



BC FREEDOM OF
INFORMATION
AND PRIVACY
ASSOCIATION

PRIVACY AND THE USA PATRIOT ACT
Recommendations of the Information and Privacy Commissioner
Implemented / Not Implemented By Government
January 2005

Recommendations not applicable to existing contracts

Most of the amendments made to the *Freedom of Information and Protection of Privacy Act* (FOIPPA) will not apply to outsourcing contracts that preceded the amendment act. Therefore the recommendations of the Commissioner will not apply to those contracts.

Commissioner's report: <http://www.legis.gov.bc.ca/cmt/37thparl/session-5/foi/reports/Rpt-FOIPPA37-5.pdf>.

Amendments to FOIPPA

Implemented / not implemented

Recommendation 1

The government of British Columbia should amend the Freedom of Information and Protection of Privacy Act (FOIPPA) to:

- (a) pending nation-to-nation agreement, as contemplated by Recommendation 16, prohibit personal information in the custody or under the control of a public body from being temporarily or permanently sent outside Canada for management, storage or safekeeping and from being accessed outside Canada;
- (b) expressly provide that a public body may only disclose personal information in response to a subpoena, warrant, order, demand or request by a court or other authority if it is a Canadian court, or other Canadian authority, that has jurisdiction to compel the disclosure;
- (c) impose direct responsibility on a contractor to a public body to ensure that personal information provided to the contractor by the public body, or collected or generated by the contractor on behalf of the public body, is used and disclosed only in accordance with FOIPPA;

Implemented (except for existing contracts)

Not yet implemented
 (Prohibition against disclosure in response to foreign court orders)
- Changes introduced along these lines, but they should be clarified and strengthened.

Implemented (except for existing contracts)

<p>(d) require a contractor to a public body to notify the public body of any subpoena, warrant, order, demand or request made by a foreign court or other foreign authority for the disclosure of personal information to which FOIPPA applies;</p>	<p>Implemented (except for existing contracts)</p>
<p>(e) require a contractor to a public body to notify the public body of any unauthorized disclosure of personal information under FOIPPA;</p>	<p>Implemented (except for existing contracts)</p>
<p>(f) ensure that the Information and Privacy Commissioner has the powers necessary to fully and effectively investigate contractors' compliance with FOIPPA and to require compliance with FOIPPA by contractors to public bodies, including powers to enter contractor premises, obtain and copy records, and order compliance; and</p>	<p>Implemented (except for existing contracts). Exception: no clear power for the Commissioner to act on a complaint under s. 42 about a ministerial order for disclosure that might be improper.</p>
<p>(g) make it an offence under FOIPPA for a public body or a contractor to a public body to use or disclose personal information, or send it outside Canada, in contravention of FOIPPA, punishable by a fine of up to \$1 million or a significant term of imprisonment, or both.</p>	<p>Not yet implemented. Lesser penalties and fines of \$500,000 for corporations, \$25,000 for partnerships and service providers and \$2,000 for individuals)</p>

IMPORTANT NOTES:

1. The Commissioner commented unfavorably on the weakness of the FOIPPA amendment limiting information sharing in s. 33.1(1)(d) "...in accordance with a treaty, arrangement or agreement...that authorizes or requires its disclosure." This prompted him to make four additional recommendations for amendments to FOIPPA in order to limit data sharing (See OIPC letter of October 29, 2004 at <http://www.oipcbc.org/news/21120murray102904.pdf>).
2. There is no mechanism in FOIPPA for enforcement of the Commissioner's orders. The Commissioner recommended that an amendment should be made to enable orders to be filed with the Supreme Court for enforcement purposes.
3. The Commissioner further recommended that the BC government take immediate steps to implement the recommendations of the Special Committee to Review the FOIPPA (See the Committee's report at <http://www.legis.gov.bc.ca/cmt/37thparl/session-5/foi/reports/Rpt-FOIPPA37-5.pdf>).

<p>Provincial litigation policy</p>	
<p>Recommendation 2</p> <p>The government of British Columbia should create a published litigation policy under which it would, as necessary, participate in or commence legal proceedings in Canada or abroad to resist a subpoena,</p>	<p>Not yet implemented.</p>

<p>warrant, order, demand or request made by a foreign court or other foreign authority for disclosure of personal information in British Columbia that is in the custody or under the control of a public body.</p>	
<p>Further protection of personal information from FISA orders</p>	
<p>Recommendation 3</p> <p>The government of British Columbia, in conjunction with the government of Canada as appropriate and necessary, should seek assurances from relevant US government authorities that they will not seek a FISA order or issue a national security letter for access to personal information records in British Columbia.</p>	<p>Not yet implemented</p>
<p>Outsourcing contract privacy protection measures</p>	
<p>Recommendation 4</p> <p>All public bodies should ensure that they commit, for the duration of all relevant contracts, the financial and other resources necessary to actively and diligently monitor contract performance, punish any breaches and detect and defend against actual or potential disclosure of personal information to a foreign court or other foreign authority.</p>	<p>Not yet implemented</p>
<p>Recommendation 5</p> <p>Recognizing that it is not enough to rely on contractors to self-report their breaches, a public body that has entered into an outsourcing contract should create and implement a program of regular, thorough compliance audits. Such audits should be performed by a third party auditor, selected by the public body, that has the necessary expertise to perform the audit and recommend any necessary changes and mitigation measures. Consideration should be given to providing that the contractor must pay for any audit that uncovers material noncompliance with the contract.</p>	<p>Not yet implemented</p>

<p>Recommendation 6</p> <p>Treasury Board should direct all ministries, agencies and organizations covered by the Budget Transparency and Accountability Act to include the activities in Recommendations 4 and 5 in their annual service plans and to ensure that service plans include all financial resources necessary to perform these functions. The government of British Columbia should consider also requiring all public bodies to plan and budget for such financial resources.</p>	<p>Not yet implemented</p>
<p>Federal protection of personal information from foreign orders</p>	
<p>Recommendation 7</p> <p>The government of Canada should consider whether federal legislation protects adequately the personal information of Canadians that is in the custody or under the control of the government of Canada or its agencies (directly or through contractors) from disclosure in response to a subpoena, warrant, order demand or request made by a foreign court or other foreign authority. This should include a thorough review of the federal Privacy Act, as earlier urged by the Privacy Commissioner of Canada, with particular attention to the fact that the federal statute contains no equivalent to the reasonable security requirement in section 30 of FOIPPA.</p>	<p>Outside provincial powers</p>
<p>Recommendation 8</p> <p>The government of Canada should review British Columbia's Freedom of Information and Protection of Privacy Amendment Act, 2004 (Bill 73) and consider enacting provisions to protect personal information in Canada from disclosure in response to a subpoena, warrant, order, demand or request made by a foreign court or other foreign authority.</p>	<p>Outside provincial powers</p>

Audits of information sharing agreements and data mining activities	
<p>Recommendation 9</p> <p>The government of British Columbia should:</p> <p>(a) undertake a comprehensive and independent audit of inter-provincial, national and transnational information sharing agreements affecting all public bodies in British Columbia;</p> <p>(b) use the audit to identify and describe operational and planned information sharing activities, including in each case: the kinds of personal information involved, the purposes for which it is shared, the authority for sharing it, the public bodies or private sector organizations involved, and the conditions in place to control the use and security of the information shared;</p> <p>(c) publicly release the audit report (including timely posting on a readily accessible government of British Columbia website);</p> <p>(d) act on deficiencies or other problems indicated by the audit;</p> <p>(e) conduct and publish periodic follow-up audits and reports to ensure ongoing transparency and accountability in this area; and</p> <p>(f) require information sharing agreements entered into by all public bodies to be generally available to the public (including timely consolidated posting on a readily accessible government of British Columbia website).</p>	<p>Not yet implemented</p> <p>Not yet implemented</p> <p>Not yet implemented</p> <p>Not yet implemented</p> <p>Not yet implemented</p> <p>Not yet implemented</p>
<p>Recommendation 10</p> <p>The government of British Columbia should</p> <p>(a) undertake a comprehensive and independent audit of data mining efforts by all public bodies;</p> <p>(b) use the audit to identify and describe operational and planned data mining activities, including in each case: the kinds of personal information involved, the purposes of the data mining, and the authority and conditions for doing so;</p>	<p>Not yet implemented</p> <p>Not yet implemented</p>

<p>(c) ensure that the audit report also proposes an effective legislated mechanism to regulate data mining activities by public bodies and effective guidelines for the application of fair information practices to data mining by public bodies; and</p>	<p>Not yet implemented</p>
<p>(d) publicly release the audit report (including timely posting on a readily accessible government of British Columbia website).</p>	<p>Not yet implemented</p>
<p>Recommendation 11</p> <p>The government of Canada should implement Recommendations 9 and 10 at the federal level.</p>	<p>Outside provincial powers</p>
<p>Section 69 of FOIPPA (Personal Information Directory)</p>	
<p>Recommendation 12</p> <p>The government of British Columbia should:</p> <p>(a) ensure that, within 60 days after the date of release of this report, all ministries are fully compliant with the reporting requirements of section 69 of FOIPPA;</p> <p>(b) make the section 69 reporting requirements regarding information sharing agreements applicable to all public bodies (this can be done under section 69(7) by the minister responsible for FOIPPA); and</p> <p>(c) in conjunction with Recommendations 9 and 10, review the utility of section 69 in its present form, noting our view that section 69 needs to be amended to require more complete, transparent, ongoing and effective reporting about the information sharing agreements and data mining activities of all public bodies.</p>	<p>Not yet implemented</p> <p>Not yet implemented</p> <p>Not yet implemented</p>
<p>Private sector issues</p>	
<p>Recommendation 13</p> <p>The government of British Columbia and the government of Canada should consider and address the implications of the USA Patriot Act for the security of personal information that is entrusted to private</p>	<p>Not yet implemented</p>

sector custody or control in British Columbia or elsewhere in Canada.	
Trends in information gathering and use for state purposes	
<p>Recommendation 14</p> <p>The Parliamentary review of the Anti-terrorism Act provides an important opportunity for the government of Canada to renew its commitment to ensure that human rights and freedoms are not unnecessarily infringed by national security and law enforcement measures. As part of this renewed commitment, we recommend that the public be permitted to participate in the review in a meaningful way.</p>	Outside provincial powers
International trade and investment agreements	
<p>Recommendation 15</p> <p>The government of Canada should, in consultation with the provincial and territorial governments, negotiate with foreign trade partners (including members of the World trade Organization) to ensure that trade agreements and other treaties do not impair the ability of Canadian provinces, territories and the federal government to maintain and enhance personal information protections in accordance with Canadian values.</p>	Outside provincial powers
Other international agreements	
<p>Recommendation 16</p> <p>In moving towards a North American trade, energy, immigration and security zone, the government of Canada should, in consultation with the provincial and territorial governments, advocate to the US and Mexico for comprehensive transnational data protection standards and for multilateral agreements respecting continental control and oversight of transnational information sharing for government purposes, including national security and public safety purposes.</p>	Outside provincial powers