

A NEW OPENNESS:

Freedom of Information in British Columbia

INTRODUCTION

In June 1992, the British Columbia legislature unanimously passed the Freedom of Information and Protection of Privacy Act (the "act").¹ It is widely acknowledged as the most effective information rights legislation in Canada, while at the same time maintaining strong safeguards for personal privacy.² It is intended to change the relationship between government and the public by opening up government files. As the minister responsible for the legislation, Attorney General Colin Gabelman noted:

Whereas previously a citizen had to justify a request for information in government hands, this bill requires government to justify any refusal to provide such information ... We want to create a 'culture of openness' within government so that public information is routinely released. If we are successful, the public will not even need to use the legislation.³

As in other major jurisdictions, the act makes an *independent* Information and Privacy Commissioner (the "commissioner") responsible for monitoring this commitment to openness.

The act covers over 200 government ministries, provincial Crown Corporations, boards, commissions, and agencies (collectively known as "Provincial Public Bodies").⁴ A year later, it was amended to cover a broader range of public bodies including municipalities, school boards, universities, colleges, hospitals, municipal police forces and professional governing bodies, such as the Law Society of British Columbia, (collectively known as "Local Public Bodies"). Unlike Quebec, the privacy provisions of the act do not extend to the private sector.

More than a year has passed since the act was proclaimed for provincial public bodies, more than six months has passed since the act was proclaimed in November 1994 for most local public bodies, and

the act is due to be proclaimed for self-governing professions in 1995. It is therefore timely to assess the effectiveness of the legislation across the public sector.

OVERVIEW OF LEGISLATION

Public bodies have extensive holdings of information recorded in many different forms, including correspondence, documents, maps, photographs, videotapes, and electronic mail. It is estimated that records held by government ministries alone would fill the legislative chamber in Victoria 15 times over.⁵ The expressly stated purpose of the act is to give the public a legal right of access to records in the custody or control of public bodies (section 2), subject to limited exceptions (sections 12 to 22).

The act is administered by the office of the Information and Privacy Commissioner. The commissioner is an independent officer of the legislature, appointed for a six-year non-renewable term on the unanimous recommendation of a special committee of the legislative assembly (section 37). The office also employs portfolio officers to mediate and settle disputes and independently verify adequacy of disclosure.

The act provides for both reactive and proactive disclosure of information.

Reactive Disclosure: Freedom of Information ("FOI") Requests

If an individual is unable to obtain information through routine channels, then she or he can make a written FOI application under the act. The public body is required to "make every reasonable effort to assist applicants" and to "respond without delay to each applicant openly, accurately and completely" (section 6(1)).

In most cases the time limit for response is 30 days (s. 7). Before responding, the public body

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should locate the record and review it in order to determine if it can be released in its entirety. The public body will sever (that is, not release, or "white-out") the information in the record exempted from disclosure by the twelve exceptions contained in sections 12 to 22 of the act.

There are two types of exceptions, mandatory and discretionary. In the case of mandatory exceptions, the public body *must* refuse to disclose the information. In the case of discretionary exceptions, the public body *may* refuse to disclose the information. The twelve exceptions are:

MANDATORY EXCEPTIONS

- Cabinet confidences — section 12
- Harm to business interests of a third party — section 21
- Harm to personal privacy of a third party — section 22

DISCRETIONARY EXCEPTIONS

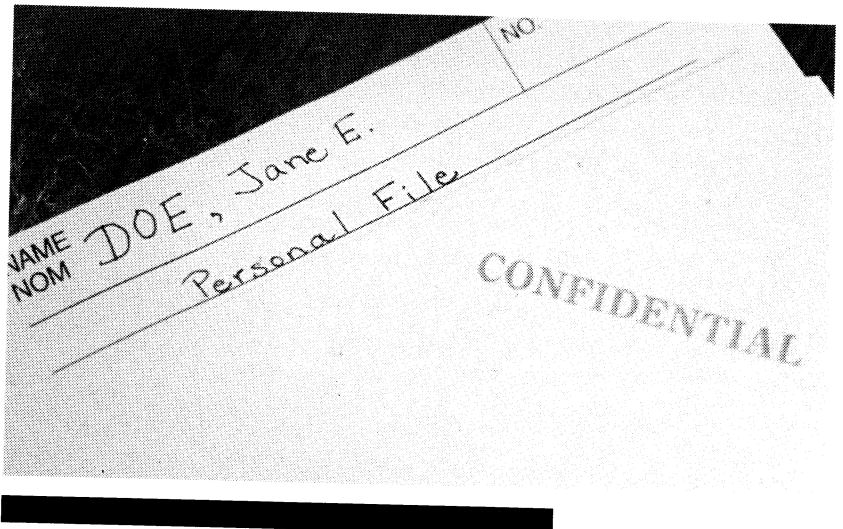
- Local public body confidences - section 12.1
- Policy advice or recommendations — section 13
- Legal advice — section 14
- Harm to law enforcement — section 15
- Harm to intergovernmental relations or negotiations — section 16
- Harm to financial or economic interest of a public body — section 17
- Harm to conservation of heritage sites — section 18
- Harm to individual or public safety — section 19
- Information soon to be published or released within 60 days — section 20

Reactive Powers of Commissioner

Under section 53 of the act, an applicant may ask the commissioner to review a decision of the public body within 30 days of being notified of the decision. The commissioner has the power to overrule the public body (section 58). Grounds for review are broad and include any decision, act or failure to act that relates to the request (section 52). Usually a portfolio officer will attempt to mediate and settle the matter. If mediation is unsuccessful, then an oral or written inquiry must be held within 90 days (section 56). The public body almost always has the burden of proving on a balance of probabilities that the applicant has no right of access to the record, or the part "whited out" (section 57).

Under section 58 of the act, the commissioner

must make an order which either confirms the decision of the public body to refuse disclosure, orders the information disclosed, or, in the case of discretionary exceptions, requires the public body to reconsider its refusal. Once an order is issued, the public body has 30 days to comply or bring an application for judicial review (section 59).



Use of the Act - An Overview

The public is making heavy use of the act and is being rewarded with information which would have never seen the "sunshine" under previous governments. Examples are numerous and include:

- Public opinion polls
- Hospital severance packages
- Audit reports
- Complaint letters about teachers
- Premier's telephone records
- Portions of cabinet submissions
- Government contract details.

At the provincial level, government ministries and Crown corporations received approximately 9,400 FOI requests in the first year following proclamation of the act.⁶ Most FOI requests were made by individuals, while political parties and the media made approximately 450 FOI requests. One noteworthy individual filed 1,789 FOI requests with the B.C. Lottery Corporation.⁷ Even if those requests are excluded, British Columbia provincial public bodies still received more than four times the number of requests, per capita, of their Ontario counterparts in their first year.⁸

The Ministry of Social Services receives more requests than any other ministry. Applicants often seek information from the ministry about their past.

Providing that information is complicated by the intermingling of the applicant's personal information with that of other individuals. In the first year, the ministry processed 1,788 FOI requests, "whited out" other individuals' information, and disclosed approximately 500,000 pages of documents to applicants. Only two decisions of the ministry resulted in commissioner's orders, and in both cases the commissioner upheld the ministry's original decision.

FACTS AND FIGURES

What information do British Columbians want?

A statistical overview of the first year FOI legislation was in force shows that only eight public bodies received 82% of requests.

Ministry/Crown Corporation	FOI Requests Received	Orders Issued To Dec/94
Attorney General	558	3
Environment	333	1
Health	979	6
Social Services	1708	2
Transportation and Highways	403	1
B.C. Lottery Corporation	2617	0
Workers' Compensation Board	390	1
Insurance Corporation of B.C.	613	6
Sub-total	7681	20
Other Ministries/Crowns	1719	9
Total	9400	29

Source: Information and Privacy Branch, Ministry of Government Services, Government of British Columbia.

Looking at all requests, only a small percentage of applicants are dissatisfied (or dissatisfied enough) with the information they are receiving that they request the intervention of the commissioner. Of the 9,400 FOI requests received in the first year there were approximately 500 requests for review, representing seven per cent of total FOI requests. As of December 31, 1994 only 29 requests for review were not successfully mediated and required commissioner's orders. In the majority of orders the commissioner upheld the original decision of the public body.

The reason for the small percentage of FOI decisions which are successfully challenged is likely quite simple; provincial public bodies are

largely complying with the act. A less likely explanation is that applicants are unable to judge when they are not receiving information to which they are entitled, or are unaware they can appeal. However, any applicant who receives a document with large parts "whited out" will probably be curious or even suspicious. Furthermore, section 8 of the act provides that every applicant must be advised of their right to appeal to the commissioner when they receive the reply to their request.

As a result, an applicant can appeal — at no cost to themselves — and enlist the expertise and mediation services of a portfolio officer at the office of the Information and Privacy Commissioner to independently verify the applicant is not being "short-changed." There is no evidence to suggest that portfolio officers are mediating and settling cases in a manner which frustrates the applicants' desire to access information. Perhaps a more interesting question, and one which remains to be answered, is whether this pattern of high numbers of FOI requests, low numbers of reviews, and low numbers of commissioner's orders will be repeated in the case of local public bodies.

Trends in Commissioner's Orders

The commissioner's orders have consistently interpreted the exceptions to disclosure narrowly, thereby respecting "... the presumption of openness and accountability for governmental processes and non-personal information that a unanimous legislature built into the act."⁹ A review of case law and orders in other Canadian provinces reveals that this trend is consistent with other jurisdictions.

To date, the most significant aspect of commissioner's orders is the degree to which interpretations of the act draw on Ontario commissioners' orders ("Ontario orders") and the British Columbia Policy and Procedures Manual (the "manual").¹⁰ For example, in one order affecting third party business information, the commissioner found the Ontario interpretation of "supplied in confidence" provided a reasonable basis for application in British Columbia.¹¹ In another order, the commissioner decided that a public body must prove harm on a balance of probabilities using detailed and convincing evidence in order to refuse disclosure. In his decision, the commissioner relied on the manual:

Although the language of the manual is not binding on the head of the public body or the

Commissioner in the interpretation and application of the *Act*, I find it supportive in this specific instance, especially absent a body of commissioner's orders to guide interpretation.¹²

The Ontario orders and the manual are useful starting points for interpreting the act when a new issue arises. But because the Ontario act and the manual may not provide for the same degree of openness as the new B.C. act, this reliance may hinder the potential scope of the act.

One such example is the issue of disclosure by private institutions funded by government. Drawing on Ontario orders and the manual, the commissioner held that policy manuals created by Dogwood Lodge, an intermediate care facility partially funded by the Ministry of Health, are not under the control of the ministry and therefore need not be disclosed under the act. The commissioner states:

In my view, where a public body does not have the right to have custody of a record, "control" ... must derive from a contractual or specific statutory right to review records of a contractor which relate to the services being provided, as well as a right to have a say in the content, use, or disposition of the document.¹³

In a single order, the commissioner has potentially exempted thousands of records otherwise covered by the act. The other clear implication of this order from an "openness" perspective is that public bodies can "contract out" of the provisions of the act. This can be accomplished by contracting services out, then ensuring that the contract is silent on the "content, use or disposition" of the records in question and ensuring that the public body has limited or no power to access and inspect the records.

An approach more in keeping with the intent of the act would be to adopt an expansive definition of control which would cover contractors' records such as policy manuals (especially when the contractor receives funding from government), and allow the exceptions in the act to govern what portions of the record are disclosed. The Freedom of Information and Privacy Association argued in its submissions relating to that order, "the absence of explicit contractual provisions regarding control over records ... should be accorded little, if any weight."¹⁴

Proactive Disclosure

Processing large numbers of FOI requests can be time consuming and costly. The act has several

provisions which are designed to encourage routine disclosure and avoid the need for an FOI request. For example:

- section 69 provides for a Freedom of Information Directory which is an index to all government information holdings, including routinely available information.
- section 70 of the act requires that policy manuals and guidelines be made available to the public.
- section 71 of the act allows for the designation of public records (e.g., public opinion polls) which are available without a request for access under the act. To encourage dissemination of this information, section 72 provides for publication of a Public Record Index of records designated under section 71.

JURISDICTIONAL ISSUES FACING BRITISH COLUMBIA'S FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

Almost two years after enacting the Freedom of Information and Protection of Privacy Act (FOIPPA), the government of British Columbia is still trying to figure out just how this legislation will work. The confusion as to what the act covers – and what it does not – persists. Section 78 of FOIPPA outlines the relationship between FOIPPA and any other acts which prohibit or restrict the disclosure of information. This section provides for both an interim and a long term structure for addressing conflicts between FOIPPA and other statutes.

In the interim, section 78 states that "... the head of a public body must refuse to disclose information to an applicant if the disclosure is prohibited or restricted by or under another Act." This provision was designed to give the legislature a two-year transition period to review the disclosure restrictions found within other acts. These sections were either to be removed or reinforced against FOIPPA scrutiny through the addition of a notwithstanding clause. This limitation will be repealed in October 1995, the same time that sub-section (2) comes into force. Sub-section (2) states that in cases involving a conflict between FOIPPA and another statute, "... unless the other Act expressly provides that it, or a provision of it, applies despite this Act ...", FOIPPA will prevail.

There is debate as to just how easy it should be for the legislature to remove a particular statute from FOIPPA scrutiny. This debate has led to questions about the effects of section 78 and what kinds of discretionary powers the Information and Privacy Commissioner has in connection to the application of this section. During a similar interim period in Ontario, the commissioner in that province made it clear that he would not assume that a statute contained a restrictive confidentiality clause simply because the public body had interpreted the clause in that way. Two recent decisions of British Columbia's commissioner (orders #35 and #37) suggest that the commissioner in this province has adopted a similarly protective interpretation of FOIPPA's jurisdiction.

The fundamental issue appears to be whether or not the legislature should have the ability to create confidentiality provisions which will operate independently of information and privacy legislation. The cautious interpretation the commissioner has given to this question so far encourages government to be explicit when amending or drafting legislation it wants to stand in spite of FOIPPA.

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- section 67 of the act provides for the establishment of a consultative committee to make recommendations to government about the operation of the act, including opportunities for routine disclosure.

Public bodies are required to disclose information in certain circumstances under the public interest override (section 25). The override applies even if the information has not been requested or if an exception would ordinarily apply. For example, public bodies must disclose information about a “risk of significant harm to the environment or to the health or safety of the public or a group of people.” Public bodies must also disclose information which is for any other reason “clearly in the public interest.” The addition of the phrase “clearly in the public interest” is intended to make the act more open than equivalent legislation in other jurisdictions.

The commissioner has broad general powers to foster a “culture of openness” (section 42). These include the power to conduct an investigation or audit of a public body or process to ensure compliance with the act. For example, rather than waiting for a request for review, the commissioner could investigate disclosure policies with respect to a class of documents and suggest ways to expand routine access. The act also envisages proactive measures to inform the public and obtain public input on the operation of the act.

Unlike section 58 orders, the commissioner’s exercise of his section 42 powers often involves a large element of moral suasion. In this respect, the commissioner’s role is more akin to that of the ombudsman. The willingness of public bodies to comply with the commissioner’s section 42 recommendations will depend, to a large extent, on the inherent fairness and logic of the commissioner’s position. Needless to say, if the commissioner’s relationship with public bodies is adversarial or if the office of the commissioner does not enjoy widespread respect, then recommendations for change are unlikely to be followed.

The single most important challenge the commissioner faces in the remainder of his mandate is to be more proactive in promoting openness. To date, the primary focus of portfolio officers and the commissioner has been the successful resolution of requests for review. In the medium term, the only way to minimize the cost of freedom of information is to create a “culture of openness” using the proactive tools already in the act. Ideally, the commissioners’

office should have less, not more, to do with respect to freedom of information as the years go by.

Examples of the types of proactive measures the commissioner could take abound. These measures should complement, not displace, FOI policy formulation by government. The commissioner could:

- study the types of records. e.g., public opinion polls, policy manuals, contracts, that could be included in a public record index and distributed on the Internet,
- encourage government to establish a consultative committee to act as a “sounding board” on the operation of the act,
- propose non-binding standards for the duty of public bodies to assist applicants and encourage government to adopt these standards by way of regulation,
- expand methods of informing the public about their rights, while soliciting public input on what “core records” are essential to public accountability, and
- examine ways to ensure that the public interest override is used to its full potential.

Most importantly, the commissioner could investigate or more actively participate in reviews of the life-cycle of particular types of records such as cabinet records, audits, and health care records to find ways to restructure these records to maximize routine public disclosure, minimize time-consuming “whiting-out” and at the same time maintain informative content. These types of measures are envisaged by the act and the challenge facing the commissioner is to use the full range of his “moral suasion” powers to proactively foster a “culture of openness.” If he does, then surely we will see a new openness and accountability in the public sector. ▲

HAS BRITISH COLUMBIA'S INFORMATION AND PRIVACY LEGISLATION BECOME A NEW ARENA FOR OLD GRIEVANCES?

Most complaints regarding a public body's refusal to disclose requested information are settled by the Information and Privacy Commissioner's office through a mediation process. Complaints which, for any number of reasons, cannot be resolved by this process end up in a hearing before the commissioner. It is at this level that an unanticipated category of applicant has repeatedly appeared. These applicants are either private citizens or groups who are using the act as a new arena for old battles.

An interesting use of the commissioner's office as a new venue for an old issue occurred in the events leading up to order #34, issued in January, 1995. This hearing essentially dealt with a feud between two neighbours. The applicant wanted the Ministry of Transportation and Highways to release a letter of complaint written by a neighbour about the applicant in regard to an ongoing parking dispute.

Another example of the act being used as a new forum for an ongoing dispute occurred in a recent hearing involving the Ministry of the Attorney General. The applicant had been battling the government over a variety of issues for more than twenty years, the most recent being the appropriation of an island owned by the applicant. The issue for the applicant could have been the applicant's long standing frustration with government, and not the Ministry's refusal to disclose four documents out of the 2200 which had originally been requested.

Realistically, it does not appear that there are any easy solutions to this "creative" use of the Freedom of Information and Protection of Privacy Act. Indeed it is unclear where the line falls between making a full presentation of one's case and merely venting about an old grievance. However, when arguments for disclosure are based on submissions complaining, as one applicant did, about "God damned feminists," "bloody murderers" and the "Morgue & Dollar" (Morgentaler) decision, one may question whether the processes of information access are being used for a motive other than proper disclosure. The wording used in the above situation suggests that a desire to express one's political views in an official forum may be an additional motive to that of proper disclosure.

British Columbia's Freedom of Information and Protection of Privacy Act was enacted to regulate proper information disclosure in the public sector. Technically, it appears to offer little to applicants waging old battles other than to provide them with a new forum for expressing their displeasure. However, if the above examples are any indication, this may be exactly what some people are looking for.

By Nicole Rhodes

ENDNOTES

- 1 S.B.C. 1992, c. 61.
- 2 For example, the Freedom of Information and Privacy Association stated in a June 1992 letter to the Attorney General of British Columbia, "this is the most open, balanced and effective information rights legislation in Canada." Mr. Tom Riley, an International Information Consultant, stated in the June 1992 edition of Access Reports, "The B.C. Freedom of Information and Protection of Privacy Act. ... is now considered the best possible piece of legislation and the best in North America..."
- 3 Ministry of the Attorney General, Press Release (22 May 1992) at 1.
- 4 Only a few provincial boards, commissions, and agencies are not covered by the Act. An example is B.C. Rail. Members and officers of the Legislative Assembly and the Court of Appeal, Supreme Court and Provincial Court are also excluded from the Act (see section 1).
- 5 See note 3.
- 6 The source of the British Columbia statistics in this section is the Information and Privacy Branch, Ministry of Government Services, Government of British Columbia. It should be remembered that numbers are only a rough indicator of activity. One request could involve thousands of pages of records, while another request could involve one page of information. Data on requests received by Local Public Bodies is not yet available.
- 7 Section 43 of the act enables a public body to apply to the commissioner for permission to disregard requests of a systematic and repetitious nature which would unreasonably interfere with the operations of the public body. The Information and Privacy Branch confirmed to the author that this provision was used in this case.
- 8 *Annual Report of the Information and Privacy Commissioner of Ontario* (Toronto: 1988) Table 3.
- 9 British Columbia Information and Privacy Commissioner Order No. 1 (1994) at 10.
- 10 British Columbia Information and Privacy Branch, Ministry of Government Services, Government of British Columbia.
- 11 British Columbia Information and Privacy Commissioner Order No. 26 (1994) at 7.
- 12 Order No. 1, see note 9 at 10.
- 13 British Columbia Information and Privacy Commissioner Order No. 11 (1994) at 12.
- 14 Order No. 11, see note 13 at 10.