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CANADIAN CENTRE
for POLICY ALTERNATIVES
BC Office

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

Presented by Keith Reynolds
On behalf of the BC Office of the Canadian Centre for Policy Alternatives

February 3, 2010

The British Columbia office of the Canadian Centre for Policy Alternatives (CCPA) welcomes this opportunity to submit its views to the Legislative Committee to Review the Freedom of Information and Protection of Privacy Act.

The CCPA is an independent, non-partisan research institute concerned with issues of social, economic and environmental justice. Founded in 1980, we have a National Office in Ottawa, and provincial offices in British Columbia, Saskatchewan, Manitoba, Ontario, and Nova Scotia. We have more than 15,000 members across Canada.

Our research and policy documents are produced both directly by CCPA staff and by research associates working in academic institutions and in other organizations.

In the past year the British Columbia Office of the CCPA has produced work on areas such as the environment, the provincial economy and social policy issues such as the treatment of seniors. In the past we have also commented on the appropriateness of funding levels for the Offices of the Information Commissioner and the Auditor General.

The CCPA believes that in a democratic society it is critical that there be a free exchange of ideas with respect to policies chosen by government. Such a free exchange of ideas must be informed by information that frequently is only produced and held by government.

In light of the foregoing, and while respecting the vital importance of personal privacy, this submission will address only the question of the right of public access to government records not affected by personal privacy.

We urge the committee to address the issues that will arise in this review in the light of statutory purpose of the legislation to make public bodies more accountable to the public.

The recommendations of the May 2004 Report of the Special Committee, Enhancing the Province's Public Sector Access and Privacy Law, if fully implemented, would have had the effect of making public bodies more accountable. We are confident this committee will bring the same commitment to their deliberations.

About the author: Keith Reynolds is a board member and a research associate with the Canadian Centre for Policy Alternatives, where he has written for the CCPA on the role of legislative officers in government accountability. He is employed as a research representative with the Canadian Union of Public Employees. He has a Masters Degree in Public Administration from Queen's University. Previously Keith has worked for all three levels of government (including a school board and a municipality) and as a policy consultant.

Acknowledgements: The CCPA thanks Keith Reynolds for preparing this submission, and thanks David Fairey, Bruce Wallace and Vincent Gogolek for their review and input.

Summary of Recommendations

The Committee should reiterate its 2004 recommendations that sections 14, 17, 19 and 21 should not be narrowed or weakened.

Section 2 (Purposes of the Act)

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.

The Committee should recommend that provincial government public bodies be required to publish information released under access to information via a central website similar to that used by the Government of Scotland.

Section 3 (Scope of the Act)

The Committee should repeat its recommendation to 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.

Coverage of the Freedom of Information provisions of the Freedom of Information and Protection of Privacy Act should be expanded to include private sector organizations delivering government services. Failing this the Committee should recommend the government conduct a consultation on the subject similar to that being carried out by the Government of Scotland.

Section 6 (Duty to assist applicants)

The Act should be amended to provide for penalties for heads of public bodies who breach the duty to assist.

Section 6 should be amended to make it a statutory responsibility to release whatever documents are available without review immediately, rather than waiting until all issues have been settled with regard to all documents before the release of any documents.

Section 7 (Time limit for responding)

The Committee should recommend penalties of $500 per day for failing to meet the obligations of section 7. These penalties would commence when a public body was in breach of timelines for five days. Revenues obtained from this penalty should be directed to the Office of the Information Commissioner to assist his office in dealing with backlogs.

Section 10 (Extending time limits for responding)

Section 10 should be amended so that the public body must not only inform the applicant of a decision to take an extension, they must inform the applicant of this at the time the extension is taken.

Section 10 should be amended requiring that a public body making application for an extension under section 10(2) make the application at least seven working days before the expiry of the time limit under section 7(1) and that a copy of this request must be provided to the applicant at the time the application is made. The Commissioner's response to such a request should also be provided to the applicant.

Section 12 (Cabinet confidences)

The Committee should recommend the government narrow the exception for Cabinet and local public body confidences and strengthen rules regarding broader disclosure of background materials.

Section 12 should be amended by adding a subsection that allows Cabinet to waive the protection of that otherwise mandatory provision.

Sections 12(2) and (4) should be amended to reduce the time limit in those provisions to 10 years from 15 years.

Section 13 (Policy advice or recommendations)

The committee should reiterate its recommendation from 2004 that section 13 should be amended 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.

And that section 13(2) should be amended 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.

The Committee should recommend that section 13(3) be amended to reduce the time limit on section 13(1) from ten to five years.

Section 25 (Information must be disclosed in the public interest)

Section 25 should be amended to remove the provisions of urgency as a test for release. If the release of information is in the public interest, it is in the public interest regardless of urgency.

Section 56 (Inquiries by the Commissioner)

The Committee should recommend that the budget of the Office of the Information and Privacy Commissioner be increased sufficiently to both reduce backlogs of inquiries and to meet any new obligations arising from the recommendations of this Committee.

Section 75 (Fees)

The Committee should recommend that fees not be raised for services relating to Freedom of Information requests.

In order to ensure that fees are not a barrier to accessing government information the Committee should recommend that the free period for time spent locating and retrieving records be increased from three to five hours.

The Committee should recommend limits on deposits with respect to fee estimates of 50% and absolute limit on deposits of $1,000.

The legislation should be amended to waive fees where more than 20% of the material provided is blanked out.

Section 10 should be amended to require that fees be waived in cases where the public body has failed to meet timelines under the legislation.

The Committee should recommend creation of an expedited process in which the Commissioner could make a ruling as to whether or not fees should be waived. This would eliminate the possibility of fee demands being made solely to delay the process.

Schedule 1 (Definition of public body)

The Definition of "public body and "local public body" in schedule 1 of the Act should be amended to include organizations, corporations and agencies wholly or principally supported by public funds or controlled by the public body.

Sections that should not be narrowed or weakened

In 2004 the Committee received submissions from a number of organizations calling for the public's right of access to information to be reduced. They called for a further narrowing of access rights in the areas of section 14 (Legal Advice), section 17 (Disclosure harmful to the interests of a public body, section 19 (Disclosure harmful to individual or public safety) and section 21 (Disclosure harmful to the business interests of a third party).

Groups making these recommendations are advancing their own interests rather than the interests of the public and of open government. It would require a very compelling case to be made for public rights to be narrowed. We have seen no evidence of harm arising from these sections as they exist.

With each of these sections in 2004 the Committee declined to further reduce the public's right to access government information. We commend that decision in the light of the spirit of the legislation to make governments accountable.

> **The Committee should reiterate its 2004 recommendations that sections 14, 17, 19 and 21 should not be narrowed or weakened.**

Section 2 – Purposes of the Act

As the Committee noted in its 2004 report perhaps one of the most important continuing trends is the rate of technological change. The cost of making material available electronically has dropped dramatically in recent years and the majority of the public can now access information on line.

The Commissioner reported in 2004 that other jurisdictions have taken action to encourage the routine release of information and suggested this was overdue here. This is even truer today, as evidenced in one of U.S. President Obama's first declarations:

> The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

The Review Committee addressed this issue in their report saying:

> like our colleagues on the first statutory review committee, we think the tone of section 2(2) is too negative. While it points out that the Act does not replace other procedures for access to information, subsection (2) does not actively promote routine disclosure, or recognize the role of Internet technology in facilitating informal access. In our view, acknowledging the latter would be a relatively simple step to take, since the government indicated in its initial briefing that the Act is providing the legislative structure necessary for the successful implementation of e-government and alternative service delivery options.

In 2004 the Committee recommended a new section 2(3) recognizing the role that new information technology could play in promoting a culture of openness and informal access.

Six years later we believe the time has come to go further and catch up with other jurisdictions by mandating such requirements under section 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.**

The Commissioner revealed in 2004 that the US Freedom of Information Act requires federal agencies to make available to the public "copies of all records, regardless of form or format, which have been released to any person" in response to an access request. For records created after 1996 these records must be available electronically.

The Scottish Government also makes this information available under the following policy:

> The Government's policy is that where we release information in response to a FOI request we recognize that it will usually be of interest to the wider public in addition to the original applicant. Government staffs are, therefore, advised to publish information which they have released to an applicant as soon as possible via the Scottish Government website. The speed with which information released can be made available on the website will vary depending on its quantity and format. Information may not therefore always be added to the website on the same day that it is supplied to an applicant.

A page from this website is attached as Appendix B.

> **The Committee should recommend that provincial government public bodies be required to publish information released under access to information via a central website similar to that used by the Government of Scotland.**

Section 3 – Scope of the Act

In its 2004 report the Committee recommended:

> **Recommendation No. 4 — 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.**

This important recommendation was not enacted and should be put forward again.

However, the Committee in 2004 largely declined to suggest major changes to this section despite its observation that:

> Another contemporary trend over the past decade involves the administrative restructuring of the public sector. Like other jurisdictions inside and outside Canada, the government of British Columbia is pursuing alternative means of delivering certain services to the public, often by transferring public sector functions to private sector companies. Alasdair Roberts, a Canadian academic expert in access to information matters has described this trend as the growth of "shadow government."

The Committee went on to say,

> The Committee received a few requests to extend the scope of coverage to those entities no longer qualifying as public bodies under the Act. In particular, it was suggested that the records of former Crown corporations needed to be accessible. While we would not normally condone the practice of exempting the entire records of a public-private entity, because of its negative impact on access rights, we have come to the conclusion that the decision to extend or reduce the scope of the Act is a decision to be made by the governing party, rather than private members serving on an all-party parliamentary committee.

It is important to make the point that this Committee is a Committee of the Legislature, not a Committee of the government. It reports to the Legislature and its recommendations have the potential to play an important role in the democratic process.

The trend towards “shadow government,” has continued to grow. As of September 2009 the province was involved with $10 billion worth of public private partnerships.[1] These include roads, bridges, hospitals, rapid transit projects, water treatment facilities, sports centers and residential care centers. Alternative Service Delivery projects for health care information services and back office services for crown corporations add tens of millions of dollars more to the total. In addition, government-owned entities such as BC Ferries are excluded from Freedom of

Information. It is instructive to examine a quote from the British Columbia Comptroller General's 2009 report on BC Ferries and TransLink that found:

> BCFS executive compensation was significantly higher than that paid by several larger public sector entities. For example, the Chief Executive Officers (CEO) total 2008/09 compensation was more than double that of the larger public sector comparators. We also found that the performance measures and targets used to determine the incentive bonuses for executives made the bonuses easier to attain than we would have expected.

Without the report from the Comptroller, the shielding of BC Ferries from FOI would have prevented the public from obtaining this information. The Comptroller went on to recommend the province "consider making BCFS and the BC Ferry Authority, including the compensation they pay, subject to the Freedom of Information and Protection of Privacy Act."

As public services are increasingly contracted out, subjected to public private partnerships or exempted from Freedom of Information, the public's right of access to information with respect to government services paid for by taxes is diminished.

In keeping with the purpose of the legislation to make government accountable this Committee has the opportunity to open new doors for citizens in a way that would truly make this the most open, accountable and democratic government in Canada.

To do this we recommend that the Committee follow the lead of the Government of Scotland. In December 2009 Minister for Parliamentary Business Bruce Crawford confirmed the Scottish Government would consult on whether to extend the Freedom of Information Act for the first time to cover a wider range of bodies that deliver public services in Scotland.[2]

The following are listed as among the groups that might potentially be covered:

- Contractors who build and maintain hospitals,
- Contractors who build and maintain schools,
- Contractors who run privately managed prisons and provide prisoner escort and court custody services,
- Contractors who operate and maintain trunk roads under private finance contracts.[3]

Scotland's discussion paper on this subject raises the possibility of access legislation being extended to organizations performing work "of a public nature" as might be defined by the degree to which the function was underpinned by statutory authority and the extent of public funding.[4]

While the Scottish government has suggested such extended coverage might be limited to companies delivering "core services," we would argue that this should also include ancillary services such as, but not limited to, contract cleaning and maintenance of hospitals and educational institutions.

As public services become increasingly co-mingled with private enterprise it should be made clear that private companies delivering public services, including ferry services, will be subject to no less scrutiny under Freedom of Information than their public counterparts.

This would be a bold move that would put British Columbia in the forefront of government accountability.

> **Coverage of the Freedom of Information provisions of the Freedom of Information and Protection of Privacy Act should be expanded to include private sector organizations delivering government services. Failing this the Committee should recommend the government conduct a consultation on the subject similar to that being carried out by the Government of Scotland.**

Section 6 – Duty to assist applicants

Section 6 of the Act places an important obligation on the "head" of the public body for the purposes of FOIPPA. It demands:

> 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

We have seen too many cases where this obligation is not met. This is partially due to delay, which is dealt with in the next section, but it is also due to adequacy of search. CCPA research associates have received rulings from the Commissioner's office that state bluntly that public bodies have failed in their obligations. The following is a quote from one of these rulings:

> The public are entitled to expect that Ministry staff responsible for fulfilling requests will take reasonable steps to ensure that they are capable of responding to requests in accordance with the Act. This explanation provided by the Ministry demonstrates both that those steps were not taken in this case and that the Ministry does not appear to understand its responsibility in this regard.

In another case the OIPC found:

> In this case I find that the public body took a narrow approach to interpreting your request. In this case, it would have been helpful if Partnerships BC had contacted you to discuss your request. It is likely that further communication would have revealed that a business case was approved, but not in the form in which you requested."

In another case that was not subject to a ruling FOI officials from different agencies coordinated their responses to a common request. The starting position from one official was that they had 1,000 responsive pages. At the end of the consultation it was decided the agencies would take a common position that the response to the request was a single number. Narrowing indeed.

There are two possible reasons why a public body would fail to meet its obligations under section 6 leading to inadequate search and delay. The first is that they are deliberately choosing to not meet their obligation. The second is that they simply do not have the resources to do so. Even in this case, however, a choice has been made by the public body to not provide sufficient resources to meet their obligations under the Act.

They can do this because they face no consequences for their failure.

In respect of this we support the position taken by the Freedom of Association and Privacy Association that:

> **The Act should be amended to provide for penalties for heads of public bodies who breach the duty to assist.**

On a more specific issue, the Information Commissioner advises public bodies that in cases where some documents in an FOI request are immediately open to access while others are under review, the documents that are accessible should be released immediately. In our experience this is almost never done.

> **Section 6 should be amended to make it a statutory responsibility to release whatever documents are available without review immediately, rather than waiting until all issues have been settled with regard to all documents before the release of any documents.**

Section 7 – Time Limit for Responding

The issues that arise from this section are among the most important issues this committee will deal with. CCPA research associates routinely wait for years while the FOI process carries on through initial application, routine claiming of extensions, failing to meet deadlines and repeated extensions of the appeal process.

As the Information Commissioner said in his current Annual Report:

> Access delayed is access denied. Almost one-third of government responses to information requests under FIPPA exceeded the legislated 30-day time limit and half the

> responses to political parties were late, on average by three times the time limit permitted by FIPPA.

He continued in more detail:

> Key findings included the revelation that the government took an average of 35 business days to respond to access requests, managing to respond within the time required by law only 71% of the time, even taking into account permitted time extensions and time during which requests were placed on hold by the public body to allow for consultations with other affected parties. This meant that almost one-third of the government's responses to access information requests were late – overdue, on average, by 37 business days – and thus in violation of the law. Of the 22 ministries and other public bodies whose performance we reviewed, only four had an average request processing time of 30 business days or fewer, 30 business days being the default response time permitted under FIPPA.
>
> We also were disturbed by the discovery that ministries responded in time to access requests from political parties only 53% of the time, while responding in time to requests from businesses and other public bodies 79% and 94% of the time, respectively. We were also troubled to learn that, when responses to access requests made by political parties were overdue, they were late on average 64 business days, compared to 36 business days late for businesses and 23 business days late for other public bodies.

In short, the <u>average</u> response time is longer than the law permits.

It is also important to keep in mind that a "response" is often not an end to the process. Frequently a response simply leads to an appeal which can take years to proceed.

The Committee's 2004 report did not recommend action in this area. It said, "delays occurred mainly in relation to complex and or/large requests."

In both of these cases, however, there are provisions in section 10 allowing extensions that permit requests to be met within the legislative mandate.

As noted earlier, failure to meet timelines happens either because the public body commits insufficient resources to follow the law or because it chooses to ignore the law. Again, the problem is that public bodies face no consequences for breaking the law.

The existence of penalties would encourage public bodies to meet their obligations. FOI regulations currently permit charges to applicants of $30/hour for locating, retrieving and preparing records. This would amount to roughly $250 per day. A penalty of $500 a day would be the equivalent cost of having two people working full time on a request and would be a significant incentive to completing requests within the legislative time limit.

The Committee should recommend penalties of $500 per day for failing to meet the obligations of section 7. These penalties would commence when a public body was in breach of timelines for five days. Revenues obtained from this penalty should be directed to the Office of the Information Commissioner to assist his office in dealing with backlogs.

Section 10 – Extending the time limits for responding

Section 10 of the legislation outlines possible reasons for extending a time limit to respond as well as requiring the public body to inform the applicant that such an extension has been taken. However, the section does not explicitly stipulate the public body must inform the applicant at the time the extension is taken.

As a result, the Commissioner's Office is now refusing to accept deemed refusal complaints when the public body is late unless the applicant has already contacted the public body to ask why the response is late.

In correspondence the Commissioner's Office said:

> It is the policy of the Office of the Information and Privacy Commissioner to refer a complainant back to the organization, where the complainant has not first given the organization an opportunity to respond to an attempt to resolve the issue.

We believe this places a burden on applicants that was not originally intended by the legislation. Further, while regular users of the legislation are aware of this policy and act upon it, one-time users will not be aware of the policy. They will be left in limbo with no idea whether or not an extension has been taken or if the public body is simply ignoring them. This legislation must meet the needs of occasional users who are less aware of complex regulations.

Section 10 should be amended so that the public body must not only inform the applicant of a decision to take an extension, they must inform the applicant of this at the time the extension is taken.

Section 10(2) permits public bodies to request a second extension from the Commissioner. Currently, public bodies are not required to provide the applicant with a copy of its request to the Commissioner for this second extension. The Commissioner is also not required to provide an applicant with his response. In the case of one of the CCPA's research associates this led to a situation where the Commissioner granted an extension based on an inaccurate chronology provided to him by the public body. We recommend that the clause be amended so that the public body and the applicant are placed on a more equal footing in this situation.

Section 10 should be amended requiring that a public body making application for an extension under section 10(2) make the application at least seven working days before the expiry of the time limit under section 7(1) and that a copy of this request must be provided to the applicant at the time the application is made. The Commissioner's response to such a request should also be provided to the applicant.

Section 12 – Cabinet Confidences

We are concerned that section 12 is being used increasingly as an excuse for blanket withholding of information. As with section 13, this is now not only being used for specific Cabinet documents but even for any information that might have gone into the creation of those documents.

In Order F09-27 the Office of the Information Commissioner accepted the argument of the Premier's Office that:

> "The two records at Tabs 4 and 5 were not part of the submission that went to Treasury Board, it said, but were "key inputs in the development of the business case for the Project" and in the drafting of the Treasury Board submission that went to the Treasury Board. The Office of the Premier argued that disclosure of the two records at Tabs 4 and 5 would allow someone to draw inferences about Treasury Board deliberations."

In effect, section 12(2) (c) of the Act has been largely undermined.

> 12 (2) Subsection (1) does not apply to
>
> (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.

The Committee's 2004 report stated section 12 should not be changed because it might:

> undermine the principles of Parliamentary government. Under the Westminster model, cabinet secrecy is necessary to protect the confidentiality of cabinet proceedings and deliberations and to maintain the collective responsibility of the political executive for public policy decisions.

Colin Gabelman, who while in Cabinet introduced the Freedom of Information legislation made the following points in a 2007 speech:

> Section 12, the "Cabinet Confidences Exception", protects Cabinet deliberations by prohibiting the disclosure of any advice or recommendations that would reveal the substance of those deliberations. We sought to ensure that Cabinet could conduct its business freely and that public servants would not feel constrained in advising Cabinet.
>
> But we intended that exception to be limited. We designed the Act to ensure that the information considered by Cabinet would become public once a decision was announced or implemented. My words to the House, in 1992, in respect of Section 12, were: "This bill limits the government's right to cabinet secrecy by providing that factual material presented to cabinet or developed by ministries will be accessible once the decision has been implemented."

The current interpretation of section 12 goes far beyond this point and is in fact out of touch with court decisions in other parts of Canada.

> **The Committee should recommend the government narrow the exception for Cabinet and local public body confidences and strengthen rules regarding broader disclosure of background materials.**

Further, we agree with the following recommendation made to the Committee by the Information Commissioner in 2004.

> **Section 12 should be amended by adding a subsection that allows Cabinet to waive the protection of that otherwise mandatory provision.**
>
> **Sections 12(2) and (4) should be amended to reduce the time limit in those provisions to 10 years from 15 years.**

Section 13 – Policy Advice or Recommendations

In its 2004 report the Committee said:

> Based on what we heard, the Committee thinks there is a compelling case, as well as an urgent need, for amending section 13(1) in order to restore the public's legal right of access to any factual information. If left unchallenged, we believe the court decision has the potential to deny British Columbians access to a significant portion of records in the custody of public bodies and hence diminish accountability. Furthermore, as described earlier, we have had the opportunity to hear firsthand accounts of the devastating impact the denial of access to factual information about themselves is having on some families in British Columbia. Regardless of whether these cases are directly related to the court decision, as a matter of principle, we believe that individuals have the legal right to

access and correct personal factual information in third-party files, except in the most unusual circumstances. For these reasons, we urge the government to take speedy action to clarify the exception relating to policy advice or recommendations.

We believe public bodies have continued to increase their use of this section as a route to blanket denial of information that should be available.

We urge the Committee to reiterate its recommendations from 2004 which were:

> **Recommendation No. 11 — 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**

And

> **Recommendation 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.**

We also recommend that section 13(3) be amended to reduce the time limit on section 13(1) from 10 years to five years. This is a reasonable improvement to the Act which has been recommended in the past both by the Freedom of Information and Privacy Association and the Freedom of Information and Privacy Commissioner.

> **The Committee should recommend that section 13(3) be amended to reduce the time limit on section 13(1) from ten to five years.**

Section 25 – Information must be disclosed in the public interest

The Committee concluded in 2004 that there was no reason to amend section 25 because "there are other, more appropriate provisions in Part 2 of the Act."

However, we have seen since then that the broad application of both sections 12 and 13 have seriously undermined the intended purposes of the legislation.

Moreover, the interpretation of this section, based on the presence of the words "without delay" in section 25(1) has been that the release of the information must not only be in the public interests but that the need for the release must be urgent and compelling.

This has become an almost impossible test to meet. It is difficult to argue for the urgency of release of information faced with a potential three year wait as the freedom of information request goes through its process. It may well be urgent, for example in a case put forward by a CCPA research associate, for the public to have information before an election, but the argument is meaningless if the decision is published several months after the election.

> **Section 25 should be amended to remove the provisions of urgency as a test for release. If the release of information is in the public interest, it is in the public interest regardless of urgency.**

Section 56 – Inquires by the Commissioner

Unfortunately, this has become one of the primary reasons for delay of the FOI process. CCPA research associates waiting for the results of inquiries on severing or on public interest fee waivers have seen the 90 day mediation period extended five or six times. The only way this problem can be solved is by providing increased resources for the Office of the Information and Privacy Commissioner.

Section 80 of the legislation calls on this Committee to submit to the Legislature a comprehensive review of this Act. Such a comprehensive review should also speak to the financial ability of the Freedom of Information Commissioner to meet his obligations under this legislation as well as any other obligations this Committee might recommend the Commissioner undertake.

> **The Committee should recommend that the budget of the Office of the Information and Privacy Commissioner be increased sufficiently to both reduce backlogs of inquiries and to meet any new obligations arising from the recommendations of this Committee.**

Section 75 – Fees

Section 75 permits the charging of fees for services related to a request. The charging of fees in this process does act as a barrier to accessing government information. These fees can be high enough to give not for profit organizations concern. For individual citizens they can be a real barrier.

Although the fees have not been raised at $30/hour for search time they are still very significant.

> **The Committee should recommend that fees not be raised for services relating to Freedom of Information requests.**
>
> **In order to ensure that fees are not a barrier to accessing government information the Committee should recommend that that the free period for time spent locating and retrieving records be increased from three to five hours.**

Section 75(4) allows a public body to require an applicant to pay a deposit if a fee estimate is given. It is common practice for public bodies to require a 50% deposit, however, this is not set out in the legislation and in some cases public bodies are requiring a deposit of 100%. The CCPA believes that if the legislation had anticipated a requirement of 100% prepayment of fees it would have been stated in the legislation. In our view the word "deposit" makes it clear a lower amount was anticipated, however the legislation should be amended to make this clear.

Once again, in this situation an applicant may face years of waiting as the FOI process is concluded. It is unreasonable to expect an applicant to make a 100% deposit for material they might never get and for decisions that might be years away.

> **The Committee should recommend limits on deposits with respect to fee estimates of 50% and absolute limit on deposits of $1,000.**

Even when fees are demanded it is not uncommon for the large majority of material provided to be blanked out because of various exemptions. Applicants should not be expected to pay for information they do not receive.

> **The Committee should recommend amendments to the legislation waiving fees where more than 20% of the material provided is blanked out**

Finally, it is not uncommon for public bodies to demand fee deposits and to then fail to meet timelines under the legislation. Public bodies should not be permitted to request fees if they are not prepared to abide by the legislation that is supposed to guide them.

> **Section 10 should be amended to require that fees be waived in cases where the public body has failed to meet timelines under the legislation.**

In a number of recent cases significant demands for fees have been made only to be withdrawn either when the fees are paid or at the end of the process. In some cases applicants are informed that the volume of information is much smaller than had been originally estimated.

Sections 7(5) and 52(1) permit an appeal over fees to the Information Commissioner; however, section 7(4) stipulates that the clock stops on the processing of the request while this appeal

takes place. By this process, as demonstrated in the case of a CCPA research associate in Appendix A, a public body can delay production of materials for more than two years by simply generating a very large fee request, even when that request is subsequently found to be inappropriate. Most of this time is taken up by the appeal process.

The Office of the Information Commissioner currently has an expedited process in place to deal with issues when a public body fails to meet its legislative timelines (deemed refusal). In that case an order can be written for the public body to provide a response in a process that takes approximately one month.

> **The Committee should recommend creation of an expedited process in which the Commissioner could make a ruling as to whether or not fees should be waived. This would eliminate the possibility of fee demands being made solely to delay the process.**

Schedule 1 (Definition of public body)

Last fall there was an extremely worrisome development that threatens to dramatically undermine the authority of the FOIPPA to make public bodies more accountable by compelling public access to records.

In an October Supreme Court of British Columbia decision (Simon Fraser University v. British Columbia — Information and Privacy Commissioner, 2009, BCSC 1481), Mr. Justice Leask examined whether or not records held by a private company owned by a public body were accessible under FOIPPA.

The court found that the public body, Simon Fraser University, was the sole shareholder of a private company, Simon Fraser Univentures Corporation (SFUV). The court continued that:

> The president of SFUV is the vice-president of research at SFU. The director of UILO [University Industry Liaison Office] is a director of SFUV. All of the SFUV's directors as or August 2004 were SFU employees. The board of directors may include representatives from industry.

Despite this relationship, the court ruled that the Office of the Information Commissioner had erred in finding that records controlled SFUV were controlled by the public body, Simon Fraser University, and the records were thus not accessible under FOI laws.

This opens the door for every public body in British Columbia to create a wholly owned and controlled subsidiary private company out of reach of freedom of information requests. We cannot imagine it was the intention of the drafters of FOI legislation to permit this.

There are other jurisdictions that have acknowledged this issue and dealt with it. The State of Virginia Freedom of Information Act addresses this question through its definition of "Public body" which says:

> "Public body" means any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth, or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties school boards and planning commissions, boards of visitors of public institutions of higher education; *and other organizations, corporations and agencies in the Commonwealth supported wholly or principally by public funds*…[emphasis added]

In the United States Freedom of Information Act "agency" is defined as follows:

> (f) For the purposes of this section, the term –
> (1) "agency" as defined in section 551(1) of this title includes an executive department, military department, Government Corporation, Government controlled corporation, of other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency. (Underlining added)

In the United Kingdom the definition of "public authority" in their Freedom of Information Act includes publicly owned companies wholly owned and controlled by public authorities.

> **The Definition of "public body and "local public body" in schedule 1 of the Act should be amended to include organizations, corporations and agencies wholly or principally supported by public funds or controlled by the public body.**

Appendix A

THE VANCOUVER SUN

Labour ministry makes a mockery of open, accountable government

Vancouver Sun, Wed Jul 22 2009

Page: A7, Section: Issues & Ideas

Byline: David Fairey, Source: Special to the Sun

For three years now, the B.C. government has been fighting requests to disclose Employment Standards enforcement records. Whither freedom of information, public accountability and transparency?

I am an independent public policy researcher, part of an academic and community research team investigating how changes to employment standards have affected B.C.'s vulnerable farmworkers.

Since 1994, when the Employment Standards Review revealed a consistent pattern of violations and abuses of employment standards and workplace safety for farmworkers, it has been clear that standards need to be improved and additional resources put into enforcement.

In a report to the minister of labour in 2001, the Agricultural Compliance Team of the Employment Standards Branch characterized farmworkers as "one of B.C.'s most vulnerable work forces." Yet shortly thereafter, the government substantially reduced the minimum employment standards for farmworkers and cut the Agricultural Compliance Team.

In order to assess how these cuts and changes have affected farmworkers, our research team needs access to ministry enforcement records that will reveal what complaints and investigations have taken place in this sector, what violations have occurred and what penalties have been issued to employers? Although the Employment Standards Act permits the publication of violations, the ministry has never published a list of violators.

In July 2006, I submitted a Freedom of Information request for Employment Standards Branch enforcement records. Here is the sordid story of what has happened to this public interest information request:

The ministry responded to my initial request by unilaterally extending the 30-day deadline for a response allowed under the Freedom of Information and Privacy Act by 44 days. Two months later, I was told by the ministry that I would have to pay in advance an initial fee of over $4,200

and agree to pay any additional actual costs for the ministry to retrieve the requested records. I asked the ministry for a fee waiver (as permitted under the act) on the basis that a clear public interest would be served by providing these public records to our research project at no cost.

The ministry rejected my fee waiver application on the grounds that "there is no pressing or urgent need to disclose these records in the public interest at this time." In November 2006 I applied to the Office of the Information and Privacy Commissioner for a review of the ministry's fee waiver denial. Ten months later, the commissioner decided that my complaint should be the subject of a formal inquiry.

In June 2009 -- 15 months after the inquiry -- the Information and Privacy Commissioner finally issued a decision in my favour, rejecting all of the ministry of labour's main arguments and ordering them to comply by August 5. The ministry, however, is now challenging that decision and has requested that the commissioner reconsider.

The commissioner further concluded that the ministry of labour had failed to "respond to the applicant openly, accurately and completely." All public policy researchers and legislators should be alarmed by and raise objections to these unceasing efforts of the provincial government to undermine the purposes of the Freedom of Information and Privacy Act and to block the disclosure of public documents in the public interest.

David Fairey is a Labour Economist and a co-author of the 2008 publication Cultivating Farmworker Rights: Ending the Exploitation of Immigrant and Migrant Farmworkers in BC (co-published by the Canadian Centre for Policy Alternatives, Justicia for Migrant Workers, Progressive Intercultural Community Services Society and the BC Federation of Labour).

Appendix B


Freedom of Information Disclosures Archive - Windows Internet Explorer
http://www.scotland.gov.uk/About/FOI/Disclosures
File Edit View Favorites Tools Help
Favorites
Freedom of Information Disclosures Archive
The Scottish Government
Riaghaltas na h-Alba
HOME ABOUT TOPICS NEWS PUBLICATIONS CONSULTATIONS
Text size: A A A
You are here: About > Freedom of Information > Information Disclosed
Search site
Search
About
Freedom of Information
Information Disclosed
2007
2006
2005
2004
2008
2009
2010
Recent Disclosures
Information released in response to Freedom of Information (FOI) requests made to the Scottish Government.
Policy on publishing disclosed information
Report on information requests handling - January to June 2005
Report on information requests handling - January - December 2005
RSS Version of this page (what is RSS?)
Page: [1] [2] [3] [4] [5] [6] [7] [8] ...[40]
Filter Disclosures By:
Month: -- Year: ---- Keywords:
Topic: ---- Sort By: Newest First Show
Currently showing 10 most recent disclosures.
Cabinet Secretary for Justice External Engagements
Details of external events attended by the Cabinet Secretary for Justice 1 May 2009 – 23 September 2009 (inclusive). Excludes Parliamentary/Cabinet and other meetings already in the public domain.
11/01/2010 - Government
Government Data Losses from 15 December 2007 to 14 December 2009.
Details of all incidents of data loss within the Scottish Government from 15 December 2007 to 14 December 2009 including the type of data or equipment lost and whether the information/assets were lost or stolen.
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Notes

[1] Partnerships British Columbia, 2009/10 – 2011/12 Service Plan Update, 2009 page 3.

[2] Government of Scotland News Release, Extending Coverage of the FOI Act, December 8, 2009, http://www.scotland.gov.uk/News/Releases/2009/12/08113806.

[3] http://www.scotland.gov.uk/About/FOI/Coverage.

[4] Government of Scotland, Discussion Paper: Coverage of the Freedom of Information (Scotland) Act 2002, November 2008. http://www.scotland.gov.uk/Resource/Doc/925/0069128.pdf .