly mocked the spirit of the information law. It was a cover-up, plain and simple." The deletions included: "Based on that funding information, bed closures and service cuts would be inevitable.... Put simply, we have a crisis situation in the Fraser Health region," and so forth. The exemption rationale is nonsense, for a resignation letter is not "policy advice developed by a public body" as per section 13.

* New heights. In the Province newspaper, Michael Smyth's headline to his May 2006 story told it all: "Liberals take secrecy to insane new heights." The government was now refusing the NDP's routine FOI requests for Premier Campbell's question-period briefing notes, despite always having released them before, with the claim these were now exempt under section 13. Wrote Smyth: "If they'll go this far to cover up their own pre-rehearsed sound bites, how far would they go to cover up something really politically damaging? As their aborted attempt to weaken the FOI law even further shows, they'll go as far as they can."

POlICY ADVICE OPENED UP IN BRITAIN

Several recent FOI rulings on policy advice in Great Britain, Canada’s parliamentary model, give us examples to consider and follow. Note how the "public interest" was invoked to override exemptions. Some similar records might have been withheld here on Sec. 13 grounds, but why should British Columbians accept any less than the British public?

1.) One case involved a request from environmentalists for the submissions which the Export Credits Guarantee Department (ECGD) received from other government departments, about a proposal to extract oil and gas near the island of Sakhalin, north of Japan. The project is contentious because oil spills could endanger a near-extinct species of whale.
The government argued that the decision-making process itself requires ‘space to think,’ even where the information itself is innocuous. ‘In earlier cases,’ said Britain’s premier FOI advocate Maurice Frankel, ‘it has taken this to absurd lengths arguing for the withholding of even the blandest minutes.’

The Information Tribunal, insisted that the government should show how disclosure of the records involved would harm the public interest. In August 2007 it concluded that disclosure of one of the three submissions would improve, not harm, the quality of decision-making, and that another did little more than ask to be kept informed: ‘there appears to this Tribunal to be a weighty public interest in the need for the public to be acquainted with (the information).’ The government appealed the Tribunal’s ruling to the High Court but lost.

- From Should policy discussions be kept under wraps? by Maurice Frankel, director of the UK Campaign for Freedom of Information. The Independent (London), March 28, 2008 http://www.cfoi.org.uk/sakhalin170308.html

2.) Another case involved a 2004 review of the readiness of the identity-card program's IT system, which the Tribunal also held should be disclosed on public-interest grounds. (The plan had raised fears over rising costs and privacy impacts.) The government argued that doing so would make it impossible for officials to speak frankly to those carrying out such reviews in future. Ironically the 2004 report had questioned whether ‘the current levels of secrecy are necessary.’ In March 2008 the government appealed the ruling to the High Court.

- From Should policy discussions be kept under wraps? by Maurice Frankel, ibid.

3.) Information Commissioner Richard Thomas told the Department for Environment, Food and Rural Affairs in January 2007 to disclose details relating to salmon fishing in a Devon river to help ‘demystify’ the policy-making process. The case arose after the ministry refused to release the advice on the grounds that it constituted internal communications and should, therefore, be withheld regardless of any public interest in disclosure.

The commissioner argued that the public interest in disclosure was strong, for it would help inform local people, show how a government decision was reached, and ensure officials were held accountable. FOI experts said the decision might have a wider significance in the context of similar cases ongoing; lawyer Michael Smyth said overcoming government resistance to publishing internal policy advice seemed a ‘bit like securing the holy grail.’

- From Department ordered to disclose confidential advice to minister, by Michael Peel. Financial Times (London), Jan. 6, 2007.
4.) In January 2006, Information Commissioner Richard Thomas ordered the Department for Education and Skills to comply with a request to disclose minutes of senior management meetings regarding the setting of school budgets because the information is in the public interest. ‘This indicates that I am prepared to take a tough line if I have to,’ he said.

The department refused the request for the minutes - recorded at a time when there was a perceived crisis in school funding - on the grounds that it would inhibit candour at private meetings and that the names of individual civil servants should be exempt from disclosure. Mr. Thomas agreed that some of the information should remain exempt on policy development grounds, but not all, and that each case would be judged on its own merits.

Government had tried to censor an innocuous extract (on ‘policy formation’ grounds) that read: ‘The group discussed the latest situation on school budgets and funding.’ It argued, unsuccessfully, that the names of senior officials who made such remarks should also be withheld, for fear they would no longer be willing to speak out.


5.) In March 2007, Information Commissioner Richard Thomas ordered the Treasury to release documents related to its budgeting. In his judgment he recognised the budget process could involve ‘difficult and controversial policy considerations’ where the need to maintain ‘the confidentiality of candid debate’ could outweigh the public interest in disclosure. But he ruled for publication because of the amount of time that had elapsed since the discussions, the effect of the pension changes on official revenues, and the public interest in the transparency of decision-making.

- From *Publication rules need rethinking, says ex-chancellor*, by Ben Hall and Michael Peel. Financial Times (London), April 3, 2007

6.) Information Commissioner Richard Thomas ordered the Foreign and Commonwealth Office (FCO) in February 2008 to release the first draft of a controversial, now discredited Iraq weapons dossier. The FCO had argued unsuccessfully that the document was exempt under section 36 of the FOI law, that is, ‘prejudice to effective conduct of public affairs.’

*The Guardian* also reports that officials have also fought repeated campaigns to suppress frank comments handwritten on drafts, to try to protect the principle that only formal, sanitized minutes and memos should ever be made public.
AUSTRALIAN COURT ORDERS POLICY RECORDS RELEASED

1.) In a landmark decision in April 2006, the highest court in New South Wales threw out arguments used for two decades by federal and state government agencies to keep secret thousands of their documents. The unanimous judgment of the Court of Appeal imposed tough new tests for governments that want to refuse to release documents by claiming they are ‘internal working documents’ in which there is no legitimate public interest.

The decision, certain to have ramifications throughout Australia, said many documents rightly regarded as confidential internal working documents when created, must become available for release as their significance wanes over time.

The ruling went against WorkCover, which had appealed a decision by the Administrative Decisions Tribunal to grant the NSW Law Society access to five documents prepared for WorkCover by legal costs consultant Michelle Castle.

It also means government agencies will have to show ‘tangible harm’ would flow from disclosing the documents rather than relying on theoretical arguments known as the ‘Howard Factors’ formulated in a 1985 FOI case which John Howard lost against the then-treasurer Paul Keating. FOI expert Rick Snell said the 2006 decision was a landmark because it scrapped ‘stupid arguments about theoretical possibilities.’

Australia’s FOI laws have been widely criticized because of the ease with which policy exemption clauses are used to refuse access. But the judgment, written by Justice Ruth McColl, said time had moved on: ‘Freedom of information legislation … was intended to cast aside the era of closed government and principles developed in that era may, with the benefit of 20 or more years of experience, be seen as anachronisms.’

2.) Channel 7 reporter and FOI Editor Michael McKinnon lost his case in Australia’s Administrative Appeals Tribunal, ending his effort to get the advice the government had when it was drafting the Work Choices law. Yet there were
some important victories in the fine print. The government won because the tribunal upheld one argument against release, but most of the other arguments were demolished by the deputy president, Stephanie Forgie. ‘This decision blows away arguments used for decades to hide options papers prepared for all big policy decisions,’ said one newspaper.

The Government used arguments known as the Howard factors (see case above). Briefly, those factors say that if senior public servants knew their advice or discussion papers might be released, they might not write things down, and they might not give frank, honest, comprehensive, accurate and timely advice to their ministers. Departmental advisers could be left out of the policy loop altogether. The higher up the echelons you go, the more sensitive the advice. What Ms Forgie has said is: prove it.

It is no longer enough for public servants to state this is their belief about how others would behave if documents were released. Ms. Forgie rejected government claims that advisers would simply be cut out of the loop when policy is prepared. This decision says that if governments want to make these claims, then they will have to get senior bureaucrats and ministers to give sworn evidence.


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APPENDIX 2

Needed B.C. transparency measures beyond the B.C. FOIPP Act

A. Record creation, retention and management
B. Open meetings
C. Whistleblower protection

A. Record creation, retention and management

In its purpose clause, B.C.’s FOIPP Act grants the public “a right of access to records.” Yet this right to obtain records is meaningless if documents have not been created in the first place, were not retained, or cannot be located. Such a system is as resistant to accountability as any autocracy of the past.
One might wonder how such a fundamental FOI problem can remain so neglected; perhaps the public and journalists presume the record management system is working adequately. The reality, however, is quite different.

In a response to a FIPA questionnaire on this topic to party leaders in May 2009, the Liberal party stated: “The BC Liberal government has a protocol in place covering the preservation of documents and records. Employees are required to preserve non-transitory records as part of that FOI record-keeping protocol. The Act provides a penalty of up to $5,000 for anyone convicted of violating the Act.”

This is a fair start, but much more needs to be done. For one thing, librarians have rightly complained that British Columbia is the only province in Canada lacking an Archives Act. This problem urgently needs to be corrected.

There remains the important question on whether rules on record creation and retention had best be placed within the FOIPP statute, or in a separate stand-alone archives law. Both options are followed in other nations. I prefer the latter course, although the former might be workable too. As lawyer and global FOI expert Toby Mendel, in correspondence with me last year on this topic, wrote:

I would separate out the issues of record creation and retention. Few FOI laws place an obligation on public authorities to create information, outside of proactive publication rules (where they may need to create it). Retention is really part of a larger issue of record management. Many FOI laws do include framework rules on this (usually allocating responsibility to someone to develop more detailed rules or codes). But if it is dealt with adequately in the archives law that is fine too.

Recommendation No. 62

The B.C. government should pass an effective Archives and Information Management Act, designed to regulate the entire life-cycle of government-held information.

“Oral Government”

Since the passage of freedom of information laws, the deplorable trend towards “oral government” has spread: officials no longer commit their thoughts to paper, and convey them verbally instead, to avert the chance of the information emerging in response to FOI requests.\(^{105}\) (It is more the case for the higher level policy records than for operational documents.)

This could become the greatest single threat to the FOI system, yet in the end, of course, governments can only legislate conduct but not attitudes. In 2005, federal Information Commissioner John Reid noted:

> A deeply entrenched oral culture exists, tolerated if not encouraged, at the most senior levels of government. The government’s policy on the management of government information holdings (which is a good policy) is largely ignored in practice and accountability for its enforcement/implementation is so diffuse as to be non-existent.\(^{106}\)

The 2002 Treasury Board task force also found that some government agencies question whether the ATIA “may undermine transparency by discouraging officials from committing views to paper” and from providing frank advice to ministers for “fear of being misinterpreted” when documents are released.\(^{107}\)

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\(^{105}\) Yet Prof. Roberts takes a slightly brighter view, noting that ‘one recent Canadian government study that examined documents produced before and after the Access to Information Act was passed found no evidence that the law had any influence on record keeping by government officials.’ Another key question arose, he adds: would officials now censor themselves in email? ‘This fear has proved to be overstated. E-mail has become too deeply entrenched in contemporary work life for self-censorship to be an effective strategy: Writing elliptically takes time, and undermines the effort to get work done.’ - Roberts, *ibid*

\(^{106}\) John Reid, Information Commissioner of Canada, *Submission to the Commission of Inquiry into the Sponsorship Program and Advertising Activities.* Ottawa, Oct. 14, 2005 [http://www.infocom.gc.ca/pressreleases/preleaseview-e.asp?intPreleaseId=26](http://www.infocom.gc.ca/pressreleases/preleaseview-e.asp?intPreleaseId=26) Indeed, the reality still is that public servants who delete important emails know they are very unlikely to be caught or publicly exposed, and if so, still more unlikely to be seriously disciplined even if there were legal penalties; they could plead ignorance of the rules, or technological ineptitude.

The federal Conservative party running for office in 2006 pledged to amend the Access to Information Act to “oblige public officials to create the records necessary to document their actions and decisions” - a promise as yet unfulfilled.

The taxpaying public needs and deserve much better; whole dimensions of our political awareness and historical consciousness have vanished due to such practices, and the loss to the common good is incalculable. A decade ago, the former information commissioner John Grace issued a sharp rebuke to the “oral government” concept:

As to the “don’t-write-it-down school,” any effort to run government without creating records would be humorous if it were not so dangerously juvenile. Though it is impossible to quantify its seriousness (and its extent is probably exaggerated by critics of access), any such evasion of access poses a threat not only to the right of access, but to the archival and historical interests of the country.

Left without written precedents and decisions, other officials are deprived of the benefit of their predecessor’s wisdom - or folly. The misguided effort to avoid scrutiny by not making records is driven by ignorance of the law’s broad exemptive provisions.108

As the government converts to digital record creation and archiving, protocols regarding this format will surely become the most ambiguous and contentious of all, e.g., some public servants might not recall that email and blackberry messages are to be preserved.109

### Recommendation No. 63

Seek an effective way to oblige public officials, in law, to create the records necessary to document their actions and decisions.

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109 Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age*. New York: Cambridge University Press, 2006. In fact, email is in some ways more enduring than paper, when we consider backup tapes, and email copies floating about amongst recipients (which may then be copied to many further recipients in turn, and so forth). The main problem for the media now becomes volume: One study cited by Roberts found that in 2002, Canada’s 150,000 federal public servants exchanged about six million emails every working day.
Unfortunately, there are yet other pernicious practices employed to undermine the FOI process, actions which can be committed with or without remorse. Perhaps an amendment to the B.C. *FOIPP Act* or a new *Archives Act* should explicitly prohibit these, with penalties for violations.

Although it seems quite embarrassing to need to cite such practices in a statute, policies or regulations to bar them are insufficient, because such rules can too easily be dropped at any time by a future administration. Some officials sadly evidence a fertile, ever-renewing imagination for “creative avoidance,” as one commissioner called FOI resistance.

Besides recalling my own FOI experiences, such cat-and-mouse games have been widely reported from various nations, and from sources such as information commissioners’ reports, public inquiries, books and news articles. Practices can include, amongst others:

- Changing the title of a record sought by an FOI applicant, sometimes after a request for it is received, then wrongly telling the applicant ‘we have no records responsive to your request.’ The law should make it make it absolutely clear it is only the subject matter that counts, not the record’s title per se. (Thankfully some FOI laws – as the B.C. Act could do - prohibit the destruction of a record after a request for it has been received, even if the record had already been scheduled for destruction.)

- Post-it sticky notes. Such notes affixed to documents can contain the most important information on a topic. Yet - on hopefully rare occasions - when an FOI request comes in, some officials have removed the sticky notes, photocopied the denuded original, mailed that copy to the applicant, and then later reattached the notes to the originals – all in the false assumption that the sticky notes are not covered by FOI laws (or knowing they are nonetheless).\(^{110}\) Officials can also write penciled notes that can be easily erased.

- Storing records offsite - or at a site owned by a private company partnering with government - and so claiming they are not in the state’s “custody” and cannot be

\(^{110}\) In the British Columbia FOI regulations, any marginal note made upon a document transforms that record into ‘a new record,’ and a separate photocopy is made of it for FOI applicants: ‘Marginal notes and comments or "post-it" notes attached to records are part of the record, not separate transitory records. If the record is requested, such attached notes are reviewed for release together with the rest of the record.’ Ideally, such FOI regulations would be in force everywhere. [http://www.cio.gov.bc.ca/services/privacy/Public_Sector/backgrounders/transitory_records.asp](http://www.cio.gov.bc.ca/services/privacy/Public_Sector/backgrounders/transitory_records.asp)
accessed. (See Quebec’s FOI solution.\textsuperscript{111})

- Sending illegible photocopies, which can delay the FOI replies for months as the applicant appeals, or applies over again for legible copies of the same records

- Incorrectly claiming that records are in too fragile a condition to be accessed, or that documents are not available in a readable format.

- Providing only a positive summary of the records instead of the original records sought, offering other information as a compromise, or burying the applicant with positive but not really relevant records

- Mingling exempt and non-exempt records together, then claiming an exemption for them all; for example, incorrectly placing records into files of cabinet or international relations documents

- Mislabeled records, which is a major problem in federal \textit{ATIA} requests for cabinet records.

- Stonewalling, i.e., incorrectly claiming that records do not exist when they do; or not searching properly and then claiming documents cannot be found

- Inflated fee estimates. This was detailed during the 1997 inquiry on the Canadian military scandal in Somalia, along with established cases of improper document alteration.\textsuperscript{112}

- Delaying responses until after the applicant’s deadline to appeal to the commissioner has run out.

- Mislabeled records as “preliminary” or “investigatory,” and so forth; or arguing that the records need not be released under the FOI law because they will be published within 60 days – and then not publishing them

- BC FOIPP Act Sec. 6 prescribes that an agency must produce a record for an applicant if “the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer,” and

\textsuperscript{111} Quebec’s FOI law takes account of this issue: ‘1.1. This Act applies to documents kept by a public body in the exercise of its duties, whether it keeps them itself or through the agency of a third party.’ Other provincial FOI laws provide that records in the ‘custody’ and ‘control’ of public bodies are subject to the statute.

\textsuperscript{112} http://www.dnd.ca/somalia/somaliae.htm
“creating the record would not unreasonably interfere with the operations of the public body.” But some agencies could overstate the difficulty of doing this, and so refuse to create records, or heighten fees.

- Interpreting the wording of an applicant’s request too narrowly, or even altering it and then replying to the agency’s re-worded version; delaying the release for months with clarifications and re-clarifications until an issue is stale, or until after an election\textsuperscript{113}

Global Commentary

- **Article 19, *Principles of Freedom of Information Legislation, 1999*, endorsed by the United Nations:**

'Destruction of records - To protect the integrity and availability of records, the law should provide that obstruction of access to, or the willful destruction of, records is a criminal offence. The law should also establish minimum standards regarding the maintenance and preservation of records by public bodies. Such bodies should be required to allocate sufficient resources and attention to ensuring that public record-keeping is adequate. In addition, to prevent any attempt to doctor or otherwise alter records, the obligation to disclose should apply to records themselves and not just the information they contain.’

- **Article 19, *Model Freedom of Information Law, 2001*:**

‘19. (1) Every public body is under an obligation to maintain its records in a manner which facilitates the right to information, as provided for in this Act, and in accordance with the Code of Practice stipulated in sub-section (3).

‘(2) Every public body shall ensure that adequate procedures are in place for the correction of personal information.

\textsuperscript{113} Still other methods were detailed by former Australian FOI official Don Coulson. These included ‘pumping applicants for extra information to find out why they want documents, before briefing ministers and advisers; delaying the release by saying an application has been overlooked, the department is overloaded with requests and is understaffed; hiding behind the excuse that requests are too voluminous or time-consuming to process, often without helping applicants to narrow down exactly what they want; Others did not notify applicants of their rights of appeal.’ - Chris Tinkler, *The FOI’s bag of dirty tricks*. Sunday Herald Sun (Australia), November 10, 2002 [http://ricksnell.com.au/FOI%20Reviews/FOI_102a.pdf](http://ricksnell.com.au/FOI%20Reviews/FOI_102a.pdf)
‘(3) The Commissioner shall, after appropriate consultation with interested parties, issue and from time to time update a Code of Practice relating to the keeping, management and disposal of records, as well as the transfer of records to the (insert relevant archiving body, such as the Public Archives).’

• **Commonwealth Secretariat, *Model Freedom of Information Bill, 2002***:

‘Preservation of records and documents. 44. (1) A public authority shall maintain and preserve or cause to be maintained and preserved records in relation to its functions and a copy of all official documents which are created by it or which come at any time into its possession, custody or power, for such period of time as may be prescribed.’

• **Council of Europe, *Recommendations on Access to Official Documents, 2002***:

‘Public authorities should in particular: i. manage their documents efficiently so that they are easily accessible; ii. apply clear and established rules for the preservation and destruction of their documents; iii. as far as possible, make available information on the matters or activities for which they are responsible, for example by drawing up lists or registers of the documents they hold.’

‘Paragraph ii refers to issues related to the preservation and the destruction of official documents. The preservation generally implies the transfer to archives services. There is a strong need for clear rules on these matters.’

**Other Nations**

Among the FOI laws of 68 nations, 37 of these (nine in the Commonwealth) include rules to preserve records, or send these to archives, or otherwise govern them. These jurisdictions describe the rules at some length within their FOI laws: Finland, Germany, Japan, Pakistan, Peru, Scotland, St. Vincent and the Grenadines, Thailand, and Trinidad.

The others’ FOI laws mainly transfer information management responsibilities to archival statutes: Albania, Austria, China, Columbia, Croatia, Denmark, Estonia, France, Hungary, Iceland, Ireland, Israel, Liechtenstein, Lithuania, Mexico, Moldova, Netherlands, Norway, Romania, Slovenia, Switzerland, Ukraine, Antigua, Australia, Belize, India, Jamaica, and South Africa. (I have not searched for nations that have only an archival law without an FOI law as well.)
With remarkable consistency, 20 jurisdictions have chosen to set 30 years\(^{114}\) as the time limit in their archival statutes to generally release records (except, usually, those records especially marked as confidential, such as for national security): these include Australia, India, Ireland, Scotland and the United Kingdom.

Government records are (with exceptions for some topics) routinely declassified after 10 years in Latvia, 12 years in Mexico, 15 years in Lithuania, 20 years in Estonia and South Africa, and 25 years in the United States. Record creation and retention laws – apart from FOI statutes - have been common for years across the United States, and may suggest good models.

In Canada and most nations, records are primarily catalogued for the government’s convenience, not to assist FOI applicants. Yet the FOI laws of three nations - Finland, India, South Korea – set a different course. There, agencies must ensure all their records are catalogued in a way that facilitates access. The same is true for the draft FOI bills of Bangladesh, Kenya, Malaysia, Palestine and Vanuatu.

Consider the statute of India:

4. 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 computerized are, within a reasonable time and subject to availability of resources, computerized and connected through a network all over the country on different systems so that access to such records is facilitated […]

In the Palestinian bill, Art. 5 requires agencies to maintain their records in ‘a manner that allows the competent staff member to easily retrieve it,’ while in Finland’s law, Sec. 18 (4), prescribes indexing to facilitate ‘effortless realization of access to the documents.’

As well, Bangladesh’s bill prescribes, in Sec. 3(3), that ‘The Information Commission shall develop guidelines on proper record keeping and management which must be followed by all bodies subject to the Act.’ All these provisions might well be advisable for the B.C. FOIPP Act as well.

\(^{114}\) As a point of historical interest, Prime Minister Trudeau announced in May 1969 that 30 years after their transfer to the public archives, practically all departmental documents would be open to the public – a time shortened from 50 years – except for those whose release could harm personal privacy, national security and external relations.
Three nations’ FOI statutes - those of New Zealand, Denmark and Poland - contain a valuable feature: record creation. The Danish law is worth considering:

Duty to Make Notes etc. 6. (1) In any matter to be decided by an administration authority, an authority receiving information by word of mouth on facts of importance to the decision or in other manner having notice of such facts, shall make a note of the substance of such information, always provided that such information is not contained in the documents of the matter.

The draft FOI bill of Kenya prescribes the same general duty, and also includes (once again) other model provisions for Canada:

26. (1) Every public authority shall keep and maintain its records in a manner which facilitates the right to information as provided for in this Act.

(2) At a minimum, to qualify to have complied with the duty to keep and maintain records under sub-section (1), every public authority shall –

(a) create and preserve such records as are necessary to document adequately its policies, decisions, procedures, transactions and other activities it undertakes pertinent to the implementation of its mandate;

(b) ensure that records in its custody, including those held in electronic form, are maintained in good order and condition; and

(c) within no more than three years from the date that this Act begins to apply to it, computerize its records and information management systems in order to facilitate more efficient access to information.

(3) A public authority which fails to comply with sub-section (2) commits an offence.

In some jurisdictions, records may not be destroyed after an FOI request for them has been received, even if they had already been scheduled for destruction. The FOI statute of Ecuador commendably goes one step better, wherein information cannot be classified following a request.\(^{115}\)

The problem of “oral government” is clearly a global concern. For example, as one Scottish parliamentarian objected: “Practices are now in place to make sure

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\(^{115}\) [http://freedomain.org/countries/ecuador.htm](http://freedomain.org/countries/ecuador.htm)
that, even if you are successful, the information you want will not be there, they will have discussed it in places where it is not recorded or minuted and the worst offenders are the Scottish Executive.” Scotland’s Information Commissioner Kevin Dunion said that all public authorities should change their way of working, collating all information and minuting all meetings with an eye to the FOI law.\(^\text{116}\)

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**Canadian commentary**


'Recommendation 13: That section 68 of the Act be amended to eliminate the exclusion of published material from the coverage of the legislation, and that, in addition, that government institutions are required to organize, catalogue and advise the public of the existence of all government publications, including grey literature, through the inventory and government locator system described in the next section.

‘Recommendation 16: That section 5 of the Act be amended to require government institutions to organize and index their information holdings and compile and maintain in a current state an electronic inventory of these for effective decision-making and to support both active dissemination of useful information to appropriate publics and general accessibility to non-exempted documentation. (All references to accessing manuals currently in the legislation should be wrapped up into this requirement.)’


‘The Archives Act should be amended specifically to impose the duty to create such records as are necessary to document, adequately and properly, government’s functions, policies, decisions, procedures, and transactions. A duty to create records has been imposed on the United States federal government by the Federal Records Act.

‘The need to keep, at least for a time, all [email] messages on these systems stems directly from the notion of open and accountable government. To give the official

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\(^{116}\) *Secret Scotland*, by Hamish MacDonell, Scottish Political Editor. The Scotsman, March 8, 2007
who created or received a message unfettered choice about its destruction would clearly jeopardize accountability.’


‘9-1. The Task Force recommends that: a co-ordinated government-wide strategy be developed to address the crisis in information management…’

9-2. That 'training on the safeguarding, classification and designation of information in accordance with the Government Security Policy be incorporated into an integrated training package that would cover information management and Access to Information…'

9-3. That 'an effective accountability regime for information management, including the necessary audit and evaluation tools, be established and implemented within government institutions…'

9-4. That 'standards be established for the documentation of the business of government; orientation and training, and ongoing guidance in information management, be available for all employees…'

**John Reid, former Information Commissioner of Canada, model ATIA bill, 2005:**

‘3. The Act is amended by adding the following after section 2: 2.1 Every officer and employee of a government institution shall create such records as are reasonably necessary to document their decisions, actions, advice, recommendations and deliberations.'

**Justice Gomery report, *Restoring Accountability, 2006:**

‘Recommendation 16: The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions.’ (Report also advises additional 'free-standing legislation' for transparency on 'the disbursement of public funds.‘)

**Government of Canada discussion paper, *Strengthening the Access to Information Act, 2006:**

‘Although codifying the duty to document may not be necessary, the principle behind the proposal appears to be sound.
'After examining how other jurisdictions have dealt with this issue, it appears that the duty could be best placed in the Library and Archives of Canada Act. In that way, the rules governing both the creation of records and their eventual disposal, which are presumably based on many of the same principles, would be brought together.'

The only provincial FOI law that prescribes record management to assist applicants is that of Quebec:

16. A public body must classify its documents in such a manner as to allow their retrieval. It must set up and keep up to date a list setting forth the order of classification of the documents. The list must be sufficiently precise to facilitate the exercise of the right of access [….]

In British Columbia for now, public servants look for guidance to the Document Disposal Act, which was passed in the 1930s. This Act applies only to provincial ministries, whereas it should have covered all entities, and it mandates a blanket seven year retention period for records. About five percent of the total B.C. government record output is eventually sent to the B.C. Archives, about the same proportion as that retained by the federal government.

The B.C. information and privacy commissioner wrote in 2007 that “lamentably, there is no across-the-board law in British Columbia requiring ministers and public servants to create and maintain full and accurate records,” and he called for a “duty to create records” law to be passed, requiring public servants to document their deliberations and decisions.117

Regarding record creation, the B.C. government passed the Local Government Act in 1999 (later revised as the Community Charter), which prescribes that certain types of documents must be generated by civic councils, e.g. records of resolutions and decisions; why should we accept any less of the B.C. provincial government?

There are myriad problems regarding record management in B.C. For example, in 2005 the provincial government initiated a highly (and ironically) secretive review of the FOI act by bureaucrats; due to the growing trend towards oral government, no written report was delivered to government by the consultant George Macauley who reported on the process.

117 For the record: Why we need to know what our government is doing, by David Loukidelis. Vancouver Sun. Oct 2, 2007
Above, Mr. Grace suggested of the oral government problem that “its extent is probably exaggerated by critics of access.” Yet startling comments by Ken Dobell, then B.C. deputy premier and head of the provincial public service, to an FOI conference in 2003, confirm one’s worst suspicions.

E-mails and blackberry records must be preserved and accessible under the B.C. FOI law. Mr. Dobell confirmed that he runs the government via informal meetings or telephone conversations, seldom keeping working notes of either. He did make thorough use of e-mails - his on-line correspondence with the premier was said to be voluminous - but he said “I delete those all the time as fast as I can.”

Mr. Dobell continued that the intent is not to hide ‘necessary information’ from the media and public, but to avoid having internal e-mails caught up in media fishing expeditions.

“I don't put stuff on paper that I would have 15 years ago . . . . The fallout is that a lot of history is not being written down. Archivists of tomorrow will look for those kinds of things, and none of it will be there. It will change our view of history.”

Former Information commissioner John Grace said some officials boast that they follow the advice supposedly given by a New York Democratic Party boss: ‘Never write if you can speak; never speak if you can nod; never nod if you can wink.’ At a recorded panel discussion at the 2003 B.C. FOI conference, Vancouver Sun reporter Jim Beatty elaborated on this idea, and explained the unwritten ‘Briefing Rule’ in Victoria:

The high level and professional people in government just don’t write anything down. Bureaucrats are told that “when you brief the minister, put the good stuff in notes, convey the bad stuff orally. If the information is sensitive, send it by email, if it’s more sensitive then fax it. Then talk by cell phone, and then by landline phone. It it’s most sensitive, talk only in person.”

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118 Recording of panel discussion of conference marking the 10th anniversary of the adoption of the B.C. Freedom of Information and Protection of Privacy Act. Sept. 23-25, 2003, Victoria. B.C.’s information and privacy commissioner said he was initially concerned with Mr. Dobell’s statement, and raised it with him. Mr. Dobell assured and satisfied him, the commissioner later said, that he only deletes insignificant ‘transitory’ emails, not ‘important’ emails or other records, and that Mr. Dobell had written to all deputy ministers to remind them of the need to ensure that permanent records are kept. It is uncertain how widely this email retention directive is actually followed in the provincial government.
Vancouver Sun columnist Vaughn Palmer echoed most of those observations:

Not long after the introduction of freedom of information legislation in B.C., a senior bureaucrat predicted the emergence of a "nothing-in-writing" style of government. Civil servants and political appointees deliver their most important advice and instructions in person or over the phone…. "Never put real policy in writing," was a laughline for politicians and journalists alike.

Within a couple of years, some of the most controversial business of government was being conducted at one-on-one meetings with no notes taken, no minutes kept. Likewise, some of the most powerful officials began to disappear from written documentation, the better to exclude open-ended requests for "all memos written by or addressed to" so-and-so.119

Mr. Dobell added that fear of FOI inquiries only marginally hinders the free flow of ideas within the civil service as phone calls and informal meetings make up the gap. “Where FOI permits reasonable access, it’s good. Where it allows fishing expeditions and cheap research, it forces the careful handling of information.” The term “reasonable” he left undefined.

**ACCESS TO 2010 OLYMPICS RECORD DISAPPEARS**

In a good illustration of the growing trend towards ‘oral government,’ two key sources of information about the finances and management of the 2010 Vancouver Olympic Games have been abruptly cut off.

Minutes are no longer being recorded of the meetings of the B.C. 2010 Olympic and Paralympic Winter Games Secretariat (a branch of the provincial Economic Development Ministry), the entity that politically oversees the Games.

As well, until now the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games would forward copies of its meeting minutes to the same ministry in Victoria, but now the ministry says it cannot find such records any more.

For news stories, I had twice obtained hundred of pages of minutes from both entities through quarterly requests under the B.C. Freedom of Information Act and

Protection of Privacy Act. But in reply to my third identical attempt, I was told: ‘We have not located any records in response to your request.’

A spokesman for the secretariat confirmed to the Vancouver Province newspaper that meeting minutes are no longer taken: ‘The secretariat was keeping minutes but found they were not an effective management tool.’ He added that the secretariat’s approach to keeping records is ‘consistent with cross-government practices and legislation.’ (See Appendix 3 below.)

There was an important exchange in the Legislature on these matters in spring 2007. In a debate on record retention as regards the BC Rail trial, as reported in the Vancouver Sun, Premier Campbell told the House, "The premier's office has a full records management system that's in place, both hard copy and electronic. Everyone in the office is trained. We abide fully by the Freedom of Information and Protection of Privacy Act." (Yet such matters are more in the purview of the BC Document Disposal Act than the B.C. FOIPP Act.)

Indeed, his office had recently received an independent seal of approval on that very point. "The office of the comptroller general just undertook an audit of our records management and information technology systems, and we received a very high score."

At another point, the opposition leader wondered whether politicians, staffers and bureaucrats could be trying to evade the official record by writing on their personal at-home computers. "I have no problem with people across government doing work from home," he replied. "If someone is using private e-mail, it is a big concern about evading the opportunity for things to be gathered and documents to be kept around FOI," she protested.

What about the use of BlackBerrys and other portable devices for generating e-mail and accessing the Internet? "All of the BlackBerrys that are in use by any of the staff in my office are covered by FOI," Campbell said. "It's government equipment, right?"

She inquired: "Do any of the premier's staff have e-mail accounts, cellphones, BlackBerrys, paid for by the B.C. Liberal Party?" The Premier professed not to know, and yet "FOI applies to anything government-related, regardless of the network. If it's government-related, it's FOI-able."

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120 The premier's promise. By Vaughn Palmer. The Vancouver Sun. July 24, 2009
The Premier added that: "The leader seems to be under the impression that somehow or other, [these] communications are not backed up on the server. They are backed up on the server."

He corrected the record until the next day. "What I have been now informed is that we have taken steps to upgrade our technology so the server can back up (those devices). ... It is not in place yet, but it will be shortly."

Such practices need to be more clearly and comprehensively regulated and systematized in law.

**Recommendation No. 64**

Either the B.C. *FOIPP Act* or a new *Archives Act* should set record retention rules on cell phone and blackberries and all communication technologies (and which accounts are private or public), and computer backups of these, and be reviewed often to keep current with new technologies.

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**B. Open Meetings**

Some observers regard the public’s right to attend meetings of public bodies to be, in some way, even more essential to transparency and participatory democracy than FOI statutes. FOI laws grant access to records that by definition have been created in the past; but open meetings give citizens the right to attend, participate and potentially change the present and future course of their circumstances.

I believe we need a *B.C. Open Meetings Act*, to set rules on what each ministry and agency must discuss in open session, and may discuss in closed session. Certain smaller or specialized agencies could continue to meet entirely in private.

The Liberals introduced a B.C. Community Charter, the law governing local government. This was a revision of the NDP’s 1999 Local Government Act, which (after a decade of pleas by FOI advocates) was the first law passed in Canada to set rules on what municipal councils must discuss in open sessions.

This Charter would allow councils to place many more subjects into closed meetings. Unfortunately there are no rules at all setting out what B.C. school boards, colleges, universities and some other public bodies can place in-camera.
(In the recent past, some committees of B.C. universities and city halls were held entirely in private. But recently they began the practice of dividing not just their main board meetings into open and closed sessions, but their board committee meetings also - and voluntary practice had best be guaranteed in law. This is a most salutary move, because it widely known that often in universities the most important business occurs in such committee meetings; resolutions are proposed there, and passed a week later up the main board meeting, which often acts as a mere rubber stamp.)

A good model might be the American "sunshine laws" whereby most states prescribe the items that all public bodies must discuss in open sessions. For example, a few years ago, parents complained bitterly of the secrecy of a Vancouver School Board budget planning meeting, which never could have occurred in the U.S. But resistance to this move would be intense; one B.C. school board wrote to the provincial government in the late 1990s that it would fight against the passage of a sunshine law, complaining (dubiously) that such a law would only create more litigation and conflict.

As noted above, in 2004 NDP house leader Joy MacPhail, decried what she believed was a growing tendency for the B.C. Liberals to conduct public business behind closed doors in parliamentary committees. Such an Open Meetings Act would apply to those committees as well.

**Recommendation No. 65**

Pass a B.C. Open Meetings Act, to establish which agencies must hold open meetings, and set rules on what they must discuss matters in open session, and may discuss in closed session. Certain smaller or specialized agencies could continue to meet entirely in private (although their minutes could still be requested by FOI). Alternatively, such rules could be set in the B.C. *FOIPP Act*, or in the legislation currently governing each agency.

**Other Nations**

In its open meetings provisions, the FOI law of Romania and several other nations require the bodies to invite citizens “to participate in decisions.” Similarly, it is the practice (though not always law) in many Canadian municipalities to post agendas online in advance, and grant citizens five minutes each to address council meetings.
Public access to meetings – for several entities such as parliament, courts, commissions, municipalities and even ecclesiastical bodies - are prescribed in the FOI statutes of Croatia, Finland, Liechtenstein, Moldova, Montenegro, Norway, Poland, Romania and the code of Wales; and in the draft FOI bills of Abkhazia, Kenya and Palestine.\(^\text{121}\)

Regarding access to meeting records, Peru’s FOI law grants this right, without an FOI request, in Sec. 10: “Every type of documentation financed by the public budget based on decisions of an administrative nature is considered public information, including records of official meetings.”

The United States’ federal *FOI Act* also does not mandate open meetings, *per se*, but does require in Sec.(5): “Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.”

Without publicizing open meetings, the right would be less effectual; therefore, several of these laws require the state to widely advertise the agenda, date and location of upcoming meetings. Besides the right to attend, the Polish FOI law grants citizens “the opportunity to make sound and visual recordings” of open meetings.

Perhaps attitudes are changing even in Canada. In Ottawa in November 2007, the National Capital Commission held its historic first public regular meeting of the NCC board at the Holiday Inn Plaza La Chaudiere. It was moving to shed its image as a secretive, powerful federal agency that shaped the capital region by dictate of an all-powerful chairman, who ran both the board and day-to-day operations. The NCC established three new public consultation committees that will give area people input, which chief executive officer Micheline Dube said were needed because area people felt shut out of the commission's decisions.\(^\text{122}\)

Another concept proposed is that of requiring, in law, federal crown corporations to hold public annual general meetings, where the president and board would take

\(^{121}\) Apart from FOI statutes, several nations also have separate laws on open meetings, such as Norway’s *Municipalities Act* of 1992, Romania’s *Law on Decisional Transparency in Public Administration* of 2002, and New Zealand’s *Local Government Official Information and Meetings Act* of 1987, and the Russian Federation’s *Law on Procedure of the Coverage of State Bodies Activity in State Mass Media* of 1995.

\(^{122}\) *First public NCC meeting sheds veil of secrecy; Stronger board presence counter-balances power of chairman*, by Patrick Dare. The Ottawa Citizen. Nov 8. 2007
questions from the floor, much as publicly-traded private companies often do for their shareholders.

**Global Commentary**

- **Article 19, *Principles of Freedom of Information Legislation*, endorsed by the United Nations, 1999:**

'Principle 7 – Open Meetings. Freedom of information legislation should establish a presumption that all meetings of governing bodies are open to the public... meetings of elected bodies and their committees, planning and zoning boards, boards of public and educational authorities and public industrial development agencies would be included.

‘Meetings may be closed, but only in accordance with established procedures and where adequate reasons for closure exist. Any decision to close a meeting should itself be open to the public. The grounds for closure are broader than the list of exceptions to the rule of disclosure but are not unlimited. Reasons for closure might, in appropriate circumstances, include public health and safety, law enforcement or investigation, employee or personnel matters, privacy, commercial matters and national security.'


‘Opening up government meetings - To bolster open government, encourage informed participation and inspire confidence, progressive governments are putting in place laws that make participation and consultation with the public a legal requirement. South Africa values this so highly that it is mentioned in the Constitution, and New Zealand has had its so-called ‘sunshine law’ in place for more than 15 years.

‘Sunshine laws’ legally require government meetings to be open except in certain specified cases. These laws habituate government to functioning under the public’s gaze. Sunshine laws increase public understanding of government actions; build effective citizenship at the grassroots level; make both elected and appointed officials more accountable; foster a free press able to acquire information without currying favour; and improve procedural and record-keeping standards of governmental bodies.’

- **Commonwealth Parliamentary Association, *Recommendations for Transparent Governance*, 2004:**
‘[Within Parliament] (14.3) There should be a presumption that committee meetings are open to the public, so that closed meetings are the exception rather than the rule. Where it is necessary to hold a meeting, or part of a meeting, in private, a decision to that effect should be taken in public and reasons for that decision should be given.’

**Commentary by Article 19 on draft FOI bill of Palestine, 2005:**

‘The Article 19 Principles recommend that only meetings of governing bodies should be open to the public, understood as bodies that exercise decision-making powers. This would include meetings of elected bodies and their committees, and meetings of bodies such as planning authorities and the boards of public and education authorities and public industrial development agencies. Bodies that merely proffer advice and meetings of political parties are not covered.’

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### C. Whistleblower Protection and FOI

The subject of government transparency encompasses a much broader field than freedom of information statutes. Closed municipal meetings, access to court records, “libel chill,” official secrets laws, and other topics – anything which potentially blocks the public’s and media’s right to know the truth - are all subjects within the mandate of FOI advocates.

One of these topics is certainly “whistleblower protection.” Although it is an elaborate and distinct subject, and we can do no more than sketch the outlines of it here, whistleblowing is deeply interwoven and often overlapping with FOI, for several reasons.

A whistleblower can be an employee, former employee, or member of an organization, who reports misconduct to people or entities that have the power and presumed willingness to take corrective action. Generally the misconduct is a violation of law, a rule, a regulation and/or a direct threat to public interest, such as fraud, health or safety violations, and corruption.

Whistleblowing has a long and varied history, and one report summed up its main characteristics:

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Whistleblowers have been held up as conscientious heroes and scorned as traitors and malcontents. Thus, it is not surprising that whistleblower protection – whether it be in the form of common law doctrines, government policy, legislation or collective agreement provisions – will inevitably try to strike a balance. On the one hand, it will try to protect freedom of expression and disclosure in the public interest. On the other hand, it will try to protect the basic duty of loyalty owed by employees to their employers.¹

The most common type of whistleblowers are internal, who report misconduct to another employee or superior within their company or public agency. In contrast, external whistleblowers report misconduct to outside persons or entities. (These are both distinct from leakers, who release information anonymously.)

In such cases, depending on its severity and nature, they may report the misconduct to lawyers, the media, law enforcement or watchdog agencies. Some whistleblowers feel they have no option but to resort to the external route when the internal one fails.

It is well known that the consequences for revealing information without authorization can be grave indeed. These can include disciplinary actions, civil lawsuits, criminal charges, lost employment, demotion or suspension, damaged reputations, slander, social isolation, physical ailments, divorce, family breakup, and bankruptcy. Or worse: during the Somalia scandal that wracked the Canadian military in the mid-1990s, the government assigned bodyguards to a whistleblowing army physician.

Despite all that they suffered, several surveys have found that most whistleblowers say they ‘would do it all again,’ even in the absence of a protection law. With such a law in place, however, still more potential whistleblowers, wavering on a making a choice, might feel empowered to speak out, and this would generally enhance the public interest.

Human rights principles and humanitarian law mandates that whistleblowers should be protected against legal, administrative or employment-related sanctions if they act in ‘good faith.’ Yet in global terms, Canadian legislators have been very slow to respond by passing stand-alone statutes.

There are a number of other protections currently available to whistle blowers. These can include common law and statutory protection from being disciplined or fired without ‘just cause’; collective agreements that often include provisions allowing whistleblowing and protection from harassment, usually in narrow circumstances; and government policies to allow whistleblowing (such as the
anonymous safety violation ‘SECURITAS’ reporting system in the *Transportation Safety Board Regulations*). Yet statutory law is the indispensable guarantee of protection.

In designing a whistleblower protection law, many important questions arise, such as: what should its scope be, that is, upon which subjects may one speak out? Should there be separate protections both within an FOI statute as well as a stand-alone whistleblower act? Should whistleblowers be entitled to a portion of the funds saved by the state as a result of their actions? What should the penalties be for those who improperly retaliate against employees? Should the law cover the private sector as well as the public? Several of these topics are discussed below.

The interplay between whistleblowing and FOI processes - that is, the dialectic of the authorized (by FOI) versus the unauthorized release of information - can be intriguing. The two laws’ relationship is reciprocal and complementary; if either an FOI or a whistleblower statute is strongly effective, it may partially compensate for the failings of the other; conversely, if one law is weak, this necessitates improvements in the other.

If Canadian FOI laws were reformed to meet global standards and if they also worked well in practice, whistleblowing might still be necessary, but likely far less so. If the same results could be achieved by FOI, how much better for all parties to have information released under the FOI process rather than through the conflict-ridden last resort of whistleblowing.

A conscientious public servant might understandably perceive that the B.C. *FOIPP Act* (or its current application) is often failing to reveal problems of which the public has a need to know.

Even if vital information could be revealed under the B.C. *FOIPP Act*, the government might never receive an FOI request for it; and even if it did, records may have been improperly altered or shredded.

Finally, the Act only deals with records; now there is a pernicious trend, often decried by information commissioners, towards ‘oral government,’ whereby sensitive information is only relayed orally and not written down, to avert possible disclosure under the FOI.

As well, what if offenses such as bribes or assaults occurred but were never recorded - as they rarely would be - in any medium? Records can also sometimes contain errors: there is a common fallacy of placing too much reliance upon records, *per se*, to reveal the whole truth. All the problems noted above can
increase pressures on public servants, who might then see no other option but to verbally reveal the wrongdoings.

In case of a conflict between the two laws, which should prevail over the other? For many reasons and all the factors cited above, especially the trend towards “oral government,” many believe a good whistleblower law should override the FOI statute.

We might consider the intent of the legislature expressed in the purpose clause of the B.C. FOIPP Act:

2. (2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

Although parliament intended the FOI law to be the “last resort,” some public servants may perceive whistleblowing as the genuine last resort. The reason is that disclosure of government records under the FOI law can take months or years, and large parts of the records are often blacked out.

So journalists, necessarily, often circumvent the Act and turn to sources within the public service to receive more complete and timely information about the inner workings of government. Leaking records to the media or whistleblowing is a longstanding tradition while still, of course, not being a means of access “available to the general public.”

The 1999 legislative FOI law review committee well advised:

The Committee agreed that the province would benefit from general "whistleblower" protection, and that the protection of information and privacy administrators could be covered under general legislation. Suggestion: That a separate Act be considered for general "whistle-blower" protection.

Recommendation No. 66

That B.C. pass a strong and comprehensive whistleblower protection statute for both the public and private sector.
The inclusion of whistleblower protection provisions within an FOI statute is a special topic. These provisions typically bar retaliation against FOI directors and staffers, as well as public servants who speak to information commissioners or other appellate bodies on FOI issues.

These persons cannot generally be defined as “whistleblowers” *per se*, for they should be perceived simply as doing their jobs, that is, releasing information within the authorized legal channels. Yet, sadly, they can still suffer reprisals nonetheless, as scapegoats for bad news. Here are the only provisions in the B.C. *FOIPP Act*:

**Whistle-blower protection**

**30.3** An employer, whether or not a public body, must not dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee of the employer, or deny that employee a benefit, because

(a) the employee, acting in good faith and on the basis of reasonable belief, has notified the minister responsible for this Act under section 30.2,

(b) the employee, acting in good faith and on the basis of reasonable belief, has disclosed to the commissioner that the employer or any other person has contravened or is about to contravene this Act,

(c) the employee, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done in order to avoid having any person contravene this Act,

(d) the employee, acting in good faith and on the basis of reasonable belief, has refused to do or stated an intention of refusing to do anything that is in contravention of this Act, or

(e) the employer believes that an employee will do anything described in paragraph (a), (b), (c) or (d).

Yet this does not remove the need for a more general whistleblower protection law. It was seen as necessary to create these provisions within FOI statutes in Canada instead of within a general law, because enactment of a good general law was too slow, and the needs regarding the FOI subject might also be somewhat specialized.

The calls for such protections were not unexpected, for FOI officials are often amongst the least respected or trusted officials in an agency; taking on the task can
be seen as a dead-end, career stalling job, one entailing considerable stress and a high turnover rate.

When performing their tasks diligently and to-the-letter, FOI officials might be misperceived by a few as being overzealous or officious, too keen to assist an antagonistic FOI applicant. Then, politicians and their aides, businesspeople or other bureaucrats may want to obstruct or punish one for the embarrassing release of information by ‘shooting the messenger,’ i.e., punishing the FOI official. This tension can be onerous enough in large agencies or cities but much worse in smaller, remote or close-knit communities.

Asked if Ottawa access officials face political stressors, then deputy federal information commissioner Alan Leadbeater told the FIPA Bulletin:

Very much. When our office investigates complaints, we see the co-ordinator is trying to persuade senior officials to fill the ATI request; those officials want to do other work, and the ATI users are very hard to please. So the co-ordinators are stuck in the middle, and if they become very activist and try to insist the ATI role gets well handled, sometimes they do suffer.

Some come up against the glass ceiling of career, or simply get reorganized out of the department. I think most access coordinators want to move on after they've been there a couple of years because it is rather stressful. Some of them decide to save their sanity and careers by simply become apologists for the department, and some are almost flaks who will go to any lengths to defend the secrecy of the department. And then some are very, very brave employees who stand up and do whatever they think their job is under the Act.124

The situation is likely not much different in British Columbia. In 1999, for instance, an FOI official in Langley Township in B.C. resigned because of what she called interference from administrators and stonewalling by municipal staff. Sheila Callen said that after a series of documents embarrassing to the administration were released, her superiors began to take a more active role in deciding what should be made public.

Ms. Callen added that “in many cases, I found it very difficult to get the records from staff in order to review them. . . . The time finally came where I could no longer continue in good conscience to be only a puppet just to collect a

124 FIPA bulletin, Spring 2003, Vancouver
paycheque.” The official who held the FOI post before Ms. Callen said she also faced difficulties in releasing municipal documents.

“When I walked into city hall, people would look at me like I was the enemy,” Cullen told the FIPA bulletin. After leaving, Callen said she had been negotiating with other municipalities but doubted she would be hired due to the bad press:

I wouldn’t do it again – not because of the quitting part, which was easy, but because of the press. . . The township tried to discredit me in the Langley papers. The sad part is that it put my family through hell for a week. Because [the chief clerk and FOI head] is a lawyer we had totally different philosophies. I didn’t take any sides. I just did my job and applied the Act.

Global Commentary

• Article 19, Model Freedom of Information Law, 2001:

‘47. (1) No one may be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment, as long as they acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.

‘(2) For purposes of sub-section (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or serious maladministration regarding a public body.

‘48. No one shall be subjected to civil or criminal action, or any employment detriment, for anything done in good faith in the exercise, performance or purported performance of any power or duty in terms of this Act, as long as they acted reasonably and in good faith.’

125 One commentator wrote that a lack of legal qualifications can sometimes even be an asset in FOI management: “It is about time we had less law and more common sense in deciding what information the public has a right to know.” - The law needs fixing, and so does the culture; Freedom of Information - What they won’t tell you, by Matthew Moore, Herald FOI Editor. Sydney Morning Herald (Australia), Nov. 30, 2007.


‘(10.3) Individuals who disclose information pursuant to the access to information law should be protected against sanction and victimization, including for defamation.’

**Other nations**

**Whistleblower Protection Sections in FOI Laws**

There are provisions to protect whistleblowers in six national freedom of information statutes – those of Antigua (Sec. 47), Trinidad (Sec. 38), Macedonia (Art. 38), Moldova (Sec. 7(5)), Montenegro (Art. 18), and Uganda (Sec. 44(1)). The first two in this list prescribe employee protection only in regards to the processing of FOI requests, and the last four apply to general subjects; many believe that the ideal location for broader protections should be within a stand-alone whistleblower law.

The strongest general protection within the FOI statute of any Commonwealth nation is found in Uganda:

44. (1) No person shall be subject to any legal, administrative or employment-related sanction, regardless of any breach of a legal or employment obligation, for releasing information on wrongdoing, or information which would disclose a serious threat to health, safety or the environment, as long as that person acted in good faith and in the reasonable belief that the information was substantially true and disclosed evidence of wrongdoing or a serious threat to health, safety or the environment.

(2) For purposes of subsection (1), wrongdoing includes the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty, or maladministration regarding a public body.

45. Protection of officers. A public officer, information officer or other person acting on the directions of such a person is not subject to any civil or criminal liability for any act done or omitted to be done in good faith in the exercise or performance of any power or duty under this Act.

Kenya’s FOI draft bill again is of great interest. In its whistleblower protection section, it states that “the imposition of any such penalty in contravention of this
section shall be actionable as a tort,” and the provision applies to the private and even the voluntary sector – a broader coverage that would be valuable in Canada and elsewhere too:

24. (1) No person shall be penalized in relation to any employment, profession, voluntary work, contract, membership of an organization, the holding of any office or in any other way, as a result of having made or proposed to make a disclosure of information which the person obtained in confidence in the course of that activity if the disclosure is one which is in the public interest […].

**Canadian commentary**

- **Open Government Canada, From Secrecy to Openness: How to Strengthen Canada's Access to Information System, 2001:**

  ‘Recommendation 46: The federal government should enact a whistleblower protection law that has the following characteristics: applies to public servants and political staff; creates an entity that has full investigative powers and adequate resources, and that reports only to Parliament; gives whistleblowers the right to complain anonymously to the entity about violations of laws, regulations, government policies or guidelines; protects whistleblowers who reveal their identity from retaliation of any kind if their complaint is proven true; and rewards whistleblowers whose claims are proven true with a portion of the financial penalty assessed against the violators of whichever law has been violated.

  ‘Recommendation 47: In accordance with the above recommended enactment of a whistleblower protection law, the federal government should change its guidelines for public servants to replace the principle of ‘loyalty’ with a duty ‘to obey the law.’’

- **West Coast Environmental Law, Whistleblower Protection: Strategies for BC, 2002:**

  ‘Any [whistleblower protection] legislation should include the following:

  - Prohibitions on release of information that is publicly accessible: No civil servant should be disciplined for passing on information records that are accessible through Freedom of Information.

  - Coverage should extend to all persons, not just government employees: Government provisions should apply to contractors where they are carrying out functions analogous to the civil service.'
• A duty to disclose illegality: Switching disclosure from a personal initiative into a positive duty will encourage potential whistle blowers to come forward, and should help strengthen protection for whistle blowers.

• Realistic statute of limitations: Too often in other jurisdictions the statute of limitations has been 30 to 60 days. A more realistic limitation would be closer to a year.

• No limitations on the common law. Legislative protection should specifically add to and not detract from common law rights or protections.’

• Justice Gomery report, Restoring Accountability, 2006:

Parliament should be congratulated for passing Bill C-11 before its dissolution on November 28, 2005. [Public Servants Disclosure Protection Act] This bill marks the first time that federal legislation has included any protection for public service whistleblowers. While the passage of this type of protection is a positive step, the Commission has concerns about whether this new legislation will achieve what parliamentarians wanted. [...] The Commission takes the position that the new Act could be significantly improved if it were amended. It suggests that

• the definition of the class of persons authorized to make disclosures under the Act (“public servants”) should be broadened to include anyone who is carrying out work on behalf of the Government;

• the list of “wrongdoings” that can be disclosed should be an open list, so that actions that are similar in nature to the ones explicitly listed in the Act would also be covered;

• the list of actions that are forbidden “reprisals” should also be an open list;

• in the event that a whistleblower makes a formal complaint alleging a reprisal, the burden of proof should be on the employer to show that the actions taken were not a reprisal;

• there should be an explicit deadline for all chief executives to establish internal procedures for managing disclosures; and

• the Act’s consequential amendments to the Access to Information Act and to the Privacy Act should be revoked as unjustified. The Commission agrees in general with the scheme for disclosure, which has employees disclosing the information to their supervisors or to designated persons in
their public service “units.” Disclosure to the Public Sector Integrity Commissioner or to the public is permitted only in exceptional (listed) circumstances.

**Canadian provinces**

There are five provincial FOI statutes with whistleblower protection sections – British Columbia, Manitoba, Saskatchewan, Alberta and Prince Edward Island – but only with respect to FOI processes. The broadest scope is found within B.C.’s law.

Commendably, Saskatchewan public employees cannot be penalized for performing their duties under the FOI law, for “the giving or withholding in good faith of access to any record pursuant to this Act […]”

The FOI laws of Alberta and PEI prescribe that anyone who takes “any adverse employment action” against an employee who provides information to the Commissioner can be fined a maximum of $10,000.

With respect to employee protection outside of FOI statutes, there are no stand-alone whistleblower laws in the provinces, but there are protection clauses within several other statutes.

In British Columbia, provincial whistleblower protection is currently limited to the *Forest Practices Code of BC Act*. It applies to private and public sector and prohibits reprisals against a wide variety of persons who take part in *Forest Practices Code* proceedings (including prosecutions and statutory complaint provisions). Stand-alone private members bills for whistleblowers were introduced into the B.C. legislature in 1994 and 2007 but never passed.

**APPENDIX 3**

**Secrecy and the 2010 Olympics Games**

As noted earlier, the B.C. government refused to include VANOC, the Olympic organizing committee under the FOI law. Advocates here have been pleading for this measure for the past five years but of course, it will be a moot point after the Games are over. Yet the similar entity that manages the 2012 Olympic Games in Britain, the Olympic Delivery Authority (ODA), is covered by the British FOI law
– and FOI requests have produced news stories in England.\textsuperscript{127} The ODA website notes other positive features lacking in B.C.:

The ODA has developed a publication scheme, approved by the Information Commissioner, which lists the classes of information made available by the ODA on request, and how to request information in the relevant categories. . . . [this] will provide you with an easier way of getting information without having to make a request under the Act. The scheme lists information that is available to the public and where it can be obtained. Click here to View the ODA's publication scheme - [http://www.london2012.com/about-this-website/freedom-of-information.php](http://www.london2012.com/about-this-website/freedom-of-information.php)

If you are dissatisfied with the ODA's response, you can ask that the matter be reviewed internally by the ODA by sending a request to the ODA's Freedom of Information Officer at the address above, stating the grounds for your complaint. A member of senior management will conduct the review and you will be notified of the outcome within 20 working days.

Now that is a good measure of Olympic transparency.

As well, in August 2009, I made an FOI request to the Ministry responsible for the 2010 Games for:

1) The total number of such allotted tickets that your government holds, the total cost, the categories of recipients the tickets will be allotted to, and the costs of these.

2) A list of how many tickets will go to which government branches, companies, organizations, officials, and individuals all named, with titles.

3) Your policy and practice on the allotment of such tickets.

After months of delay, the ministry replied. It said no records were found for item 2, and items 1 and 3 were withheld completely under B.C. FOIPP Act sections 12 (cabinet records), 13 (policy advice), 16 (harm to intergovernmental relations), and 17 (economic harm to government).

Yet I did receive many similar records from Heritage Canada under the federal Access to Information Act, and B.C. civic governments which released them under

\textsuperscript{127} [http://www.whatdotheyknow.com/body/oda](http://www.whatdotheyknow.com/body/oda)
our B.C. law or even proactively. Usually the national government is far more secretive than the B.C. provincial one; on this rare occasion the reverse was true.

The news that follows should be far better known, as it concerns every British Columbian taxpayer.

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**Records for 2010 Olympic Games go missing**

**By Stanley Tromp, The Georgia Straight**

Aug. 17, 2008


Two key sources of information about the finances and management of the 2010 Olympic Games have been abruptly cut off.

Minutes are no longer being recorded of the meetings of the B.C. 2010 Olympic and Paralympic Winter Games Secretariat (the B.C. Secretariat), a branch of the provincial Economic Development Ministry, which manages the Games.

As well, until now the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (Vanoc) would forward copies of its meeting minutes to the same ministry in Victoria, but now the ministry says it cannot find such records any more.

The Georgia Straight had twice obtained hundred of pages of minutes from both entities through quarterly requests under the B.C. Freedom of Information Act. Upon the third similar request, the then FOI director of the ministry, Darlene Kotchonoski, replied in February: “We have not located any records in response to your request.”

Kotchonoski later explained that she had been told by the secretariat that it had decided to stop recording minutes of its meetings, without explanation. In addition, she added, because the ministry can no longer locate any minutes of Vanoc meetings, those records cannot be obtained either. (Although Vanoc is not covered by the FOI law, the copies of its records it had sent to the ministry had been accessible because the ministry itself is covered by the law.) The B.C. information commissioner’s office is investigating the loss of FOI access to the minutes.

At Vanoc’s office, which is located on another floor of the same Graveley Street building as the secretariat, spokesperson Chris Brumwell was unable to explain if
meeting minutes were still being kept or sent to the ministry. “Vanoc’s meetings are understandably considered internal,” he said, but added:

“We do report out on our board meetings, provide agendas, and have press conferences after each one, which the media is welcome to come to.” Calls and e-mails to secretariat president Annette Antoniak were not returned.

When the minutes were received, it often took five months to obtain them, and many sections were blanked out, yet what remained still gave insight into the Games’ planning.

For example, at a secretariat meeting of August 28, 2007, the minutes say: “A team reviewed Vanoc’s risk management to ensure the process is working and that they identify risk exposures. The process is effective, however they need to improve on how they identify risks.”

At a Vanoc finance-committee meeting of March 12, 2007, chaired by Ken Dobell, the record notes that when the Hillcrest Curling Venue amending agreement was discussed, three officials left the room to avoid a potential “conflict of interest”.

Maureen Bader, spokesperson for the Canadian Taxpayers Federation, laughed when told the secretariat had stopped keeping minutes. “Why did that become secret?” she asked. “All those minutes should be posted on Web sites, like city councils do. The Games will cost us billions of dollars, and there has to be full accountability for that money.”

The loss of FOI access to the minutes is “reprehensible”, the B.C. NDP Olympic Games critic, MLA Harry Bains, told the Straight. “It’s like pulling teeth. This secrecy is absolutely unacceptable. This is $2.5 billion of taxpayers’ money. It’s also paramount to the success of an organization to keep minutes so that [we] can review the past history of decision-making, and improve it in the future.” Bains said Vanoc should be covered by the FOI law, the meetings should be open to the public, and the B.C. auditor general should be the ongoing Olympics auditor of record.

The situation highlights a broader issue. Canadian information commissioners have often spoken out against a growing trend toward “oral government”, whereby records are not created or preserved, a process that prevents information release under FOI. They lament that it leads to poor governance and management of the public interest, as corporate history is lost. They also call for new laws to compel agencies to create and preserve records of their important decisions and actions.
Secrecy and the 2010 Olympics

The Asian Pacific Post. Editorial
April 22 2008

http://www.malaysiantourism.ca/portal2/c1ee8c44195e35b801197d4ae04402b4_Secrecy_and_the_2010_Olympics.do.html

On Feb 11, 2008, the eve of the two year countdown to the 2010 Olympics, Premier Gordon Campbell took to the stage and proclaimed proudly to the people of BC; “these are your games”.

What he did not say was that you, the people of BC have no right to know how your money will be spent on the games. Wrapping another cloak of secrecy around the games, the B.C. Olympic Winter Games secretariat, which manages public funds for the event, has stopped recording minutes of its meetings. At the same time the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games aka VANOC, has stopped supplying the minutes of its meetings to the government secretariat. There is only one reason for this. Both VANOC and the secretariat do not want nosy reporters and members of the opposition from getting access to these minutes using the FOI process.

The minutes, blanked out in many sections and often delayed, were one of the few places the public was able to gauge and assess what was being planned for your money. The Canadian Taxpayers Federation believes the secretariat stopped keeping minutes to prevent access through Freedom of Information saying when “people find a way of getting information, those channels are shut down.”

NDP Olympic Games critic, MLA Harry Bains said the secrecy surrounding the use of $2.5 billion of taxpayers’ money is unacceptable. The secretariat said keeping the minutes were “not an effective management tool" whatever that means.

The move it says is "consistent with cross-government practices and legislation." Translated, VANOC officials and the BC Government want you to believe their spin doctors.

128 This prompted a satirical response from lawyer David Eby, Executive Director of the B.C. Civil Liberties Association: “[The spokesperson] also suggested that their approach was ‘consistent with cross-government practices and legislation.’ Really? Wow. A whole provincial government of non-minute taking departments. What was it we were talking about last time? Was it something about transportation?”- Olympic Secretariat stops keeping minutes, by David Eby, 25 Apr 2008 http://gorillradioblog.blogspot.com/
The *Asian Pacific Post* and the *South Asian Post* are big supporters of the 2010 Olympic Games in Vancouver. We have always believed that the games will entrench Vancouver and its panoramic diversity on the global stage reaffirming its position as one of the best places to live on the planet.

However, the increasing secrecy surrounding the 2010 games is creating a credibility gap between VANOC and its supporters, let alone its detractors. Now with the minutes gone, the media and the public has to rely on oral governance of VANOC. That means if anything or anyone screws up, we will have to rely on hearsay on who authorized what and when.

There will be no raw records, except perhaps for carefully doctored final versions, to review the decision making processes involving $2.5 billion of taxpayer’s money. The zeal for secrecy by VANOC is in defiance of the spirit of the Freedom of Information laws which was created to ensure transparency of governance.

If Premier Campbell is serious about accountability and this being the people’s games, his government should order the secretariat and VANOC to keep meticulous records and minutes of all that transpires with the taxpayer’s money. VANOC should not deprive the taxpayer of the transparency required for democracy to work.

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*Olympic secrecy sowing a bitter harvest*

**By Charlie Smith. The Georgia Straight**
March 22, 2007


You can imagine the panic taking place behind the secretive walls of Vancouver's Olympic organizing committee, otherwise known as VANOC. Its beloved Olympic flag was stolen. Hordes of protesters have begun crashing Olympic events because of broken promises over evictions on the Downtown Eastside.

The 2010 Winter Games Inner-City Inclusive Commitment Statement, which is posted on the City of Vancouver Web site, states that the Olympic-bid corporation and its member partners had adopted several goals to protect the interests of inner-city neighbourhoods. The document highlights the protection of rental stock. It also pledges to ensure that people will not be made homeless as a result of the Games. Since then, the Pivot Legal Society has documented the loss of 350 single-occupancy rooms on the Downtown Eastside.
Meanwhile, middle-class taxpayers are recognizing that they were conned by low-ball promises over construction costs of Olympic facilities, the expansion of the Vancouver Convention and Exhibition Centre, and the Canada Line. VANOC’s response? The board has asked management to improve "transparency".

It's a nice spin. The truth, however, is that VANOC and its masters—municipal, provincial, and federal governments and the Canadian Olympic Committee—could have provided transparency a long time ago. In 2003, the Georgia Straight suggested four simple measures even before VANOC was created:

> Place VANOC under the province's Freedom of Information and Protection of Privacy Act, so it would be obliged to respond to public requests for information.

> Ensure that VANOC adheres to the Financial Information Act, which would require the organization to publish annual lists of payments to suppliers.

> Force VANOC to follow the provisions of the Document Disposal Act so that management would be penalized for shredding records.

> Put VANOC under the Financial Disclosure Act, which would reduce the likelihood of management conflicts of interest.

In their hubris, Premier Gordon Campbell and VANOC ignored these suggestions. So it’s time for a different set of proposals to enhance VANOC's transparency. Firstly, VANOC directors could publish the contracts and the benefits plans of executives such as CEO John Furlong on its Web site. It's not unprecedented, and it would reassure provincial taxpayers who are responsible for any VANOC operating shortfalls. BC Hydro has been doing this for years.

VANOC could also post an annual list of its five highest-paid executives, which would put it on par with Canada's publicly traded companies. While they're at it, VANOC directors could also publish an annual list of payments to suppliers of goods and services. That way, taxpayers could see which consultants, law firms, construction companies, entertainers, and former athletes are generating income from the Olympics.

The provincial government, BC Hydro, TransLink, the Greater Vancouver Regional District, and the City of Vancouver already publish these lists. Meanwhile, the federal government mentions all contracts and grants over $25,000 on the Web. To date, VANOC hasn't done this.
If VANOC were really interested in spreading sunshine, it would add a lobbyists' registry to its site, so the public could know who is seeking contracts from the organization. The feds and the province already do this.

VANOC could also copy the federal government and post travel and hospitality expenses on its Web site on a quarterly basis. Anyone can go to the Web page of the Department of Foreign Affairs and International Trade Canada and see how much David Emerson, the federal minister overseeing the Olympics, has spent on his overseas and domestic jaunts. You can also look up the travel and hospitality expenses of top bureaucrats. But you can't find out how much Furlong and friends are coughing up on hotels, air fare, and meals.

VANOC directors also don't post the minutes of their meetings on the Web site, nor do they provide transcripts or videotapes. Forget about the directors listing their personal investments and debts in a general way, which would reveal if they're approving contracts to companies in which they have a financial stake.

The board has retained former judges Allan McEachern and Martin Taylor as "ethics commissioners", which provides a veneer of accountability. The ethics commissioners' report for the period from June 2004 to August 2006 mentioned that an unnamed director was in a position to be "compensated for delivery of communication and public speaking services" for the 2010 Legacies Now Society.

"Based on the recommendation of the Commissioner, neither VANOC nor the Director proceeded with a contract with the Society," the report stated. The commissioner didn't identify the director by name. The report provided no details about how the public might levy ethical complaints against any director's conduct in the future. The Web site doesn't feature any guide to the conduct of employees and directors. And the ethics commissioners' statement itself, according to the document, was prepared by VANOC management. That's like having MLAs write the reports of the conflict-of-interest commissioner who is evaluating their behaviour.

VANOC chairman Jack Poole told the Vancouver Sun earlier this month that the budget for the Games is now "north of $2 billion". That's 50 percent above the original estimate. The convention-centre expansion, which will house international media for the Games, is now heading toward $800 million, up from the province's original claim of $495 million. The Canada Line has likely passed $2 billion by now and could reach critics' original estimate of $2.5 billion.

TransLink officials have frequently claimed that the Canada Line was "never part of our Olympic bid". But in April 2003, Poole himself wrote a letter to Premier Campbell, then prime minister Jean Chrétien, and then-mayor Larry Campbell.
describing the transit project as "a valuable tool in the campaign to win the right to host the 2010 Winter Games".

All of this has contributed to a growing credibility gap. Compounding the problem has been a compliant B.C. media, which has bred a sense of complacency among VANOC officials. Now, angry mobs are in the streets and taxpayers are increasingly suspicious.

And VANOC is finally talking about transparency almost four years after Vancouver won the Olympic bid. You reap what you sow. If this city suffers a whirlwind of international embarrassment as a result of all of this, Premier Campbell and his friends at VANOC will have only themselves to blame.

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http://www.leg.bc.ca/hansard/38th4th/H80428p.htm

Economic Development Minister Hon. Colin Hansen, and NDP MLA Harry Bains

H. Bains: Let me move on to a different area. I asked the minister during one of the question periods about the practice of not keeping minutes by the secretariat office. The minister at that time said he was not aware of that practice. I believe that was roughly two weeks ago.

So my question is: is the minister aware of that practice now?

Hon. C. Hansen: As I understand it, there was a decision to eliminate some of the paperwork around the general meetings that took place internally at the staff level within the secretariat. These are not meetings that would be passing resolutions for which there would need to be a minuted record afterwards. In order to streamline the efficiency of the operation, it was decided to shift over to making sure that there was a list of the action items that needed to be followed up on after each meeting and then the appropriate accountabilities at a subsequent meeting to ensure that those action items had been delivered on.

So that is totally in keeping with the general practice of the provincial government. It is a slight shift, because what they were doing in the past was over and above what was required, and they felt that that additional paperwork was...
redundant and did not provide added oversight and did not add to the administrative, operational side of the secretariat.

H. Bains: Let me stay with the secretariat office for a minute. When an action item is decided, there's a meeting in the office and a number of issues put on the table. Then, at the end of the meeting, decisions are made on what projects to proceed with, what projects not to proceed with, what the reasons were for proceeding with the projects, who was present, who made those decisions. That is pretty basic stuff to keep for whoever comes after to see when those decisions were made, by whom those decisions were made and why those decisions were made.

But if you don't have minutes, how would anyone ever know how that item actually got on to the agenda, who actually suggested that we should have this project to proceed with and who was there to make that decision that that project is a go and the other projects aren't a go?

Hon. C. Hansen: In this context, we're talking about a division within the Ministry of Economic Development. They make decisions as a team. It is the minister who is responsible for those decisions. [. . . .]

The way that they operate their internal staff meetings is totally in keeping with every other ministry, every other division within a ministry. The action items, as I mentioned, are documented so that the appropriate staff members know who follows up on what, and there can be accountability at a following meeting so that there's a report-out on what progress has been made on those particular action items.

As I say, it is entirely in keeping with the practice within the provincial government, and it is ultimately the minister who takes responsibility for those decisions.

H. Bains: I guess there's an agenda when there's a meeting, and that agenda stays with the action items. So there's a discussion on those agenda items. If only action items are listed as the outcome of that meeting, what happened to the rest of the agenda? How will the minister ever know what happened to the rest of the agenda?

Hon. C. Hansen: What we're talking about are staff meetings where the staff are coming together to report on the progress, decide on what actions are necessary. You know, I could ask the member in return: do you keep minutes of your caucus meetings? Clearly, the same kind of arguments could be made for
meetings of the opposition caucus. I would suspect that minutes are not kept, but everybody knows what responsibilities they have and what action items they have. Within the ministry they have staff meetings, and they have action items that flow from that, and it certainly is in keeping with the rest of government and how it works.

[Continues . . . ]

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APPENDIX 4

Examples of proactive release in other nations’ FOI laws

For now, the main proactive publication mandated in the B.C. FOIPP Act is the meager notation in Sec. 70, for “policy manuals.” Lest Canadians become complacent about their own FOI statutes, consider two examples of proactive release in other nations’ FOI laws and bills. It is not necessary to replicate every item below in our law, but just to be aware of the range of possibilities.

(There are dozens of other nations’ examples in column X of my World FOI Chart, at www3.telus.net/index100/foi)

Kyrgyzstan

On November 14, 2006, parliament of the Kyrgyz Republic adopted a freedom of information law that was initiated by the president.

Chapter 3 – Promulgation of Information About Activity of State Bodies and Local Self-Government Bodies. [This chapter contains 1,800 words of description, apparently the longest in any FOI statute in the world for proactive release. Several are noted here.]

Article 17. 1. State bodies and local self-government bodies shall promulgate official information regarding: 6) signing and course of implementation of the international treaties; […] 7) measures, undertaking for liquidation of the extreme events (incidents) menacing to the life and health of the people. […] Article 20. 1. State body and local self-government body obligated annually and in available form to promulgate information, which includes: […] (3) order of consideration and satisfaction of requests or complaints, which can use citizens and organization concerning activity of state body and local self-government body, and example of preparation of request, complaint and other actions of turned persons; […] (7) any
mechanisms and procedures which allow citizens and organizations to present own judgment (opinion) or influence to forming of politics or fulfilling the powers of this state body and local self-government body; (8) generalized information about addressing of citizens and organizations received by state body and local self-government body, about results of consideration and taken measures; [...] (10) information about official visits and business trips of the heads and official delegations of state body and local self-government body; [...] (21) forecasts prepared by state body and local self-government body; [...] (23) information about open competitions, auctions, tenders, expertise and other activities conducting by state body and local self-government body; [...] (25) information about checks conducted by state body and local self-government body within their competence, and checks conducted in state body and local self-government body; [...] (27) list of civil agreements concluded by state body and local self-government body with individuals and legal entities; [...] (29) information about interaction of state body and local self-government bodies with other state bodies and local self-government bodies, public unions, political parties, trade unions and other organizations, including international organizations; [...]’ / Also see Article 23. Providing access of publicity to state foundations of official information of state bodies and local self-government bodies, and Art. 24-25.

Kenya

The Kenyan government promulgated a first draft of the Freedom of Information Law in 2005, and it has been responsive to the suggested amendments made by civil society organisations including ICJ Kenya. The International Commission of Jurists (ICJ), Kenya Chapter completed the drafting of the Bill. The draft Law has the potential to set an important African benchmark in the protection of FOIPP rights. Proactive release in the Bill includes:

6. (1) A public authority shall – (a) publish and update – (i) the particulars of its organization, 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) any guidance used by the authority in relation to its dealings with the public or with corporate bodies, including 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 guide sufficient to enable any person wishing to apply for information under this Act to identify the classes of information held by it, the subjects to which they relate, the location of any indexes to be consulted by any person; (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 advising it with information 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 to the 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 agencies, indicating the particulars of all plans, proposed expenditures and reports on disbursements made’ [etc] / 6.(2)(b) publish all relevant facts while formulating important policies or announcing the decisions which affect the public; (c) provide to any person the reasons for any decision taken by it in relation to that person; (d) before initiating any project, or formulating any policy, scheme, programme or law, publish or communicate to the public in general or to the persons likely to be affected thereby in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles.’ [etc] / (2) It is the duty of every public authority to take steps in accordance with the requirements of sub-section (1) to provide information proactively to the public at regular intervals through various media of communication. [etc ]

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**APPENDIX 5**

**Freedom of Information as a Basic Human Right and Constitutional Right**

Is public access to government records a basic human or constitutional right? Can there be any definitive answer to this question? And if it is indeed such a right, how can that right best be guaranteed?

As Toby Mendel wrote in the forward to *Fallen Behind*, there has been a legal and political shift on FOI thought since the first transparency laws were passed:

There is a large and growing body of authoritative statements by international human rights bodies and officials, including international human rights courts, to the effect that access to information is a fundamental human right. Indeed, one can observe a shift in terminology, as access to information/freedom of information laws are starting to be

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129 See, for instance, the Open Society Justice Initiative, *International Law and Standards on Access to Information*, 2004: “3. the right of access to information is a fundamental human right which can be exercised by all, regardless of frontiers.” In a 1985 Advisory Opinion, the Inter-American Court of Human Rights concluded that “a society that is not well-informed is not a society that is truly free.” - *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 Nov. 1985
called right to information laws (see, for example, the 2005 *Right to Information Act* of India).

Recognizing this outlook, earlier in this report, I made two recommendations:

**Recommendation #2. (The Act’s Purpose)**

Amend Section 2 to state that the B.C. *FOIPP Act*’s purposes include increasing public participation in policy making, scrutinizing government operations, reducing corruption and inefficiency, and protecting the public’s rights and the spirit of justice; and add phrases on the models of purpose clauses in the FOI laws of Nova Scotia or Finland.

**Recommendation #3.**

Add a clause to Section 2 to state that access to government information is to be regarded in British Columbia as “a basic human right.”

One FOI law, that of Indonesia (2008) noted the human rights concept in its preamble, as the B.C. *FOIPP Act* could do as well:

> Considering: a) that information is a basic need of every person to develop their personality as well as their social environment, and is a significant part of the national security; b) that the right to obtain information is a human right and transparency of public information is a significant characteristic of a democratic state that holds the sovereignty of the people in high esteem, to materialize good state management; [....]

The theme of public participation recurs continually.\(^\text{130}\) For instance, the 1982 federal Access to Information Act’s purpose was described in this oft-quoted ruling from the Supreme Court of Canada:

> The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required

\(^{130}\) Former Prime Minister Joe Clark’s words a year before his taking power still bear consideration: “We are talking about the reality that real power is limited to those who have facts. In a democracy that power and that information should be shared broadly. In Canada today they are not, and to that degree we are no longer a democracy in any sensible sense of that word.” (House of Commons, Ottawa, Hansard, June 22, 1978)
to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.\textsuperscript{131}

It is noteworthy here that the purpose clauses of many FOI laws in the world which stress public participation have phrases that roughly parallel those found in the \textit{BC Human Rights Code}:

\begin{quote}
3 The purposes of this Code are as follows:

(a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia; [. . . . ]
\end{quote}

Now, I believe that from this common theme of public participation, the concepts of FOI and human rights can be bound together, for \textit{the former helps guarantee the latter}. Lack of public access to government information seems clearly an impediment to the \textit{BC Human Rights Code}’s stated goals of participation.

From this chain of reasoning, it seems that we would valuably reinforce the rights that already seem implicit in a Canadian FOI law (as noted in the Supreme Court ruling above) by making them explicit in an amended FOI text.

The importance of a transparency law was summarized by Richard Calland writing for the Carter Center:

\begin{quote}
With greater knowledge, people can participate more meaningfully and can contribute to the policymaking process. Moreover, they can use access to information law to gain the information with which comes greater power. In this sense, the Right to Know is the Right to Live.\textsuperscript{132}
\end{quote}

\textbf{FOI as the Right to Life?}

Beyond political participation, there is a more pressing theme to FOI rights: self preservation. What could be more of a “human right”? 

\begin{flushright}
\textsuperscript{131} Mr. Justice La Forest, speaking for the entire Supreme Court of Canada, Dagg v. Canada (Minister of Finance), 1997
\end{flushright}

\begin{flushright}
\textsuperscript{132} Access to Information, a Key to Democracy, edited by Laura Neuman (Chapter: ‘Access to Information: How is it Useful and How is it Used? Key Principles for a Useable and User-Friendly Access to Information Law’ by Dr. Richard Calland), Atlanta, Georgia, November 2002
\end{flushright}
Prof. Roberts notes that human rights specialists often make a distinction between two “generations” of human rights: (1) basic civil and political rights, and then (2) economic, social and cultural rights. He argues that some of the practices which appear to fall only under the second class are also really covered by the first as well, and so the practices should be open to scrutiny through FOI laws. For example, private companies might be contracted to count votes and to educate children; the public needs to know of, debate, and approve of their activities, which it can only do with accurate information.

Some claim that access to government records is a basic “human right,” but not all agree (such as former Canadian Privacy Commissioner George Radwanski, who called FOI a mere “administrative right”).

For Prof. Roberts, FOI is a “derivative right,” that is, a necessary tool with which to protect human rights. The same principle could be applied, say, to the internal safety audits of B.C. Ferries, which ferry passengers have a basic human right to access for their own and families’ wellbeing. (They currently cannot, since BC Ferries was removed from the FOI law’s scope.)

The term Right to Life can at times be raised in a quite literal sense. In support of my Recommendation No. 49 (to enforce more proactive publication per B.C. FOIPP Act Sec. 25, the public interest override, on risks to public health and safety), I cited several examples:

In response to FOI requests, the B.C. media exposed several long-term care facilities that could be rated by the government as "high risk," fire safety concerns with five and six storey wood-frame buildings, a report that many of the trucks used to make B.C.'s highways safe are themselves unsafe, and papers noting that at least 54 people have died on SkyTrain tracks since 1985 yet there is no plan to retrofit any Skytrain platforms with barriers.

Abroad, many other cases could be raised. For example, Japan’s health ministry was ordered through the FOI law to release the names of 500 hospitals that had received hepatitis-C tainted blood. On occasion, environmental transparency can also be regarded as a basic human right in law. The European Court of Human Rights ruled in the 1998 case of Guerra v Italy that governments had an obligation to inform citizens of risks from a chemical factory under Art. 8 - protecting privacy and family life - of the European Convention on Human Rights, which Italy had failed to do.
FOI as a Constitutional Right

As David Flaherty, B.C. information and privacy commissioner, wrote in his annual report for 1996-97:

I have argued for a number of years that the right to privacy should be specifically articulated in the Canadian Charter of Rights and Freedoms. So should the public's fundamental right of access to all government information. Only the establishment of such explicit constitutional rights to these basic democratic and human values will make possible legal challenges to governmental practices that threaten our fundamental interests as citizens. What is considered essential for Hungarians in a free society should be de rigueur for Canadians as well, federally and provincially.

We are well aware the British Columbia cannot change the federal Constitution; still the BC government could raise the concept to the federal government and the other provinces for discussion. (The matter could even be proposed in a private members bill by an MP or senator.) I candidly expect it might take years, if not decades, to achieve this goal in Canada. Yet each long journey begins with a single step.

Recommendation No. 67

That the Committee request that the B.C. Premier ask the Prime Minister and other premiers to begin discussions on amending the Canadian Constitution to include the public’s right to obtain government information - which is a provision that 42 other nations have in their Constitutions or Bill of Rights, and one that was urged by B.C.’s first information and privacy commissioner.

Several Canadian court rulings have described the FOI right as “quasi-constitutional.” Yet for many observers, “quasi-constitutional” is inadequate, and what may be implicit in a law needs to be rendered explicit.

While a constitution may be written or unwritten, and may depend on explicit rules or unspoken conventions, a written constitution tries to protect rights by entrenched clauses (although this, of course, depends on judicial interpretations). One of these rights should be the right to know.

At least two objections might be raised to Mr. Flaherty’s proposal.
Firstly, critics might say they do not oppose transparency rights in principle, but argue that such a constitutional amendment is redundant and unnecessary, since these rights are already enshrined in the Canadian FOI laws.

FOI advocates might counter that Canadian FOI laws (in the world context) are both woefully ineffective statute and regularly disregarded in practice; moreover, a solid constitutional underpinning is essential because future administrations could amend the FOI laws to weaken them far more easily than they could ever amend a constitution, the supreme law that overrides all others. Such a broad overriding principle is also needed if an agency undermines the spirit of a freedom of information statute in practice by fixating on its letter.

Secondly, critics might assert that such a constitutional amendment may be too powerful, granting citizens a right that might override other rights of equal or greater importance.

Advocates might counter that the public’s right to know would not be absolute and unlimited; courts would weigh this new Charter right against other values and needs. If government worry that the right could in certain cases grants a citizen too much information - for instance, when record disclosure might harm national security or others’ personal privacy - it could invoke the Charter’s limitations clause. This clause has already been used successfully by government to override citizens’ rights to voice racist speech. It is also very similar to South Africa’s Bill of Rights Sec. 36, which can override Sec. 32 of that nation’s Constitution of 1996 guaranteeing the right to information.

If Canada had a long tradition of judicial rulings favouring government transparency, or had long practiced the concept according to an unwritten constitution, the argument for a written constitutional guarantee might not be as compelling. But such is not the case.

Such a new constitutional right might enable an applicant to appeal in court – as a last resort - against such obstacles as a systemic over-application of FOI exemptions, the wrongful exclusions of quasi-governmental entities from the Act’s scope, or the pernicious trend of clauses in other statutes overriding the Act.

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133 ‘1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’
Global Commentary

• London based human rights organization Article 19, Principles of Freedom of Information Legislation, 1999, endorsed by the United Nations:

‘Principle 1. Ideally it should be provided for in the Constitution to make it clear that access to official information is a basic right.’

• United Nations Development Agency (UNDP), Right to Information Practical Guidance Note, 2004:

‘Key question: Is there any constitutional guarantee for the right to information?’

Canadians should consider that in New Zealand, Sec. 14 of the Bill of Rights Act (1990) states that “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.” The New Zealand Court of Appeals said in 1988 that “the permeating importance of the Act [NZ Official Information Act] is such that it is entitled to be ranked as a constitutional measure.”

There is a BC Constitution Act (http://www.bchomerule.com/page3_b.htm), but a transparency guarantee seems beyond its main purview (i.e., the division of federal-provincial powers). Only one province has attempted to grant a kind of constitutional status to the public’s right to know. Quebec’s Charter of Human Rights and Freedoms (1975) states in Sec. 44: “Every person has a right to information to the extent provided by law.”

In sum, human rights and constitutional guarantees for transparency in law would count for much more than airy, banal “motherhood” statements, but rather would help guide information commissioners and judges in their deliberations on FOI disputes. Even if such provisions were to be perceived be some as symbolic, such symbolism still has value.

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134 Commissioner of Police v Ombudsman [1988] 1 NZLR 385
http://www.freedominfo.org/countries/new_zealand.htm

135 Having precedence over all legislation - including Quebec’s FOI statute - the Quebec Charter stands at the pinnacle of Quebec's legal system; only the Canadian Charter of Rights and Freedoms, as part of Canada's Constitution, enjoys priority over the Quebec Charter.
Complete list of 67 Recommendations

Recommendation No. 1

Change the Act’s title to The B.C. Right to Information and Protection of Privacy Act

Recommendation No. 2

Amend Section 2 to state that the B.C. FOIPP Act’s purposes include increasing public participation in policy making, scrutinizing government operations, and reducing corruption and inefficiency; and add phrases on the models of purpose clauses in the FOI laws of Nova Scotia or Finland.

Recommendation No. 3

Add a clause to Section 2 to state that access to government information is to be regarded in British Columbia as “a basic human right.”

Recommendation No. 4

Amend the Act so that the B.C. government may not enter into a “shared jurisdiction” arrangement or contract, or create a new institution with federal, provincial, municipal or other governmental partners, unless the records of that arrangement, etc., are available under a freedom-of-information law of at least one of the partners.

Recommendation No. 5

Retain the terms “custody or control” of public entities in Sec. 3, but add definitions of the terms.

Recommendation No. 6

Amend Sec. 3 of the Act to state that the law’s coverage extends to any institution that is established by the Legislature or by any public agency - that is publicly funded; publicly controlled; wholly owned; performs a public function and/or is vested with public powers; or has a majority of its board members appointed by it. This includes public foundations and all crown corporations and all their subsidiaries.
Both options - definitions and entity listings in a schedule - could be implemented; and it would be noted that covered bodies are those “included but not limited to” those listed in schedules.

**Recommendation No. 7**

Amend the *Act* so that government and public agencies must post all P3 partnership and large supply contracts on their websites within one week of finalization, subject only to *FOIPP Act* exemptions (which may be appealed to the OIPC).

Amend the *Act* to prohibit *any* restrictions on readership of these records. Copying or redistribution rights should conform to the terms of the “Crown copyright” Recommendation No. 10 in this report.

**Recommendation No. 8**

If recommendation No. 6 is not followed, there is an interim measure: To ensure better *FOIPP Act* coverage, regarding the addition of entities, amend Section 76.1(1), “The minister responsible for this Act may, by regulation, amend Schedule 2 to do one or more of the following […]” by changing “may” to “must.”

**Recommendation No. 9**

Insert a section in the *FOIPP Act* to define the term “out-of-scope” and its permitted usage. Alternatively, state that government and agencies may not invoke the rationale of “out of scope” (or any equivalent term) to withhold any part of any record requested under the *FOIPP Act*. Records or parts of records may only be withheld if they fall under an exemption in the *FOIPP Act*, not if the government asserts that they fall outside the Act’s scope.

**Recommendation No. 10**

Add a clause to the *FOIPP Act* to state that government and agencies may not assert “crown copyright” regarding records released in response to *FOIPP Act* requests.

The only exceptions to this clause would be very limited and must be detailed in the *FOIPP Act* (not regulations), and could include situations where “such material is subject to an existing legal obligation of the Province, i.e., a licence, or someone makes copies of something purporting to be the official version of Provincial material, but which is out of date, and distribute those copies to others, thus creating the potential for inconvenience, or worse, to third party recipients of that material.”
Applicants would retain the right to appeal a wrongful or overly broad assertion of “crown copyright” in regards to FOIPP Act responses to the Commissioner, who could prohibit the government from asserting copyright claims in cases where such assertions do not conform to this relevant section of the Act.

**Recommendation No. 11**

Amend the Act to mandate an initial reply in 20 days (instead of the current 30 days), extendable for another 20 – the standard in the FOI laws of Quebec, New Zealand, the United Kingdom and the United States.

**Recommendation No. 12**


**Recommendation No. 13**

Amend the Act to mandate that when a department's response falls into deemed refusal (i.e., failure to meet lawful deadlines), it loses the right to collect fees (including application fees and any search, preparation, and photocopying charges).

**Recommendation No. 14**

Amend the Act to implement the approach in some laws (e.g. Mexico), so that if an agency is in a deemed refusal situation, it is required to gain the approval of the Commission before withholding information.

**Recommendation No. 15**

Amend the law to mandate that where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, a response must be provided within 48 hours (a model found in many other FOI laws).

**Recommendation No. 16**

Restore the term “calendar days” – as it was initially – in place of “business days,” in regards to B.C. FOIPP Act response and appeal times.
Recommendation No. 17
Amend the Act to mandate that B.C. FOIPP Act performance measurements including response times will be recorded, and that these measurements shall be published online in an annual FOI report card of all public bodies.

Recommendation No. 18
Amend the Act to mandate that failures to respond would be reflected in the reduced bonuses of the “head of the public body” on FOIPP issues (such as deputy ministers in ministries).

Recommendation No. 19
To reduce delays, “sign off” authority levels and processes must be streamlined and simplified. Consider vesting such authority at the lowest reasonable level, normally with the information officer if there is one.

Recommendation No. 20
To lessen overall response times, public bodies must give records to the applicant in staged releases if he or she requests it.

Recommendation No. 21
Amend the Act to permit “continuing” or “rolling requests” on the model of Alberta’s FOI law Sec. 9.

Recommendation No. 22
In Section 11, “Transferring a request,” restore the original 10 day limit (not 20 days).

Recommendation No. 23
Add a harms test for the Sec. 12 cabinet records exemption, modeled upon the terms used in Scotland’s FOI law Sec. 30.

Recommendation No. 24
Amend Sec. 12(2) to state that the Sec. 12 exemption does not apply to agendas or topic headings, including such examples as "items for discussion" and "legislation review." Such records could still be withheld under other sections of the Act.
**Recommendation No. 25**

Consider posting the cabinet meeting topic headings on the internet - as several public bodies’ boards do, subject to an exception for emergencies.

**Recommendation No. 26**

Amend the Act to state that “government caucus committees” are not committees for the purposes of Sec. 12.

**Recommendation No. 27**

If the recommendation above is not accepted, there is a second option: Amend Sec. 12 to state that at least 2/3 of the members of the committee must be members of the Executive Council (not 1/3), and the cabinet members of the committee must have attended at least 50 percent of the meetings in the calendar year in order for the committee records to qualify for Sec. 12 coverage. Include all cabinet or caucus committees dealing with climate change.

As well, state that parliamentary committees fall within the scope of the B.C. FOIPP Act, though excluded from Sec. 12.

**Recommendation No. 28**

Change Sec. 12 on cabinet records from a mandatory exemption to a discretionary one, whereby deliberative records may be released if cabinet consents.

**Recommendation No. 29**

Delete clause “or prepared for submission” from Sec. 12(1). Records can only be withheld under Sec. 12 if they were actually submitted to and considered by cabinet, not if they were “prepared” to be but never were. (They could still be withheld under other exemptions.)

**Recommendation No. 30**

Amend Section 12 to state that the cabinet records exemption cannot be applied after 10 years (as in Nova Scotia’s FOI law), instead of the current 15 year time limit.

Consider proactively releasing cabinet minutes on a government internet page 20 years after their creation (subject to FOIPP Act exemptions, other than Sec. 12), eventually moving to 10 years after their creation. (See Recommendation No. 53.)
Recommendation No. 31

An amendment to the B.C. FOIPP Act should remove all potential uncertainties in the wording around cabinet documents, making it clear that they are defined solely by their substance, not by their titles.

Recommendation No. 32

As FIPA advised in 2004, amend the Act so that Section 12(3), which applies to local public bodies, has parallel provisions to s. 12 (2)(c) which applies to Cabinet confidences. The lack of similar qualifying language in 12(4) allows local public bodies to withhold background materials or analysis in conditions not allowed to Cabinet, and this omission should be corrected.

Recommendation No. 33

Add a provision to the B.C. FOIPP Act Sec. 12 to state that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public within five years after the decisions have been taken and the matter is complete.

Recommendation No. 34

Amend Sec. 13 to include a section on the model of Quebec’s FOI law Sec. 38, whereby the B.C. government may not withhold policy advice records after the final decision on the subject matter of the records is completed and has been made public by the government.

If the record concerns a policy advice matter that has been completed but not made public, the B.C. government may only withhold the record for two years.

If the record concerns a policy advice matter that has neither been completed nor made public, the B.C. government may only withhold the record for five years (on the model of Nova Scotia’s FOI law, Sec. 14).

Recommendation No. 35

Amend Sec. 13 to include a harms test, wherein a policy advice record can be withheld only if disclosing it could cause “serious” or “significant” harm to the deliberative process. The best models can be found in the FOI laws of South Africa (Sec. 44), the United Kingdom (Sec. 36), or Article 19’s Model Freedom of Information Law (2001).
Recommendation No. 36

Amend Section 14 (legal advice) to state that the exemption cannot be applied to records 30 years after they were created (per the model of the UK FOI law’s Sec. 43). As well, add a harms test, to state the exemption can only be applied to withhold records prepared or obtained by the agency’s legal advisors if their release could reveal or impair procedural strategies in judicial or administrative processes, or any type of information protected by professional confidentiality that a lawyer must keep to serve his client.

Recommendation No. 37

Amend Sec.16(1)(a) by changing the word “relations” to “negotiations.” Also change the term “harm” to “serious harm based on reasonable expectations of secrecy.”

Recommendation No. 38

Amend Sec. 16(1)(a) and (b) to state that, upon receiving an FOI request that might trigger this section, the B.C. government must consult with the other government to ask if it would object to disclosure of the records, as likely to cause “serious harm based on reasonable expectations of secrecy” to negotiations, not just unilaterally presume that it might do so without inquiring.

Recommendation No. 39

Amend Sec. 16 (1)(b) to state that information may be withheld if it would “(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies” and add “where there is an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information, and where disclosure would cause serious harm based on reasonable expectations of secrecy.”

Recommendation No. 40

Amend Sec. 20 to state that if the government does not release requested information within 60 days if it promised to do so, then upon the 61st day, it must release all the sought information immediately, without exemptions or costs to the applicant, unless doing so would cause “grave harm” to the public interest..

Recommendation No. 41
Amend Sec. 22 to state that a B.C. FOIPP Act applicant’s identity must not be revealed within government without a strict need to know (which is, mainly to locate the records being sought).

**Recommendation No. 42**

Amend Sec. 22 to state that bonuses of named officials and employees of all entities covered by the FOIPP Act are not the private information of individuals, and encourage the government to post them online, as it does for salaries and expenses.

**Recommendation No. 43**

Amend the Act to state that all salaries and expenses of officials and employees of all entities covered by the FOIPP Act must be available for routine release, without an FOI request, and encourage all such entities to publish such figures online annually, as the B.C. government does for ministries for salaries over $75,000.

**Recommendation No. 44**

Consider amending Sec. 22 to permit the release of the premier’s telephone records, for institutional but not personal contacts, in reply to FOI requests.

**Recommendation No. 45**

Delete Sec. 22.1. Disclosure of information relation to abortion services. Such information is already protected by other exemptions.

**Recommendation No. 46**

Amend Sec. (22)(3)(i) to state that information on political memberships or associations cannot be withheld as private in regards to FOI requests about the governmental appointments and employment of senior named persons.

**Recommendation No. 47**

Amend Sec. (22)(3)(d) so that the term “personal information relates to employment, occupational or educational history” cannot be withheld as private in regards to FOI requests about the governmental appointments and employment of senior named persons.
Recommendation No. 48

Retain the term “for any other reason” in Sec. 25, but add further illustrative examples to it, such as those noted in this report from other nations.

Recommendation No. 49

Encourage the Commissioner to devote a chapter of his annual report to describe serious cases of failure (whether or not an FOI request for access was made) where the government and agencies had an obligation to proactively disclose information in the public interest per Sec. 25, but did not.

Seek and consider input on further measures to guarantee the Sec. 25 duty of proactive publication.

Recommendation No. 50

The deadline to appeal to the Commissioner on a B.C. FOIPP Act related matter should be doubled to 60 days. The deadline to file an appeal of a FOIPP ruling to Judicial Review should also be doubled to 60 days.

Recommendation No. 51

Amend the Act so that upon the conclusion of an investigation, the Commissioner’s office will have the power to recommend to the Attorney General’s office that it lay charges and fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal. These amounts will be determined in further amendments or regulations.

Recommendation No. 52

Place a provision in the Act to preserve pre-existing access to information, on the model of Ontario’s FOI law Sec. 63 (2).

Recommendation No. 53

Amend Sec. 70 to mandate that B.C. cabinet minutes be routinely released onto government websites after 20 years, a period gradually moving to the 10 years advised in this report for the termination of the cabinet records exemption.
**Recommendation No. 54**

Amend Sec. 70 to add a much longer list of records that must be routinely released or proactively published, on the examples of Article 19’s Model of Freedom of Information Law (2001), and those of many other nations and commentators noted in this report.

**Recommendation No. 55**

Amend the B.C. Act’s Section 74 to prohibit and penalize persons for the unauthorized record destruction and handling in the FOI process, with the wording of the Canadian *Access to Information Act*, Sec 67.1.

**Recommendation No. 56**

Regarding penalties, consider amending the B.C. Act’s Section 74 along the models of Article 19’s *Model Freedom of Information Law* (2001) and the Commonwealth Secretariat’s *Model Freedom of Information Bill* (2002).

**Recommendation No. 57**

Amend Section 74 to double the fine for obstructing the Commissioner to $10,000. Consider the advisability of prison terms for the same offense.

**Recommendation No. 58**

Amend Sec. 75 (2)(b) to change the wording from “time severing…” to “time reviewing the record and severing information from a record.”

**Recommendation No. 59**

Consider extending the free time “spent locating and retrieving a record” from the current 3 hours up to 5 hours (which is the standard in the federal *Access to Information Act*, Sec. 11).

**Recommendation No. 60**

First option: Repeal B.C. *FOIPP Act* Sec. 79 and its related schedule.
If that is not accepted, there is a secondary option (which was FIPA’s recommendation in 2005): Extend coverage to categories of records exempted by “notwithstanding clauses” in other statutes.

**Recommendation No. 61**

Consider a policy directive for the ministry that administers the FOIPP system to educate and promote the FOIPP process to the general public.

Alternatively, the Commissioner could be encouraged to educate and promote the FOIPP process to the general public. If so, government must provide adequate funds for this task, and it would be a dedicated, stand-alone part of the Commissioner’s budget.

**Recommendation No. 62**

The B.C. government should pass an effective *Archives and Information Management Act*, designed to regulate the entire life-cycle of government-held information.

**Recommendation No. 63**

Seek an effective way to oblige public officials, in law, to create the records necessary to document their actions and decisions.

**Recommendation No. 64**

Either the B.C. *FOIPP Act* or a new *Archives Act* should set record retention rules on cell phone and blackberries and all communication technologies (and which accounts are private or public), and computer backups of these – and be reviewed often to keep current with new technologies.

**Recommendation No. 65**

Pass a B.C. Open Meetings Act, to establish which agencies must hold open meetings, and set rules on what they must discuss matters in open session, and may discuss in closed session. Certain smaller or specialized agencies could continue to meet entirely in private (although their minutes could still be requested by FOI). Alternatively, such rules could be set in the B.C. *FOIPP Act*, or in the legislation currently governing each agency.
Recommendation No. 66

That B.C. pass a strong and comprehensive whistleblower protection statute for both the public and private sector.

Recommendation No. 67

That the Committee request that the B.C. Premier ask the Prime Minister and other premiers to begin discussions on amending the Canadian Constitution to include the public’s right to obtain government information - which is a provision that 42 other nations have in their Constitutions or Bill of Rights, and one that was urged by B.C.’s first information and privacy commissioner.

SOURCES FOR TEXTS

FOI Policies and Best Practice Recommendations from World Non-Governmental Organizations

African Union, and African Commission on Human and Peoples’ Rights


The African Union (AU) is a supranational union consisting of fifty-three African states. Established in 2001, the purpose of the union is to help secure Africa's democracy, human rights, and a sustainable economy, especially by bringing an end to intra-African conflict and creating an effective common market.

Council of the League of Arab States

- Arab Charter on Human Rights, May 23, 2004  (Text not online)

The Arab League, also called League of the Arab States, is a regional organization of Arab States in the Middle East and North Africa. It was formed in Cairo on March 22, 1945 and currently has 22 members. The Arab League is involved in political, economic, cultural, and social programs designed to promote the interests of member states.
ENDORSEMENTS – ‘These Principles were endorsed by Mr. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, in his report to the 2000 session of the United Nations Commission on Human Rights, and referred to by the Commission in its 2000 resolution on freedom of expression. They were also endorsed by Mr. Santiago Canton, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression in his 1999 Report, Volume III of the Report of the Inter-American Commission on Human Rights to the OAS.’


ARTICLE 19 is a London-based human rights organisation with a specific mandate and focus on the defence and promotion of freedom of expression and freedom of information worldwide. The organisation takes its name from Article 19 of the Universal Declaration of Human Rights. ARTICLE 19 is a founding member of the Freedom of Information Advocates (FOIA) Network, a global forum that aims to support transparency.

Campaign for Open Government (Great Britain)

• The Right to Know Bill, 1993  
http://www.cfoi.org.uk/opengov.html#rtk

The Campaign for Freedom of Information was founded in 1984, and has been headed by Maurice Frankel since 1987. The Right to Know Bill was a freedom of information bill drafted by the Campaign and introduced by Mark Fisher MP in 1993. It completed its committee stage but was then blocked by the Government at its report stage in July 1993.

The Carter Center

• Access to Information, a Key to Democracy, edited by Laura Neuman. Chapter: Access to Information: How is it Useful and How is it Used? Key Principles for a Useable and User-Friendly Access to Information Law, by Dr. Richard Calland. Atlanta, Georgia, November 2002  
The Carter Center is a nongovernmental, not-for-profit organization founded in 1982 by former U.S. President Jimmy Carter and his wife Rosalynn Carter. In partnership with Emory University, The Carter Center works to advance human rights and alleviate human suffering. The Atlanta-based center has helped to improve the quality of life for people in more than 70 countries. In 2002, President Carter received the Nobel Peace Prize.

**The Commonwealth**

  http://www.thecommonwealth.org/shared.asp_files/uploadedfiles/%7BAC090445-A8AB-490B-8D4B-F110BD2F3AB1%7D_Freedom%20of%20Information.pdf


When capitalized, ‘Commonwealth’ normally refers to the 53 member Commonwealth of Nations - formerly the ‘British Commonwealth’ - which is a loose confederation of nations formerly members of the British Empire, including Canada. The (appointed, not hereditary) head of the Commonwealth of Nations is Queen Elizabeth II.

**Council of Europe, Committee of Ministers**


The Council of Europe, founded in 1949, is the oldest organisation working for European integration. It is an international organisation with legal personality recognised under public international law and has observer status with the United Nations. The seat of the Council of Europe is in Strasbourg in France.
(The Council of Europe is not to be confused with the Council of the European Union, which is the EU's legislature, or the European Council, which is the council of all EU heads of state. These belong to the European Union, which is separate from the Council of Europe, although they share the same European flag and anthem since the 1980s because they also work for European integration.)

**The Johannesburg Declaration of Principles on National Security, Freedom of Expression, and Access to Information**

- ‘These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgments of national courts), and the general principles of law recognized by the community of nations. [http://www.article19.org/pdfs/standards/joburgprinciples.pdf](http://www.article19.org/pdfs/standards/joburgprinciples.pdf)

**National Security Archive**


**Open Society Justice Initiative**


The Open Society Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in the
following priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. It has offices in Abuja, Budapest and New York.

**Organization for Security and Co-operation in Europe (OSCE)**


  [http://www.privacyinternational.org/foi/OSCE-access-analysis.pdf](http://www.privacyinternational.org/foi/OSCE-access-analysis.pdf)

The OSCE is the world's largest regional security organization whose 56 participating States span the geographical area from Vancouver to Vladivostok. And ad hoc organization under the UN Charter, it serves as a forum for political dialogue, and its stated aim is to secure stability in the region, based on democratic practices.

**Transparency International**


Transparency International (TI), founded in 1993, is a leading international non-governmental organization addressing corruption. It is widely known for producing its annual Corruptions Perceptions Index, a comparative listing of corruption worldwide. TI has some 100 national chapters, with an international secretariat in Berlin.

**United Nations Development Agency (UNDP)**

- (1) *Summary of the presentation at the Regional Workshop on Media and Accountability*, Kuala Lumpur, 27 May 2006. By Patrick Keuleers, Regional advisor, UNDP Regional Centre in Bangkok
• (2) UNDP Democratic Governance Group, *Right to Information Practical Guidance Note*, July 2004. Document developed by Andrew Puddephatt (Executive Director, Article 19) in collaboration with the Oslo Governance Centre, a unit of UNDP’s Democratic Governance Group [http://www.undp.org/governance/docs/A2I_Guides_RighttoInformation.pdf](http://www.undp.org/governance/docs/A2I_Guides_RighttoInformation.pdf)


The United Nations was founded in 1945 to replace the League of Nations, in the hope that it would intervene in conflicts between nations and thereby avoid war. There are now 192 United Nations member states, including almost every recognized independent state.

**World Bank**


The World Bank, a part of the World Bank Group (WBG), is a bank that makes loans to developing countries for development programs with the stated goal of reducing poverty. The World Bank was formally established on December 27, 1945, following the ratification of the Bretton Woods agreement.

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**FOI Policies and Best Practice Recommendations from Canadian Non-Governmental Organizations and other sources**


In March 1987 the committee released its review. Later the same year, the government released its response, *Access and Privacy: The Steps Ahead*.
Subsequently most of the administrative recommendations of the committee report were implemented, but none of the legislative recommendations.


  This report was prepared for the Information Commissioner of Canada by Sysnovators Ltd. of Ottawa. The opinions and recommendations it presents are those of the authors and do not represent the official position of the Information Commissioner of Canada.


  John Grace, a PH.D. from the University of Michigan, was Canada’s first Privacy Commissioner being before being appointed Information Commissioner (succeeding Inger Hansen), serving from 1990 to 1998. After teaching at the University of Michigan, he was a journalist for 22 years, as an editorialist and editor for the Ottawa Journal.


  John Reid was Information Commissioner of Canada from 1998 to 2006. (He was then succeeded by Robert Marleau). Mr. Reid was a Liberal MP from 1965 to 1984, and Minister of State for for federal-provincial relations in 1978-79. He worked on issues such as improving the access of MPs to government records, and later represented Canada on the OSCE’s mission to Bosnia and Herzegovina.

- **A Call for Openness.** Report of MPs’ Committee on Access to Information, chaired by Liberal MP John Bryden. Ottawa, 2001  (Not online)

  In 2000, backbench Liberal MP John Bryden, formed a special all-party committee to discuss needed reforms to the ATIA, and it produced a report. Because he was acting independently of the Liberal government, it explicitly disapproved of Mr. Bryden’s committee and forbade civil servants to speak to it. In June 2000, a private member’s bill was introduced by Mr. Bryden to overhaul the Act was defeated at second reading by a vote of 178 to 44.
In 2000, the Justice Minister and Treasury Board President announced the establishment of the Access to Information Review Task Force, with a mandate to review both the legislative and administrative issues relative to access to information. The Task Force was widely criticized for the secrecy of its processes and meetings.

**Bill C-201 An Act to amend the Access to Information Act and to make amendments to other Acts.** Introduced by NDP Member of Parliament Pat Martin, 2004

In 2003, MP John Bryden attempted to initiate a comprehensive overhaul of the Act through a private member’s bill, Bill C-462, which died on the order paper with the dissolution of the 37th Parliament in May 2004. A similar bill was introduced by MP Pat Martin in October 2004 as Bill C-201. The bills’ provisions are virtually identical.


In April 2005, Liberal Justice Minister Irwin Cotler introduced this discussion paper, asking the House of Commons Standing Committee on Access to Information, Privacy and Ethics for input on a range of policy questions before the introduction of legislation.

**Access to Information Act - Proposed Changes and Notes.** By John Reid, Information Commissioner of Canada, Ottawa, 2005

This draft bill of Mr. Reid, the Open Government Act, was tabled at the House of Commons Standing Committee on Access to Information, Privacy and Ethics on October 25, 2005, at the request of the Committee. Most of this draft bill was endorsed by the ETHI Committee, who advised that it be passed into law. Also see Mr. Reid's 2005 special report on proposed changes to the ATIA, at the same website.
• **Stand Up For Canada.** 2006 federal election platform statement of the Conservative Party of Canada, led by Stephen Harper, now Prime Minister [http://www.conservative.ca/media/20060113-Platform.pdf](http://www.conservative.ca/media/20060113-Platform.pdf)

The Conservative Party of Canada, colloquially known as the ‘Tories,’ is a conservative political party in Canada, formed by the merger of the Canadian Alliance and the Progressive Conservative Party of Canada in December 2003. The party has formed the Government of Canada since February 6, 2006.


The Gomery Commission was a federal Canadian Royal Commission headed by retired Justice John Gomery for the purpose of investigating 'the sponsorship scandal,' which involved allegations of corruption within the Canadian government in regards to the awarding of advertising contracts.


‘The Government was in a position to introduce some reforms as part of the proposed Federal Accountability Act, as sufficient consultations have been undertaken with the affected entities to allow the development of reforms. The remaining proposals, however, require further consultation, analysis and development before additional reforms can be drafted and introduced.’ – Justice Department of Canada

• **Bill C-554, Act to amend the Access to Information Act (open government).** Introduced by NDP Member of Parliament Pat Martin, 1st reading, May 2008 [http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3525397&Language=e&Mode=1&File=27#1](http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3525397&Language=e&Mode=1&File=27#1)
Global freedom of information resources


Freedom of Information journal. Edited by Marcus Turle, London. 6 issues annually.


http://www1.worldbank.org/prem/PREMNotes/premnote93.pdf (‘This note was written by Toby Mendel, Article 19. This note series is intended to summarize good practices and key policy findings on PREM-related topics. The views expressed in the notes are those of the authors and do not necessarily reflect those of the World Bank. PREM notes are widely distributed to Bank staff.’)

**ARTICLE 19**


**The Commonwealth**


http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/commonwealth_expert_grp_on_the_rti_99-03-00.pdf


http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BAC090445-A8AB-490B-8D4B-F110BD2F3AB1%7D_Freedom%20of%20Information.pdf

United Nations


**Transparency International**


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**INTERNET SITES**


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Access Info Europe. [http://www.access-info.org/](http://www.access-info.org/)

Alasdair Roberts’ FOI website. [http://www.aroberts.us/](http://www.aroberts.us/)


Huntingdon College FOI page [http://fs.huntingdon.edu/jlewis/FOIA/FOIAlinks.htm](http://fs.huntingdon.edu/jlewis/FOIA/FOIAlinks.htm)

Global Accountability Project [http://www.oneworldtrust.org/?display=project&pid=10](http://www.oneworldtrust.org/?display=project&pid=10)


Access Info. [http://www.access-info.org/](http://www.access-info.org/)

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Institute for Information Law, Amsterdam

Access to Information Program, Europe  http://www.aip-bg.org/index_eng.htm

Global Transparency Initiative  http://www.ifitransparency.org/


Public Affairs Centre, Right to Information  http://www.pacindia.org/issues/right-to-information

IFEX – International FOI exchange
http://www.ifex.org/20fr/layout/set/print/layout/set/print/content/view/archivefeatures/20/offset/1675


Statewatch, monitor of civil liberties in Europe  http://www.statewatch.org/

European FOI portal of Walter Keim http://aitel.hist.no/~walterk/wkeim/foi.htm

Democracy Watch, Ottawa  www.dwatch.ca

Canadian Newspaper Association  http://www.cna-acj.ca

British Columbia Freedom of Information and Privacy Association (FIPA).  www.fipa.bc.ca

Global FOI Chart

Explanatory Notes

As an aid to freedom of information scholars, I thought in 2007 to cross-reference the most relevant documents on freedom of information law that could be found: i.e., the texts of 68 national FOI laws, 29 draft FOI bills, 12 Canadian provincial and territorial FOI laws, the commentaries of 14 global and 17 Canadian non-governmental organizations.
Their key topics were entered into a comparative Excel spreadsheet, to create the *Global FOI Chart* at [www3telus.net/index100/foi](http://www3telus.net/index100/foi). It is the foundation for the report *Fallen Behind: Canada’s Access to Information Act in the World Context*, 2008, and could also serve as a reference for law and political science classes. When FOI provisions are compared, new patterns and surprises may emerge (particularly within regions, or the Commonwealth).

Although the Report contains interpretation on Canadian FOI issues, the *Chart* has been conceived to be as neutral and comprehensive as possible which is why, whenever possible, the original statute texts (or available translations) have been quoted, rather than sections paraphrased, and there are internet hotlinks to the original texts.

The *Chart* was prepared for both Canadian and global readers, in a manner that hopefully makes the topics accessible to all. One of the goals of this *Chart* is to encourage more real engagement and dialogue between sectors that have hitherto been mainly segregated in FOI discussions - journalists, lawyers, academics, politicians, the bureaucracy, the private sector, applicants and the general public – both in Canada and around the world. (Hopefully, we will also one day see more international conferences for FOI users and scholars.) For instance, Column K might be used as a reference for FOI applicants across borders in our global community, e.g., as I have make FOI requests to other nations.

The multi-purpose *Chart* (word searchable using Ctrl-F) can also assist FOI applicants and scholars in each global jurisdiction to study how their FOI statutes compare to similar laws in other provinces or nations; to perhaps press for higher standards in their own nations’ access laws or practices; or to cite the commentaries when arguing general principles in their FOI legal disputes.

Of course foreign statutes do not bind other jurisdictions, but where domestic literature on an FOI point of law is otherwise scanty, foreign sources might at least be studied for interest by appellate bodies; e.g., the internet links to Commissioners’ websites (some included in the *Chart*) can lead one to their rulings on a certain point, and in fact I have utilized these in my FOI arguments. Applicants may sometimes have stronger precedent-based arguments for disclosure than they realize.

The focus here is on FOI requests for general records, not requests for one’s own personal records, which are often the mandate of separate privacy laws. In the *Chart*, blank fields remain, where information was not available or could not be located (and sometimes a law’s silence on a matter can be eloquent).
Special columns (N and O) have been created for what are, at least in Canada, probably the two most overapplied and contentious FOI exemptions: those for policy advice, and cabinet records. If the Chart was to be expanded in future, it would be valuable to create a new column for each exemption type, e.g., personal privacy, third party trade secrets.

For space restrictions, several topics are absent, such as the privacy protection parts of the laws; the transfers of FOI requests; ignoring ‘systematic and repetitious’ requests; when a public body may ‘refuse to confirm or deny’ the existence of a record; full lists of types of public bodies covered (e.g., universities, hospitals); if the state must make an annual report on FOI; applicants acting on behalf of others, records released so many years after a person’s death; notices to third parties; who is delegated to make access decisions, etc.

But those who wish to read of these features may go to the original texts, which are hotlinked from within the chart. In fact, I would urge the reader to find and read the entire original section in the official statute text, because they may contain important technical detail that could not fit into this Chart’s cells.

In several cells, I placed a {*} symbol, as a kind of modest award, next to a rare and outstandingly positive feature of a freedom of information statute or policy, one that might serve as an inspiration for other jurisdictions. If you disagree with my choices for the {*} mark, or have other choices of your own, I would be keen to hear them.

We are all indebted to David Banisar at www.freedominfo.org, and Toby Mendel of Article 19, without whose groundbreaking analysis of FOI statutes and draft bills, such a Chart would not have been possible.

Incomplete and imperfect, the Global FOI Chart, the world’s first as far as I know, is not the end point in the comparative study of FOI laws, but just the beginning. (For one thing, as laws are revised, the Chart would require revision as well.) Although the struggle for open government seems a very uneven one, the goal of this Chart is to educate and perhaps empower the public worldwide who are pressing for more transparency, to hopefully create a somewhat more level playing field.

- Stanley L. Tromp, Vancouver, B.C., Canada

(Note. This Chart is not meant as legal advice of any kind, and we bear no liability for errors, omissions or consequences of using these works. The Chart may be widely distributed without further permission, but only without any charge or profit.)
A Note on the Author

Stanley L. Tromp is a graduate of the University of British Columbia Political Science department (B.A., 1997), where he completed the course in international law at the UBC Law Faculty; and the Langara College journalism program (Vancouver, 1993). He was named best Langara journalism student by the B.C. Yukon Community Newspaper Association (BCYNA), and won the 1996 essay prize on the Responsible Use of Freedom from St. Mark’s College at UBC.

While a reporter for the UBC student newspaper the *Ubyssey*, his freedom of information act request for the UBC-Coca Cola marketing contract in 1995 prompted a five year legal battle, a successful B.C. Supreme Court appeal, and an influential ruling for disclosure by the B.C. Information and Privacy Commissioner (http://www.oipebc.org/orders/2001/Order01-20.html) His FOI requests have been the subject of nine rulings by the Commissioner since 1996.

He has been nominated for a Canadian Association of Journalists award (1997) and a B.C. Newspaper Foundation award (1999), and has been invited to give lectures to UBC and Langara journalism classes on FOI. He 1998 he helped compile a collection of 150 notable stories produced from B.C. *FOIPP Act* requests, for the book *For the Record*, published by the B.C. Press Council, at http://www.direct.ca/bcjc/archives.htm

For news articles, he makes hundreds of FOI requests, including to foreign countries and American states. His stories have been published in the *Globe and Mail*, the *Vancouver Sun*, the *Georgia Straight, Vancouver Magazine*, the *Vancouver Courier*, and many other publications.

He conceived and initiated the FOI caucus of the Canadian Association of Journalists at its annual general meeting in 2004, and was one of the founders of the group B.C. Journalists for Freedom of Information (BCJC) in 1998.

In 2006 he gave oral presentations to the House of Commons and Senate committees in Ottawa considering access to information amendments to the Accountability Act, *Bill C-2*. He has also made two presentations to British Columbia legislative reviews of the B.C. *FOIPP Act*.

In 2007-08 he spent a year producing the world’s first Excel chart to compare the world’s FOI laws, as an aid to scholars, at his website http://www3.telus.net/index100/foi. This site cross-references by topic key primary documents on freedom of information law, including texts of 73 national FOI laws, 29 draft FOI bills, 12 Canadian provincial and territorial FOI laws, the commentaries of 14 global and 17 Canadian non-governmental organizations.
The Chart is the foundation for his 393 page report *Fallen Behind: Canada’s Access to Information Act in the World Context* (posted at the same site).

In Right to Know Week of 2009, he was invited by the Information Commissioner to Ottawa to speak on two panels on FOI law. He may be reached at stanleytromp@gmail.com

Reviews of *Fallen Behind: Canada’s Access to Information Act in the World Context*:

"This will be a key reference globally for those fighting for freedom of information. It's thoroughly researched and very clearly written. This is a significant achievement in the field."

- David Loukidelis, B.C. Information and Privacy Commissioner

“I’ve now had the opportunity to review your report. I want to congratulate you for this initiative, its quality and exhaustive scholarly content. It will stand as a significant reference for all who are interested in the FOI field, but more importantly for those who advocate that Canada should be at the forefront as a governance model for the rest of the world.”

- Robert Marleau, Information Commissioner of Canada

“This report is by far the most comprehensive comparative analysis to date of Canadian and international access to information laws.”

- Toby Mendel, law program director of London-based human rights organization *Article 19*

“Stanley Tromp has done us all a great service in compiling this thoughtful analysis of freedom of information law and policy around the world. Its remarkable scope and its detailed analysis of the key issues are staggering. His spreadsheet, *World FOI Chart*, alone is worth the price of admission. In a sense, he has become our conscience in this crucial policy field. . . . Freedom of information is a right worth fighting for. Stanley Tromp has been a real champion of this right: he leads the way for the rest of us to follow.”

- T. Murray Rankin, QC, Adjunct Professor of Law, University of Victoria