

**Comments on Bill 38,
BC's *Personal Information Protection Act***

**May 30, 2003
BC Library Association Annual Conference**

**Darrell Evans
Executive Director
BC FREEDOM OF INFORMATION
AND PRIVACY ASSOCIATION**

First, I want to reiterate the opinion that my organization has expressed publicly: that Bill 38 is a very good piece of privacy legislation. In fact, it is a huge breakthrough for privacy rights in the provinces outside Quebec. (Quebec has had privacy legislation for the private sector since 1993.)

BC has shown strong leadership among the provinces in moving forward with a private-sector privacy bill that has real teeth. For this, great credit is due to the Minister of Management Services, Sandy Santori, and to Chris Norman and Sharon Plater, the officials who conducted the public consultation process and led the development of the legislation.

Bill 38 is the product of a consultation process that was very thorough and quite fair...even though I estimate that about 50 business organizations were consulted for every privacy advocate. Chris can correct me if that estimate is in error.

The consultations lasted a year, and FIPA was invited in at about the halfway mark. (Actually, we asked with some insistence to be invited.)

I feel free to tell you now that, when we saw what was being proposed at that stage, we were not at all pleased! The draft bill -- really just a sketch at that stage -- was not something we could have supported.

Chris cautioned us at the beginning that it was NOT a privacy bill, but a data protection bill. I think he wanted to reduce our expectations.

DATA PROTECTION VS. PRIVACY RIGHTS

A data protection law is about managing personal information so it is only collected, used and disclosed by those authorized to do so. The government and the bureaucracy is squarely in the driver's seat

Privacy legislation is about establishing a constitutional or quasi-constituional right of privacy and mechanisms of enforcement. The citizen is in the driver's seat.

Enacting data protection legislation is a back door way of instituting what we prefer to see as human rights legislation specific to privacy rights.

Over six months, we were allowed to examine and debate progressive drafts section by section and almost line by line. A transformation began to occur, and after six months, we were very pleased. In our estimation, the bill had turned into a real privacy bill.

By this I mean it is human rights legislation through the back door. (Not a prospect this government could be expected to savour.) It gives individuals new and significant privacy rights.

To the credit of Chris, Sharon and the Minister, this happened in spite of tremendous lobbying by certain sectors of the business community, either to produce a weak bill or do nothing at all.

So -- recognizing how far the government had moved to improve and strengthen Bill 38, and figuring we had wrung everything we could out of Chris and his boss, we decided to take a positive "Good roads and fair weather" approach in our public statement.

However, being opportunists -- always -- we used the opportunity to push the government on a issue very important to us: The drastic cuts that the government has made to the budget of the Information and Privacy Commissioner -- the officer who will end up overseeing and enforcing the PIP Act.

So our message became:

New law a big leap for privacy rights in BC, but government must fund it adequately

FIPA is declaring legislation introduced this week by the BC Liberals "an enormous leap for privacy rights."

But the group is also warning that the law will be a failure unless the government gives BC's Infor-mation and Privacy Commissioner adequate resources to enforce it.

FIPA's president stated, "We are pleased at how far the bill progressed [during the consultation process]. We're not saying that the act is perfect, but we give it a high "B" grade."

However, “This act ... will only be enforceable and effective if the government devotes the necessary resources to it.”

“The act mandates a strong oversight and enforcement role for the Commissioner, but the budget of the Commissioner’s office has just been slashed by 35 percent.”

“The office has lost much of its staff and is already overwhelmed just with enforcing the current freedom of information act.

“The government must show it is serious about FOI and privacy rights by giving the office the resources it requires to fulfill both its current mandate and this new responsibility.”

Privacy Commissioner Fires a Broadside

Then, on May 7, 2003, federal Privacy Commissioner George Radwanski sent a public letter to the Minister of Management Services that took us completely by surprise and radically changed the dynamics for FIPA as an advocacy group.

In a blunt, four-page letter to Mr. Santori, he indicated that, in his opinion, the legislation contains "grave deficiencies" that would, in his opinion, ‘...make it impossible for the Government of Canada to recognize this legislation in its current form as “substantially similar” to the federal [*Personal Information Protection and Electronic Documents*] Act.’

This put FIPA in an awkward position. We couldn’t sit on the sidelines. We had to go on the public record with a response to the Commissioner’s criticisms.

We wrote a letter to the Minister reiterating our support for Bill 38 “because its merits greatly outweigh its flaws.”

Nevertheless, we indicated that we were in substantial agreement with most of the points the Privacy Commissioner made.

(These points were not new to us, but, as I said, we had decided to be low-key about the faults of the bill.)

We urged the Minister to consider the substance of the Privacy Commissioner’s comments seriously, and if at all possible, make improvements to the Bill in the areas in which he expressed concern.

Although the federal Commissioner's position is not binding on the federal government, it is expected that his report to Parliament will be a key consideration in determining whether BC's legislation is substantially similar to the federal Act.

First, the Positives

I'll go into what the Privacy Commissioner said about the Bill in a minute. First, I want to tell you what FIPA likes about the Bill. The "LIKES" outweigh the "DISLIKES".

- BILL 38 IS CLEARLY DRAFTED AND SIMPLER THAN THE PIPEDA
- IT COVERS THE ENTIRE PROVINCIAL PRIVATE SECTOR, INCLUDING NON-PROFIT ORGANIZATIONS (not just information used for commercial purposes a la PIPEDA).
- IT INCLUDES OVERSIGHT AND ENFORCEMENT BY A COMMISSIONER WITH ORDER-MAKING POWER
- THE RIGHT OF CONSENT IS AT THE HEART OF THE BILL (as it should be.)
- THE EXCEPTIONS TO THE CONSENT PRINCIPLE ARE FAIRLY LIMITED
- THE PURPOSES FOR COLLECTION, USE AND DISCLOSURE MUST BE SPECIFIED AND MUST BE REASONABLE
- CONSENT MUST BE EXPLICIT IF INFORMATION IS SENSITIVE (Not implied following one's failure to exercise an "opt-out".)
- THERE IS AN EXCEPTION ALLOWING USE OF PERSONAL INFORMATION FOR RESEARCH WITHOUT CONSENT, BUT IT IS FAIRLY NARROW
- THE ACCESS TO INFORMATION PROVISIONS ARE REASONABLE
 - "Minimal" fee that may be charged for copy of all your personal information is better than "reasonable" fee as in PIPEDA.
 - There is no charge for access to one's own employee information
- CONTAINS GOOD WHISTLEBLOWER PROTECTION (as does PIPEDA).
- THERE ARE STRONG PENALTIES FOR OFFENSES...such as:
 - Use of deception or coercion to obtain information
 - Disposing of PI to evade an access request
 - Obstructing the commissioner or failing to comply with an order
 - Contravening whistleblower protections
 - Fines are up to \$10,000 for individuals and \$100,000 for organizations

Next...the Negatives

I'll start with the Privacy Commissioner's points.

1. GRANDFATHERING

At the top of Mr. Radwanki's criticisms is the fact the BC bill, unlike the federal act, does not cover information gathered in the past.

A "grandfathering" provision substantially weakens privacy protections by eliminating the need for consent to use or disclose personal information collected before the legislation comes into effect, as long as it is used for the purposes for which it was collected.

2. EXCEPTIONS TO THE CONSENT PRINCIPLE

The federal Commissioner also criticized Bill 38 for being:

"clearly inferior to the PIPED Act with regard to the concept of consent, which is at the heart of any statute purporting to protect privacy. It is by exercising the right of consent that individuals control personal information about themselves.

"The problem with the Bill is that it specifically refers to implicit consent – a weak form of consent that is acceptable only in certain limited circumstances – but says nothing about express or written consent.

"This is a critical omission, because it could very well lead an organization to assume that it can rely entirely on implicit consent.

In contrast, the PIPED Act strongly recommends the use of express consent with respect to the collection, use or disclosure of sensitive information."

3. REDUCED RIGHTS FOR EMPLOYEES

The Commissioner stated that the BC act fails to provide adequate privacy protection for employees. Unlike the federal PIPED Act, Bill 38 specifically allows broad collection, use and disclosure of employees' personal information without consent.

The PIPED Act, in contrast, makes no distinction between information collected, used, or disclosed in employment and in commercial activities.

4. LIMITS TO ACCESS AND CORRECTION PROVISIONS

The Commissioner also criticized Bill 38 for a provision limiting access by people to their own information:

“First of all, individuals would be prevented from obtaining access to information about themselves if it would reveal the identity of individuals who provided the information.

“For example, an individual would not be able to obtain access to negative comments provided by a co-worker or supervisor if it would reveal the identity of the person who made the comments.

“Without access to this information, an individual would not even know it existed and obviously would not be able to challenge its accuracy.

5. INVESTIGATIONS

Lastly, the Commissioner criticized Bill for very broad provisions allowing organizations to collect, use and disclose people’s information without consent for “investigative purposes.”

FIPA’s Comments and Recommendations

1. GRANDFATHERING

First, with regard to the “grandfathering provisions” of Bill 38: FIPA shares the Commissioner’s concern that organizations will not require the individual’s consent to use and disclose personal information collected prior to the Act’s coming into force.

This exception will deprive people of rights that are at the very heart of the Act, create two levels of protection for personal information, and create enormous confusion among both organizations and the public. It will also generate an additional, unnecessary burden for BC’s Information and Privacy Commissioner.

As a compromise solution, FIPA recommends that information previously collected be grandfathered for a period of one year following the Bill’s enactment. This would allow ample time for organizations to inform individuals about their intended uses and disclosures of personal information and to solicit consent. In the meantime, normal business may proceed unhindered.

2. EXCEPTIONS TO THE CONSENT PRINCIPLE

FIPA is not as concerned as the Commissioner over the concept of “implicit consent”, since it is fortified by the requirement for “reasonableness” and other controls.

However, we are quite concerned over the lack of strong requirements when consent is implied by a person’s failure to exercise an “opt-out” option (i.e., where an organization gives notice of its intended practices and the onus is on the customer or client to take positive action to opt out).

The weaknesses here are that the Bill does not specify that the notice of intended practices must be obvious (not buried in small print at the end of a long text) and that the effort needed to opt out must be minimal (not, for example, requiring that the person write and post a letter).

We hope the Minister will consider strengthening the Bill in this regard.

3. REDUCED RIGHTS FOR EMPLOYEES

We agree with the Privacy Commissioner that the Bill goes too far in depriving employees of privacy rights. He makes a striking point in his letter:

It is important to note in this regard that these provisions of the PIPED Act have now applied for more than two years to employers in some 15,000 federal works, undertakings and businesses – primarily banks, broadcasters, transportation and telecommunications companies – without any indication that these organizations have thereby been prevented from effectively managing their workforces.

4. LIMITS TO ACCESS AND CORRECTION PROVISIONS

Fourth, regarding the rights of individuals to have access to, and where appropriate, to have corrections made to their personal information:

We understand that access to one’s own information should sometimes be limited in order to protect a third party who is a source of information. However, we think this should apply only where a clear case can be made that the third party or another specific interest will be harmed, and where the potential of harm is sufficiently serious to merit overriding an individual’s normal right of access.

Regarding the lack of a requirement in Bill 38 for an organization to inform other organizations with whom they have shared information when the accuracy of that information is in dispute: FIPA shares this concern and recommends the weakness be amended to bring the Bill into line with the PIPEDA.

5. INVESTIGATIONS

Bill 38 takes a very different approach from that of the PIPEDA with respect to the conduct of “investigations”.

Both acts permit organizations to collect, use and disclose personal information without consent for the purpose of conducting investigations into possible breaches of contract and criminal offenses such as fraud.

The PIPEDA only allows special approved bodies to conduct investigations, whereas Bill 38 allows any organization to do so in a wide variety of situations.

This includes disclosure to private investigators or law enforcement agencies without consent and without a warrant. This is a practice we disagree with strongly.

In addition, the definition of “investigation” is much broader under the B.C. legislation than the PIPED Act. The vast range of activities allowed to any organization under this definition is one of the least acceptable aspects of the Bill, and FIPA has been on record for months as opposing it.

For example, investigations are allowed for “the prevention of fraud or fraudulent practices”. This as a reason for an investigation is both highly speculative and prospective.

When the phrase “prevention of fraud” is added to the wording “...if it is reasonable to believe that the breach, contravention, circumstance or conduct in question may occur or may have occurred”, the exception in Bill 38 becomes even broader.

In our opinion, this would provide justification for unfounded and indiscriminant monitoring of the information and behavior of customers and employees on the mere suspicion that an offense has occurred or may occur.

Under this definition, it would be “reasonable” for a business to conclude, if one particular customer has violated an agreement — say illegally copying software — that many other customers may also be doing so or will do so in the future, and would this not justify surreptitious monitoring of all their customers’ use of the software product?

One additional concern, not raised by the Commissioner:

6. THE BROAD EXCEPTION GRANTED TO THE INSURANCE INDUSTRY

In our opinion, a section of Bill 38 gives insurance companies *carte blanche* to collect, use and disclose the personal information of their customers.

Subsection 8(2) of the Bill states:

(2) An individual is deemed to consent to the collection, use and disclosure of personal information for the purpose of his or her enrollment and coverage under an insurance, pension, benefit or similar plan if he or she is a beneficiary or has an interest as an insured under the plan.

We understand that this subsection was added to allow the personal information of family members of individuals to be collected, used and disclosed if they are beneficiaries of the plans listed. However, on a plain reading, we think there is dangerous ambiguity in the language.

There is a high probability this section will be interpreted to allow *carte blanche* collection, use and disclosure, without consent, of the personal information of any individual covered by such plans. This could include the non-consensual disclosure of sensitive health information between, for example, insurer and employer.

FIPA recommends that subsection 8(2) be re-drafted to remove all ambiguity and clarify the narrower meaning the government intended.



The concerns expressed above are not the only reservations FIPA has about Bill 38, but we recognize that we are not the only stakeholder that is asking the government to consider our views, and, as stated above, we consider the Bill on the whole to be a very good one. We hope that the Minister receives our comments as the constructive criticism they are intended to be.

FIPA is a non-profit society that was formed to advance the ideals of open and accountable government, an informed electorate, and enhanced human rights and civil liberties, by promoting and defending the principles of freedom of information and privacy protection in British Columbia. We serve a wide variety of individuals and organizations through programs of public education, public assistance, research, and law reform/advocacy.

BC FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

#103 - 1093 West Broadway

Vancouver, BC V6H 1E2

Tel: (604) 739-9788 Fax: (604) 739-9148

E-mail: info@fipa.bc.ca

www.fipa.bc.ca