

Meet BC's new Information and Privacy Commissioner

Elizabeth Denham, formerly Canada's assistant Privacy Commissioner, was appointed as BC's new Information and Privacy Commissioner on May 6, after a vote in the legislature. She began her six-year term on July 6.

Ms. Denham served as the country's assistant privacy commissioner with primary responsibility for the federal private sector privacy law, PIPEDA, since 2007. She is best known for spearheading a high-profile investigation into the way Facebook handles user information, which pushed the company to revamp the way it handles and shares personal information from more than 200 million users worldwide.

She launched a follow-up investigation into Facebook early this year after a complaint that the default setting of the new privacy options presented to users made a person's information more readily available than before the changes.

Ms. Denham has a Master's Degree from the UBC School of Library, Archival and Information Studies and has extensive experience in privacy compliance in both the public and private sectors. She began her privacy career in 1997 when she was appointed as the first Privacy Officer for the Calgary Health Region. From 2000 to 2003 she practiced as a privacy consultant, assisting over 45 companies and government organization with their privacy and information management programs.



FIPA welcomes Elizabeth Denham and looks forward to working with her. She has accepted our invitation to be the keynote speaker for the third BC Information Summit on September 29. (*See insert*)

FOIPP Act review report a mixed bag

The Special Committee to Review the Freedom of Information and Protection of Privacy Act handed down its report to the BC Legislature on May 31. The unanimous report has many positive recommendations – and a few that could create huge problems for FOI and privacy rights in this province.

First, the good stuff

The committee has repeated a number of the recommendations of its 2004 predecessor. There are recommendations pushing public bodies to more routine disclosure, which will make information more widely available and reduce the need to use the FOI process. In some cases,

time limits would be shortened, and a number of measures are proposed to streamline the processes of the Information and Privacy Commissioner's office.

The committee has recommended closing what could be a huge loophole for educational institutions creating subsidiary companies to avoid FOI requests. This is very important as the courts have already ruled that records with a wholly owned subsidiary of Simon Fraser University are beyond the reach of FOI requests. It is important to have this loophole closed by legislation, rather than hoping the BC Court of Appeal will overturn the decision.

The committee has also accepted a recommendation from FIPA that the test for mandatory release of documents in the public interest under s.25 of the Act be relaxed to meet standards set down by the Supreme Court of Canada.

Privacy Recommendations

On the privacy side, there are also positive developments.

The committee ruled out amending the Act to allow storage of information outside Canada. The government pressed hard for this amendment, and FIPA is very pleased that the Committee has declined to recommend it.

The committee also recommended that the government hold public consultations on data sharing initiatives like the Integrated Case Management system (see the following article in this bulletin).

They also recommended an amendment to make privacy impact assessments (PIAs) mandatory at the "conceptual, design and implementation phases" of an electronic record project. (Case example: No PIA has ever been done of the Integrated Case Management Project, despite the Commissioner's repeated requests over more than two years.)

The Bad and Ugly Recommendations

Three recommendations in the committee's report give FIPA serious concern.

First, the committee has failed to repeat the 2004 recommendation of the previous review committee to close the ever-widening loophole that allows the government to withhold 'advice or recommendations'.

As a result of a 2002 BC Court of Appeal decision that misinterpreted section 13 of the act, this province now has the widest possible scope for preventing disclosure of information that the government says is advice or recommendations. The government has repeatedly taken advantage of this, and this has gone so far that FIPA is now waiting for a court decision on whether submissions to a consultation process are considered 'advice' for the purpose of s.13 of the Act (See p.4, 'Legal Actions').

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Why the NDP members gave unanimous support to the Special Committee's Report

The NDP held five of the 12 positions on the Special Committee. The NDP members disagreed strongly with some of the Committee's recommendations and could have filed a minority report to express their concerns. Instead all members gave unanimous support to the report.

"We came close to not being able to endorse it," committee vice chair Doug Routley told reporter Andrew MacLeod of *The Tyee*. There were concerns, he said, but "not enough that we could walk away from what we did negotiate."

The NDP wanted the report to talk about a 'duty to document' which would require at least a basic account of the rationale for government decisions to be recorded, he said. It also should have had more to say regarding the delays in responding to FOI requests, he said.

The NDP members strongly disliked the recommendation that would allow people to consent to having their private information collected and shared, but Routley stated it was much better than the sweeping change government representatives asked for when they appeared before the committee. "We pretty much defeated most of what the government asked for in their submission," he said.

On the positive side, the recommendations around routine disclosure would be a big advancement, he said. "The fact is the majority of the recommendations in the report we endorse."

Private Member Bill clarifies NDP Position

A day after the release of the Special Committee report, NDP critic Doug Routley tabled Bill M-211, a very progressive bill designed to deal with many of the problems the committee had overlooked.

Entitled 'Open Government Act, 2010', this private member bill would open up cabinet secrecy by making the exception discretionary instead of mandatory, return the 'advice or recommendations' exception to its proper scope, revitalize the public interest release requirement and require outsourcing and other off-book records to be brought under the scope of the Act.

You can read Bill M-211 on the Legislature web page at http://www.leg.bc.ca/39th2nd/1st_read/m211-1.htm

FIPA is disappointed that the special committee declined to keep pressure on the government to bring in a desperately needed amendment to section 13.

Second, the committee has recommended making the "Legal Advice" exception, section 14 (which allows government to withhold information covered by solicitor-client privilege) mandatory, meaning a public body MUST withhold information that falls under this heading.

This alone would make the legal advice exception more restrictive, but the committee didn't stop there. They also recommended that the application of the exception may only be ruled upon by the Supreme Court of BC instead of the Information and Privacy Commissioner.

The committee report did not cite a single case where the current system resulted in improper release of privileged documents, nor say how this amendment would actually work in practice. Would every s.14 claim by government go before a judge, or just requests where the applicant contests the government's claim? Would the Commissioner have to wait for the court to rule before dealing with other exceptions, or would the court wait for the Commissioner? One thing is certain: this proposal would make the system more complicated, slower and more costly.

Finally, the committee recommended instituting a system of 'consent' for the collection, use and disclosure of personal information by a public body. This means that people could be asked to consent to uses of their personal information that are not otherwise allowed by the act - basically waiving their privacy rights!

This was a recommendation pushed by the government during hearings, and as "some members" of the committee noted, the concept of consent in the government context is essentially meaningless. Unlike the private sector, where there may be other companies willing and able to provide goods or services if you don't like a company's privacy policy, there is no where else to go for government services if you refuse to consent.

It is now up to the government to decide whether or not to take action on the committee's recommendations. As the Legislature may not be back until 2011, they should have plenty of time to consider what to do about amending the FOIPP Act.

The report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act is available at <http://www.leg.bc.ca/cmt/39thparl/session-2/foi/reports/PDF/Rpt-FOI-39-2-Rpt-2010-MAY-31.pdf>

FIPA report blasts massive data-matching scheme

FIPA released a major report in March, strongly criticizing the \$180 million Integrated Case Management (ICM) project the BC government announced in February's Throne Speech.

The planned ICM system would collect comprehensive personal data from hundreds of independent community service organizations which are contracted to provide government services, in order to create a database of unprecedented scope and detail about citizens' lives, including their participation in health care, education, family services and other government services. The information will be shared across government and with outside organizations.

The FIPA report, entitled *Culture of Care...or Culture of Surveillance?* took two years to complete and includes written and onsite surveys of service organizations. It highlights serious

Culture of Care...or Culture of Surveillance?

May be downloaded at

<http://www.privacyresearch.ca>

We wish to thank the Law Foundation of BC for funding this very important study.

concerns about the ICM system related to privacy rights and the potential effect of the program on social services and the independent community service organizations themselves.

The system, which will be used at first by the Ministry of Children and Family Development and the Ministry of Housing and Social Development, will at some point extend its reach outside the public sector to gather all client information held

by independent agencies contracted by government to provide social services.

"If this project goes forward as planned, it will turn service groups into surveillance organs for the government," said FIPA Executive Director Darrell Evans. "It has the potential to make these organizations into agents of the state."

The BC government has not responded directly to the report, but its massive submission to the Special Committee reviewing FIPPA clearly indicates that it has no intention of giving up on its dreams of massive data sharing and matching.

We also quoted the most recent annual report written by former freedom of information and privacy commissioner David Loukidelis: "It is certainly important that government not move forward with any legislated changes in this area unless and until there has been a full public consultation in the form of a position paper published by the government, followed by meaningful, extensive stakeholder consultations."

The government should follow Loukidelis' "sage advice" before pursuing the project any further, FIPA wrote.

Legal actions

Are submissions to government consultations 'policy advice'?

FIPA was in court seeking judicial review of an adjudicator's decision that submissions by outside groups to a government consultation on reform of *FOIPPA* could be kept secret because they were 'advice or recommendations' to the Minister. In Order 09-02, the adjudicator found that the submissions were policy advice, but that the Ministry had not properly exercised its discretion to release them. Tam Boyar and Christine Joseph represented FIPA.

BC government loses again in attempt to keep big contracts secret

Government secrecy took another hit when the OIPC adjudicator shot down two different cases related to the huge Maximus contract with the Ministry of Health Services for the delivery of MSP and PharmaCare services.

The government argued that the release of certain terms of the contract and the information related to penalties paid under the contract would harm the economic interests of the province. FIPA and the BC Government

Employees Union argued the terms should be released. The Adjudicator agreed, finding that the government and Maximus had not shown that there was a reasonable apprehension of harm to the economic interests of the province. FIPA will be arguing for the release of two other large contracts, with IBM and EDS, with the hearing before the Commissioner set for later this summer. We hope to get a similar result.

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We have arranged to collect only the minimum amount of information required to process the credit card transaction, and regular cheque processing is still available for anyone who doesn't want to use the on-line facility.

FIPA would like to thank the Law Foundation of BC, the Notary Foundation of BC and the Province of British Columbia for supporting FIPA programs

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