

## Big Challenges ahead for Freedom of Information and Privacy

It will take a new government to change BC's anti-FOI, anti-privacy culture

We wish we had some good news for you from BC's FOI and privacy battlefield.

Sorry. The only thing keeping hope alive at the FIPA office is the fact that in 1 year, 1 month and 11 days from this writing, BC citizens will have the opportunity to choose a new provincial government.

FIPA is and always will be non-partisan, but we also have to face the facts: It will take a new regime to change BC's entrenched anti-FOI, anti-privacy government culture. Theoretically a new Liberal Party leader could do it – but not the current one, for all the reasons we will give below.

This bulletin will summarize the unfortunate situation in which BC finds itself with regard to FOI and privacy rights and legislation.

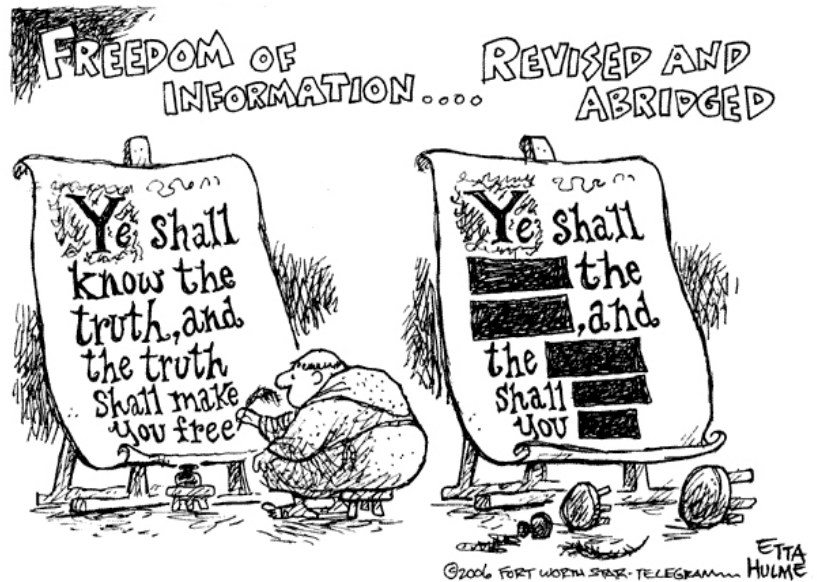
### Government reaches a new low in FOI avoidance

The Freedom of Information and Protection of Privacy Act (FOIPPA) allows government to block the disclosure of records that "would reveal advice or recommendations developed by or for a public body or a minister", but this 'Policy Advice Exception' is routinely abused. FIPA has fought against the government's ever-expanding use of the exception for years, even challenging it in court.

In January a Vancouver Sun reporter revealed just how far the government has come in abusing the exception, and how far they will go to withhold information that might embarrass them.

Jonathan Fowle [reported](#) how, for a year and a half, the BC Liberals used the exception to avoid releasing one of the few undestroyed copies of an unreleased \$780,000 pamphlet touting the virtues of the harmonized sales tax.

His colleague Vaughn Palmer said it best when he wrote:



*"Cabinet secrecy," they claimed, rejecting an application filed under provincial access to information legislation.*

*Never mind that they'd printed 1.6 million copies of the 12-page full-colour pamphlet with intentions of mailing it to every household in B.C., before second thoughts relegated the lot - a half dozen truckloads worth - to the shredder.*

*Could material prepared at public expense for public distribution really fit the legal definition of "information that would reveal advice or recommendations developed by or for a public body or minister?" [\[Source\]](#)*

The answer is NO, it couldn't. On the eve before an inquiry that would have required the Province to justify its case to BC's Information and Privacy Commissioner, the documents were finally released to the Vancouver Sun.

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The tale of the HST pamphlet is only the latest and most ridiculous example of the abuses that afflict the dysfunctional FOI system.

The Information and Privacy Commissioner recently issued a report congratulating the BC government for improving the timeliness of its response to certain types of FOI requests. Unfortunately, this report failed to analyze the *quality* of the government's responses to requests. Judging by our own experience and by the many complaints FIPA receives from frustrated requesters, the quality of FOI responses is at an all-time low.

### **FIPA calls for penalties when government abuses FOI process**

Fowlie's treatment prompted FIPA to [call for penalties](#) to be imposed on the BC government in cases where deliberate cover-ups of embarrassing information amount to an abuse of the freedom of information process.

"There are provisions in the law that allow public bodies to take action against requesters who make frivolous or vexatious requests, but

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nothing to sanction a public body that abuses the FOI process," stated FIPA Executive Director Vincent Gogolek. "It's time that a public body that deliberately frustrates an FOI request faces some real consequences."

## **FOIPPA Amendments pave way to unprecedented sharing of personal information**

**I**n case you missed it, an act called the *Freedom of Information and Protection of Privacy Amendment Act* was passed in BC on October 25, 2011.

The act was introduced in the legislature by Labour, Citizens' Services and Open Government Minister Margaret MacDiarmid, who said, "These amendments serve to modernize an act that came into force in 1992, when the majority of citizens had not even heard of the Internet. We are aligning the act with current-day technology and with the way British Columbians want to be served by government today."

The government's news release is brazenly entitled "Amendments introduced to strengthen privacy act", but the reality is completely opposite – not one of the 31 amendments introduced improves privacy protection. They were passed to provide enabling legislation for programs that will collect, use and disclose British Columbians' personal information on a vast and unprecedented scale in the name of providing "citizen-centered services".

In our view, the act trades essential privacy rights for administrative efficiency and will move the province closer than any other in Canada to being the "surveillance state" privacy commissioners across Canada have warned about.

This is a radical departure from the leadership in information rights and privacy protection the province demonstrated over the past 20 years, by enacting the *Freedom of Information and Protection of Privacy Act* (FIPPA) in 1992, the *Personal Information Protection Act* (PIPA) in 2003, and the *Personal Health Information Access and Protection of Privacy Act* (e-Health Act) in 2008.

Unfortunately, leadership in this area of law and policy has been delegated to the province's Chief Information Officer. But not for long, we hope.

### **We have seen the future, and it is IT**

The FOIPPA amendment act confirms the Clark government's commitment to so-called "Government 2.0" principles (see [here](#)). Further, it represents the triumph of a clique of technocrats

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led by B.C.'s Chief Information Officer (CIO), who have convinced politicians that the complex problems of modern government can be solved by new, improved (and more expensive and intrusive) information technology.

As you see from the quotes at right, the CIO and his acolytes see the diminishment of privacy as integral to Government 2.0. According to them, the "outdated" and "antiquated" privacy rules of FOIPPA are no longer necessary. Government transformation depends on the ability to collect and share unprecedented amounts of personal information across the entire range of organizations involved in government programs and activities.

### Government 2.0 mega-projects

The CIO's 'Transformational projects' include:

- "Integrated Case Mgmt" for people who receive government services (See more about this [here](#) and [here](#)),
- more generally, "[Citizen-centered Services](#)" which will vastly expand the collection, use and disclosure of personal information across a mind-boggling number of public and private government partners, including other governments, law enforcement agencies, for-profit corporations and non-profit groups,
- a system of government-controlled Electronic Health Records that deprives people of meaningful consent over who may see their medical information (More about this [here](#)),
- and, to anchor the whole enterprise, a spiffy new provincial identity card [announced](#) last May. The card will replace the current medical CareCard and will coordinate with the BC driver's Licence.

### Features of the FOIPPA Amendment Act

A full analysis of the act is not possible here, but here are some of its main features:

- **Consent:** The act allows for much greater collection, use and disclosure of personal information with an individual's consent.

Consent is not the basis upon which public services generally operate, since service delivery is based on need and the statutory mandate of public bodies. Will this consent be meaningful? Will an individual be able to decline and still receive a government service?

Consent must never be used as a free pass by which the government can avoid the privacy

### **From BC's Chief Information Officer:**

*The Office of the Chief Information Officer in the Ministry of Labour and Citizens' Services is leading the Social Sector Integrated Information Management Project... This will provide the holistic view of each citizen required to truly integrate delivery of social services in support of Great Goal 3, linking case information collected by other organizations delivering services to the public, such as the ministries of Health, Education, and the Attorney General, other provinces, the federal government, and Service Delivery Providers. [[Source](#) - See pp. 14-15.]*

*Privacy barriers can be mitigated by updating three elements: organizational culture, policy and FOIPPA. Existing culture, policies and legislation are antiquated and have collectively become a barrier to the collection and sharing of data and information within government and with citizens. [[Source](#)]*

protections in the act that otherwise would apply.

- The act loosens the purposes for which information may be collected from "...relates directly to and is necessary for an operating program or activity of the public body" to "...relates directly to and is necessary for a program or activity of the public body..."
- The act expands circumstances in which a public body may disclose personal information inside and outside Canada.
- The act expands the scope for information-sharing agreements so that personal information may be shared with any entity, public or private.
- The act makes it easier for public bodies participating in data-linking initiatives to comply with any prescribed regulations.
- The act leaves the specification of many vital requirements to coming regulations – including specifics regarding data-linking initiatives, information-sharing agreements, privacy impact assessments and what will constitute "common or integrated programs"

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that require information sharing between organizations. FIPA considers this to be excessive reliance on regulations to protect our privacy rights.

- The act relieves “health-related organizations” from the regulations for data linking and the duty to do privacy impact assessments that apply to other public bodies.
- The act requires the Minister responsible for FOIPPA to establish an information-sharing code of practice in consultation with the Information and Privacy Commissioner.

### **Lack of FOI reform reveals emptiness of ‘Open Government’ promises**

On the FOI front: In spite of Christy Clark’s pledge to make “Open Government” one of her top priorities, the amendment act makes it plain that Clark intends to continue the Liberals’ 10-year old undeclared war against freedom of information.

This is the fifth major FOIPPA amendment act

passed by the Liberals since 2001. In spite of many urgent calls for FOI reform over 10 years, only one of the 128 amendments they made to FOIPPA in that time improved the FOI process, while dozens made it harder, slower and more expensive.

And what was the one amendment made in 10 years that improved FOI? Christy Clark can take credit for a change that requires government ministers to “establish categories of records that are available without an FOI request”. There is no minimum for the amount of categories that must be established or records that must be made available, and no timeline. Small gain indeed.

Making FOI work is the real test of any government’s intentions to be open and transparent. Christy gets a big fat ‘F’ from us for not even trying to introduce basic FOI improvements advocated by FIPA, three Information and Privacy Commissioners and two Liberal-dominated Special Committees since 2001.

## **BC government abandons e-Health Act, issues Health Minister a free pass to collect personal health information**

Privacy of personal health information in BC remains in a perilous state, following an extraordinary set of amendments the government made to health sector legislation in 2010 that gave the Minister of Health the power to commandeer personal health information from any health authority or public body, and use and disclose it for any “Stewardship purpose” deemed necessary.

“Stewardship purposes” include health program development, operation, monitoring and evaluation, health systems planning, maintenance and improvement, the conduct or facilitation of research into health issues and – just for good measure – anything else the Minister may prescribe.

Another part of the Bill allows the health ministry “if (it) is satisfied that the collection, use or

disclosure of personal information is reasonably needed to fulfill a stewardship purpose, (to) enter into an information-sharing agreement with any person”. At law, a “person” can be any individual or “body corporate” (company, agency, registered non-profit society, etc.).

These unusual amendments came after an investigation by the Information and Privacy Commissioner into the types of personal information Vancouver Coastal Health Authority was sharing with the Ministry of Health. The Commissioner found that some of the disclosure was not authorized by the *Freedom of Information and Protection of Privacy Act*, and VCHA stopped sending it. The government didn’t like that.

Read more extensive analysis [here](#).

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**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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