



BC FREEDOM OF
INFORMATION
AND PRIVACY
ASSOCIATION

'Open Government'

**Submission to
The House of Commons Standing Committee on
Access to Information, Privacy and Ethics (ETHI)**

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Introduction

The BC Freedom of Information and Privacy Association (FIPA) is a non-profit society established in 1991 for the purpose of advancing freedom of information, open and accountable government, and privacy rights in Canada. We serve a wide variety of individuals and organizations through programs of public education, legal aid, research, public interest advocacy and law reform.

Although we are based in British Columbia, FIPA has maintained an active role on the federal scene as well.

We applaud the Committee for taking up the cause of Open Government, although we note that the very first episode of the BBC television series Yes Minister was entitled "Open Government". It featured this exchange between two of the lead characters.

Bernard Wooley: But surely the citizens of a democracy have a right to know.

Sir Humphrey Appleby: No. They have a right to be ignorant. Knowledge only means complicity in guilt; ignorance has a certain dignity.

If Canadians and their elected representatives really do wish to have 'open government', it will be vital to keep the Sir Humphrey Applebys of this world away from the task of creating it – they will want to preserve the citizens' 'dignity' at all costs.

Open Government is Good Government

FIPA supports the increasing push for more routine electronic disclosure of information by government and public bodies.

Public debate and policy development can also be helped by making more and better information available to everyone.

Members of this Committee have undoubtedly been in situations where a meeting over an issue, often a contentious issue, comes to a halt while everyone argues over the facts. Often, this occurs because government officials and members have access to better or more complete or more reliable information than members of the general public, even an interested public.

When that happens, people begin to suspect that government is keeping citizens in the dark for nefarious purposes. Government representatives, on the other hand, wonder why members of the public can't seem to grasp the obvious in light of the facts as they know them.

What has come to be known as 'Open Government' – the enhanced availability of data to the public through electronic means – will hopefully allow anyone interested in a subject area to be able to do better research, provide better input to public consultations, and improve their representations to government as a result.

This is a good thing, but it is not the only thing. And it does not mean that bringing in electronic 'Open Government' will bring about a truly open government.

How information becomes public

There are essentially three ways government information reaches the public.

Routine release

Because most if not all records now exist in electronic form, much more government information should be available on government websites.

The Access to Information Review Task Force report in 2001 set out a number of recommendations for improvement to the release of information. One important recommendation was:

8-3 The Task Force recommends 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.¹

Recently, there has been an increasing trend in government information management to make information available proactively over the Internet. This approach has been embraced by national governments in the United States, the United Kingdom and in Australia, to list three of the best known recent examples. Sub-national governments in this country, particularly at the municipal level, have also undertaken initiatives to put their data online.

There is no insurmountable challenge preventing the government of Canada from moving forward with a similar initiative. Information Commissioner Suzanne Legault has outlined several manageable concerns, some of which are common to open data schemes anywhere; others, like the requirement of translation to meet official language requirements, are particular to this country.

In British Columbia, our *Freedom of information and Protection of Privacy Act* has been subject to statutory review by three Legislative committees, going back to the last century. All three have recommended greater routine release of information, including information in electronic formats² – but this is something that governments of differing political stripes in BC have not managed any enthusiasm for in more than fifteen years.

Access to Information Requests

The second method of information release by government is by direct requests made under the *Access to Information Act*. The *ATIA* provides a complete code for making access requests to government and a process for the review of decisions to refuse release. This is a vital link in the chain of citizens' ability to find out what their governments are doing, and provides a balance between the rights of citizens to information and legitimate requirements for confidentiality in certain clearly defined, limited circumstances. However, it was not intended as, and should not be, the primary method of release.

We will not set out the many deficiencies of the current ATI system, as this committee has explored that question at length in the recent past and has made a number of useful recommendations for reform. We will come back to the need for serious change both in law and practice, because this is an essential element of any real attempt to create 'open government' by using 'open data'.

¹ In the next recommendation, 8-4, The Task Force recommended that "...where there is an identified need or interest, and where the information is not sensitive, government institutions make as much information as possible available to the public either in hard copy or electronically."

² <http://www.oipc.bc.ca/pdfs/public/Rpt-FOI-39-2-Rpt-2010-MAY-31.pdf>
<http://www.oipc.bc.ca/pdfs/public/Rpt-FOIPPA37-5.pdf>
http://www.leg.bc.ca/cmt/36thParl/foi/1999/review_act.htm

Unauthorized unrequested release

The third method is what happens when there is no FOI system, or the system is dysfunctional. That is unauthorized release, also known as whistleblowing or a leak if it is done from within a public body.

In BC, section 25 of our *Freedom of Information and Protection of Privacy Act* requires the head of a public body to release information, even without a request, to 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.

Recent revelations from Wikileaks come immediately to mind as the latest high-profile examples of whistleblowing and leaks, but there is a long and celebrated tradition of 'brown envelopes' that expose serious danger or wrongdoing within organizations. The federal government has recognized the value of whistleblowing and has enshrined a process for the protection of whistleblowers.

Although this system has been the subject of some recent controversy, the protections provided in the law and the mechanisms put in place are a recognition of the importance of whistleblowing for public administration and open government. In fact, FIPA has recommended to the Special Committee of the BC Legislature that recently reviewed the *FIPPA* that they consider the federal model to provide protection for whistleblowers at the provincial level.³

Possible Pitfalls of 'Open Government'

We have run through some of the advantages of routine electronic disclosure for both government and the public. They are important for the future of our democracy and for the exercise of Canadians' right to information.

Electronic brochures

The 'Open Government' models being discussed generally involve governments making the electronic information they wish the public to have available on the web. The government gets to 'push' favoured content to the public, as opposed to citizens 'pulling' the specific information they want from government – the 'freedom of information' model.

³ http://fipa.bc.ca/library/Reports_and_Submissions/FIPA_sub_to_FOIPPA_rvw_committee-Feb_2010_CORRECTED.pdf

There is probably no way around this, and we have to have a measure of trust that officials will not unreasonably restrict the type of information being disseminated. But that has not been the experience under ATI under various parties, Prime Ministers and Ministers. Without a way to compel disclosure, there is little reason to believe that the information that will be routinely released will be much more than electronic brochures.

The reluctance of governments to allow broad disclosure of information they don't favour releasing is very well understood, but a current instance in British Columbia in which we are directly involved provides an outstanding example.

FIPA is now in the middle of one of the longest-running FOI requests in BC history. In 2004, we requested a copy of a major contract for computer services between the BC government and IBM. The contract duration is ten years, and we are now moving into year seven of our request. The government has gone back to court for a second time in an attempt to keep part of the contract under wraps, although they have lost every single step of the way, and were ruled against on this point by the Information and Privacy Commissioner's adjudicator.⁴

Our ultimate point is that major government contracts should be readily available for public scrutiny, and ideally they should be posted online. Indeed, the BC government has acknowledged the public interest in making contracts available electronically by routinely posting contracts of public-private contracts online.

There is a great deal of public demand for this contract, and we have recently received a redacted electronic copy. The government has not seen fit to put this contract – or any similar contract with central government – on line, although they have essentially run out of arguments for keeping them secret. The BC Commissioner, Elizabeth Denham, has called on the government to use routine release, stating "Proactively releasing these contracts would save everyone considerable time, money and paperwork."⁵

At the end of the day, FIPA may have to put up the redacted copy on our own website, pending the result of the latest litigation or a change of heart by the government.

This should be a cautionary example for anyone who believes that moving to open data will result in a flood of new government information becoming available.

⁴ OIPC Order F10-39, November 2010
<http://www.timescolonist.com/opinion/Government+secrecy/4101944/story.html>

⁵ <http://www.oipc.bc.ca/news/2010Releases/NR-CompassFIPAorders.pdf>

Ignoring the major problems with ATI

As this Committee is well aware, Canada's ATI system has very serious problems. The current Information Commissioner and her predecessors have appeared before you and outlined the many shortcomings of the current law and the way it is administered. You have made unanimous recommendations to deal with the most urgent problems identified by former Commissioner Marleau, recommendations that were rejected by the Minister of Justice.⁶

It also appears that the amount of information being released has been on a downward path. According to the Information Commissioner, "During the past ten years, the number of cases where all information has been disclosed has decreased from 41% to 16%."⁷

Much is being made of the idea of putting documents released through Access to Information on line for all to see, but there is little point in putting responses to ATI requests on line if the system is so dysfunctional that fewer and fewer requests are made, and even fewer result in the release of any useful records.

Replacement of CAIRS

The Coordination of Access to Information Requests System (CAIRS) was a federal government database which contained a trackable history of access-to-information requests made to all government departments. The government stopped using the system in 2008, citing cost (\$50,000 p.a.) and outdated system architecture. It has not been replaced, although there are reports that Treasury Board had plans for a government-wide system almost a decade ago.⁸

It would seem that a system to track FOI requests would make sense in terms of reducing needless duplication for both requesters and government ATI officials. However, there is also a danger when public bodies turn transparency on its head.

⁶ 11th report of the Standing Committee on Access to Information, Privacy and Ethics
Response of Minister Nicholson
<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4139070&Language=E&Mode=1&Parl=40&Ses=2>

⁷ http://www.oic-ci.gc.ca/eng/med-roo-sal-med_speeches-discours_2011_1.aspx

⁸ <http://www.cbc.ca/politics/insidepolitics/2010/12/hold-the-applause-some-federal-government-departments-are-posting-access-to-information-requests-onl.html>

Trompe l'oeil Transparency

FIPA is currently involved in a complaint⁹ about BC Ferries corporation, which was put back under the FOI regime last year after an investigation by the province's Comptroller General.¹⁰

The new policy states that any records released to requesters will immediately be posted on the BC Ferries website. The result will be that requesters will be deprived of first use of the information they obtain, which in turn will take away much of requesters' motivation for investing time and resources in making FOI requests. To state it plainly, we have here a covert attempt to stifle FOI requests in the guise of the noble aim of allowing greater public access.

This is not the first time a public body has used this technique to discourage FOI requests, but BC Ferries is the first BC public body to make it official policy and use it to actively discourage requests from the media and others.

The BC Ferries policy works this way:

- Requesters are required to go through the normal processes for FOI requests.
- BC Ferries charges fees to the person requesting the information, to the maximum permissible in every case.
- Any released records are posted to the BC Ferries website. If requested electronically, the requester will receive them at the same time they are posted. If sent in hard copy, the records will be posted within 24 hours of the records being mailed to the requester.
- BC Ferries sends a news release telling the media what records have been released and where to find them.

BC Ferries also has the material released available on its website for only 90 days, after which time it is withdrawn.

Although BC Ferries claims this plan is part of their agenda of transparency or routine release, their real motivation is revealed by the fact that they have never put up any information that should be routinely released, such as the salaries, benefits and expenses of senior management.

BC's Comptroller General in an investigation pointed to inflated executive salaries as a rationale for putting BC Ferries back under FIPPA.¹¹

⁹ FIPA official complaint to OIPC, October 5, 2010
http://fipa.bc.ca/library/Letters/Complaint_Letter_re_BC_Ferries_release_policy-Oct_5_2010.PDF

¹⁰ Report on Review of Transportation Governance Models, Office of the Comptroller-General, October 2009, p.21

¹¹ *ibid*, pp22-26

In fact, documents requested by FIPA and put up on the BC Ferries website show that BC Ferries officials considered such proactive disclosure of executive remuneration, but abandoned the idea for unknown reasons. There is no indication why proactive disclosure was rejected, nor who made the decision.

If this type of 'transparency' is what we would end up with under 'open government', then it would probably result in less transparency than under the existing system.

Crown copyright

FIPA made submissions on the issue of Crown copyright to the consultation process run by the Ministry of Canadian Heritage and the Ministry of Industry. FIPA also successfully challenged the BC government when they tried to use Crown copyright to prevent FOI requesters from using or disseminating released records without first seeking the government's permission.

Former Information Commissioner John Grace probably made the best description of the danger of abuse of Crown copyright:

From an information commissioner's perspective, the concept of a perpetual Crown copyright in any field richly deserves to be challenged. It is an antique curiosity essentially incompatible with the government's own stated information policies and the spirit of the Access to Information Act.

The works covered by this anachronistic relic cover everything published by government. But Crown copyright is capriciously and arbitrarily invoked. In particular, Crown copyright makes no sense in an era of expanding government databases when records are held electronically, in T.S. Eliot's phrase, between "fixity and flux".

Crown copyright is not a necessary restriction. It flies in the face of the principles of the *Access to Information Act*. The power to copyright, as noted by Robert Gellman, the U.S. Congress's freedom of information expert, "is the power not to publish". It is monopoly without a regulator. Crown copyright by another name is political or bureaucratic control and bureaucratic empire building. One of the reasons why Canada has an access law is precisely to take the decision of what is released out of the hands of politicians and bureaucrats. Crown copyright is a residual remnant of the bad old way....¹²

We urge you to be wary of arguments for restricting release of information based on this archaic concept.

Next steps

There is nothing preventing a government from becoming more open by using the vast array of electronics available today to make information routinely

¹² Information Commissioner of Canada Annual Report, 1991-92, p.22

available to the general public. Legislative amendments are not required, just the will to make it happen. We encourage governments across the country, including our national government, to act now to make this a reality.

As noted above, a number of issues have been identified which must be dealt with before the Government of Canada can proceed with an open data plan that actually benefits government and the public. No obstacles are insurmountable if there is the will to act.

However, initiatives in the field of 'open data' cannot take the place of action to repair our seriously crippled Access to Information system. It appears that an air of defeat has settled over the entire topic of reform of Access to Information – that nothing can ever be done to improve government attitudes, the Access law or its implementation – so perhaps we should move on to something more promising. That would be a mistake.

Without the ability to pull information from the government vaults, be they paper or electronic, an open data system that allows the government to push the information it deems suitable for public consumption will be a Trojan horse for those who prefer that information stay within the control of the bureaucracy.

Conclusion

In conclusion, FIPA's view is that we have to ensure that overdue moves toward more routine release and the use of technology to make government information more widely available must also make this information useable for all Canadians.

Canadians must have the ability to request specific information from their government and receive that information in a reasonable time at no or minimal cost. This means creating a functional Access to Information system.

No one wants to head toward a dystopia where governments push out information electronically which no one uses or trusts, while occasional Wikileaks-type document dumps raise the risk of serious damage to legitimate state, business or personal interests.

Government information was paid for with taxpayers money, we own it and we should have access to it.

We hope your work on Open Government will be a big step toward bringing about real openness in government.

Thank you.

