THE VANISHING RECORD

A report on needed improvements to

British Columbia's *Freedom of Information*

and Protection of Privacy Act

With 67 recommendations for reform

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A presentation by Stanley L. Tromp to the B.C. Special

Legislative Committee to review the *FOIPP Act*

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A shorter oral version of the presentation below was spoken to the Committee on Nov. 9, 2015. See https://www.leg.bc.ca/documents-data/committees-transcripts/20151109am-FIPPAReview-Vancouver-n6

Executive Summary

There are three urgently needed reforms (amongst many others) for British Columbia's *Freedom of Information and Protection of Privacy Act.* The first concerns the misuse of *FOIPP Act* Section 13, policy advice and recommendations, which is being broadly applied in ways never approved by the B.C. legislature when it passed the statute in 1992.

The *Act* needs to be amended to clarify and emphasize that Section 13 cannot be applied for facts and analysis, only for genuine advice. The section also requires a harms test, wherein a policy advice record can be withheld only if disclosing it could cause "serious" or "significant" harm to the deliberative process. The best models can be found in the FOI laws of South Africa (Sec. 44), and the United Kingdom (Sec. 36).

The second problem is that public bodies - such as UBC and BC Hydro - have been creating wholly-owned and controlled puppet shell companies to perform many of their functions, and manage billions of dollars in taxpayers' money, whilst claiming these companies are not covered by FOI laws because they are private and independent – a form of "information laundering."

The *Act* needs amendment to state that the its coverage extends to any institution that is controlled by a public body; or performs a public function, and/or is vested with public powers; or has a majority of its board members appointed by it; or is 50 percent or more publicly funded; or is 50 percent or more publicly owned. This includes public foundations and all crown corporations and all their subsidiaries.

The third problem is that of "oral government" – whereby government officials do not create or preserve records of their decisions, actions or policy development because they do not wish such records to be publicized through the FOI process.

The case of the triple deletion of emails related to the missing women on the Highway of Tears was expertly analyzed in the report *Access Denied* in 2015 by the B.C. Information and Privacy Commissioner Elizabeth Denham. Then former Commissioner David Loukidelis thoroughly reviewed the matter in a new report, with exemplary recommendations for future record best practices - all of which should be implemented.

The B.C. *FOIPP Act* should be amended to add a duty for public bodies to document key actions and decisions based on the definition of "government information" found in the *Information Management Act*.

In sum, British Columbia in many ways has fallen behind the rest of the world in FOI law and practice. Yet if it wished to, this province could be the world leader on these subjects. This Committee is well placed at this historic time to effect real change. As well, the current premier based her leadership campaign on open government and transparency, and now is her chance to demonstrate it.

THE RIGHT TO KNOW

The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry.

> - *Mr. Justice La Forest, speaking for the Supreme Court of Canada, Dagg v .Canada (Minister of Finance), 1997*

After I had been confirmed as federal Information Commissioner, I met with the former Commissioner, John Grace, to get his advice. One thing he said struck me in particular; he said that in his seven years as Privacy Commissioner and eight years as Information Commissioner (a total of 15 years spent reviewing the records which government wanted to withhold from Canadians) he hadn't seen a really good secret.

My experience is much the same over the first year of my term. For the most part, officials love secrecy because it is a tool of power and control, not because the information they hold is particularly sensitive by nature.

> - *Federal Information Commissioner John Reid, Remarks to CNA Publishers Forum on Access to Information, Nov. 25, 1999*

The government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in *FOIA,* and to usher in a new era of open Government.

- *U.S. President Barack Obama, executive order, first day in office, January 21, 2009*

We will bring in the most open and accountable government in Canada. I know some people say we'll soon forget about that, but I promise that we won't!

- *Newly elected B.C. premier Gordon Campbell, victory night speech, 2001*

We're committed to being the most open government in Canada by May 2013.

- *B.C. premier Christy Clark to Vancouver Sun, October 26, 2011*

Open government is about giving people access to the information that they need to participate and to help us find solutions to the issues that affect us all. After all, it's taxpayers' money and it's taxpayers' information. It's time to open up government.

- *B.C. premier Christy Clark in video posted on YouTube, July 18, 2011*

INTRODUCTION

Good morning. I am pleased and honoured to be here today to speak, for freedom of information and protection of privacy law is one of the most important and interesting subjects you will ever deal with, because it concerns the health of our democracy, and the citizen's relationship to the state. Let me just note that I am speaking personally and not behalf of any organization.

I recall speaking to a similar B.C. legislative review of this law chaired by MLA Rick Kasper in 1998, then one by Blair Lekstrom, then Ron Cantelon, and now at the fourth such review today. FOI in legal study and journalistic practice has been my life's main work for the past twenty years, and perhaps it will be for years to come.

It began for me when I was a student at Langara College journalism school and I heard that the college had commissioned a report on the seismic condition of the building. But the building manager at the time refused to release it, despite the students' right and need to know if the roof could collapse on their heads during an earthquake.

In a most imperious manner, he told me, "The report is technically too complex for you to understand, and I don't have time to explain it to you." The B.C. FOI law came into force a year later, which meant that such a refusal would have been impossible thereafter. But this event instilled in me a profound opposition to government secrecy from then on.[1]

Later when I was with *The Ubyssey* student newspaper, we waged and won a very costly five year legal battle to view UBC's exclusive marketing contract with Cola-Cola. (See chapter 12.) Since then I have had to push for FOI record releases through two dozen rulings from the Information and Privacy Commissioner's office and six court cases. You can read about 100 of my FOI news stories on my website at http://www3.telus.net/index100/trompfoistories. I also wrote *Fallen Behind: Canada's Access to Information Act in the World Context* in 2008, the first book to cross-reference the FOI laws of every nation and Canadian province.

The news media act as a surrogate for the citizens, who have neither the time nor expertise to obtain the records for themselves. With Canada's ineffectual FOI laws, we can produce far fewer FOI news stories than the American press does. In fact I often use the FOI law of Washington State, and the contrast in service with B.C. is like night and day. The loss of hundreds of such

[1] In fact, the Victoria legislature's seismic report, one that revealed that, unless it spent $250 million in upgrades, the buildings could collapse during an earthquake upon the 500 people who work there, and cause civil unrest. The Speaker's office blocked access to the report by misapplying four exemptions of the law, but upon my appeal gave it up 14 months later (later saying it kept the report private because it didn't wish to upset the public). Still it continues, as *Vancouver Courier* reporter Bob Mackin was denied Vancouver city hall's seismic condition on the Burrard Street Bridge, until he appealed, and the Information Commissioner in 2014 ordered it released in Order F14-37, after city hall had - in a scattershot, try-anything manner - misapplied *five* exemptions of the *Act*. (This seems an obvious time to apply Section 25, the public interest override.) Yet does anyone believe there is any legitimate excuse to withhold quake reports from the public?

untold and untellable news articles in the public interest that might have been possible amounts to a world of lost opportunities.

We too often forget the public paid for the production of these records, millions of them, and so they are for that reason as much the public's *property* as are roads, schools, and bridges. (The public hence should not have to pay for their production twice, through FOI fees.)

One serious flaw of this nation is that open government is simply an un-Canadian concept, and it has never been a part of our political culture. Canada's pre-eminent FOI requestor Ken Rubin asserts that Canadian freedom of information laws are misnamed, for their main undeclared purpose is not to grant the public access to records, but to *codify secrecy*.

I once doubted his assertion but now am a bit less certain. Our FOI laws are so top-heavy with overbroad exemptions, which are in turn so heavily overapplied in practice, he says, that it seems as though the law was really another *Official Secrets Act* by another name. Even if this is not so, I believe that it is too often interpreted and applied by officials as it if was.

Back in 1993 when the *FOIPP Act* came into effect (and the standard two-year governmental FOI honeymoon period ended), I knew this would be a very long road. In 2010 I proposed 67 recommendations for reform; the reason I have to re-attach them to this submission is that none were implemented since then. Not one. As well, the best recommendations of the first three FOI review committees were shelved by premier and cabinet and never acted upon.

When it was passed, British Columbia's *Freedom of Information and Protection of Privacy Act* was hailed by some FOI commentators as "the best in North America." Yet since then, in its practice, several flaws and shortcomings have become apparent, and the need for certain amendments are obvious. While it remains overall amongst the best FOI laws in Canada, it is still a very modest achievement within the world context.

In fact, it is even not the best in Canada in every aspect, for some provinces' FOI laws, e.g., that of Quebec and Nova Scotia, have several sections much advanced over B.C.'s law, and all are well surpassed by Newfoundland's new FOI law this year (as we shall see below). Yet is there any valid reason why the B.C. *FOIPP Act* could not be reformed so as to render it the best transparency law in the world?

Why It Matters

A legislative review of an FOI statute may appear, to some readers, very remote from their practical daily concerns. Why, in fact, should they care if we have an effective FOI law?

As a kind of answer, I have collected and posted on my website summaries of B.C. news stories from the past two years on issues as diverse as health, safety, government waste, public security,

and environmental risks.[2] They all share two common features: all reveal issues vital to the public interest - *i.e.,* not merely topics the public "might find interesting" - and all were made possible through B.C. *FOIPP Act* requests. On occasion we need to view the human face on abstract legal questions, as we can here.

FOI activists in India (some of whom have been killed for their work) have adapted the slogan "the Right to Know is the Right to Live." They invoked the term in the broad human rights sense, but it later occurred to me that it could be applied in a literal manner as well. In response to FOI requests, the B.C. media (the last three examples below are of mine) have reported that:

> • British Columbia Coroners Service statistics obtained through FOI note that at least 54 people have died on SkyTrain tracks and platforms since 1985, yet there is no plan to retrofit any Skytrain platforms with barriers to stop people from falling or jumping on tracks.
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> • A briefing note prepared for the B.C. Housing and Social Development Minister advised there would be "significant" fire safety concerns with five and six storey wood-frame buildings - yet the government still moved ahead with its plan to permit the construction of those buildings.
>
> • Many of the trucks used to make B.C.'s highways safe are themselves unsafe. The violations committed by the private heavy commercial vehicles are the type of infractions targeted under a new safety program announced by the provincial government.
>
> • B.C.'s Agriculture Ministry warned the poultry industry two years ago that if farmers didn't take biosecurity measures more seriously, B.C. could face a bird-flu outbreak within months of the 2010 Olympics.
>
> • Documents show that scores of accidents at B.C. ski resorts go unpublicized and that visitors are far more likely to be injured while loading, unloading, or just falling off a lift. The B.C. Safety Authority recorded 106 "reportable incidents" at ski hills in 2008.
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> • The *Vancouver Sun* has made inspection reports on daycare centres and nursing homes (some revealing serious problems) available in online databases.
>
> • A chronic shortage of specially trained nurses kept overtime costs for B.C.'s two largest health authorities at more than $70 million a year, with their exhaustion creating potential impacts on patient health, as the B.C. Nurses Union president said 16-hour shifts are the new norm.
>
> • Many B.C. doctors are not reporting on the children they immunize, and children could be at risk of an "outbreak of vaccine preventable diseases" if immunization rates drop too low due to health workers who disparage vaccinations to parents, a government audit said.

[2] Some such summaries can be found at my 2010 submission to the last BC FOIPP review, *The Road Forward*, pgs. 10-12, at http://www3.telus.net/index100/theroadforward, at http://www3.telus.net/index100/bcfoi2008, and at http://www3.telus.net/ index100/bcfoi2009

• An audit by the Ministry of Finance highlighted many safety violations - including fire hazards, potential carbon monoxide poisoning and natural gas leaks, with "general neglect over a long period of time" - at Vancouver Community College.

From such examples, one may realize that while debating esoteric points of the B.C. *FOIPP Act* that there is a fact that one can easily lose sight of but what would ideally remain the primary focus: how often freedom of information is not about documents in filing cabinets nor data in digital storage, but about real issues impacting everyday people. The cases above also belie the most pernicious myth of all: "What the people don't know won't hurt them."[3] The costing debate could then shift from "Can we afford to have an FOI law?" to "Can we afford not to?"

These texts require a second look, for when they appear in a daily newspaper they may be forgotten within days, but many should not be, because we could be living continuously with the unresolved problems that they have raised. In fact, many of the problems revealed above are so serious that one can wonder why government did not publish them proactively per the *Act*'s Section 25 (the Public Interest Override) instead of waiting for *FOI* requests.[4]

The stories can serve as an antidote against despondency or cynicism regarding the weakened B.C. FOI system, for they show how journalists can still overcome the barriers of bureaucratic and political resistance to produce valuable results. While these are impressive enough, imagine how much more could yet be achieved with an FOI law reformed up to global standards, and the potential loss of such stories if the system deteriorates further.

British Columbia in the World Context

Most of the arguments regarding B.C. *FOIPP Act* reform are by now familiar. So I wish to consider another perspective on the issue, one not explored yet: we need instead to continuously reframe and re-conceptualize the *Act* in the light of rapidly-changing international and historical contexts. This could positively alter what British Columbians come to expect, perhaps even

[3] The federal *ATI Act* has been well utilized also. For example, *ATIA* expert Ken Rubin has struggled for years in the courts to obtain records on meat inspections and airline safety. When the media applied through FOI for notes on conference calls during the 2008 meat listeriosis outbreak which killed 20 people, Ottawa illegally delayed the records' release for months. Through *ATIA* requests, CBC radio reporters acquired a key database from Health Canada that chronicled cases of adverse drug reactions, for a news story showing that thousands of seniors were dying each year from the drugs prescribed to them by doctors. In 2005, as a result of their efforts, Health Canada made this database available to the public online, a move that might have saved lives since then; I regard this as the greatest usage of an FOI law in this country to date, one result that alone would have justified the law's passage.

[4] Some such articles have also prompted regulatory improvements. Moreover, not every FOI story necessarily reveals a scandal, but can still be valuable in educating the public on the scope of a little-known issue, and on how the government operates.

demand, their own rights to information. Exemplary sections of our *FOIPP Act* have been adopted in other jurisdictions' FOI laws, so why not visa versa?

Since 2004 our knowledge and experience of the FOI subject have multiplied, and we can now draw more accurate conclusions about it. To this end, I created the *World FOI Chart* in 2008 as an aid to FOI scholars, and posted it at http://www3.telus.net/index100/foi

This chart cross-references by topic key primary documents on freedom of information law, including texts of 73 national FOI laws, 29 draft FOI bills, 12 Canadian provincial and territorial FOI laws, the commentaries of 14 global and 17 Canadian political organizations. (It is also the basis of my report *Fallen Behind: Canada's Access to Information Act in the World Context*, and for a global index of FOI rulings, both posted there.) On the chart, upon scrolling down to Row 15, you can compare B.C.'s *FOIPP Act,* section by section, to all other laws.

The whole ground has shifted. Previously we did not have clear global FOI standards that each FOI law could be measured besides, but now we do. British Columbia surely needs to at least raise its own FOI law up to the best standards of British Commonwealth nations - and then, hopefully, look beyond the Commonwealth to consider the rest of the world.

I ask B.C. legislators to consider that a positive and workable idea could be welcomed whatever its source. For example, in Mexico's FOI statute, "information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake." As well, its agencies "must place computer equipment at the disposal of interested persons so that they may obtain information directly or by printing it out." In Serbia's law, agencies must respond to FOI requests in 15 days, except in cases where there is a threat to the person's life or freedom, protection of the public health or environment, in which case the reply must be made within 48 hours.

Some senior bureaucrats and politicians habitually warn of the grievous harms that could occur if the public's FOI rights were expanded in law. From the experience of other nations, we can see if these speculative injuries actually came to pass, or not.

Even the United Kingdom – B.C.'s model for parliamentary secrecy – has well outpaced us on many critical points. Some Canadian officials, to deter FOI reform, still invoke the great tradition of Westminster-style confidentiality. If so, how do they explain why the UK *Freedom of Information Act* has a harms test for policy advice and cabinet records, a 20 day response deadline, a 30 year time limit for legal advice records, and coverage of a vastly wider range of quasi-governmental bodies – all features lacking in our B.C. *FOIPP Act*?

The best Commonwealth examples for Canada to generally follow for inspiration are, I believe, the access laws of India and South Africa - in most but not all their respects. In response, would not critics laugh and call it absurdly naïve to assume such provisions will be enforced or possibly affect any reality on the ground? The statutes might be just "paper tigers," they say, for

recalcitrant officials can (and sadly do) find countless means to sabotage a law, such as by creating harmful regulations, or undermining its spirit by fixating on its letter.

Should these facts discourage us? Yes, and no. Although fully aware of such objections, I would reply that statutes are comparatively more important and enduring than actual governmental practices of the day. The relationship is not reciprocal - that is, there are many good FOI laws that do not result in good practice, but one very rarely sees good FOI practice without a good FOI law first in place as a foundation for it.

The Main Obstacle

But not only politicians are trying to curtail the *Act*'s powers. In fact, the main initiative likely lies elsewhere: In its own submission to the 2004 review, the provincial bureaucracy had claimed that it was only trying to "fine-tune" the *Act*'s language, so that its "original intent" would be better expressed. In response, the information commissioner's aide, in a letter of April 2004, noted "very grave concerns" in a stern reply:

> It is objectionable for appointed public servants who are subject to *FOIPPA* to, a decade after *FOIPPA*'s enactment, purport to be identifying and expressing the 'original intent' of *FOIPPA*, an Act of the Legislature. Talk of fine-tuning the law or returning to its original intent disguises the real effect of the [bureaucracy's] recommendations discussed below - to reduce the public's right of access, and impair openness and accountability.

As James Travers wrote: "Twenty-three years after access to information was born, politicians and bureaucrats continue to kill its spirit by arguing endlessly over the letter of the law. So determined is that resistance that a cottage industry now thrives counseling ministers, their staff and the civil service on how not to share public information with the public."[5] In B.C. some external law firms specialize in expert legal maneuvers to block FOI requests, overriding the spirit of the law by torturing its letter.

A 1993 FOI training video for B.C. civil servants called *Finding a Balance* says, "We must realize that embarrassment is not an exemption. Our culture is changing to one of openness" - yet this point is forgotten by many. Some FOI staff have a reverse attitude – one not of "how I can I get it out?" but "how can I stop it getting out?" as they keenly scour their FOIPP manuals for the law's exemptions they can apply to the widest areas (almost as if donuts and Swiss cheese were valued most not for their substances but their defining cavities). In his final annual report, David Flaherty, B.C.'s first information and privacy commissioner, wrote that:

> Senior government officials have complained that they were no longer free to give candid advice to their political masters, because of the risks of disclosure of what they write in briefing notes. It was almost as if democracy was being undermined by too much democracy.
>
> I was actually told by a senior public servant that the public's right to know was limited to what they could ask for through their elected representatives. When I countered that this sounded too

[5] *Harper: Do as I say, not as I do*, by James Travers, *The Toronto Star,* April 13, 2006

much like the BBC-TV series, *Yes Minister,* there was unabashed acclaim for Sir Humphrey as an outstanding public servant.

One hopes this hard line may have softened since then. Yet there remains the obvious imbalance of power, with senior bureaucrats and crown lawyers, some opposed to FOI laws, potentially having the ear of ministers continuously, as opposed to members of the public whom politicians might hear for one day every six years at a legislative hearing. Above all, I plead with the bureaucracy not to oppose needed B.C. *FOIPP Act* reforms (particularly on Sections 12 and 13).

There are other approaches. On his first day in office - January 21, 2009 - U.S. President Barack Obama issued an Executive Order to all government agencies to reverse the default secrecy position of his predecessor. A similar public order from the premier to the B.C. public service would be most welcome.

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(1) Section 13, Policy Advice - The Bureaucratic Interest Override

Section 21, permitting the exemption of advice and accounts of consultations and deliberations, is probably the Act's most easily abused provision. - Information Commissioner Inger Hansen on federal *ATI Act* Section 21 (the equivalent of B.C. *FOIPP Act* Section 13), 1987–1988 Annual Report

Unfortunately, secrecy, once accepted, becomes an addiction – it is difficult to kick the habit. - Edward Teller, nuclear scientist, 1973

There is something addicting about a secret. - J. Edgar Hoover, FBI director

The most widely misapplied section of the B.C. *Freedom of Information and Protection of Privacy Act* is surely unlucky number 13, for this section creates a wide opportunity of secrecy for "policy advice or recommendations developed by a public body or for a minister."

How did we arrive here? The B.C. Court of Appeal set a dangerous precedent in 2004 when it ruled on an FOI request dispute: the "Dr. Doe" case of the B.C. College of Physicians and Surgeons. The court held that Section 13 of *FOIPP* was not limited to recommendations. Instead, the investigation and gathering of facts could be exempted from access pursuant to Section 13, regardless of whether or not any decision or course of action was actually recommended.

In the Dr. Doe case, the bureaucracy pulled off a legal coup - one contrary to the public interest – with arcane, ingenious arguments that bare facts somehow implicitly prompt a policy direction, and the two are inseparably "interwoven." Today they take refuge in these rulings, for which they are as profoundly grateful as to manna from heaven.[6]

[6] In early 2015 the Supreme Court of Canada had the opportunity to pronounce on the nature of the policy advice exception in a case called *John Doe v. Minister of Finance*. In that case, the high court held that a series of drafts were covered under Sec.13 of the Ontario law (which also covers policy advice)

As the Commissioner told your committee: “This interpretation broadens the application of Section 13 such that any document compiled in the course of considering alternative options is effectively exempt from disclosure under FIPPA. This frustrates the intended balance that the Legislature sought in enacting the provision.”

Later, some other Canadian courts disagreed with the B.C. Dr. Doe ruling. The B.C. Commissioner tried to appeal to the Supreme Court of Canada to overturn the ruling, but he was denied leave to appeal, without explanation. Reform seemed a forlorn hope; *The Richmond News* reported in May 2007 that the minister for B.C. FOI policy said "the government disagrees with him, and agrees with a court decision that upholds the government's right to deem policy advice confidential."

So, by now, officials use the policy advice exemption in practice as a *de facto* all-purpose master key that can lock up almost any FOI door, or a catch-all net hanging beneath all the other exemptions, and it has become like a spreading epidemic that urgently needs to be quarantined. It seems to be a well-known joke amongst officials that if all else fails, just invoke Section 13 and hope for the best. This surely happened because the drafters of the B.C. *FOIPP Act* in 1992 did not foresee Section 13’s usage spreading so far (indeed as former Attorney General Colin Gablemann, who helped pass the law, said in a speech to the 2007 BC Information Summit[7]).

While Section 25 is known as the Public Interest Override, I would describe Section 13 as, in effect, “the Bureaucratic Interest Override,” an inverted Section 25 (except this former one’s usage never expressed the will of the legislature but the contrary). It is rather like Section 13 versus Section 25, with the first being applied hundreds of times more often than the second. Although such a match is no contest, I do not call for this balance to be reversed entirely, just more equitably distributed, for in the difference between the politician’s inner counsel (internal advisors) and outer one (the public), the former is too often more influential.

Why is this occurring? Perhaps because records such as internal audits serious reveal internal failures and the need for costly solutions, but more often can generate political embarrassments and inconveniences, and secrecy is a tool of power and control.

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and did not have to be released to the requester. *John Doe v. Ontario (Finance)* 2014 SCC 36. It is noteworthy that the usage of this exemption is rising in Ottawa as well; in her last 2014-15 annual report the information commissioner found that the ATIA Sec. 21 (policy advice) was used *10,000 times* last year.

[7] Mr. Gablemann: “Section 13 was so clear and obvious that there was not a word spoken by any member of the House on it during the committee stage debate. Not a word! . . . . I have to tell you that the Appeal Court quite simply failed to understand our intention - the intention of the legislature - when using these words as we did…. A government which believes in freedom of information would have introduced amendments in the first session of the legislature after that Appeal Court decision to restore the act's intention.”

The PHSA audits

How does it affect us in practice? What follows is the worst misuse of Section 13 I have seen.

For many years (in my view), UBC and the BC Lottery Corporation[8] were tied for the status of the most obstructionist FOI branches in the province, but that prize has now been claimed by the Provincial Health Services Authority, the PHSA. This body oversees the B.C. Cancer Agency, the B.C. Centre for Disease Control, the B.C. Mental Health Society, the Children's and Women's Health Centre, and more, all with $2 billion in annual revenue.

In 2011 I applied though the FOI for summaries of five of its internal audits. The PHSA refused under Section 13, and I appealed to the Commissioner. The office in Order F12-02 ordered two of the summaries released in full, and parts of the other three. (The PHSA had also incorrectly claimed Section 12.) Even the audits' topic headings were so sensitive that the Commissioner's adjudicator wrote he could not mention them in his public order. The PHSA then appealed to overturn the Order in a judicial review in BC Supreme Court.

I listened in the courtroom as lawyers argued the Dr. Doe. ruling was binding. Utilizing lawyers at taxpayer's expense (to block access to audits produced at the same taxpayers' expense), the PHSA made its arguments using in-camera affidavits, which we could not view or challenge. Madame Justice Dardi agreed with the PHSA (in Ruling 2013 BCSC 2322[9]) and the health authority won. Yet the public lost. After that court ruling, I applied for four new audits, and PHSA denied them all in full, citing that ruling on Section 13. And so it goes.

It is crucial to note here that, by stark contrast, all the other B.C. health authorities gave out their internal audits by FOI and did not claim Section 13. As with most FOI exemptions, Section 13 is discretionary, which that means the agency *may* but not *must* withhold the records, and is called upon here to exercise its own judgement. So then often it becomes not so much a legal problem as an attitudinal one; it seems apt here that Rob Botterell, the senior public servant who developed the FOIPP Act in 1992, told your Committee on Nov. 9 that in practice in B.C., "discretionary exemptions effectively have been converted into mandatory exceptions." As well, this would have been the ideal time to apply Section 25, the Public Interest Override, as the records concern public health. (As a last resort, I hope the Premier would publicly urge the PHSA to release its audits.)

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[8] FIPA reported in 2012 that the BC Lottery Corporation was appealing three of six OIPC disclosure orders to BC Supreme Court, with a likely legal expense of hundreds of thousands of dollars. https://fipa.bc.ca/bc-lottery-corporation-goes-all-in-to-avoid-foi-requests-4/

[9] https://www.oipc.bc.ca/orders/1197

One can see two samples of the growing misuse of section 13 in Appendix 1 of this report, and there are many other examples such as:

> • The B.C. government hired consultant George Macauley to do a highly secretive review of the FOI act in 2005. I filed an FOI request for the 27 public and private entities' submissions on their preferred FOI-reforms, and the government denied half the texts, claiming Section 13. The Commissioner's office ruled against the section's application, and the B.C. government appealed this ruling to judicial review.[10]
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> • The Health Ministry used Section 13 to censor Fraser Health Authority chairman Keith Purchase's resignation letter. Purchase resigned in 2006, expressing frustration with inadequate funding for the health authority. The white-out rationale is nonsense, for a resignation letter is not "policy advice developed by a public body" as per section 13.
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> • In the *Province* newspaper, Michael Smyth's headline to his May 2006 story was apt: "Liberals take secrecy to insane new heights." The government was now refusing the NDP's routine FOI requests for Premier Campbell's question-period briefing notes (i.e., pre-rehearsed sound bites), citing Section 13, despite always having released them before.

The government hides behind the Dr. Doe ruling (and any FOI ruling it favours, such as the Justice Leask ruling on SFU's FOI-exempt companies) with faux helplessness, a false posture of legal impotence, saying "The court has spoken and we must obey it." Courts do interpret the law *as written*, indeed. But Section 13 is poorly written, and so it *can* be rewritten, and it must be.

In reply, the B.C. government may try to reassure us by replying that "Section 13 is well written, yet in some cases it may have indeed been misapplied. But if so, just trust us to correct such misapplications on a case-by-case basis, and we can also provide better regulations and guidance for it." This view is mistaken, for the problem is now far too systemic and widespread in practice for such ineffectual measures, and so the section needs to be re-worded.

I expect it will be politically the most difficult section to change (except perhaps section 12), the one privilege most treasured by unelected bureaucrats, who far outlast elected politicians. I emphasize that I am not calling for the repeal of the policy advice exemption (as some may mistakenly suggest I do) but only its reform, so it is limited and constrained, unlike today. The amount of information in the public interest lost over the past 20 years due to the overapplication of this section is incalculable. We have all been too slow to notice and catch up to its wide misuse, and if not repaired, it will only grow worse.

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[10] In its order, the OIPC could not resist noting the "irony" of the government's usage of Sec. 13 to conceal records of advice on how to amend Sec. 13 (a Kafkaesque form of built-in defense).

How to reform Section 13

Ideally, records that might attract Section 13 would be divided into two parts – [1] facts and analysis, and [2] genuine advice and recommendations. The agency should release the first part and consider withholding some of the second; for then the second part (true advice) would itself be subdivided into two categories – [2a] that which would cause no harm to the deliberative process if disclosed, i.e., would pass a harms test, and so would be released; and [2b], that which would likely cause some such harm, and so would be withheld.

Federal information commissioner Suzanne Legault in 2015 well advised of the *Access to Information Act:* "21. The Information Commissioner recommends adding a reasonable expectation of injury test to the exemption for advice and recommendations." Also, in 4.23, "The Information Commissioner recommends reducing the time limit of the exemption for advice and recommendations to five years or once a decision has been made, whichever comes first."

The FOI of the law of the United Kingdom (B.C.'s parliamentary model) is advisable:

> 36. (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act [….]
>
> (b) would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation, or (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.[11]

I also endorse Recommendation #11 of the 2004 B.C. Legislative FOI review committee:

> 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.

In the early 1980s (and still in some forms recently), Canadian Treasury Board guidelines set a harms test for its *ATI Act* policy advice exemption Section 21, stating that records which would otherwise be exempt under the section should only be withheld if their disclosure would "result in injury or harm to the particular internal process to which the document relates."

Positively, one Canadian administration put a harms principle into writing. But such guidelines have not the legal force of a statute, of course, and could be annulled any day; hence an FOI law amendment to guarantee this right is essential. There is more guidance here:

[11] Scotland's exemption, in its FOI law Section 30, echoes the terms of the U.K. one but is stronger; here, such release must "prejudice substantially" the effective conduct of public affairs.

• Commonwealth Secretariat (of which Canada is a member), *Model Freedom of Information Bill,* 2002:

> Formulation of policy. 26.(1) A document is an exempt document if the disclosure of the document under this Act would prejudice the formulation or development of policy by government, by having an adverse effect on (a) the free and frank provision of advice; or (b) the free and frank exchange of views for the purposes of deliberation.
>
> (2) Where a document is a document referred to in subsection (1) by reason only of the matter contained in a particular part or particular parts of the document, a public authority shall identify that part or those parts of the document that are exempt.
>
> (3) Subsection (1) does not apply to a document in so far as it contains publicly available factual, statistical, technical or scientific material or the advice of a scientific or technical expert which analyses or gives an expert opinion of such material.[12]

Recommendation: Amend Section 13 to include a harms test, wherein a policy advice record can be withheld only if disclosing it could cause "serious" or "significant" harm to the deliberative process. The best models can be found in the FOI laws of South Africa (Sec. 44), and the United Kingdom (Sec. 36). Also clarify and emphasize that Section 13 cannot be applied for facts and analysis.

Enact FIPA's recommendation that "the Section 13 advice and recommendation exception be amended to include only information which recommends a decision or course of action by a public body, minister or government."

Access should be denied only when disclosure would pose a serious risk of harm or injury to a legitimate aim, with the harms explicitly described. Unfortunately, some FOI laws include exemptions that are not subject to harm tests, which are often referred to as "class exemptions."

The broadly sweeping Sec. 12 and 13, for cabinet records and policy advice, were presumably added to prevent some sorts of harm. Our problem is that these (supposed) harms as they stand in our FOI law are implicit and undefined, whereas they need to be made explicit and detailed (and in terms understandable to the general public beyond FOI experts); only in this way can we separate the cabinet and policy records whose release might cause such harms and those that would likely not, and release the latter. I believe this was the intent of the legislature in 1992 when it passed the Act.

[12] Similar points were made in *Open and Shut*, the report by the *MPs' committee on Enhancing the Right to Know*, Ottawa, 1987: "3.19. The Committee recommends that Section 21 [policy advice] of the *Access to Information Act* be amended not only to contain an injury test but also to clarify that it applies solely to policy advice and minutes at the political level of decision making, not factual information used in the routine decision-making process of government."

Time limits for the policy advice exemption

One province has a shorter time limit for withholding records under the policy advice exemption than the 10 years prescribed in the B.C. *FOIPP Act* – Nova Scotia's FOI law in Section 14 permits the records' release in 5 years, and this is advisable for our *Act* also.

The Quebec FOI law - as a reformed B.C. *FOIPP Act* could do - includes an enlightened feature in one portion of its policy advice exemption, one that acknowledges how publicity can reduce record sensitivity:

> 38. A public body may refuse to disclose a recommendation or opinion made by an agency under its jurisdiction or made by it to another public body until the final decision on the subject matter of the recommendation or opinion is made public by the authority having jurisdiction. The same applies to a minister regarding a recommendation or opinion made to him by an agency under his authority.

Some other nations' examples are at least worth noting. Regarding time limits, interesting sections can be found in the FOI statutes of Latvia, Mexico and Peru, all in which the use of the exemption ends when the policy topic is decided, not 10 years after the fact as in the B.C. *Act*. Peru's law, Article 15B, adds publicity as one deciding element for policy openness:

> The right to access to information shall not include the following: 1. Information that contains advice, recommendations or opinions produced as part of the deliberative or consulting process before the government makes a decision, unless the information is public. Once that decision is made this exemption is terminated if the public entity chooses to make reference to the advice, recommendations and opinions.

As a matter of principle - as in Peru law's cited above - the fact of a policy decision being made public should greatly reduce or eliminate the waiting time for all policy records in an FOI law, for they generally become relatively less sensitive after such publicity.

(As Michael Karanicolas well told your committee: "I will note that India has ruled that disclosure should happen as soon as the decision has been made. . . on the issue of the deliberative exception, generally speaking, in the United States, public bodies looking to invoke this exception are expected to identify a specific decision-making process in order to justify their refusal.")

In some other FOI statutes, time delays are present but short indeed. In Portugal's transparency law, access to documents in proceedings that are not decided or in the preparation of a decision can be delayed until the proceedings are complete or up to one year after they were prepared. Bulgaria's law mandates that policy advice records may not be withheld after two years from their creation.

Recommendation: Amend Section 13 to include a section on the model of Quebec's FOI law Sec. 38, whereby the B.C. government may not withhold policy advice records after the final decision on the subject matter of the records is completed and has been made public by the government.

If the record concerns a policy advice matter that has been completed but not made public, the B.C. government may only withhold the record for two years. If the record concerns a policy advice matter that has neither been completed nor made public, the B.C. government may only withhold the record for five years (on the model of Nova Scotia's FOI law, Sec. 14).

Although ideally there would be no time delay for policy advice on concluded topics in the B.C. *FOIPP Act*, a two year limit would be a tolerable compromise for now.

A note on legal process

> *Governments that try to control information are fighting a losing battle and if they bother trying, will face exorbitant costs.* - Thomas Freidman, *New York Times* International Affairs Correspondent, 1999

Even when the government well knows that doing so is morally indefensible and legally spurious, they will often apply Section 13 anyways – as a cynical tactical game, aware that it has the power to outspend and outlast the applicant for years. If the applicant appeals to OIPC, it takes two years for a ruling. Then if the ruling goes against the agency, it promptly and reflexively appeals to BC Supreme Court, then then if need be to BC Appeal Court, then to the Supreme Court of Canada after that (often using in-camera affidavits which the disadvantaged applicant may not view or challenge when forming arguments). Hopefully by then the applicant will grow weary, with depleted interest or funds, and just go away.

If not, then upon a court ruling, if the court costs are assessed against the applicant, he or she can be financially ruined, pushed into bankruptcy (which is why some FOI applicants dare not engage in FOI litigation, even if they could afford to initiate it). By contrast if costs are assessed against government, it feels nothing, for there is always a bottomless reserve pool of taxpayers' funds to dip into for such legal forays.

As noted by a *Vancouver Sun* columnist[13], in 2009 the Commissioner sought a $400,000 legal budget to cover the growing number of court challenges to his rulings by the B.C. government and other public bodies, up by 50 per cent over 2008. Noting the premier's reversal of his 2001 openness pledge, and his own office's two court challenges of OIPC orders, the column concluded with a commendable idea:

> This hypocrisy is bad enough . . . No wonder [the Commissioner] wants to be able to hire his own high-priced legal help to stand up to all the government-funded lawyers swarming over him and his office.
>
> But from a taxpayers' point of view, I can think of a much better outcome. Let treasury board direct that in future, any government-funded agency hauling [the Commissioner] into court will have its budget docked threefold. Once to pay for government's legal bills. Once to pay for the commissioner's legal bills. And once to cover the waste of court time.

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(2) Peering through "the Corporate Veil"

When is a public body not "a public body"? Which public records are "public records"? How should these concepts be legally defined for freedom of information purposes?

Last July 16, a ministry official told your Committee that "British Columbia's *Act* provides the broadest coverage in Canada. At our last estimate there are 2,900 public bodies that are covered under the legislation." This statement, *per se,* might appear impressive at first glance, but it is in one sense misleading, i.e., many of those 2,900 bodies have been added to the law's schedules – voluntarily and purely at the government's whim - but not in *defining criteria,* by which Newfoundland's FOI law, and much of the world's, is far broader in scope than in B.C.

Over the past two decades, a very serious problem has arisen. Public bodies have been creating wholly-owned and controlled puppet shell companies to perform many of their functions, and manage billions of dollars in taxpayers' money, whilst voicing the fiction that these companies are not covered by FOI laws because they are "private and independent." This form of *pseudo-privatization* is one that FIPA well referred to as "information laundering."

The problem is that in setting up these FOI-exempt companies, the public bodies wish to enjoy all the benefits and flexibility of using corporate power, yet without accepting any moral responsibility or legal liability for their activities. But they cannot have it both ways. This trend is quietly and adroitly undermining the whole purpose of the FOI law, and unless the problem is fixed now it will only grow worse.

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[13] *A colossal waste of court time,* by Vaughn Palmer, *Vancouver Sun*. Dec. 3, 2009. For example ,the B.C. government spent $125,000 on its failed eight-year FOI legal battle to keep its IBM workplace service contract secret from FIPA, the type of record that would be posted online in other countries.

On the potential for such entities to multiply (as a result of the SFU and UBC legal victory), lawyer Dan Burnett acting on behalf of FIPA told the media: "When you think about it, the potential for abuse is huge. It could be the black hole that swallows up FOI."[14] One expects this arises because B.C. legislators in passing the *Act* in 1992 did not foresee this quandary.

The kind of accountability that these entities need can only come from public transparency.[15] After the Vancouver School Board's private companies lost public money in failed overseas business adventures, the education minister in 2007 sent out a press release pledging to add these companies to the FOIPP Act's coverage, but this was never done. Why not? Yet B.C. local municipalities' subsidiaries are covered by the Act (although regrettably the level of "ownership" is not specified there; I urge that it be set at a 50 percent minimum).[16]

Please consider this: companies owned by B.C. crown corporations were related to two major financial scandals of the 1990s: First, "Hydrogate," by which BC Hydro formed a subsidiary, IPC International Power Corp., to invest in a Pakistani power project. Second, BC Ferries' $500 million fast ferries loss through its subsidiary Catamaran Ferries International.

Today, BC Hydro claims that two of its wholly owned companies are FOI-exempt, and so they denied my FOI request for their records: Powertech Labs (which specializes in clean energy and engineering consulting) and Powerex (a trading partner, buying and supplying physical wholesale power, natural gas, and environmental products across North America).

There have been frequent complaints that even B.C. parent crown corporations are too little accountable to their respective ministers in Victoria (much less the media and public); now, their FOI exempt companies move that secrecy to a new level, from semi-opacity to total opacity.

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[14] *SFU and UBC seek to shield commercial info*, by Charlie Smith. *The Georgia Straight*, May 28, 2009. http://www.straight.com/article-223466/sfu-and-ubc-seek-shield-commercial-info

[15] I emphasize that I am not arguing here against the decision to privatize some public services - a choice that might work well or not, on a case by case basis - only the harmful loss of public transparency that too often accompanies that decision, but should not. Privatization of public functions has occurred in other countries also, but the global standard is to include them under the FOI laws.

[16] One new problem is that cash-strapped local public bodies are encouraged to become more "entrepreneurial" in seeking new funds. Hence, they develop fantasies of becoming global business wheeler-dealers; but as they forge international business partnerships (as did the VSB), they are often hopelessly out of their depth in the global corporate "shark tank." Unlike inept gamblers at casinos who believe they can win by throwing good money after bad, and incur staggering losses, their failures are paid for by taxpayers - hence it is so vital that these entities are open to external scrutiny by FOI requests, which might even avert such losses.

As well, the B.C. government excluded 2010 Olympics Organizing Committee (VANOC) from FOI coverage, even though in the U.K. a similar entity that managed the 2012 London Olympics, the ODA, was covered by the British FOI law.[17]

Such entities' FOI coverage was urged by the last B.C. review committee in 2010, the Information and Privacy Commissioner, FIPA and many others – all to no avail. In a 2011 media interview, the minister for FOI policy Margaret MacDiarmid said: "It seems reasonable to me that they would be covered. So we're certainly looking at it, but we need to do a consultation, because we have to watch for unintended consequences." Deplorably, the government then voted down MLAs' private member's bills that would have fixed the problem.

Regarding the addition of entities by Schedules, *FOIPP Act* Section 76.1(1) permits but does not prescribe this:

> 76.1(1) The minister responsible for this Act may, by regulation, amend Schedule 2 to do one or more of the following:
>
> (a) add to it any agency, board, commission, corporation, office or other body
>
> (i) of which any member is appointed by the Lieutenant Governor in Council or a minister,
> (ii) of which a controlling interest in the share capital is owned by the government of British Columbia or any of its agencies, or
> (iii) that performs functions under an enactment; [. . . .]

If the word "may" above was amended to "must," this would be welcome, but even this would barely half-solve the problem, as many key defining features (such as "performing a public function") are absent.

Governments usually resist a criteria-based approach because they wish to enjoy the discretionary power of excluding any entity they wish from the FOI law's scope. "The very purpose of the *Access to Information Act* was to remove the caprice from decisions about disclosure of government records," said former Information Commissioner John Reid. "Now we must remove the caprice from decisions about which entities will be subject to the Act."[18] The same principle applies to the B.C. *FOIPP Act,* and Victoria's caprice of "may."

[17] Moreover, when quasi-governmental entities do business amongst themselves, the opacity can be absolute. In 2008, the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games (VANOC) contracted the Vancouver International Airport authority (YVR) to be an official supplier. Both of these entities were not covered by FOI laws, provincial or federal, and so their contract and records can be secreted.

[18] Information Commissioner John Reid, *A Commissioner's Perspective – Then and Now.* Nov. 6, 2005

Shielding UBC's wholly-owned corporate entities

The problem was heavily underlined in 2006 when I filed a request to the University of British Columbia under the FOI law. I asked for meeting minutes, annual reports and salary records of three of UBC's wholly-owned corporate entities.

The first was UBC Properties Investments Ltd. (which controls the UBC Properties Trust), whose self-described mission is to "acquire, develop and manage real estate assets for the benefit of the University." It has a monopoly on all development that happens on campus, manages private rental housing for non-students, and is the landlord for most of the commercial space.

The university's 100 hectares of *public land* was once managed by a real estate committee of the UBC Board of Governors, then devolved to the new private company (then called UBC Real Estate Corp.) in 1988. Ever since then, students and staff have bitterly complained about its secrecy, in regards to the new mini-city arising on site, the mass cutting of trees to make way for it and UBC's building of high-priced condos for sale instead of student rental housing.

The second company, UBC Investment Management Trust, acts as investment manager of UBC's huge endowment fund and its staff pension assets, making decisions worth billions of dollars. The third, UBC Research Enterprises Inc., takes research developed at UBC and creates spinoff companies.

The university denied my FOI request, claiming that the entities are all "independent," and so not under the "control" of UBC as required by the Act. I appealed to the Office of the Information and Privacy Commissioner. UBC and its entities then hired lawyers at public expense to quash the public's right to know.

In 2009 the Commissioner's delegate Michael McEvoy ruled that I should have access to the records, writing, "UBC is found to have control of the requested records.... All three bodies were entities created and owned 100 per cent by UBC and accountable to it."[19]

The case was won mainly because had I quoted from a dozen of UBC's own official websites, which in fact boasted that UBC had a high degree of control over its entities and had appointed their boards.[20]

Students celebrated the outcome (enough so that the UBC AMS issued a premature press release to announce the problem had finally been solved forever). But it was too good to last. UBC, as

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[19] Order F09-06 – https://www.oipc.bc.ca/orders/993

[20] UBC then promptly deleted these key official websites, and then in the appeal stages UBC's lawyers belittled them as items "*allegedly* found on the internet." (Emphasis added.) Fortunately, I had already saved these UBC websites to hard-drive and had printed them as evidence, and later swore affidavits for their veracity through a notary – a sadly necessary cautionary tale for any FOI applicant.

inevitably as the sun rising, appealed the McEvoy ruling to judicial review, as did Simon Fraser University in a similar case.

Then B.C. Supreme Court Justice Peter Leask ruled that such entities were not covered by the *FOIPP Act* because one must not "pierce the corporate veil." UBC's lawyers argued that the Commissioner's office is "an inferior court," and so the Justice Leask ruling should now be regarded as "the law of the province."[21] (I believe this court ruling is so heavily flawed in several ways that it should be disregarded when considering amendments.)

Five days later in the legislature, an opposition party MLA tried to amend the FOI law to fix the problem, and the minister replied that, although appreciative of "the spirit of the amendment," she opposed it, because it would not accomplish its goal. His amendment was rejected.[22]

Ample protections already exist

What are Canadian governments' usual arguments against FOI coverage of such subsidiaries?

Firstly, such so-called "private" companies of public bodies may complain of the risk of competitive harms but the claim is illogical; they cannot suffer competitive harm from FOI releases because *they have no real competition* – i.e., most are monopolies within their parent institution. Consider for example UBC Properties Investments' status on UBC grounds. Private land developers such as Omni or Concert Properties cannot legally demand to come in and compete with UBC Properties Investments to plan the market housing there. I hope your Committee will inquire of such entities: "What competitive harms could result from FOI coverage since you enjoy a monopoly position?"

Secondly, this Committee's chairperson asked a very good question of the AMS last October 16, on whether it matters if the entity has a monopoly position or not. I have an answer to that, which is the key to the matter:

It does not matter at all whether they face competition or not – because they are already fully protected from competitive harm in the FOI law, in section 17 and section 21. The key question to ask these shell companies that oppose FOI coverage can be summed up thus (and which I respectfully urge you to ask them for a specific answer to this specific question): "Why, exactly,

[21] It may be noteworthy that SFU spent $157,144 in legal fees fighting the subsidiary case - while the PHSA spent $149,535 on external legal bills to block my access to its audits by Sec. 13 - money that would be far better spent aiding students or the ill. I believe every public dollar that is squandered on these self-serving legal adventures is a dollar foregone from something worthwhile (besides the great and underrated resource of time).[21] Imagine, for example, if PHSA use their FOI legal bills for patient services, or if instead of spending $157,000 to launch such lawsuits, SFU had used those funds to supply bursaries of $1,000 each to 157 needy students. Which is the better use of public money? Yet I acknowledge that others may argue that the fact these entities won the cases in court somehow legitimizes such legal spending.

[22] See my chronicle of this issue at: http://m.thetyee.ca/Opinion/2012/01/18/FOI-Court-Ruling/?size=

do you assert that B.C. FOIPP Act sections 17 and 21 are insufficient to protect your economic interests?"

One might learn that some responders are not or barely aware of those two exemptions, and may require enlightenment on these. Section 17 (1) begins: "The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body [. . .]" Then Section 21 repeats the same principle for private sector third parties. (Section 17 is discretionary while 21 is mandatory.) Those sections were placed in the law for that very purpose, why else?

If this illogical and indefensible claim of "competitive harms" was accepted, then no federal or B.C. crown corporation would be covered by any FOI law, and *yet they all are*. Indeed, even the most secretive prime minister in memory, Mr. Harper, amended the federal *Access to Information Act* to cover all national crown corporations *and their subsidiaries (*and even some government-created foundations). These would be the national equivalents of BC Hydro's Powerex and Powertech.

So all of the foregoing shows that vague, dark warnings of so-called "unintended consequences" of FOI coverage are (with respect) absolute nonsense.[23] The sole purpose of the call for further study is an eternal stalling tactic, which is the graveyard of reform – as is already shown from the VSB coverage that was promised eight years ago and never done. The government likely hopes this issue will just quietly go away and die, but as you can see from the many urgent submissions people have given to you here about UBC Properties Investments who function as a feudal baron in a gated fortress, there will never be peace until this problem is fixed and justice realized.

From long practice it seems as though these companies' FOI exclusion has hardened into a tradition, which they have come to expect as their due. Yet consider that UBC residents and students have been complaining of UBC's secrecy about this company ever since it was created as UBC Real Estate Corp. (later renamed to UBC Properties Investments) in the year 1988. That is more than a quarter century of pleading, all to deaf political ears and the entity's self-serving, granite-like obstructionism. Must they now wait for another quarter century? To premier and cabinet, I ask: Please do not let them down again. Finally heal this long festering sore.

Why it matters

The outcome is that public bodies today can still "veil" their records in the vaults of such walled fiefdoms (what the British call "quangos"), while the secrecy creates potential breeding grounds for waste, corruption, and risks to public health and safety. Such an outrage cannot be blandly rationalized away by crown lawyers. This exclusion is also contrary to the spirit of *FOIPP Act* Section 25, the Public Interest Override. Apart from the law, UBC students, staff and the general

[23] One major problem is that some officials in Canadian crown corporations have been appointed due to their business expertise in their private sector work, but unfortunately some cannot accept nor even understand that the same degree of confidentiality should not apply in the governmental sector, a cultural disconnect that often leads to bitter conflict with external information seekers, e.g., media.

public in a larger moral sense should be regarded as the companies' "shareholders" as much as the legal owner UBC is.[24]

Why does it matter? The financial scandals of the 1990s at BC Hydro and BC Ferries have been noted above. Yet let us make this abstract issue a more concrete one.

For example, UBC Properties Investments manages student residential buildings. In 2011 an audit that I obtained from the B.C. finance ministry through the B.C. *FOIPP Act* formed the basis of a story[25] I wrote for the *Vancouver Courier*. It revealed that Vancouver Community College had hired building management company KD Engineering for 31 years (without a bidding process), paid it over $1 million a year, and stood by as many safety violations occurred, such as major fire hazards, potential carbon monoxide poisoning, and natural gas leaks. "No effective oversight of this contractor's performance, leading to significant non-compliance with life-safety laws," the audit concluded; the health and safety of 25,000 students (and children in the VCC daycare) may have been placed at risk for years, with potentially tragic consequences.

Now, what if UBC Properties Investments had commissioned a consultant's report which similarly found that its residential buildings had fire hazards or chemical fumes? The UBC residents could not obtain that report under FOI, and they would never know. It would stay buried in the vaults forever because this UBC company claims it is FOI exempt.

The world standard, and solutions

The warning of "unintended consequence" expresses the spurious old claim about FOI law reform – that we should not do anything until we first know everything. But in these matters we already know more than enough and no more study is required; there is also much evidence from other nations and Ottawa where such entities have been FOI-covered for decades without significant harms, and they accept such coverage as the world FOI legal norm. (This is the topic of Chapter 4 of my book *Fallen Behind.*) The legislature in 1992 knew that the calculation of supposed harms for FOI releases is never an exact science. How could it be? There will always be a speculative aspect to it, and yet the choices must be made.

The B.C. government has already acknowledged the principle of wider subsidiary coverage in its new *Information Management Act* of 2015 (which replaced the 1930s *Document Disposal Act*), one with some definitions that would be welcome in a reformed B.C. *FOIPP Act*:

> **"government agency"** means an association, board, commission, corporation or other body, whether incorporated or unincorporated, if
>
> (a) the body is an agent of the government,

[25] http://www3.telus.net/index100/vcc1

(b) in the case of a corporation with issued voting shares, the government owns, directly or indirectly, more than 50% of the issued voting shares of the corporation, or

(c) a majority of the members of the body or of its board of directors or board of management are one or both of the following:

(i) appointed by the Lieutenant Governor in Council, by a minister or by an Act;

(ii) ministers or public officers acting as ministers or public officers;

The Commonwealth Parliamentary Association (to which Canada belongs), in its *Recommendations for Transparent Governance*, 2004, advised:

(2.1) The obligations set out in access to information legislation should apply to all bodies that carry out public functions,[26] regardless of their form or designation. In particular, bodies that provide public services under public contracts should, to that extent, be covered by the legislation. The Group commends the situation in South Africa, whereby even private bodies are obliged to disclose information where this is necessary for the exercise or protection of any right[27]

Federal information commissioner Suzanne Legault, in her 2015 report *Striking the Right Balance for Transparency*,[28] made 85 recommendations for amending the antiquated 1982 *Access to Information Act*, and many of these should be adopted into the B.C. *FOIPP Act.*

Recommendation 1.1 - The Information Commissioner recommends including in the Act criteria for determining which institutions would be subject to the Act. The criteria should include all of the following:

[1] institutions publicly funded in whole or in part by the Government of Canada (including those with the ability to raise funds through public borrowing) (this would include traditional departments but also other organizations such as publicly funded research institutions);

[2] institutions publicly controlled in whole or in part by the Government of Canada, including those for which the government appoints a majority of the members of the governing body (such as Crown corporations and their subsidiaries);

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[26] The organization Article 19 points out that pursuant to this definition, a private security firm (for example) that guards a city hall is to be regarded a "public body" only to the extent of its public activity, but not when it guards private property, e.g., a factory.

[27] On the South African extension, Alasdair Roberts in *Blacked Out: Government Secrecy in the Information Age* (2006) adds that, due to intense and well-funded opposition from the private sector, "We know that any attempt to introduce comparable legislation in an established democracy would be doomed to failure."

[28] http://www.oic-ci.gc.ca/eng/communique-de-presse-news-releases-2015_1.aspx

[3] institutions that perform a public function, including those in the areas of health and safety, the environment, and economic security (such as NAV CANADA, which is Canada's civil air navigation service provider);

[4] institutions established by statute (such as airport authorities); and

[5] all institutions covered by the *Financial Administration Act*.

Amongst Canadian provinces, Newfoundland has partly caught up to the world with its reformed 2015 access law, in which these entities are FOI-covered: "a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown."[29]

Below are indicators of global standards. I am well aware of the fact that because FOI rights exist on paper in other nations it does not mean they are always followed in practice (but then again, Canadian FOI laws are not necessarily followed either), and that good laws can even at times be used for negative purposes.

• The FOI law of the United Kingdom includes companies "wholly owned by the Crown."[30]

• The American national FOI law's definition of "agency" includes: "any executive department, military department, Government corporation, Government controlled corporation, [....]"

• Florida has the best American state law, with the fullest coverage of entities. It defines "agency" as "any state, county district, authority, or municipal officer, department division, board, bureau, commission, or other separate unit of government created or established by law . . . and any other public or private agency, partnership, corporation, or business entity acting on behalf of any public agency."

[29] Meanwhile, Ontario Information and Privacy Commissioner Ann Cavoukian has been calling on the provincial government to bring all organizations primarily funded by the province under the FOI law. Even the cautious Justice Department of Canada – in *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, 2005 – conceded the problem: "Since the *Act* came into force, government functions have been increasingly outsourced to consultants or contractors, or assigned to alternate service delivery organizations, such as NAVCAN. This suggests that improvements should be made to the federal access to information system to ensure that more entities that perform government-like functions are accountable under the *Act*."

[30] An FOI consultation paper from the UK Ministry of Justice, *Designation of additional public authorities* (2007), stated: "Some non-public authorities consider that they carry out work of a public nature and would readily accept that they should be included within the scope of the Act." Such a "ready acceptance" from similar entities in B.C. that have so long tenaciously opposed FOI coverage in court would be astonishing but always welcome.

• The French law allows access to records from "'public institutions or from public or private-law organizations managing a public service."

• New Zealand prescribes coverage for official information held by public bodies, state-owned enterprises, and bodies which carry out public functions.

• The FOI law of India explicitly covers all public authorities set up by the constitution or statute, as well as bodies controlled or substantially financed by the government, and non-government organizations which are substantially funded by the state.

• Many Eastern European laws go even further, the most sweeping being that of Ukraine: "Article 3. Scope. This Law shall apply to information relationships in all spheres of life and activities of society when receiving, using, disseminating, and storing information."

• The world's newest FOI law – that of Kazakhstan passed last November 16 - covers state, quasi-state and some private entities (such as monopolies and budget beneficiaries).[31]

• Nigeria, once known as amongst the world's most corrupt nations, passed a progressive FOI statute in 2011:

> Scope – A public institution is any Legislative, executive, judicial, administrative or advisory body of the Government, including boards, committees or commissions of the state which are supported in whole or in part by public fund or which expends public fund - also includes private bodies providing public services, performing public functions or utilising public funds.[32]

Broader subsidiary coverage than in Canada is also found in the FOI laws of Uganda, Nepal, and Uzbekistan; as well as in the more recent laws of Malaysia and Liberia (both 2010), and Rawanda (2013).

All the foregoing and what follows makes the B.C. and Canadian FOI reality seem all the stranger, or even disconcerting. This is how much the subsidiary coverage has become a global FOI standard:

[31] As noted by the OSCE Representative on Freedom of the Media, Dunja Mijatović, in Vienna. (An English translation is pending).

[32] Also in the Nigerian FOI law (which has a 7 day response time), Section 10 provides that: "It is a criminal offence punishable on conviction by the court with a minimum of one year imprisonment for any officer or head of any government or public institution to which this Act applies to willfully destroy any records kept in his custody or attempts to doctor or otherwise alter same before they are released to any person entity or community applying for it." http://www.foia.justice.gov.ng/?page=resources&content=whatis

• In 2006 an FOI law was passed in the Islamic Republic of Iran.[33] (It was just translated from Persian: بسم‌الله الرحمن الرحیم) In Article 2 part H, the definition of public institution includes "each institution, company or foundation whose whole share or more than 50 percent of its share belong to the state or government."[34]

• According to the CLD's RTI Rating and Access Info Europe, state-owned enterprises are covered in the Russian Federation. Coverage in the Russian FOI statute[35] (Российская Федерация) includes "information, created by government bodies, their territorial bodies, bodies of local self-government, or organizations subordinate to government bodies […]"

• For Israel (רָאֵלִישְׁ מְדִינַת), as the Justice Initiative noted: "The Israeli FOI Law was amended in 2007 and now includes all government owned corporations, except for some specifically excluded by the Justice Minister with consent of parliament. A "government owned company" is defined in law as any company in which the government holds more than 50% of the shares."

(Overall, of course, it would be better to follow the examples of emerging democracies such as Moldova, Bulgaria and Guatemala rather than Iran or Russia. I am well aware that the latter two nations and some others have dreadful human rights problems and I would not wish to endorse them here as models for anything else. My point is just to show that accepted global FOI standards have risen to such a level that even these nations endorse the subsidiary principle, along with advanced democracies.)

I was buoyed to discover one good point upon which Iran and Israel agree. But not so in B.C., yet, under our current "open government premier." This, one regrets, can hardly be a source of national pride. Under the definitions above, UBC Properties Investments and BC Hydro's PowerTech could never escape FOI coverage as they now do.

Yet reform in B.C. is surely possible. For example, after BC Ferries was privatized in 2003, its FOI coverage was dropped but, after years of its hard campaigning against it, the coverage was restored by the legislature.

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[33] The Iranian law text in English, fascinating reading, is at http://www3.telus.net/index100/iran ('Many thanks to Kowsar Gowhari at Integrity Watch Afghanistan and Monir Ahmadi at Internews Afghanistan for their help in translating the document." - Toby Mendel, Centre for Law and Democracy, Halifax)

[34] It may also be of passing interest that Iran's FOI law in Article 8 has a 10 day response time, and in Article 22, public servants can be fined about Can. $4,000 for "A - Blocking access to information contrary to the regulation of this law," and "C - Trivial or general destruction of the information without having the authority." Yet I cannot say how this is followed in practice and to what purposes.

[35] The Russian law text in English is at http://legislationline.org/documents/action/popup/id/17759 with commentaries at http://www.freedominfo.org/regions/europe/russia/

On November 18, the B.C. Chief Information Office told your Committee, regarding FOI and subsidiaries: "This has been something that has been on our to-do list for a number of years. There have been conversations with the different entities . . . It is a very complex issue, and it is one of the many, many things that we are working on." Yet most of the world does not find the issue complex at all.

To date to this topic, the public has had to wage a steep uphill struggle against political indifference, and a provincial bureaucracy that is far more sympathetic to the entities' indefensible (and private) pleas than to the broader public interest. To deter FOI coverage in B.C., it is likely the subsidiaries and government will eternally repeat the mantra that "this is a *very complex* matter that needs *more study* due to the risks of *unintended consequences*" – for years or even decades to come, perhaps beyond my lifespan, whilst B.C. becomes ever more an international FOI embarrassment in the process. Rather, let us now catch up to the UK and the U.S. - as Iran, Nigeria, and Russia already have.

With respect, I cannot agree with several submissions to your Committee that simply extending the definition of a "local government body" to all public bodies would be sufficient, for that definition in the 1992 *FOIPP Act* is too narrow today. [36] The amendment must be very carefully worded, to remove ambiguities and any potential escape hatches (which some public bodies, unfortunately, will endlessly search for).

Initially I thought there were two options – [a] general overriding principles, and [b] specific criteria. There are plusses and minuses to both approaches; for example 50 percent has the benefit of clarity, but if an agency has control through other means (special share class, holding shares through other subsidiaries) it means its subsidiaries are not captured. Then I realized that both options could and should be present, that one need not choose only one or the other.

After much contemplation and peer discussion, I arrived at this solution: Amend the B.C. *FOIPP Act* to state that the *Act*'s coverage extends to any institution that is:

> [1] controlled by a public body; or
>
> [2] performs a public function, and/or is vested with public powers; or
>
> [3] has a majority of its board members appointed by it; or
>
> [4] is 50 percent or more publicly funded; or
>
> [5] is 50 percent or more publicly owned.

[36] In the B.C. *Act*, "local government body" is defined as: "(n) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in paragraphs (a) to (m) and all the members or officers of which are appointed or chosen by or under the authority of that body." Yet here, the ownership level is not specified, the phrase "performing a public function" is missing, as is the criteria of appointing a majority of the board – all of which renders the definition far too ineffectual.

It is absolutely crucial that such entities be at least 50 percent publicly owned, and not "fully owned," for if the latter course was the law, the government could just sell off 5 percent of the entity and still own the remaining 95 percent, as a dextrous way to escape FOI coverage. In fact, it might best be set to a degree less than 50 percentage, since in some cases 20 percentage ownership could mean control.

Recommendation: Amend the B.C. *FOIPP Act* to state that the *Act*'s coverage extends to any institution that is controlled by a public body; or performs a public function, and/or is vested with public powers; or has a majority of its board members appointed by it; or is 50 percent or more publicly funded; or is 50 percent or more publicly owned.

This includes public foundations and all crown corporations and all their subsidiaries. The OIPC should be granted extra resources when its mandate is expanded to include such subsidiaries.

Contracting Out

In 2004 the B.C. Information and Privacy Commissioner, David Loukidelis, raised the serious concern that "outsourcing" initiatives by the B.C. government were eroding the B.C. *FOIPP Act*. He recommended that the law be amended to clarify that records created by or in the custody of any service-provider under contract to a public body remain under the control of the public body for which the contractor was providing services. The Special Committee of the B.C. Legislature reviewing the FOI law in 2004 and 2010 agreed.

The B.C. government claims it has resolved the issue with 2011 amendments to the B.C. *FOIPP Act*'s Section 3(1)(k), i.e., prescribing that the *Act* does not apply to "(k) a record of a service provider that is not related to the provision of services for a public body." Yet this section is insufficiently clear and strong as to exactly what records the Act *does* apply to. (The problem is often closely related to that of excluded shell companies above.)

Contracting out services can also lead to lost transparency. For example, in 2003, BC Hydro privatized the services provided by hundreds of its employees in its Customer Service, Westech IT Services, Network Computer Services, Human Resources, Financial Systems, Purchasing, and Building and Office Services groups.

These services were then provided under contract by Accenture, a private foreign company. Although the B.C. government obviously does not have the power to place a foreign company under our *FOIPP Act*, it should guarantee to the public that any of Accenture-held records regarding British Columbians will be accessible by FOI, or not enter into such a contract.

Yet another intransigent problem is that dozens of Canadian entities have a "shared jurisdiction" amongst federal, provincial and other governments; since it is claimed that these bodies do not fit the within scope of any one partner's FOI laws, they fall between the cracks and are covered by none. (Examples include the Canadian Centre on Substance Abuse and the Canadian Energy Research Institute.)

If obtaining consent for FOI coverage from one partner is onerous enough, how much more so to gain it from several? Which partner has legal "custody" or "control" of the information? There are solutions, though: the B.C. government should not be able to enter into such arrangements unless it ensures that the records are available under either its FOI law or that of the federal government, or both.

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(3) Oral Government

In its purpose clause, the B.C. *FOIPP Act* grants the public access to information in "records." Yet this right is meaningless if documents have not been created in the first place, were not retained, or cannot be located. Such a system is as resistant to accountability as any autocracy of the past.

The case of the triple deletion of emails related to the missing women on the Highway of Tears was expertly analyzed in the report *Access Denied*[37] this year by the B.C. Information and Privacy Commissioner Elizabeth Denham. Then former Commissioner David Loukidelis thoroughly reviewed the matter in a new report,[38] with exemplary recommendations for future record best practices (all of which should be implemented).[39]

Positively, premier Christy Clark said in a news release that "I am announcing that we are accepting all of Mr. Loukidelis' recommendations," and "the practice of 'triple-deleting' will be prohibited, ministers and political staff will continue to retain sent emails and a new policy and specific training will be developed."[40]

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[37] https://www.documentcloud.org/documents/2475478-ir-f15-03-accessdenied-22oct2015.html

[38] http://www.cio.gov.bc.ca/local/cio/d_loukidelis_report.pdf

[39] Especially valid is his call for improved training to prevent "semantic games" on how requests are interpreted, and for government to do a better job explaining where records are located, rather than telling requesters there are no files when the files do exist within other ministries.

[40] While it seems lamentable here that only a scandal or crisis prompts positive change, in response, perhaps the tide is finally turning somewhat in Victoria against the arbitrary use of power and more towards the rule of law. Some BC FOI applicants tell me that after the two reports, the ministerial FOI offices (as though in response to these events) seem more helpful than usual, for now. As well, the

But the acceptance seems to lack urgency; in a supplemental document, the Office of the Premier writes: "Government also agrees with Mr. Loukidelis' recommendations to *study and consider* the establishment of duty to document which is currently under review by the Special Committee to Review the *Freedom of Information and Protection of Privacy Act*." (Emphasis added) However this falls short of a commitment to impose penalties for improper destruction of records.[41]

Writing at the end of 2015, overall, I believe the political balance has finally shifted, with an irrefutable momentum for positive change. It seems that any advantages politicians or bureaucrats might have once enjoyed by "oral government" techniques have been outweighed by public outrage over these devices, and the critical reports by the current and former Commissioners. I would venture that official tolerance for the "Dobell Doctrine" in principle is likely by now mostly over (although there will always be exceptions and stubborn holdouts). The government could see that unless such tricks were prohibited, they would create recurring political scandals and headaches for the indefinite future.

The solutions are discussed further below, but I will first try to establish the background and scope of the oral government problem, hence the need for statutory changes.

Perhaps the apt term for this event is "shocking but not surprising." Although it is perhaps the worst FOI scandal in B.C. history to date, the overall problem is hardly new. Indeed it has been publicly and widely known here for at least 12 years.[42] The reason I describe the problem at such length below is to underline how deeply ingrained the oral culture is, so much so that penalties are required to end it, as we cannot depend mainly upon good will.

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reports will hopefully effect a powershift, and psychologically empower more whistleblowers (even with the absence of a B.C. law to protect them); and also help dutiful FOI public servants to push back against aggressive political aides, keyboard grabbers and triple deletors.

[41] As well, said FIPA, "The government ought not to sit on its hands until the Committee presents its report—with the report due in May and a lack of clarity on whether the Legislature will have a fall sitting this year, it is entirely possible that the Committee recommendations would have to wait until 2017."

[42] In Ottawa, it was well known since the 1980s. Since the *ATIA* was passed, one journalist noted, access requests caused the government many embarrassments: "As a result, many top-level briefings are done orally. Very little paper floats around, paper that could come back to haunt the government in a later news story." - Stevie Cameron, *Ottawa Inside Out,* 1989. As well, the 2002 Treasury Board task force found that some government agencies question whether the *ATIA "*may undermine transparency by discouraging officials from committing views to paper," and from providing frank advice to ministers for "fear of being misinterpreted" when documents are released.[42] Treasury Board Secretariat and Justice Department of Canada, *Access to Information: Making it Work for Canadians; Report of the Access to Information Review Task Force*. Ottawa, 2002

There are myriad problems regarding record management in B.C. For example, in 2005 the provincial government initiated a highly (and ironically) secretive review of the FOI law by bureaucrats; due to the growing trend towards oral government, no written report was delivered to government by the consultant George Macauley who reported on the process.

Most of all, startling comments by Ken Dobell, then B.C. deputy premier and head of the provincial public service, to an FOI conference in 2003, confirmed one's worst suspicions.

Mr. Dobell said he ran the government via informal meetings or telephone conversations, seldom keeping working notes of either. He did make thorough use of e-mails - his on-line correspondence with the premier was said to be voluminous - but he said "I delete those all the time as fast as I can."[43] Mr. Dobell continued that the intent is not to hide "necessary information" from the media and public, but to avoid having internal e-mails caught up in media fishing expeditions.

"I don't put stuff on paper that I would have 15 years ago . . . . The fallout is that a lot of history is not being written down. Archivists of tomorrow will look for those kinds of things, and none of it will be there. It will change our view of history."[44] *Vancouver Sun* columnist Vaughn Palmer echoed most of those observations:

> Not long after the introduction of freedom of information legislation in B.C., a senior bureaucrat predicted the emergence of a "nothing-in-writing" style of government. Civil servants and political appointees deliver their most important advice and instructions in person or over the phone…. "Never put real policy in writing," was a laughline for politicians and journalists alike.
>
> Within a couple of years, some of the most controversial business of government was being conducted at one-on-one meetings with no notes taken, no minutes kept. Likewise, some of the most powerful officials began to disappear from written documentation, the better to exclude open-ended requests for "all memos written by or addressed to" so-and-so.[45]

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[43] Recording of panel discussion of conference marking the 10th anniversary of the adoption of the B.C. *Freedom of Information and Protection of Privacy Act.* Sept. 23-25, 2003, Victoria. B.C.'s information and privacy commissioner said he was initially concerned with Mr. Dobell's statement, and raised it with him. Mr. Dobell assured and satisfied him, the commissioner later said, that he only deletes insignificant "transitory" emails, not "important" emails or other records, and that Mr. Dobell had written to all deputy ministers to remind them of the need to ensure that permanent records are kept. It is uncertain how widely this email retention directive is actually followed in the provincial government.

[44] Some of Mr. Dobell's statements seem eerily a bit familiar at least in spirit to those found in George Orwell's novel *1984*: "Everything faded into mist. The past was erased, the erasure was forgotten, the lie became truth. Every record has been destroyed or falsified. . . . History has stopped. Nothing exists except an endless present in which the Party is always right."

[45] *Cynics borne out on 'new era' of information, Vancouver Sun*, Sept. 30, 2003

Mr. Dobell added that fear of FOI inquiries only marginally hinders the free flow of ideas within the civil service as phone calls and informal meetings make up the gap. "Where FOI permits reasonable access, it's good. Where it allows fishing expeditions and cheap research, it forces the careful handling of information." (The term "reasonable" he left undefined.) After this speech, a verb was then whimsically coined in Victoria: to "Dobell" a record, and a noun: the Dobell Doctrine.[46]

The OIPC said it has investigated *hundreds* of complaints where government claimed that requested records did not exist because they were never created in the first place, and noted the frequent misapplication of the escape-hatch word - "transitory."

During the BC Rail corruption trial in 2010, former Liberal aide Dave Basi told the court he assured others not to worry about their e-mails to him emerging under FOI, because he just printed out his emails and then deleted them; he quipped that "FOI is for purists."[47] (American presidential candidate Hillary Clinton also faced a major email deletion controversy.)

I discovered the oral government problem directly when a key source of information about the finances and management of the 2010 Vancouver Olympic Games was abruptly cut off. Minutes of the meetings of the B.C. 2010 Olympic and Paralympic Winter Games Secretariat (a branch of the B.C. Economic Development Ministry), the entity that politically oversees the Games, were at one time recorded, then no more.

For news stories, I had twice obtained hundreds of pages of minutes from the Secretariat through quarterly requests under the B.C. *FOIPP Act.* But in reply to my third identical attempt, I was told: "We have not located any records in response to your request." A spokesman for the secretariat confirmed to the *Vancouver Province* newspaper that meeting minutes were no longer

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[46] Former federal information commissioner John Grace said some officials boast that they follow the advice supposedly given by a New York Democratic Party boss: "Never write if you can speak; never speak if you can nod; never nod if you can wink." At a recorded panel discussion at the 2003 B.C. FOI conference, *Vancouver Sun* reporter Jim Beatty elaborated on this idea, and explained the unwritten "Briefing Rule" in Victoria: "The high level and professional people in government just don't write anything down. Bureaucrats are told that 'when you brief the minister, put the good stuff in notes, convey the bad stuff orally. If the information is sensitive, send it by email, if it's more sensitive then fax it. Then talk by cell phone, and then by landline phone. It it's most sensitive, talk only in person.'"

[47] Improper record destruction has a long tradition in Ottawa also. In the 1980s, for instance, one journalist reported that "Government officials are quietly shredding paper at breathtaking speed." After the *ATIA* was implemented in 1983, the federal government bought nearly 700 crosscut shredders at a cost of $10 million. "What are they all used for? When asked, one senior mandarin confessed that he systematically shredded everything he thought he could get away with to avoid paper trails sought by investigative reporters under access to information law." - Stevie Cameron, *Ottawa Inside Out,* 1989

taken: "The secretariat was keeping minutes but found they were not an effective management tool." (I do not know what was meant by this.)

He added that the secretariat's approach to keeping records is "consistent with cross-government practices and legislation."[48] But what is the consequence of that statement? A whole provincial government of non-minute-taking departments?

When the minutes were obtainable, it would take five months to receive them, and about one-third were blanked out, yet what remained still gave some insight into the Games, which accounted for $2.5 billion of public funds.

Moreover, I used to obtain copies of minutes of VANOC meetings that it had forwarded to the Secretariat (even though VANOC was not itself covered by the B.C. *FOIPP Act*), but then VANOC stopped forwarding those, so this tenuous supply route of information was cut off too. See Appendix 2 of this report for samples of the Secretariat and VANOC minutes (and note the amount of detail we have lost). This problem was further highlighted in the very interesting OIPC Order F15-65 in December 2015 that found that even archived VANOC minutes held by other public bodies were excluded from the *Act*'s scope, for various reasons.

Beyond the gap in public accountability, there is a second grievous loss for the public interest: a lack of written records leads to poor governance, and when that happens, we are all in trouble. Conversely, the benefits of good record keeping are felt internally as much as externally.[49]

The taxpaying public needs and deserve much better; whole dimensions of our political awareness and historical consciousness have vanished due to such practices, and the loss to the common good is incalculable. In his 1996-97 annual report, federal information commissioner the late John Grace issued a sharp rebuke to the "oral government" concept, in words worth pondering by our B.C. leaders:

> As to the "don't-write-it-down school," any effort to run government without creating records would be humorous if it were not so dangerously juvenile. . . . Left without written precedents and decisions, other officials are deprived of the benefit of their predecessor's wisdom - or folly. The misguided effort to avoid scrutiny by not making records is driven by ignorance of the law's broad exemptive provisions.

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[48] *Olympic secretariat meetings too secret, says Bains*, by Damian Inwood. *The Province*, April 20, 2008

[49] The same point was made by Alberta Information and Privacy Commissioner Frank Work in a 2005 speech: "Ten years later and across Canada I still hear people say 'Well, we just don't take notes, keep minutes, or create records so we don't have to produce them under FOIP.' So in order to avoid being accountable, you become a poor, even negligent, manager. You cannot properly manage the affairs of an organization without notes, records, minutes, evidence, instructions. If there was no law, if my Office did not exist, the auditors would still tell you that."

There are many other methods of disclosure avoidance such as off-site document storage, and - as FIPA has noted - incorrectly claiming documents sought through FOI do not exist when in fact they do.[50] (More such methods are cited in Appendix 6 of this report.)

In regards to email deletion, the whistleblower in the case reported that a senior Liberal political official breezily dismissed his concerns with: "It's like in the West Wing. You do whatever it takes to win." But here nobody really wins. Everyone loses. The public was mortified by the spectacle of party officials playing cynical political mischief with a public tragedy; officials may "win" some short term advantage, but the outcome is a long term disaster for the public interest.

Government can indeed legislate some conduct, but it is dangerously naive to assume that it can ever legislate attitudes. Still, external constraints are needed if internal ones are lacking (that is conscience, defined by one philosopher as "obedience to the unenforceable"). Hopefully some good will come from last year's email triple deletion debacle, and it someday be relegated to a dismal memory.

The long shadow of record destruction

The B.C. email deletion case related to the Highway of Tears and Commissioner Denham's report this year was foreshadowed by a shocking event in Ottawa that highlighted the urgent need for stronger record retention laws in Canada. Officials destroyed documents that might have been key to understanding the tainted-blood tragedy of the 1980s because they did not want to risk having to make them public, Information Commissioner John Grace concluded. This case has lessons for this province.[51]

In a 1997 report, he castigated two Health Canada officials for destroying all of the written transcripts and erasing all of the tapes of meetings of the Canadian Blood Committee, which oversaw the blood system in the crucial years 1982 to 1989. During those years 1,200 Canadians were infected with the AIDS virus while another 12,000 were infected with hepatitis C through blood and blood products. (That was done in the pre-email days; today, such record destruction would be vastly easier with digital methods.)

His report stated that the committee was under pressure from the Canadian Red Cross Society not to release documents to the public because they might be useful in lawsuits that had been filed by victims of the tragedy. The decision to destroy the documents was made in May 1989, after an *ATIA* request was

[50] Such "oral government" culture reminds one a bit of the dystopian novel *1984*, in which George Orwell describes how, in the Ministry of Truth, propaganda bureaucrat Winston Smith drops politically undesirable records into a pipe - called "the memory hole" - whereupon they are promptly incinerated, all with this goal: "Those who control the present control the past, and those who control the past control the future."

[51] *Key blood documents destroyed Federal officials acted to block files becoming public, Information Commissioner rules*, by Anne McIlroy. *Globe and Mail.* January 23, 1997

filed by a *Globe and Mail* reporter. One official maintained the records were destroyed for "housekeeping purposes," a claim rejected by Mr. Grace for several reasons.

"You will understand why I must take seriously and investigate thoroughly allegations of records being destroyed in order to thwart their release under the *Access to Information Act,"* he concluded. "Any such destruction strikes at the heart of what the Federal Court has called the 'quasi-constitutional' rights bestowed by that *Act*, being a wilful denial of those rights and a flagrant affront to the will of Parliament."

The *Vancouver Sun* editorialized: "If evil does indeed reside in the banal, it is no stranger to craven, grey-faced functionaries whose most fervent wish is to remain anonymous and undisturbed. Thanks to commissioner Grace's landmark report, we now know who they are and what they did."[52]

Yet Grace said no action could be taken against the individuals involved, one of whom was responsible for administering the *ATIA* at the department. The *Act*, he said, does not provide sanctions against those found to have improperly destroyed records, "perhaps because Parliament did not foresee public servants flouting this law" – a presumption he chastised as "naïve . . . ."

Solutions

The main solution is a new structure comprised of three essential and interconnected pillars, each supporting the others: (1) legislated record creation, (2) legislated record retention, and (3) penalties for violating parts 1 and 2. Firstly, there is no point in creating important records if they will not be preserved; secondly, records cannot be preserved if they were never created; and third, neither of these actions can guaranteed if there are no penalties for not doing so.

Positively, this year the B.C. government passed Bill 5, the *Government Information Act,* with much-needed measures to improve electronic preservation and access to government records. (It replaced the 1930s *Document Disposal Act*, which used to govern how information could be handled, kept or destroyed.) But this new *Act* is grievously lacking in three key aspects:[53]

> [1] Bill 5 failed to bring in a legal duty to document (the first pillar above)
>
> [2] Where the *Document Disposal Act* created a provincial offence for violations, Bill 5 abolished those penalties (the third pillar above)

[52] *Double-crossed: Shredder thwarts tainted blood victims*. Editorial. *The Vancouver Sun*. Jan. 24, 1997

[53] The B.C. Commissioner also related a lack of needed powers to your Committee: "Currently, in British Columbia, my Office has narrow authority to investigate the destruction of records. We may only investigate if the alleged destruction of records occurred after an access request was made. This lack of oversight runs contrary to the spirit of FIPPA. Effective oversight would permit my Office to investigate any complaint concerning the destruction of records — even in the absence of an access request."

[3] Bill 5 does not apply to the broader public sector (e.g., municipalities, school boards and universities).

Regarding record creation

In a letter of October 22, 2015, Amrik Virk, the Minister of Technology, Innovation and Citizens' Services, wrote to the chair of your Committee to say, "British Columbia has enacted more than 400 'duty to create' requirements within legislation," and attached a list of these examples. (I have posted this list at http://www3.telus.net/index100/dutytocreate.pdf)

If the ministry's purpose in compiling and presenting this list was to persuade the Committee that a new comprehensive record creation law is unnecessary, then it does not succeed - for many of those examples have absolutely nothing to do with decision making. e.g., one includes including "giving notice of the exclusion zone for abortion clinics" for protesters, while others regard "giving notice of a bylaw."

That is not documentation of the policy process; it is advising the public about infringements or their rights or information about where to find enactments. Even if some such enactments (which have no penalties for contravening them) really did proscribe record creation on policy matters, their creation is erratic and unsystematic; without overall definitional criteria, there can always be gaps, and such a list cannot ever cover every future eventuality.

A better route: In 1999, after a decade of pleas by FOI advocates, B.C. passed the *Local Government Act*; it became the first province to fully prescribe what topics must be discussed in local councils' public and closed sessions, and prescribed that certain types of documents must be generated by civic councils, e.g., records of resolutions and decisions. (Regrettably the later Liberal administration partially curtailed these rules when revising the *LGA* as the *Community Charter*.) Why should we accept any less of senior government?

I fully support Recommendation No. 19 of Mr. Loukidelis' report (2015):

> 19. Government should give the most serious consideration to Commissioner Denham's recommendation[54] that a duty to document be created, specifically, it should seriously consider introducing legislation creating such a duty (with the details being worked out in policy at a ministry, even program, level). Government should consider adopting a risk-based approach, with the nature and significance of decisions, actions and transactions being used to determine which records have to be documented and in what manner.

In Ontario, Bill 8, *the Public Sector and MPP Accountability and Transparency Act, 2014,* will come into effect in 2016. While welcoming its record retention features, the Ontario information and privacy commissioner nonetheless advised: "the [Ontario] IPC recommends developing a broad and effective duty to document business-related activities, including a duty to accurately

[54] Commissioner Denham: "Government should create a legislative duty to document within FIPPA as a clear indication that it does not endorse 'oral government' and that it is committed to be accountable to citizens by creating an accurate record of its key decisions and actions."

document key decisions. This duty must be accompanied by effective oversight and enforcement provisions." Two decades ago in Ottawa, the federal Information Commissioner, John Grace, made the same basic points:

> The [federal] *Archives Act* should be amended specifically to impose the duty to create such records as are necessary to document, adequately and properly, government's functions, policies, decisions, procedures, and transactions.
>
> A duty to create records has been imposed on the United States federal government by the *Federal Records Act*.
>
> The need to keep, at least for a time, all [email] messages on these systems stems directly from the notion of open and accountable government. To give the official who created or received a message unfettered choice about its destruction would clearly jeopardize accountability.[55]

Federal information commissioner Suzanne Legault advised in 2015 of the *Access to Information Act:"*2.1. The Information Commissioner recommends establishing a comprehensive legal duty to document, with appropriate sanctions for non-compliance."[56]

(The federal Conservative party running for office in 2006 pledged to amend the *Access to Information Act* to "oblige public officials to create the records necessary to document their actions and decisions," but did not fulfill the promise.)

• **Justice Gomery report, *Restoring Accountability*, 2006: "**The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions."

• **Government of Canada discussion paper, *Strengthening the Access to Information Act,* 2006:** "Although codifying the duty to document may not be necessary, the principle behind the proposal appears to be sound."

In some jurisdictions, records may not be destroyed after an FOI request for them has been received, even if they had already been scheduled for destruction. The FOI statute of Ecuador commendably goes one step better, wherein information cannot be classified following a request.

The OIPC also told your Committee that a general duty to document exists in other jurisdictions (and that the *FOIPP Act* is the best place for this duty). In the Canadian context the Committee reviewing Newfoundland's *Access to Information and Protection of Privacy Act* recommended the adoption of a duty to document and the government has committed to do so.

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[55] John Grace, *Toward a Better Law: Ten Years and Counting*, Ottawa, 1994

[56] Also note her Rec. 2.2: "The Information Commissioner recommends establishing a duty to report to Library and Archives Canada the unauthorised destruction or loss of information, with a mandatory notification to the Information Commissioner and appropriate sanctions for failing to report."

Record creation may in time become a world FOI standard. Australian jurisdictions and New Zealand have broad legal requirements to create full and accurate records. I also found such duties in the FOI laws of Denmark and Poland. Another approach is the Treasury Board of Canada Secretariat's policy directive that deputy heads ensure:

> that decisions and decision-making processes are documented to account for and support the continuity of departmental operations, permit the reconstruction of the evolution of policies and programs, and allow for independent evaluation, audit and review.

Regarding record creation, the Danish FOI law is worth considering:

> Duty to Make Notes etc. 6. (1) In any matter to be decided by an administration authority, an authority receiving information by word of mouth on facts of importance to the decision or in other manner having notice of such facts, shall make a note of the substance of such information, always provided that such information is not contained in the documents of the matter.

Recommendation: Add to Part 2 of the B.C. *FOIPP Act* a duty for public bodies to document key actions and decisions based on the definition of "government information" in the *Information Management Act*. Enact all the recommendations of *Implementing Investigation Report F15-03* by David Loukidelis.

Regarding penalties

As the third pillar of information management, penalties are essential to ensure compliance with the law. As many longtime FOI applicants know, the response of several government agencies to FOI requests are determined not by their legal or ethical obligations, but instead cynical calculations of what one "can get away with," logistically, financially and politically.

Beyond statutory changes, a strong message to promote a culture of transparency must come from the top. This is an essential start but can only go so far. Although prison terms for some FOI offenses are indeed prescribed in several nations, to some this may at times seem too severe.[57]

[57] Toby Mendel of the CLD does not believe that *criminal* penalties deter mischief: "Rather, it is hard to treat the common mischief that occurs as a criminal matter (or doing so seems over the top) and, furthermore, it is very hard to secure criminal convictions. I would suggest considering the Indian approach, which has administrative fines applied by the Commission, or something along those lines. Such sanctions are much easier and realistic to apply than criminal rules, and more appropriately tailored to the gravity of the matter. But leaving their application to internal disciplinary measures doesn't work, because the public bodies which apply those measures don't really support openness in the first place. So putting this in the hands of the Commission is a good solution (apart from some potential delicacy around the power of such a body to impose fines and the due process it would need to respect in doing so)." [Email note to author, Jan. 2016.]

Yet some measure of deterrence is necessary beyond ineffectual means such as verbal reprimands or letters of rebuke placed on one's personnel file. Apologists may plead that justice should be tempered with mercy and warn that strong penalties can effectively ruin an official's life. But to forgive everything afterwards means to permit everything in advance: those who deliberately choose to violate the law must accept some consequences, and others contemplating the same actions be discouraged.[58] (The CLD noted that in jurisdictions that have these penalties in place they are very seldom applied - just their presence is enough to deter mischief.)

There is no offence (yet) under the B.C. *FOIPP Act* for wilfully disposing of records in an attempt to evade or frustrate an access request. It is of interest that in more than 30 nations, the FOI law includes some kinds of penalties for obstructing the FOI process, including Ireland, Mexico, Pakistan, India, Russia, Scotland, and the United Kingdom.

In the Canadian *ATIA*, there are penalties for destroying records and obstructing the Information Commissioner, but other nations go much farther. In Canada, Quebec's FOI statute contains the broadest definition of obstructionism. Federal information commissioner Suzanne Legault in 2015 well advised of the *Access to Information Act,* some measures that could well be adopted for the B.C. context:

> 7.1. The Information Commissioner recommends that obstructing the processing of an access request (or directing, proposing or causing anyone to do so) be added as an offence under the Act.
>
> 7.3. The Information Commissioner recommends that failing to document or preserve a decision-making process with intent to deny the right of access (or directing, proposing or causing anyone to do so) be prohibited under the Act.
>
> 7.4. The Information Commissioner recommends that failing to report to Library and Archives Canada and/or notify the Information Commissioner of the unauthorised destruction or loss of information (or directing, proposing or causing anyone to do so) be prohibited under the Act.
>
> 7.7. The Information Commissioner recommends an administrative monetary regime be added to the Act, which should include a requirement to publish any administrative monetary penalty imposed.
>
> 7.8. The Information Commissioner recommends that adherence to the requirements of the *Access to Information Act* be made a term and condition of employment for employees, directors and officers of institutions.

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[58] Citizens may inquire: "If *we* are penalized for late tax filings, breaking traffic rules, or serious wrongdoings - to the point of being pursued by government collection agencies, bailiffs or crown prosecutors - then why is government not also penalized for breaking its own laws, such as the FOI statute? (They might perceive a reply of sorts in the famous quotation of the 1990s by B.C. cabinet minister David Zirnhhelt: "Don't forget that government can do anything.")

The federal response on record destruction

The B.C. email deletion scandal this year reminds one of another famous case in Ottawa in the 1990s, after members of the Airborne Regiment killed a teenager in Somalia, and a public inquiry later found that officials had improperly destroyed records of the case. Backbench Liberal MP Colleen Beaumier said that so many of her constituents complained to her upon hearing news reports of the record shredding, that she become embarrassed of it - enough so to move an amendment to the federal *Access to Information Act* to fix the problem, which passed.[59] The same situation applies to B.C.

MP Colleen Beaumier's 1999 amendment to federal *Access to Information Act*:

"Obstructing Right of Access. 67.1 (1) No person shall, with intent to deny a right of access under this Act, (a) destroy, mutilate or alter a record; (b) falsify a record or make a false record; (c) conceal a record; or (d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c). Offence and Punishment. (2) Every person who contravenes subsection (1) is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding $10,000, or to both; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding $5,000, or to both."

It may seem a good start to amend the B.C. *FOIPP Act*'s Section 74 to prohibit and penalize persons for the unauthorized record destruction and handling in the FOI process - with the wording of the Canadian *Access to Information Act,* Sec 67.1 - but 67.1 is too narrow, e.g., record destruction should be prohibited whether an FOI request was made for it or not (as the B.C. OIPC advised).

Within Canada (as FIPA notes), seven provinces and territories have penalties for undermining the FOI process - Newfoundland and Labrador, Prince Edward Island, Nova Scotia, Quebec, Manitoba, Alberta and Yukon.

Alberta's *Freedom of Information and Protection of Privacy Act* includes fines of up $10,000 for anyone who, among other things, destroys records for the purpose of blocking a freedom of information request. The Alberta statute also sets out the unauthorized destruction of records as an offence (as noted in my 2010 report on the Alberta FOI law, *The Hallmarks of Fairness.)*

[59] It worth noting that federal cabinet voted *en masse* against Ms. Beaumier's bill, without explanation, yet it passed nonetheless - a very rare example of an MP successfully defying the will of the autocratic prime minister of the day (and an inspiration to provincial MLAs).

The Ontario legislature also recently passed the *Public Sector and MPP Accountability and Transparency Act*, which amends the FOI law in Ontario to make the unauthorized destruction of records an offence and provides the Information and Privacy Commissioner with oversight to investigate the issue should it arise. As well, effective January 2016, it will be an offence under Ontario's *Freedom of Information and Protection of Privacy Act* to "alter, conceal or destroy a record…with the intention of denying a right…to access the record or information contained in the record" (s. 61(1)(c.1)).

Positively, the Quebec law extends beyond record alteration or destruction, to potentially cover a wide range of obstructionist practices. The Commissioner may institute penal proceedings for an offence under the law. (Yet there is a potential escape clause in the Quebec law: "An error or omission made in good faith does not constitute an offence within the meaning of this Act.")[60]

Recommendation: Penalties for offences committed by individuals under the B.C. *FOIPP Act* should be raised to be up to a maximum of $50,000 for both general and privacy offences."

(4) The best Canadian FOI law today – the Newfoundland model for B.C.

In June 2012, the Newfoundland and Labrador government of Conservative premier Kathy Dunderdale shocked observers by inexplicably and boldly eviscerating its *Access to Information and Protection of Privacy Act*, in Bill 29, to keep cabinet and companies' records secret, block the information commissioner from viewing documents, raise FOI fees, and allow ministers on their own to bar any FOI request they called "frivolous."

An uproar of protest ensued, with public rallies on the Legislature lawn in St. John's – an unprecedented public response in Canada to an FOI issue. After a new government was elected, the incoming premier appointed a panel to review the FOI law. The independent commission was chaired by former Liberal premier and chief justice Clyde Wells, who prepared the report with retired journalist Doug Letto and former federal privacy commissioner Jennifer Stoddart.

The report that resulted gave 90 recommendations on how the province could improve the *Act*, and the commission even went so far as to write draft legislation of its own.

[60] As well, Quebec has the only provincial FOI law that prescribes record management to assist applicants: In Sec. 16, a public body must classify its documents in such a manner as to allow their retrieval. It must set up and keep up to date a list setting forth the order of classification of the documents. The list must be sufficiently precise to facilitate the exercise of the right of access.

Steve Kent, the minister responsible for the Office of Public Engagement, said the proposed changes would make this province's system among the best of the world, and most FOI experts agreed it was the best FOI law in Canada. He told the CBC the review was more than just an assessment of Bill 29. "We're not just tweaking," said Kent. "What's being proposed here is a brand-new piece of legislation."[61]

In a new Act that came into force on June 1, 2015, the government repealed all the worst features of Bill 29 and adopted the commission's draft law directly (a noteworthy idea for B.C. *FOIPP Act* reviews). Below are superior features of the 2015 Newfoundland law, which are all advisable for a reformed BC *FOIPP Act.*

[Newfoundland *ATIPP Act*] Purpose

3. (1) The purpose of this Act is to facilitate democracy through

(a) ensuring that citizens have the information required to participate meaningfully in the democratic process;

(b) increasing transparency in government and public bodies so that elected officials, officers and employees of public bodies remain accountable; and

(c) protecting the privacy of individuals with respect to personal information about themselves held and used by public bodies.

[In the B.C. FOIPP Act, the valuable clauses (a) and (b) of the above are absent.]

[Newfoundland *ATIPP Act*] From DEFINITIONS

(x) "public body" means

(i) a department created under the *Executive Council Act* , or a branch of the executive government of the province,

(ii) a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown,

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[61] Report summary: http://ope.gov.nl.ca/publications/pdf/ATIPPA_Report_Vol1.pdf / Full report: http://ope.gov.nl.ca/publications/pdf/ATIPPA_Report_Vol1.pdf

(iii) a corporation, commission or body, the majority of the members of which, or the majority of members of the board of directors of which are appointed by an Act, the Lieutenant-Governor in Council or a minister,

(iv) a local public body,

(v) the House of Assembly and statutory offices, as defined in the *House of Assembly Accountability, Integrity and Administration Act*, and

(vi) a corporation or other entity owned by or created by or for a local government body or group of local government bodies, which has as its primary purpose the management of a local government asset or the discharge of a local government responsibility,

[In the B.C. FOIPP Act, the extremely valuable clauses (ii) and (iii) and (v) and (vi) above are absent from definition of "public body."]

[Newfoundland *ATIPP Act*] Public interest

9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

(2) Subsection (1) applies to the following sections:

(a) section 28 (local public body confidences);

(b) section 29 (policy advice or recommendations);

(c) subsection 30 (1) (legal advice);

(d) section 32 (confidential evaluations);

(e) section 34 (disclosure harmful to intergovernmental relations or negotiations);

(f) section 35 (disclosure harmful to the financial or economic interests of a public body);

(g) section 36 (disclosure harmful to conservation); and

(h) section 38 (disclosure harmful to labour relations interests of public body as employer).

[Newfoundland also has a general public interest override in its sec. 25 that matches the sec. 25 of the B.C. FOIPP Act, yet in B.C., all such extra reminders above of the public interest test for specific exemptions are absent.]

[Newfoundland *ATIPP Act*] Anonymity

12. (1) The head of a public body shall ensure that the name and type of the applicant is disclosed only to the individual who receives the request on behalf of the public body, the coordinator, the coordinator's assistant and, where necessary, the commissioner.

[In the B.C. FOIPP Act, the feature above is absent.]

[Newfoundland *ATIPP Act*] Transferring a request

14. (1) The head of a public body may, upon notifying the applicant in writing, transfer a request to another public body not later than 5 business days after receiving it […..]

[In the B.C. FOIPP Act, sec. 11, such a transfer may be done within 20 days.]

[Newfoundland *ATIPP Act*] Time limit for final response

16. (1) The head of a public body shall respond to a request in accordance with section 17 or 18 , without delay and in any event not more than 20 business days after receiving it, unless the time limit for responding is extended under section 23 .

(2) Where the head of a public body fails to respond within the period of 20 business days or an extended period, the head is considered to have refused access to the record or refused the request for correction of personal information.

[In the B.C. FOIPP Act, sec. 7, the time limit is 30 working days, with an extension for another 30. On time limits, please see the new extension rules, below - which are more generous than in B.C. - and which require the approval of the Commissioner. That is an excellent compromise (in Toby Mendel's view) between the need for some flexibility and the problem of abuse of extensions by public bodies.]

[Newfoundland *ATIPP Act*] Extension of time limit

23. (1) The head of a public body may, not later than 15 business days after receiving a request, apply to the commissioner to extend the time for responding to the request.

(2) The commissioner may approve an application for an extension of time where the commissioner considers that it is necessary and reasonable to do so in the circumstances, for the number of business days the commissioner considers appropriate.

(3) The commissioner shall, without delay and not later than 3 business days after receiving an application, decide to approve or disapprove the application.

(4) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16 (1).

(5) Where the commissioner does not approve the application, the head of the public body shall respond to the request under subsection 16 (1) without delay and in any event not later than 20 business days after receiving the request.

[Newfoundland *ATIPP Act*] Costs

25. (1) The head of a public body shall not charge an applicant for making an application for access to a record or for the services of identifying, retrieving, reviewing, severing or redacting a record.

(2) The head of a public body may charge an applicant a modest cost for locating a record only, after

(a) the first 10 hours of locating the record, where the request is made to a local government body; or

(b) the first 15 hours of locating the record, where the request is made to another public body.

[In the B.C. FOIPP Act, the public body may charge for locating and retrieving the record, excepting only the first 3 free hours, while severing is free.]

[Newfoundland *ATIPP Act*] Cabinet confidences [mandatory]

27. (3) Notwithstanding subsection (2), the Clerk of the Executive Council may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.

[In the B.C. FOIPP Act, the feature above is absent.]

[Newfoundland *ATIPP Act*] Legal advice

30. (1) The head of a public body may refuse to disclose to an applicant information

(a) that is subject to solicitor and client privilege or litigation privilege of a public body; or

(b) that would disclose legal opinions provided to a public body by a law officer of the Crown.

(2) The head of a public body shall refuse to disclose to an applicant information that is subject to solicitor and client privilege or litigation privilege of a person other than a public body.

[In the B.C. FOIPP Act, section 14, legal advice, reads in full: "The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege." More detail is advisable, as in Newfoundland.]

[Newfoundland *ATIPP Act*] Offence

115. (1) A person who wilfully collects, uses or discloses personal information in contravention of this Act or the regulations is guilty of an offence and liable, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or to both.

(2) A person who wilfully

(a) attempts to gain or gains access to personal information in contravention of this Act or the regulations;

(b) makes a false statement to, or misleads or attempts to mislead the commissioner or another person performing duties or exercising powers under this Act;

(c) obstructs the commissioner or another person performing duties or exercising powers under this Act;

(d) destroys a record or erases information in a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records; or

(e) alters, falsifies or conceals a record that is subject to this Act, or directs another person to do so, with the intent to evade a request for access to records,

is guilty of an offence and liable, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term not exceeding 6 months, or to both.

[In the B.C. FOIPP Act section 74, General offences and penalties, there is a $5,000 fine for obstructing the Commissioner (with no imprisonment noted), and no equivalent of the extremely valuable (d) and (e) clauses above.]

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(5) Section 25, the Public Interest Override

> *In our experience, a public interest override is crucial to the effective functioning of a freedom of information regime. It is simply not possible to envisage in advance all of the circumstances in which information should still be disclosed, even if this might harm a legitimate interest, and to address these through narrowly drafted exceptions, or exceptions to exceptions.* - Article 19[62]

A most important and elusive concept in government transparency, and perhaps the *raison d'etre* of most freedom of information statutes, is based on the question of: What, exactly, does "the public interest" mean in the law?

Should it override other exemptions absolutely, or should other needs be weighed and balanced against it? Should it apply to only the most grievous potential harms – such as life and death issues - or to less urgent ones as well? Who should be permitted to decide what can be a very political question – a commissioner, a judge, or others?

In sum, though, the concept suggests that the needs or rights of the many at times may override those of the one or few, that is, the community may prevail over individuals or certain groups or corporations. For instance, police sometimes publish the name and address of a potentially dangerous predator who moves into a neighbourhood, overriding his or her privacy rights; a government might reveal the formula of a chemical that a company has spilled into a river, overriding its trade secret rights.

"The overriding public interest" is an idea with which courts, legislators and commentators around the world have struggled for decades without agreeing upon one conclusive definition, if indeed one exists. Yet however the public interest is defined is a fair measure of the values and political culture of a nation at the time, and one might almost regard it as the jewel in the crown of a good FOI statute.

As with a muscle, Section 25 requires exercising so it will not wither from disuse. Yet it could be argued that the provincial government may have violated Section 25 at least several times each year, when it had a duty to proactively release vital information in the public interest, but did not.

[62] *Memorandum on the Law Commission of the Republic of Bangladesh Working Paper on the Proposed Right to Information Act 2002,* by Article 19, 2004

In July 2015, the B.C. Information and Privacy Commissioner released a report [63]on complaints that the provincial government had failed to inform the public, per its duty under Section 25, on the risks leading up to the Mount Polley mine tailings pond dam breach that released effluent into three B.C. lakes.

While finding the government had no information about dam-related risk, Denham also made a finding that reinterprets Section 25(1)(b) to mean that, "urgent circumstances are no longer required to trigger proactive disclosure where there is a clear public interest in disclosure of that information."[64] I applaud this principle and urge it be enshrined in a revised B.C. *FOIPP Act*.[65]

As well, in 2013, the Commissioner supported a complaint by BC FIPA and the UVic Environmental Law Clinic into the failure of government to carry out their Sec. 25 duty. She called for the government to amend this section to remove the requirement that the issue of public interest be "urgent" or timely, and urged that the government make this amendment - which the 2010 Special Committee Report also advised - "at the earliest opportunity." It has not done so.

Recommendation: Amend Section 25 in accordance with the Commissioner's recommendation to remove the temporal requirement.

(6) Section 12 and agenda headings

As with Section 13, the *Act*'s Section 12 on cabinet confidences also lacks a needed harms test and is overapplied.

For example, when I applied by FOI to view agendas for government caucus committees meetings, it was refused, with the claims that disclosing the one-line topic headings would

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[63]https://www.oipc.bc.ca/news-releases/1813 See also https://fipa.bc.ca/commissioner-denham-supports-fipa-complaint-on-public-interest-information-disclosure-4/ on the UVic complaint, 2013

[64] See a legal analysis of this OIPC order by Christopher Guly in *Lawyer's Weekly* - http://www.lawyersweekly.ca/articles/2463

[65] Regarding public interest overrides, there is an important distinction on how they apply to mandatory versus discretionary exemptions: "An override that affects a discretionary exemption will, invariably, require disclosure of the exempted information. Simply to permit disclosure would add nothing to the inherent authority to grant or refuse access that a government institution will already have under a discretionary exemption." – Colin McNairn and Christopher Woodbury, *Government Information: Access and Privacy*. Toronto: Carswell, 2007

somehow reveal the "substance of deliberations." I appealed, and the commissioner's delegate in Orders F08-17 and F08-18 [66] refuted the government's claims, noting: "There is no substance to them, and they contain no deliberations." (FIPA and I also argue that mere caucus committees should not be granted the status of "cabinet committees" for Section 12 coverage.)

The government appealed the ruling to the Supreme Court and lost, in Ruling 2011 BCSC 112.[67] Then, in reply to my latest request for the same records, they simply ignored the court ruling, and are still applying Section 12 in the same manner today. See Appendix 3 of this report for samples of such agendas (both released in full and redacted).

There is a major risk of too many records being placed under the cabinet confidence umbrella, as has often been noted in other countries. As FIPA's submission notes: "It is imperative that BC's FOI laws reflect the proper protection of the deliberations of Cabinet, and not a notion that any document however vaguely related, falls within this mandatory exception."

Section 12 also covers "substance of deliberations" of local public bodies, but here, unlike with cabinet, it is hopeful to see that progress is possible, as the following example will attest. In 1999, I made a request to the Vancouver Police Board for the agenda and minutes of its in-camera meetings. It was denied in full, with the Section 12 "substance of deliberations" claim. I appealed, and in Order 00-14, the Commissioner rejected the VPB's claim and ordered many of the records opened, including agenda headings.

The Board later explained that it had inherited its traditions on meetings from years past, and had simply followed them without reflection. Then, after its careful consideration of the Order, everything changed. Fewer issues were placed into closed session discussions and more into open meetings, and today the Board even proactively posts portions of all its closed meeting agendas online.

I have never before in B.C. seen such a major reversal in attitude and practice on an FOI issue than this - one that I wish all public bodies would follow.[68] While I am aware that cabinet deals

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[66] See https://www.oipc.bc.ca/orders/971 and https://www.oipc.bc.ca/orders/975 The government need not overly worry about "harmful" release of topic headings because even if Sec. 12 coverage is removed, topic headings could still be withheld under other sections of the *Act*. In fact the government did so in this case, at times invoking Sec. 14, 21 and 22 – and I did not object to these applications of exemptions when making my final arguments.

[67] B.C. Supreme Court ruling 2011 BCSC 112 (Jan. 31, 2011). The ruling stated: "In my view, the conclusion of the IPC delegate, that headings that merely identify the subject of discussion without revealing the 'substance of deliberations' do not fall within the s. 12(1) exception, was a reasonable decision." Justice B.M. Joyce also stated that the standards for FOI rulings should not be "correctness" but "reasonableness." The ruling discusses the status of "government caucus committees," and limits how the B.C. government can define cabinet documents to withhold records.

[68] Some do: SFU posts quite detailed "summaries" of its closed session meetings minutes online (http://www.sfu.ca/bog/summaries/2009/september.html); and full minutes of the Langara College

with topics on a higher level than those entities above, may we hope cabinet could one day do likewise, after the right time passage?

Recommendation - Amend Section 12(2) to state that the Section 12 exemption does not apply to agendas or topic headings, including such examples as "items for discussion" and "legislation review."

A harms test for Section 12

As noted above, Section 12 is a so-called "class exemptions," i.e., one lacking a harms test, contrary to new global FOI trends.

The Commonwealth Parliamentary Association's *Recommendations for Transparent Governance,* 2004, states: "(6.2) Exceptions should apply only where there is a risk of substantial harm to the protected interest, and where that harm is greater than the overall public interest in having access to the information."

Some of this spirit is found in the FOI statute of the United Kingdom, regarding its Section 35 and 36 on policy advice and cabinet confidences. In Section 36, "prejudice to effective conduct of public affairs," there is a harms test:

> 36. […] (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act (a) would, or would be likely to, prejudice (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown [….]

Scotland's FOI law expresses similar concepts on cabinet solidarity as the Canadian rationale, and yet unlike Section 12 of the B.C. *FOIPP Act*, it contains a harms test, and Sec 30 (c) has a generous escape clause.

> 30. Prejudice to effective conduct of public affairs. Information is exempt information if its disclosure under this Act
>
> (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
>
> (b) would, or would be likely to, inhibit substantially (i) the free and frank provision of advice; or (ii) the free and frank exchange of views for the purposes of deliberation; or

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Board closed meeting are posted online, after a "Confidentiality Lifted" motion for them is passed at the subsequent meeting.

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

Recommendation: Add a harms test for the Section 12 cabinet records exemption, modeled upon the terms used in Scotland's FOI law Sec. 30.

(7) "Out of scope"

In a series of decisions released on June 19, 2015, the Information and Privacy Commissioner ruled that governments and public bodies can no longer withhold information in a record on the basis that it is "outside the scope" of the FOI request. This ends one method used by officials to arbitrarily remove information from records requested under FOI - in effect by themselves to create a new exemption.

For many years, in response to FOI requests filed by myself and others such as environmental groups, the government sent back records with sections whited out, with a little "o/s" handwritten upon the blanks. This was meant to denote "out of scope of the request," i.e., the subject matter is not relevant and so "the information is 'not responsive' to your request." Of course, being unable to see the "o/s" parts, the applicant had no way of knowing if the deleted portions were truly "out of scope" or not, unless he or she appealed to the Commissioner, which very few did. (See examples in Appendix 4 of this report.)

"This is a huge victory for FOI requesters in B.C.," said BC FIPA Executive Director Vincent Gogolek in reply to the OIPC orders. "The Commissioner's office has emphatically told public bodies in this province that they can't use this loophole ever again."

FIPA had appealed to the Commissioner after filing an FOI request to ICBC requesting records related to the data sharing and privacy aspects of combining the BC driver's licence with the BC Services Card. ICBC had refused to disclose parts of records on the basis that they were "not responsive," or outside the scope of the FOI request. In Order F15-25, the adjudicator disagreed. (https://www.oipc.bc.ca/orders/1803) In another case of 2011, OIPC Order F11-34 stated that the B.C. government cannot withhold parts of ministers' calendar records from my FOI requests by claiming these are "out of the scope" of the law. (https://www.oipc.bc.ca/orders/1050)

"It looks like the government was trying to create another, bigger hole to hide information, and thankfully they got shot down," said Gogolek then. "The government chose to use one computer program for all these files, and run it out of the minister's office, then the Act applies to it. The

provincial government was hoping they could get ministers' offices moved outside the law, the same way they are in Ottawa. The Commissioner's office wasn't buying it."[69]

Most troubling is that (according to statistics supplied to me by the Labour ministry), the "out of scope" claim had been applied to withhold information in 345 requests over the 2001-2010 decade, that is, five per cent of the total requests, and the number had been rising. FIPA in its 2015 submission to your Committee noted that "one ministry estimated that they used this dodge in 25 - 40 percent of requests when they could not find an exception that applied."

This practice may appear to be a bland, arcane point of administrative law and so elude notice, but I believe that it has over the years caused much vital information to be concealed from FOI applicants and the public.

The elimination of this practice will have a large beneficial effect, primarily for less sophisticated requesters who may be unaware of their rights or reluctant to challenge unsupported redactions to the records they receive by FOI. Yet improved practice alone is not enough - its prohibition must be enshrined in law.

Recommendation: State that government and agencies may not invoke the rationale of "out of scope" (or any equivalent term) to withhold any part of any record requested under the *FOIPP Act.* Records or parts of records may only be withheld if they fall under an exemption in the *FOIPP Act,* not if the government asserts that they fall outside the *Act*'s scope.

(8) Crown Copyright

On September 13, 2000, the director of the B.C. government's information and privacy branch (CPIAB) sent an internal memo to all ministerial FOI directors, in which he reported that the attorney-general's ministry had "raised the issue of Crown copyright." CPIAB then met with the

[69] FIPA astutely wrote about this problem in its submission to the 2010 Legislative review of the *FOIPP Act*: "'Out of scope' is not an exception listed in Part 2 of the Act. Nor do officials ever state that the requested records are those listed in Sec. 3(1) of the Act as not being subject to the Act. What this means is that officials have created their own unlimited new exception to the requirement to release records. This cannot be allowed to stand. . . . What happens now leads to the suspicion that what is described as 'out of scope' may be information the public body does not want to release, but cannot find any legal reason to withhold."

Intellectual Property Program "to determine the best method of asserting Crown copyright in FOI releases."[70]

Soon afterward, I was perplexed to receive notices slipped inside packages of documents mailed to me in response to some of my FOI requests. These letters warned me that: "These records are protected by copyright under the federal *Copyright Act*, pursuant to which unauthorized reproduction of works is forbidden."

If I wanted to redistribute even a portion of these records (produced at public expense and presumably for the public good), I would have to send a special request to the IPP - which could be denied - and also pay up. The implicit threat that I could be sued for non-compliance was clear.

The assertion that FOI applicants may not inform readers of harms to the public interest without first pleading for the state's permission and paying a copyright fee is disturbing. The Australian Copyright Law Review Committee report of 2005 stated: "There is great danger in the possibility of government using copyright as an instrument of censorship," and noted it had already been applied in 1996 regarding the unauthorized release of a police video.

Worse, Crown copyright warnings were sent to some FOI applicants but not others, with no discernible pattern. Thus, on copyright lawsuits, because there are far too many FOI publishing "violations" to sue on them all, the government would be able to pick and choose its legal actions arbitrarily, potentially for political objectives. Although these notices were widely ignored, being perceived by applicants as petty harassment, or even bullying (and I have never known of anyone that complied with them), that could have changed.

This practice appears to have been a made-in-B.C. innovation, for the federal information commissioner's office in Ottawa said it had never heard of such letters being sent out under Canada's *Access to Information Act*. Nor have any of the provincial commissioners under their provincial access laws. Indeed, Section 105 of the *U.S. Copyright Act* says that copyright protection is not available for any work of the United States government.

The whole matter was best summed up in a scathing critique by former federal information commissioner John Grace, who called Crown copyright a "repugnant, and perhaps even unconstitutional" practice that "richly deserves to be challenged." He concluded that "Crown copyright by another name is political or bureaucratic control," and asked: "In the context of Crown copyright, who is the Crown if not the people?"

After several years of receiving such notices, in 2008 I complained to B.C.'s information and privacy commissioner, David Loukidelis, who began reviewing the issue.[71] Positively, the Commissioner responded to me in a letter of June 1, 2009:

[70] See my article on this topic, *Stonewalling Freedom*, at http://www.canada.com/vancouversun/news/editorial/story.html?id=69970f8a-8f9a-4200-b41d-062707d8ea7c

> As part of our investigation of your complaint, I had discussions with the ministry responsible for intellectual property within government, the Ministry of Labour and Citizens' Services. Government has decided to cease including copyright notices in access to information disclosures and has confirmed that, effective immediately and government-wide, copyright notices will no longer be issued in conjunction with disclosure of records in response to access requests under *FIPPA*.

Yet he added that the province "reserves the right to assert and/or enforce copyright" in a few rare and exceptional cases, as described in his letter, and repeated in my recommendation below. (The Crown copyright notice and the OIPC letter appear in Appendix 5 of this report.) While this current voluntary suspension of Crown copyright claims in B.C. is welcome, there is no guarantee the problem could not arise again someday, hence it needs to be prohibited by statute.

Recommendation - Add a clause to the *FOIPP Act* to state that – as is the law in the United States – the B.C. government and public bodies may not assert "Crown copyright" regarding records released in response to *FOIPP Act* requests.

The only exceptions to this clause would be very limited and must be detailed in the *FOIPP Act,* not regulations*,* and could include situations - as discussed in the Commissioner's 2009 letter- where such material is subject to an existing legal obligation of the province, e.g., a licence; or someone makes copies of something purporting to be the official version of provincial material, but which is out of date, and distributes those copies to others, thus creating the potential for inconvenience, or worse, to third party recipients of that material.

Applicants would retain the right to appeal a wrongful or overly broad assertion of Crown copyright in regards to *FOIPP Act* responses to the Commissioner, who could prohibit the government from asserting copyright claims in cases where such assertions do not conform to this relevant section of the *Act.*

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[71] Then for several months (as if to compound its error), the attorney-general's ministry tried to shut down the OIPC review entirely. It legally challenged the Commissioner's authority to investigate my complaint, with the claim that he may only rule on FOI issues but not on *Copyright Act* matters, for that is a *federal* statute and so outside his jurisdiction, i.e., arguing that after the records were mailed out to applicants, these were moved outside of the B.C. FOI scope; whereas I and FIPA argued the review was still within such scope because these copyright intimidation notices violated the B.C. *FOIPP Act*'s legislated section 6 "duty to assist" the applicant. The government eventually dropped its objections.

(9) Student societies vs "the real world"

> *Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety.* - U.S. President Woodrow Wilson

Related to the issue of quasi-governmental FOI-exempt bodies noted in chapter 2, there is another overlooked but extremely serious problem, one that I should have raised 20 years ago: the secrecy of student societies, some of which have faced major financial scandals. The key question is: What is the best mechanism to ensure more transparency?

For example, each year the Langara Students Union collects hundreds of dollars in mandatory - not voluntary - fees from every student for an income of more than $2 million per year. Long renowned for its opacity (e.g., a refusal to say how much its employees are paid), in 2012 the LSU pushed its secrecy beyond endurance when it passed changes to its constitution that could allow the LSU to bar students from attending student society board meetings, prevent in-camera meetings from being taken, and prevent students from making copies of student union records.

Several student societies, acting like a law unto themselves, manage student money much like in a Wild West - a problem lying under the radar for decades (and raised here at a B.C. legislative FOI review for the first time) - and they require more accountability.[72] Many excellent points were made by Langara students Owen Munro and James Smith in their presentation to your Committee on November 18.

The problem began with Section 19 of the *B.C. College and Institute Act*, which states that institutions must collect fees on behalf of student unions. Oddly, it seems this section was passed as a sort of blank cheque, with no thought as to how or if such financial activity was to be scrutinized, and financial probity enforced.

"This power is bestowed upon people who do not have the qualifications or meaningful experience to manage major sums of public money without being accountable to a certain standard of high quality," as Munro and Smith well noted, adding of the elected members, with their rapid turnover, "These are young people with little to no experience in politics, finance, law or leadership." (One should be aware that much of the wrongdoing comes not so often from elected students councillors as from the fulltime, long-term staffers – often much older, shrewd, unionized, and very well reimbursed with sometimes-hidden benefits.)

[72] Unfortunately, we can anticipate that student societies may again try to rally students against the idea of any external supervision or control of their activities, with spurious appeals about "political independence from Victoria" – claims based on guised self-interest. A staffer at one fiscal scandal-ridden student society that was facing a possible shutdown by the college in the early 1990s disputed the college's motives; the cancellation is "absolutely linked to [the society's] political activity," he said. "What other reason would there be?"

College administrators and B.C. politicians and bureaucrats decline to intervene, deferring to the pleas for “independence,” and thus abandoning students, perhaps seeing their needs as too inconsequential or unpleasant to bother with; most prefer to not even discuss it. (In the early 1990s, the Minister of Advanced Education said he had considered placing one particularly out-of-control student society under trusteeship due to its financial wrongdoing, but regrettably he then changed his mind.)

Most graduates of the Langara Journalism Program (which I am from 1993) can recall longstanding conflict with LSU. It has been widely reported in the press that fights over lack of financial transparency for students’ money has led to student journalists banished from some societies’ premises, yelling matches, lawsuit threats, and at one college even assaults. All this needs to end.

One Committee member on Nov. 18, in regards to extending the *FOIPP Act* to the LSU, raised the caution that “hard cases make bad law.” That may be so if the LSU was unique, but the problems are systemic, extending far beyond Langara. See Appendix 7 of this report for news of financial wrongdoing in the student societies of Kwantlen Polytechnic University, Douglas College, the University of Victoria, and the College of New Caledonia.

For instance, between 2005 and 2011 the Kwantlen Student Association was embroiled in a series of scandals connected to their one-time director of finance and chairperson of the board, Aaron Takhar, and the Reduce All Fees slate of candidates, including mismanaged and missing funds, election improprieties, and many lawsuits. One audit found nearly $150,000 of student funds had been spent without supporting documents, including $67,000 paid to Takhar's consulting firm.

At one B.C. students society in the 1990s when $20,000 vanished (and so it was almost shut down by the college president), the police fraud branch came to investigate, and said "the students' accounting systems were so bad that you couldn't even tell where money had been stolen" (e.g., they were routinely forging signatures on cheques). The little such information that was - with much difficulty - revealed is likely just the tip of the iceberg.

Even when wrongdoers are identified, they are very rarely punished, so the deterrent value is nil. Some years ago one B.C. student society employee was caught stealing several thousand dollars from a beer garden, and the executive declined to prosecute, because, as a student official put it to the media: *"This is not the real world."* And yet they must be instructed that this is *real money*. Governments’ strangely laissez-faire non-response to such activity creates a hidden rich feeding ground for wrongdoing, enables and encourages such misdeeds, and makes external media watchdog access all the more necessary.

Since they are not governmental bodies, these societies are not covered by the FOI laws. But all B.C. student societies are registered societies, governed by the B.C. *Society Act*. That *Act*, which governs non-profit organizations like the LSU, underwent a review in Victoria in 2012. It covers 26,000 societies in B.C., and according to the review’s website is outdated and in need of reform.

Lorne Brownsey, assistant deputy minister of advanced education, sensibly wrote to the *Society Act*'s review in 2010 to say of student societies: "It is submitted that any new or amended *Society Act* must include provisions that require not-for-profit organizations to accurately share information about their governance, finances and operations at particular intervals. There must be appropriate investigative mechanisms included in the new legislation to enable the registrar to investigate, and act upon, potential abuses or deceptions."

The new 2015 version of B.C. *Society Act* states, in Section 37, "Unless otherwise provided in the bylaws, the documents, including the accounting records of a society must be open to the inspection of a director or member on reasonable notice to the society."[73] Yet the problem is there is no mechanism in the *Society Act* for a member to *enforce* this inspection right if the society refuses to comply. The final recourse to enforce the *Act* is for students to appeal to court, which most cannot afford to do.

As well, because Section 37 says nothing about *making copies*, the latest outrageous measure by the LSU is its new rule forbidding students from taking any notes of their financial records, even with a ballpoint pen (!)

Possible solutions

One course may be to amend the B.C. *FOIPP Act* to cover student societies, with all of that *Act*'s powers - especially the Information and Privacy Commissioner's authority to order record disclosure. This option would be contentious, for against this proposal, at least three objections may arise, all which should be considered:

[1] "Is the *Society Act* not a better vehicle to enforce more financial disclosure?"

As noted above, the current *Society Act* is very ineffectual at enforcing financial accountability in student societies. But even if it was amended to add enforcement powers, the administrative mechanisms to effect this power are missing, and would take time to set up in the Societies branch, with all the attendant costs.

On the other hand, if the *FOIPP Act* covered student societies, the Office of the Information and Privacy Commissioner already has two decades of experience and an infrastructure in place. (The OIPC should be granted extra resources when its mandate is expanded to include student societies, yet this would still likely entail less cost than having the Societies branch try to set up and duplicate the OIPC's powers.)

[73] The *Act* is at: http://www.bclaws.ca/civix/document/id/complete/statreg/96433_01#section6 Also, Section 39 says annual financial statements must be made available to all members ten days before an AGM, but these are far too general, lacking line-item details such as each staffer's salary and expenses.

[2] "Why should the *FOIPP Act* cover only student societies but not other societies?"

Student societies are an exceptional case,[74] for these reasons:

• A post-secondary education is regarded as indispensable for most forms of success today, and student unions are different from other societies, in that there is no option about membership. "For us, that makes a student union a de facto part of the post-secondary institution, even though the post-secondary institution doesn't have any say over how not just the LSU but the student societies run," noted Munro and Smith.

• Student unions' funding is taken mainly from the students themselves. Yet in turn much of those students' money comes from government through student loans and grants, that is, taxpayer's money, and so the general public has an interest in the society's spending as well.

• Some student society officials - especially at community colleges - appear to lack the experience to manage multi-million dollar budgets and so require more external oversight.

[3] "*If* the student society is covered by the B.C. *FOIPP Act*, who should act as its director of information and privacy (DMIP)?"

It should be the college or university administration's current DMIP, a trained professional, one objective and detached from the student society. The society itself cannot be entrusted with this responsibility, which would be a conflict -of-interest, even if it did improbably have the technical competence for it. (The DMIP's salary and resources could be enhanced to fulfill this added new task.) This is not an encroachment upon the society's cherished "political independence," despite its vocal protests; the parent institution's DMIP would not create or enforce student society policies, just the *FOIPP Act*. If the societies have nothing to hide, then they have nothing to fear.

As well, the cost of administering the *FOIPP Act* on campuses would likely decline over time, as the society (and other public subsidiaries) eventually begins to routinely release more regularly-requested records - as indeed it always should have done - and knowing it has no legal grounds to deny them under FOI; such would include salaries, expenses, contracts, meeting minutes.

Of course, those opposed to FOI coverage would have many counterarguments, such as: It is unfair to single out student societies, for other societies might have as bad or worse problems as yet unknown; labour unions also collect mandatory fees, and that is no reason to FOI-cover them; such senior external oversight would be an intrusion on the society's autonomy, and could

[74] There is one other B.C. society covered by the *FOIPP Act*: the Legal Services Society. It provides legal aid in the province, receives large amounts of government funding for this goal, and works under their own *Act*, not under the *Society Act*.

be used as a means of political control, and more.[75] Yet I believe the benefits of FOI coverage would far outweigh these objections, overall.

In conclusion, as Munro and Smith put it: "We have stood idly by for far too long." It seems incomprehensible why senior governments have abandoned students for decades as millions of their dollars have been extracted from their pockets against their will, gone to unqualified managers, spent in secret, and then untold and untellable amounts of it stolen with impunity. This cannot continue.

Some advocates believe that, while extending *FOIPP Act* coverage to these entities might not be the perfect solution in every regard, it is still the best (or rather least bad) of the available options, and on balance far better than the current secret status quo. In the end, it is your choice as to what is the best mechanism to ensure accountability.

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(10) Response Times

Prior to a discussion on administrative procedures, let us pause to consider the potential real life consequences of FOI delays for an average citizen. The matter was well related in one Canadian journalistic textbook:

> Time-sensitive records can lose all their value is their release is significantly delayed. Consider, for example, a government decision on whether to protect a particular green space or deport someone to his or her native country. Records explaining the context and details surrounding these decisions could have a vital impact on the public debate, but only if they are made public in a timely way. If release is withheld until after the person is deported or the green space has given way to a tower block, that information is clearly not much use any more, and citizens have been robbed of their ability to engage fully in public debate.[76]

Furthermore, for the media, if "justice delayed is justice denied," than news delayed is news denied, rather like perishable food with expiry dates. By deferring the release of records through the FOI system long enough, officials calculate - often correctly, sadly enough - that editors will spurn them as "old news" and therefore not worth publishing. This has surely led over the years to the loss of countless potential news articles in the public interest that were essentially "spiked" (a news industry term) by the state.

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[75] As well, others may plead against *FOIPP Act* coverage with, "The *Society Act* could be made more effective by amendments." (I would call this prospect extremely doubtful; it was last amended in 2015, after consultations, with the needed accountability measures still missing.) Or, "if not FOI coverage, there may still be other options, e.g., in the provincial government, salaries over $75,000, expenses and contract amounts must be published annually in the *Financial Disclosure Act.* Perhaps routine publication of such records for institutes of higher education could be mandated in that *Act*, or other statutes such as the *B.C. College and Institute Act* and the *University Act*."

[76] David McKie, et.al., *Digging Deeper, A Canadian Reporter's Research Guide*. 2nd ed. Toronto: Oxford University Press, 2010, pg. 205

Besides the problems of official resistance, indifference to FOI deadlines, or passive-aggression (i.e., apparently cooperating while covertly resisting), there is another, more structural issue that seems as immutable as a law of nature:

A week is a long time in journalism (and politics), but a year is a short time in government. Both parties move to different speeds and rhythms, and often seem unable to understand the other's time culture. This is, of course, a recipe for perennial frustration and conflict, and with long-overdue requests, the applicant or a Commissioner is compelled to repeatedly call on the public body like a collections agency, a disagreeable situation for all concerned. Public servants may see this as unjust as chastising an elephant for not keeping pace with a cheetah; while some others might consider that the only solution is to try to meet each other part way.

Under the B.C. *FOIPP Act*, an agency must respond to requests within 30 working days, a deadline which it can extend by itself for another 30 days, and in practice often longer.

No FOI applicant without an uncommon degree of patience and endurance can prevail, and the legal odds are always stacked against him or her. For example, the applicant has just 30 working days to appeal a B.C. *FOIPP Act* refusal, and if that deadline is missed there is no second chance. By contrast government routinely breaks its own deadlines with impunity; there are no penalties for delays, as there needs to be - which stands at variance with other nations' FOI laws. (In 2015, a Newspapers Canada report gave the B.C. government an F grade - down from D in 2014 - for speed of disclosure.)

If or when officials complain to your Committee that this deadline in the B.C. *FOIPP Act* is too onerous to comply with, they could be reminded by way of reply that for FOI laws, the response time of most jurisdictions' laws is *far shorter*. The Centre for Law and Democracy in Halifax estimates that 46 of 102 countries legally mandate response times of 10 working days or less, while most of the remaining 56 have timelines that are 20 working days or longer.

I cannot say exactly how well such laws are followed in practice, but the public and media in other states would not tolerate the delays of months or even years that polite Canadians have passively come to accept as inevitable. Such B.C. officials' complaints would be even less justifiable after calendar days was changed to working days in our *Act*, and one considers the far less advanced administrative systems in other nations.[77]

In Ottawa there was an important Federal Court of Appeal decision on FOI delays in March 2014. It overturned an effort in the lower Federal Court to quash the information commissioner's

[77] As Mr. Karanicolas of the CLD told your Committee: "The Indian bureaucracy functions certainly without the level of computerization and certainly without the level of technology and administrative support that the Canadian bureaucracy works with. If they can deliver information in 30 calendar days, certainly it's difficult to believe why it wouldn't be possible among public bodies here."

request for judicial review, upon an *Access to Information Act* applicant's complaint that the National Defence department had unjustly extended the response time limit by 1,110 days.[78] The Court offered guidance for future cases (and even perhaps for revised B.C. *FOIPP Act* wording), in stating that:

> . . . it is not enough for a government institution to simply assert the existence of a statutory justification for an extension and claim an extension of its choice. An effort must be made to demonstrate the link between the justification advanced and the length of the extension taken. . . [government institutions] must make a serious effort to assess the required duration, and that the estimated calculation be sufficiently rigorous, logical and supportable to pass muster under reasonableness review.

Our *Act* was amended at Section 10 (1)(b) to give public bodies the unilateral ability to extend their response deadlines by an additional 30 days if "a large number of records is requested," and meeting the time limit would "unreasonably interfere with the operations of the public body."

Jude Crasta of the Alma Mater Society told your Committee that "public bodies wishing to delay for this reason tend to not ask, or give, essentially, a reason for their time extension, especially in our personal experience. They just take the time." The AMS advised these extensions in Section 10 (1)(b) be deleted, as do I.

Consider the global picture. In Norway, internal guidelines issued by the Ministry of Justice say that requests should be responded to in three days. The Norwegian Ombudsman in 2000 ruled: "It should be possible to decide most disclosure requests the same day or at least in the course of one to three working days, provided that no special, practical difficulties were involved."

FOI delays have been a problem in the United States as well, but the issue has been tackled. There, the Senate passed Bill S.849, the *Open Government Act* of 2007, which puts some teeth into the statutory mandate that an agency must respond to a *FOIA* request within 20 days; in the U.S. there had previously been no statutory penalty for agency delay in responding to a request, and B.C. still lacks one.

In Mexico's FOI law, agencies must respond to requests in 20 working days, which may be extended for another 20. Then, in Article 53:

> Lack of response to a request for access within the time limit indicated in Art. 44 will be understood as an acceptance of the request, and the agency or entity is still required to provide access to the information within a time period no greater than ten working days, covering all costs generated by the reproduction of the responsive material, except when the Institute determines that the documents in question are classified or confidential.

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[78] Federal Court of Appeal decision in *Information Commissioner of Canada v Minister of National Defence* (2015 FCA 56) http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/108413/index.do The court added: "This type of perfunctory treatment of the matter shows that DND acted as though it was accountable to no one but itself in asserting its extension." This often occurs in B.C. as well.

TWO JURISDICTIONS – NIGHT AND DAY

In my work I have found no jurisdiction that manages freedom of information better than American states (where the oldest known public records law in North America comes from Wisconsin in 1849[79]) and from whom much can be learned. The starkest contrast in response times can be found by those who make information requests using both the B.C. and Washington state FOI laws.

The American public and media would not tolerate the service found in the B.C. FOI system. I have had records emailed to me by the American government, in full, within three days (and one time *overnight*), that would likely have taken months under our law and have been littered with deletions.

Journalist Sean Holman reported the same results in his work, obtaining much fuller and faster replies from the Washington state FOI system than the B.C. one, regarding records of lobbyist Patrick Kinsella's activities.

Similarly, in 2009, FIPA filed two identical FOI requests on the same day with the offices of Washington Governor Christine Gregoire and B.C. Premier Gordon Campbell got very different results. FIPA asked for information about intergovernmental meetings related to the new RFID-equipped drivers' licences. Governor Gregoire's office responded in full in less than a month, with copying costs of US $5.30. The Office of the Premier did not provide an initial response until after the Washington office had sent all the requested documents, but did send a bill for C. $620.

While on the subject of cross-border comparisons, consider the B.C. – American partnership for a regional system to trade greenhouse gas emissions. The Americans published responses to the proposal for emissions trading. Some 90 submissions from corporations, non-profits, interest groups and individuals can be read online at the Western Governors Association website.

By contrast, the B.C cabinet committee for climate action fielded submissions from more than 170 "interested parties" – all were strictly confidential; even a *list* of who addressed cabinet was not released. New Mexico, California and Washington State have posted vast amounts of material on climate change discussions online – all types of records withheld in B.C.[80]

On such grounds in fact, Canadians often use American FOI laws to find records on Canadian affairs that they cannot obtain here. I have heard visiting American journalists deride Canada's FOI laws as "pathetic" in comparison to their own, and the process of trying to obtain information from Canada on cross-border issues as "shockingly bureaucratic," and I was unable to contradict them.

[79] One article notes the *Wisconsin Revised Statutes* of 1849 under Chapter 10, requires every sheriff, circuit court clerk, and county treasurer to "open for the examination of any person" all of their books and papers. Any officer who neglected to comply "shall forfeit for each day he shall so neglect, the sum of five dollars." (i.e., about $200 today with inflation. The law is still on the books, the fine $5 a day – still more than anywhere in Canada.)

[80] *Secretive Campbell compares poorly to the wide-open Americans*. By Vaughn Palmer. *Vancouver Sun*. Jan 22, 2008

A reformed B.C. *FOIPP Act* would do very well to follow the FOI law of Quebec, where the public body has 20 days for an initial reply, with the right to extend for 10 days more. Then, in the Quebec law's Section 52, "On failure to give effect to a request for access within the applicable time limit, the person in charge is deemed to have denied access to the document."

In November 2006 the B.C. information and privacy commissioner created a superb, creative new "consent order" and "expedited inquiry" process to curtail delays, which works effectively today, and this process should be enshrined in the B.C. *FOIPP Act*. (In the new process, both applicant and agency voluntarily sign a binding "consent order," and if the latter breaches the time deadline, that is a serious "deemed refusal." I have found the process has quickened replies to my requests.)[81]

One other matter, in Section 11, "Transferring a request," the B.C. *FOIPP Act* was amended in 2002 so that the allowable time for a transfer was doubled to 20 days, a change which lawyer Michael Doherty called "an extraordinary acknowledgement of bureaucratic delay and incompetence." The *Act*'s original 10 day limit to transfer requests should be restored.

Some applicants might inaccurately attribute delays to overworked FOI staff, who generally try their best, but more often the problem originates elsewhere, such as with the "program area" in which the records must be found, which can be located in another office or city. The final and worst bottleneck is usually the official who must "sign off" on the records before they can be sent out (sometimes the deputy minister, as the "head of the public body"), whenever he/she can find the time to do so. "We're too busy" is the general excuse given.

B.C. officials also claim they need to consult with multiple departments before releasing material, which further extends the process, and there can be disputes over who "controls" a document. The government can then improperly delay the FOI reply for weeks longer as its public relations branch toils on a pre-release "issue management" plan (that is, political spin control). Public relations staff need not be prohibited from being informed about FOI requests, per se - in reality this could likely not be orally stopped anyways - but only if this process does not cause delays.

Recommendation - Amend the Act to mandate an initial reply in 20 working days (instead of the current 30 days), extendable for another 20 – the standard in the FOI laws of Quebec, New Zealand, the United Kingdom and the United States.

Recommendation - In November 2006, the B.C. Information Commissioner launched an effective new "expedited inquiry" process to curtail delays, which should be placed in law.

[81] Another positive idea: As Prof. Alasdair Roberts inquired, "Customers can now track the progress of their UPS parcel deliveries online, so why not their FOI requests too?" Perhaps this could be done by allowing applicants (with their own password) access to only the small part of the CRTS governmental FOI tracking system that deals with the processing of their own request. The American national FOIA system has a working equivalent of this concept.

Recommendation - Amend the Act to mandate that when a department's response falls into deemed refusal (i.e., failure to meet lawful deadlines), it loses the right to collect fees (including application fees and any search, preparation, and photocopying charges).

Recommendation - Amend the Act to implement the approach in some laws (e.g. Mexico), so that if an agency is in a deemed refusal situation, it is required to gain the approval of the Commissioner before withholding information under any exemption.

Recommendation - Amend the law to mandate that where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, a response must be provided within 48 hours (a model found in many other FOI laws).

Recommendation - Restore the term "calendar days" – as it was initially – in place of "business days," in regards to B.C. FOIPP Act response and appeal times.

Recommendation - The *Act* was amended at Section 10 (1)(b) to give public bodies the unilateral ability to extend their response deadlines by an additional 30 days if "a large number of records is requested," and meeting the time limit would "unreasonably interfere with the operations of the public body." These provisions are abused and should be deleted.

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(11) Section 14 - Legal Advice

Section 14 of the B.C. *FOIPP Act* reads: "14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege." This section has no harms test, and no time limits.

Here one professional group is mandated to draft, interpret and apply the one FOI exemption that could most benefit itself, a privilege extended to no other sector (almost as if the police had drafted and applied Section 15 on law enforcement, or the B.C. chambers of commerce had drafted Section 21 on trade secrets). This is not a complaint *per se*, for obviously lawyers and judges are the most qualified for those tasks, and yet, how can the rest of society place some restraints upon this power?

From this situation it comes as no surprise to note that Section 14 is so over-broadly worded and so over-applied in practice. For instance, politicians sometimes call in a lawyer to merely sit in on a closed door meeting to listen and then term his or her presence "legal advice;" lawyers also fight to keep secret their taxpayer-funded legal billing figures even after all appeals are finished.

If such outcomes were not the intent of parliament, then the B.C. *FOIPP Act* should be amended to render the solicitor-client privilege much more narrow and specific, to settle such disputes before they arise. (The exemption also overlaps with that for "policy advice," which can sometimes include legal advice, and this needs better demarcation.) The *Act* was created to serve the broader public interest, not just one sector's interest. I fully agree with the CLD's advice to your committee that "The general recommendation that we make on this is to limit solicitor-client privilege to litigation privilege rather than *anything* that comes from a lawyer."

Moreover, the lack of any time limit, conceivably even for centuries, for legal advice in our FOIPP Act is simply indefensible, e.g., it could in principle be applied to a solicitor's advice written in 1871 regarding B.C.'s entry into Confederation. This concept was rebuked by former federal Information Commissioner John Reid, on the *Access to Information Act*'s similar legal advice exemption (*ATIA* Sec. 23):

> It has been obvious over the past 22 years that the application and interpretation of section 23 by the government (read – Justice Department) is unsatisfactory. Most legal opinions, however old and stale, general or uncontroversial, are jealously kept secret. Tax dollars are used to produce these legal opinions and, unless an injury to the interests of the Crown can reasonably be expected to result from disclosure, legal opinions should be disclosed.[82]

Yet in the FOI law of the United Kingdom, a record cannot be withheld after 30 years under its Section 43, Legal professional privilege. This time limit is advisable for Section 14 of the B.C. *FOIPP Act*. What is done in the U.K., British Columbia's parliamentary model, would surely be workable for B.C.

Federal information commissioner Suzanne Legault in 2015 well advised of the *Access to Information Act:* "4.24. The Information Commissioner recommends imposing a 12-year time limit from the last administrative action on a file on the exemption for solicitor-client privilege, but only as the exemption applies to legal advice privilege." (As well: "4.25. The Information Commissioner recommends that the solicitor-client exemption may not be applied to aggregate total amounts of legal fees.")

The solicitor-client exemption as described in the B.C. *FOIPP Act* is present in many global FOI laws, but not all. Even where does occur in some form, however, it is often far more narrowly defined than in the B.C. law, with language indicating what harms could occur from record release. In Mexico's statute, Article 13, information is "classified" if its disclosure could impair "procedural strategies in judicial or administrative processes that are ongoing." In Peru's law, "exempt" records in Section 15.B include:

> 4. Information prepared or obtained by the Public Administration's legal advisors or attorneys whose publication could reveal a strategy to be adopted in the defense or procedure of an administrative or judicial process or any type of information protected by professional secrecy that a lawyer must keep to serve his client. This exemption ends when the process finishes.

In Justice Gomery's report, *Restoring Accountability*, 2006, it is noted: "The Commission supports amendments that would substantially reduce the kinds of records that the Government may withhold on the basis of the injury test, such as [. . . .] the [*ATI Act*'s] section 23 category of records where solicitor-client privilege is claimed."

The 1999 B.C. legislative review committee of this law was also concerned about the overly broad scope of Section 14:

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[82] John Reid, The Access to Information Act - Proposed Changes and Notes. Ottawa, 2005 http://www.infocom.gc.ca/specialreports/2005reform-e.asp

> Members debated the rationale for keeping such documents permanently exempt from disclosure. It was also considered that solicitor-client privilege, in terms of legal advice to public bodies in their policymaking role, was not intended to be protected to the same degree as solicitor-client privilege in law enforcement matters by the *FIPPA*. It was noted that solicitor-client privilege can be waived, and that if government is the client in cases of legal advice, government has the option of waiving its right to exemption under the *FIPPA*.

I further endorse the 2005 advice of FIPA, who recommended Section 14 be narrowed so that:

> (a) The exception should apply to legal advice only as originally intended.
>
> (b) Documents must be released after information subject to solicitor-client privilege and other applicable exceptions is severed.

Recommendation - Amend Section 14 (legal advice) to state that the exemption cannot be applied to records 30 years after they were created (per the model of the UK FOI law's Sec.43).

As well, add a harms test, to state the exemption can only be applied to withhold records prepared or obtained by the agency's legal advisors if their release could reveal or impair procedural strategies in judicial or administrative processes, or any type of information protected by professional confidentiality that lawyers must keep to serve their clients.

(12) Sections 17 and 21- Trade secrets

Except for my two recommendations below, I believe Section 17 (Government Economic Interests) and Section 21 (Third Party Economic Interests) are otherwise satisfactory for now, and the government should resist any ongoing efforts to weaken them, such as Bill 30 of 2006.

As the B.C. commissioner wrote in his 2004 recommendations: "No further change to s.21 should be contemplated at this time. Any further amendments would be a retrograde step and would run counter to the thrust of such provisions in almost all Canadian access laws and would run against the current of decisions under those laws."

The government should release all winning and losing bids for supply and service contracts upon request - and better yet publish them, as many places do - outside the FOI process, as Ontario Privacy Commissioner Ann Cavoukian advised. Two cases below suggest the need for this proposal (and there are others):

- In order F13-07 of 2013, the B.C. commissioner's adjudicator ordered the Provincial Capital Commission to release to me all losing bids to lease and develop the CPR Steamship Terminal Building (the site of the former Royal London Wax Museum) in

Victoria's inner harbour, finding no evidence to support the PCC's pleas of Section 21(1) financial harm.[83] (See Appendix 7 for my dispute on another Section 17 and 21 case.)

- In order F14-36 of 2014 the B.C. commissioner's adjudicator ordered Vancouver city hall to release all losing bids on a parking meters contract to Vancouver Courier journalist Bob Mackin. The OIPC said city hall failed to show how disclosing the bidding information would cause any of the parties financial loss under Section 21, because the contract winner had already been chosen.[84]

Recommendation – The government must publish all winning and losing bids for supply and service contracts, outside the FOI process.

Recommendation – Amend Sec. 21 (1.)(b), re: "that is supplied, implicitly or explicitly, in confidence." Change to – "that is supplied or negotiated, implicitly or explicitly, in confidence."

(13) Section 22 – Privacy

This section is generally well drafted, but there are a few features that could be added.

First, the section needs to state that the FOI applicant's identity must not be revealed within government without a strict need to know - that is, mainly to locate the records being sought - a practice that has egregiously occurred and which violates privacy rights in the *Act*. Newfoundland's FOI law (see pg. 48) was amended to avert this problem, as B.C. could.[85]

[83] See https://www.oipc.bc.ca/orders/1512 In broadly sweeping efforts, the PCC also tried but failed to block release of records by Sec. 13(1), policy advice; and Sec. 15(1)(l), that releasing the building's drawings would somehow impair public security against terrorism; and Sec. 22(1), privacy.

[84] Mackin had sought the names of all bidders and the dollar values of their bids. Upon his appeal to the OIPC, city hall released the names of the companies but still kept the dollar values of their bids secret. Vancouver city council had approved a $4 million, three-year contract to incumbent PayByPhone in 2012. Five companies had tendered bids and three were shortlisted, however, only chosen bidder PayByPhone was named. The city expected to gross $45 million from parking meters in 2012.

[85] Last July 16, a ministry official told your Committee on "a Recommendation 10 related to applicant anonymity," that: "Government chose to address this issue through policy and training, as the goal could be accomplished more directly and completely this way. The issue that arises for the anonymity…. There are times when the identity of a requestor needs to be known, such as when they're asking for their own information…. That has to be passed on to the people searching for their records. The nuances of those instances are difficult to address clearly in legislation." This is not correct, for Newfoundland and others have done so very well in their laws.

This topic was fully examined in a story by journalist Ann Rees (in *TheTyee.ca*, April 3, 2004): "The provincial Liberal government has put Freedom of Information under surveillance in order to protect its political image." The problem dated back over a decade, as she noted:

> **Previous government disclosed FOIs, not names**
>
> Information and Privacy Commissioner David Flaherty first raised concerns about communications involvement in the FOI process in his 1996-1997 annual report. Flaherty launched an investigation into such breaches of privacy following a complaint by FOI researcher and reporter Stanley Tromp. The then-NDP government assured Flaherty that requesters' names were not disclosed to communications advisors.
>
> "The Commissioner's Office investigation revealed that it was not the Ministry's practice to routinely disclose applicant's names. Further, although the Deputy Minister was routinely advised when a member of the media had made an access request, only the substance of the request was provided, not the name of applicant," Flaherty concluded.
>
> But that is no longer true. Today, names of applicants who request sensitive records are provided to communications spin doctors, when deemed politically necessary.
>
> Tromp, whose complaint triggered the commissioner's investigation, was identified by name in a 2002 confidential communications memo written for the attention of Liberal cabinet minister Kevin Falcon. The minister's office did not respond to an emailed request for comment.
>
> The memo is titled "Stanley Tromp's FOI request to Deregulation Office," and explains that the request has been delayed for almost a year and that the records had been heavily-censored because of cabinet confidentiality protections in the *Act*.

Even if the current government claims to have ceased this practice today, a prohibition of it needs to be enshrined in law – not just in regulation or policy.[86]

Recommendation - Amend Sec. 22 to state that a *FOIPP Act* applicant's identity must not be revealed within government without a strict need to know (which is, mainly to locate the records being sought), as in the Newfoundland FOI law.

Secondly, in 2007, B.C. municipal police departments began refusing to routinely release the salary and expense figures for their senior officers (which they had always released before), with absurd new "privacy" arguments. This occurred despite that the Act's Sec. 22 (4) reads:

> A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if … (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[86] This principle also applies to the practice of political "sensitivity filters" for media FOI requests; the B.C. Liberals stated in their 2009 election platform, "We have eliminated the use of 'sensitivity ratings' in request processing." Yet such a termination had best be guaranteed in law, to guarantee that all FOI applicants be treated equally.

So I had to file FOI requests to each department for the figures. Such is an egregious waste of public resources, to process FOI requests and appeals. The refusals may have ceased for now, but routine disclosure of such amounts (paid for by taxpayers), without FOI requests, should be guaranteed in the *FOIPP Act* so such refusals can never reoccur.

On a similar idea, the Insurance Corporation of British Columbia rejected my FOI request to see how much "incentive pay" (bonuses by another name) it had given to its top executives in 2005. I appealed, and despite a costly three-year legal effort by ICBC, the Information and Privacy Commission adjudicator in 2010 rejected the crown corporation's "privacy" claims, and ordered the records released - which showed ICBC had paid out $650,000 in such benefits, amounts funded by ICBC ratepayers. (See Order F10-05 at https://www.oipc.bc.ca/orders/1021)

When I requested by FOI to see records on the former UBC president's unpublished $91,000 "retirement allowance" payment (added to his full pension), he objected on Sec. 22 privacy grounds. I also had to apply by FOI to see records of UBC's confidential $500,000 interest-free loans to deans. It should be emphasized that no such records can be withheld under the law.

Recommendation - Amend the B.C. *FOIPP Act* to more clearly mandate that all salaries and expenses - and bonuses and benefits - of officials and employees of all entities that are covered by the *Act* must be available for routine release, without an FOI request. Perhaps extend the *Financial Disclosure Act* to require all entities covered by the *FOIPP Act* (as the B.C. government does for ministries) to publish salaries over $75,000 and expenses.

Section 22.1 of the B.C. *FOIPP Act*, "Disclosure of information relation to abortion services," should be deleted. This later-added subsection is unique amongst the world's FOI laws and unnecessary, because if in the event that harms could result from the disclosure of such information, release could already have been blocked by other exemptions in the *Act*, e.g., Section 15, the original Section 22.

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(14) Section 79 - Conflicts of laws

The relationship of a transparency statute to other laws is a complex topic that can easily elude the radar, for when a conflict of laws arises on such a score, it may appear as an obscure, unimportant technicality. Yet FOI laws are designed to contain enough exemptions to prevent the harms that the secrecy clauses in other laws profess to avert, making those other laws' provisions redundant and illogical at best, deleterious at worst.

Passing secrecy provisions in other acts to override an FOI statute can give rise to a confusing patchwork of laws, for in such provisions, the withholding of the information might be

mandatory or discretionary; with a harms tests, time limits, a public interest override and appeal routes – or, more often, without any of these features.[87]

The problem really is acutely important, for Section 79 of the B.C. *FOIPP Act* prescribes that an agency must refuse to disclose any information requested under the *Act* that is restricted by many other statutes, as set out in a schedule to the *Act*.

> Relationship of Act to other Acts
>
> 79. If a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act.

As the OIPC told your Committee, at least 43 B.C. statutes have provisions that override or prevail over the B.C. *FOIPP Act* in whole or in part. (Some such overrides are found in Sec. 74 of the *Child, Family and Community Service Act*, and Sec. 40 of the *Human Rights Code*.) The *FOIPP Act* contains no mechanism to review, update or remove them. Yet Newfoundland has added to its access legislation a requirement that statutes that prevail over the FOI law should be listed in a schedule to that statute and routinely reviewed with it, and so should we.

Unchecked, the number of listed statutory overrides could grow still further, a practice that former federal Information Commissioner John Reid has well described as "secrecy creep," while his predecessor the late John Grace called Section 24 of the federal *ATI Act* (the equivalent to B.C.'s *FOIPP Act* Section 79) "the nasty little secret of our access legislation." Both advised that *ATIA* Section 24 be deleted, as does Justice Gomery.

Section 79 violates the stated goals of the B.C. *FOIPP Act*, which is to make government more accountable to the public and to provide a right of appeal. It is a mandatory and so-called "class" exemption: once the government decides that a record contains information of a kind contemplated in one of those other provisions, the agency has no choice but to refuse its release. However, very few of the other provisions by their own terms absolutely bar disclosure; they usually only "restrict" it in some way.

Indeed, most grant some measure of discretion to an official to determine whether to release information - usually to other government officials or to the person who provided it. As one expert notes, "This varying degree of discretion fits awkwardly within a mandatory class exemption."[88]

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[87] In British Columbia, for example, aware that amending the *FOIPP Act* directly would alert the media and FOI advocates, the government sometimes quietly inserts new secrecy provisions (consequential amendments) that override the FOI law to other statutes in a *Miscellaneous Statutes Amendment Act*, an old legislative ruse to evade notice that is less successful today.

[88] Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act, report: *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. Ottawa: Queen's Printer of Canada, 1987

Section 79 also violates the principle of independent review. The scope of the Information Commissioner's review of government refusals to release records under this exemption is quite narrow. In investigating this refusal, all the Commissioner can do is to determine whether or not the disclosure is subject to some other statutory restriction. If it is, then even if the disclosure would likely cause no identifiable harm, it must be withheld nonetheless.[89] This prescription must be followed even if the other statute merely restricts, but does not categorically bar, disclosure.

Resolving this problem seems not a high priority in Canada because statesmen perceive that there will always be other far more urgent political priorities than the harmonization of principles in domestic statutes, to avert conflict of laws disputes that might never arise in practice. But Section 79 is entirely unnecessary because exemptions in the B.C. *FOIPP Act* already provide ample protection for legitimate interests.

Federal information commissioner Suzanne Legault in 2015 well advised of the *Access to Information Act* that which should be done in B.C. as well:

> 4.29. The Information Commissioner recommends a comprehensive review, made in consultation with the Information Commissioner, of all of the provisions listed in Schedule II and any legislation that otherwise limits the right of access. Any provision covered by the general exemptions in the *Act* should be repealed.
>
> 4.30. The Information Commissioner recommends that new exemptions be added to the *Act*, in consultation with the Information Commissioner, where the information would not be protected by a general exemption that already exists in the Act.
>
> 4.31. The Information Commissioner recommends that section 24 and Schedule II be repealed.

The United Kingdom also allows the provisions of several other statutes to override its FOI law. Yet in one report, the UK's Department of Constitutional Affairs (in charge of implementing the law) identified 381 other pieces of legislation that limit the right of access under the FOI act, and committed to repealing or amending 97 of those laws and reviewing more. British Columbia should do likewise with the B.C. *FOIPP Act*. Yet as FIPA sadly remarked in its 2005 recommendations:

> We were pleased to receive the assurance of BC's Minister of Management Services, in a letter of December 10, 2001, that such a review of statutory exemptions would be undertaken as part of the legislative review of the Act. The government never followed through on this promise.

As well, the Commonwealth Parliamentary Association, in *Recommendations for Transparent Governance*, 2004, noted that:

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[89] One deplorable example: Vancouver was at one time the only B.C. municipality I know of that barred citizens from photocopying lists of the donors to civic election campaigns. My FOI request in 2004 for copies of these records was denied, so I was compelled to sit in the city clerk's office for hours to hand-write them all by pen. I appealed, but the Commissioner ruled that these rules of the *Vancouver Charter*'s Sec. 65 overrode rights in the B.C. FOIPP Act, as Sec. 79 specifically allowed. See Order 04-01

> (7.1) Where there is a conflict between the access to information law and any other legislation, the access to information law should, to the extent of that inconsistency, prevail.
>
> (7.2) Urgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information.
>
> (12.4) The independent administrative body should also play a role in ensuring that other legislation is consistent with the access to information law. This should involve reviewing existing legislation and making recommendations for reform of any inconsistent laws, as well as being consulted on whether or not proposed legislation would impede the effective operation of the access to information regime.

Several other nations have well understood this problem. Consider Section 5 of South Africa's FOI statute:

> 5. This *Act* applies to the exclusion of any provision of other legislation that (a) prohibits or restricts the disclosure of a record of a public body or private body; and (b) is materially inconsistent with an object, or a specific provision, of this *Act*.

India's FOI law contains a similar provision in Section 22. Within Canada, such a resolution was urged in Ottawa by MPs nearly three decades ago (regarding *ATI Act* Section 24 – the equivalent of B.C. *FOIPP Act* Section 79):

> The Committee is concerned about a "slippery slope" effect should the current approach of listed other statutory provisions in Schedule II be retained…. The impact of permitting wholesale additions to the list of other statutory exemptions contained in the *Access Act* is obvious: the spirit of the legislation could readily be defeated.
>
> The *Access Act* would not be a comprehensive statement of our rights to the disclosure of government records. Instead, it would be amorphous. One of the benefits to be derived from listing all exemptions in the *Access Act* is that, in effect, the complete *Act* is brought under one roof. No longer would other legislation need to be consulted in order to determine one's rights in this vital area. The Committee recommends that the *Access Act* be amended to repeal section 24/Schedule II.[90]

Recommendation: First option: Repeal B.C. *FOIPP Act* Section 79 and its related schedule. If that is not accepted, there is a secondary option (which was FIPA's recommendation in 2005): Extend coverage to categories of records exempted by "notwithstanding clauses" in other statutes.

At the very least, follow the Newfoundland example, which has added to its access legislation a requirement that statutes that prevail over the FOI law should be listed in a schedule to that statute and routinely reviewed with it.

[90] *Open and Shut*, report by MPs' committee on Enhancing the Right to Know, Ottawa, 1987

(15) Section 75 - Fees

It is widely believed by FOI applicants that governments routinely impose excessive fee estimates for access to records to dissuade requesters.

An example of this assertion was raised in 2007 when the Information Commissioner's office ruled that a fee of $173,000 levied against Sierra Legal for data on polluters was unreasonable, that the Environment Ministry did not even examine the requested records in making its estimate, and that it improperly failed to adequately consider waiving the fee in the public interest. (This information was freely posted on government websites in the 1990's.)

The next month, the minister responsible for FOI policy, Olga Illich, candidly told her hometown paper the *Richmond News*, "These (fees) are also intended to address nuisance requests. If you pay a fee, sometimes you'll be a little more thoughtful about asking for information." Yet the minister failed to note that the *FOIPP Act*'s Section 43 already bars "frivolous and vexatious" applicants (i.e., such "nuisance" requestors), and fees were not broadly intended for this purpose.

I have a few points to make regarding this section on fees.

Several years ago, Vancouver city's FOI branch became the only public body in B.C. (so far as I know to begin charging fees for "reviewing" records to see if they should be severed due to FOI exemptions (though not charging for the physical severing itself), despite the B.C. government's own FOI *Policy and Procedures Manual* that clearly states public bodies "cannot charge fees for reviewing records."

A Vancouver FOI official said "if someone asked by FOI for the whole contents of our vaults, with thousands of records, it would take a vast time to 'review' them for possible severing – why should we not be able to charge anything for all that time spent?"

He also claimed the *Manual*'s interpretation of the B.C. *FOIPP Act* is wrong, and the *Manual* has no legal force anyways, and so the city has no duty to follow it. This matter was never clearly resolved. I believe charge fees for "reviewing" records violates the intent of the *Act*, and the *Act* should be amended to explicitly prohibit this practice.

Recommendation - Amend Section 75 (2)(b) to change the wording from "time severing…" to "time reviewing the record and severing information from a record."

Recommendation - Extend the free time "spent locating and retrieving a record" from the current 3 hours up to 5 hours (mandated in the federal *Access to Information Act*, Section 11).

On another point, the Federal Court says the government can no longer charge people fees for the search and processing of *electronic* government documents covered under FOI legislation. In his ruling of March 31, 2015, Justice Sean Harrington said the wording of the *Access to*

Information Act and its regulations are "vague" and that practices under the act "have practically stood still" since the days when computers were rare in the workplace.

ATIP officials in Ottawa have told me they would indeed stop charging such fees, based on the ruling. Previously, I had to abandon some requests due to high fees, but no more. This principle should be incorporated into a reformed B.C. *FOIPP Act.*

Recommendation - Reform the B.C. *FOIPP Act* to conform to the principles of the Federal Court ruling by Justice Harrington [2015 FC 405, March 31, 2015], which states government can no longer charge applicants fees for the search and processing of electronic government documents covered under FOI legislation.

(16) What price accountability? The real cost of FOI

In reply to the frequent governmental complaints of the cost to taxpayers of the FOI system, and the media's usage of it, one could well argue that the reverse is true, because public outrage at government waste – exposed through FOI requests - prompts the state to cut such waste, or even prevent it before it occurs. Hence the modest annual cost of FOI may be an impressive bargain.

Vaughn Palmer noted this fact back in 1992, before the FOI law was passed, while reporting that the government had advanced hundreds of millions of dollars in loans to private businesses, with all the terms secret, even the loan size. In lieu of FOI law, the media had to rely on leaks, which exposed cases of massive waste in the loan program. Today records on such cases could be publicized through FOI requests.[91]

In one case then, a minister tried to push through a loan to an aviation company, at cost to taxpayers of $40 million or $160,000 per job - which the media only knew because a confidential cabinet papers on the proposal was leaked to the *Sun*. The "loan" died soon afterward, a victim, some said, of premature disclosure, wrote Mr. Palmer, adding:

[91] Or sometimes perhaps not. In such cases of government loans, I could easily envision the government inappropriately applying *FOIPP Act* exemptions to deny access, such as Sec. 12, Sec. 13, Sec. 17, Sec. 21, and others. This in turn might prompt appeals to the Commissioner, two years for a ruling, an order that the government might then appeal to judicial review, etc. Woeful as all this is, still better overall to have the *Act* than not.

> That kind of disclosure might have helped to derail other boondoggles - and there are plenty of examples. The recent review of government finances determined that some $300 million worth of government loans have gone bad in recent years. Part of the price tag for not having freedom of information.[92]

Journalist Russ Francis of *Monday Magazine* made the same point: "How many more fast ferry projects and Skeena Celluloses will never even be proposed for fear their terms will be revealed under FOI?" Conversely, knowing the FOI system is ineffective can enable politicians and bureaucrats to spend in ways that they realize the public would consider intolerable if it knew.

We also too often forget the public paid for the production of these records, millions of them, and so they are for that reason as much the public's *property* as are road, schools, and bridges. (The public hence should not have to pay for their production twice, through FOI fees.)

The cost of administering FOI, allegedly high, is really an almost imperceptibly small fraction of the provincial budget, and a bargain in terms of its democratic benefits. Even a very traditionalist Canadian government report, entitled *Access to Information: Making it Work for Canadians* (2002), found that the entire federal FOI system cost around $30 million annually, or less than $1 per Canadian per year and, "This is a modest cost, in light of the significant public policy objectives pursued by the Act: accountability and transparency of government, ethical and careful behaviour on the part of public officials, participation of Canadians in the development of public policy, and a better informed and more competitive society. " The same principles apply to British Columbia too.

Yet sometimes officials try to thwart reform to the FOI law and discredit it by telling politicians (in private) that the process is too often used by "frivolous and vexatious" applicants, such as some journalists seeking sensational information that they can use to "sell papers"- all of which causes the state to waste funds and labour to process FOI requests, resources that are more needed to "provide core services to the public," and so forth. Yet even if such problems had ever occurred, this would not invalidate the FOI law, and the B.C. government retains the option to apply *FOIPP Act* Section 43 to bar truly frivolous applicants.

In 2007 Ian Paisley, the First Minister of Ireland, indicated he would like to limit FOI enquiries aimed at the Executive. "On occasions," he argued "the requests are of a wide-ranging and detailed nature that requires many hours of research, and are sent in by lazy journalists, who will

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[92] *Cry freedom of information this week*. By Vaughn Palmer. *The Vancouver Sun*. March 30, 1992.

not do any work, but who think that we should pay them and give them the information that they want." [93]

But on the contrary, the opposite is generally true, for journalists who research, design and file access requests are amongst the hardest working, as they need to be when the process is so increasingly onerous; and surely less indolent than those who rely upon press releases for story inspiration (as the state infinitely prefers they would).

Regrettably, these specious claims may be influential. A preferable outlook was voiced by B.C. premier Mike Harcourt, who told the Webster journalism awards dinner in 1993 that "our government passed an FOI law so you fellows can do more stories."

As regard to claims of the media being driven solely by profit, the notion that information obtained through FOI requests sells more newspapers is quite amusing. If only it were so! When the *Canberra Times* of Australia sought information on various programs through FOI, the government proposed hefty charges, justifying these by claiming the paper would gain a commercial benefit. The editor replied:

> I would dearly like to see the research to back up that claim. Sadly, to my knowledge, there is no evidence that newspapers publishing serious articles for the public benefit gain anything in circulation or advertising revenues. If anything, such revenues are more likely to be threatened. Circulation is more likely to be boosted by the most superficial superstar reporting tripe.[94]

Indeed does anyone in B.C. really believe that a dry background report to cabinet on proposed sales tax reform would "sell more newspapers" than tales of illicit Hollywood romances? Moreover, it is well known that traditional media are in dire financial straits (particularly newspapers, such as with Postmedia's bankruptcy, and I can attest that no journalist becomes affluent by filing FOI requests).

In 1997 the minister in charge of FOI administration in B.C. raised a furore when he complained that the FOI fee schedule was "an explicit subsidy to major media conglomerates," and asked "why should the taxpayer subsidize research" for the nation's largest newspaper chain?

I have at least seven responses to this complaint:

(1) As noted above, media FOI requests often reveal government waste, spurring it to prevent or reduce such waste.

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[93] '*Lazy Journalists,'* by Mark Devenport. *The Devenport Diaries*. BBC News. Oct. 9, 2007

[94] *Cabinet briefings must be kept private to ensure sound advice*. Canberra Times, Nov. 25, 2007

(2) Media FOI requests were intended to serve the public by providing it with vital information, and the higher fees then being planned would most impair not chains but smaller community, student, and alternative media who could least afford to pay them.[95]

(3) If government wanted to save money on the FOI process, it would stop resisting the release of records, up to Commissioner's inquiries and court challenges to overturn OIPC orders, with the attendant heavy legal fees (as often noted above).

(4) If government really worried about the cost of information processing, it would reduce its vast public-relations apparatus, which costs millions of dollars more annually than the FOI system. Costs also rise when PR branches labour upon "issues management" strategies in response to FOI record releases.

(5) Private corporations have at times been heavier users of the FOI law than media, yet government never publicly complains of the former applicant category, likely because such businesses' FOI usage creates no political embarrassments, and this despite the fact its usage is driven solely for private profit (often seeking records on their competitors' bids, contracts, etc.), unlike the media's, which at least in principle is co-mingled with the broader public interest.

(6) Government members often forget that their own party's research branch was often amongst the heaviest users of the FOI law when in opposition, and may be again after losing power – whereupon they would then be most grateful for a well-functioning *Act*.

(7) The government could save money on FOI costs by releasing more records routinely, and not advising the applicant to use the FOI route as a first resort (which is contrary to the intent of the *Act*). As well, time is money, and FOI request processing costs can rise when the records sought are so disordered that it takes officials longer to find them – hence better records management is advisable.

In sum, as Canadian Newspaper Association president Anne Kothawala put it: "Freedom of information is not about 'selling newspapers,' as some cynics allege. It's about real people, with real stories, and about real consequences on our lives. It's central to our way of life and the structure of rights and freedoms that underwrites it."[96]

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[95] *What Price Accountability? Funding cutbacks and the current financing of the B.C. Freedom of Information process (1997-2000),* by Stanley Tromp, 2000

[96] *Lobbying for your right to know*, by Anne Kothawala. Speech to the Ontario Club. *The Toronto Star*, Sept. 26, 2006

(17) Whistleblower protection

The subject of government transparency encompasses a much broader field than freedom of information statutes. Closed municipal meetings, access to court records, "libel chill," official secrets laws, and other topics – anything which potentially blocks the public's and media's right to know the truth - are all matters within the scope of FOI advocates. One of these topics is certainly "whistleblower protection," which accounts for its brief inclusion in this report. As well, the topic assumed a new urgency after the email triple-deletion scandal this year was revealed by a whistleblower.

One hallmark of our democracy is the separation of powers amongst politicians, bureaucracy and judiciary; hence there must be no political influence on the FOI process, which is the bureaucracy's responsibility. The inclusion of whistleblower protection provisions within an FOI statute is a special topic.[97] These provisions typically bar retaliation against FOI directors and staffers, as well as public servants who speak to information commissioners or other appellate bodies on FOI issues.

These persons might not generally be defined as "whistleblowers" per se, for they should be perceived simply as doing their jobs, that is, releasing information within the authorized legal channels. Yet, sadly, they can still suffer reprisals nonetheless, as scapegoats for ensuing bad news. There are provisions to protect such employees in the B.C. *FOIPP Act* Section 30.3.

The calls for such protections were not unexpected, for FOI officials are often amongst the least respected or trusted officials in an agency; taking on the task can be seen as a dead-end, career stalling job, one entailing considerable stress and a high turnover rate.

When performing their tasks diligently and to-the-letter, FOI officials might be misperceived by a few as being overzealous or officious, too keen to assist an antagonistic FOI applicant. Then, politicians and their aides, businesspeople or other bureaucrats may want to obstruct or punish one for the embarrassing release of information by figuratively "shooting the messenger," i.e., punishing the FOI official. This tension can be onerous enough in large agencies or cities, but much worse in smaller, remote or close-knit communities.

In 1999, for instance, an FOI official in Langley Township in B.C. resigned because of what she called interference from administrators and stonewalling by municipal staff. Sheila Callen said that after a series of documents embarrassing to the administration were released, her superiors began to take a more active role in deciding what should be made public.

Ms. Callen added that "in many cases, I found it very difficult to get the records from staff in order to review them. . . . The time finally came where I could no longer continue in good conscience to be only a puppet just to collect a paycheque."

[97] It was perhaps seen as necessary to create these provisions within FOI statutes in Canada instead of within a general law, because enactment of a good general law was too slow, and the needs regarding the FOI subject might also be somewhat specialized.

"When I walked into city hall, people would look at me like I was the enemy," Ms. Callen told me for a 2003 article in the *FIPA Bulletin*. After leaving, she had been negotiating with other municipalities but doubted she would be hired due to the bad press:

> I wouldn't do it again – not because of the quitting part, which was easy, but because of the press. . . The township tried to discredit me in the Langley papers. The sad part is that it put my family through hell for a week. Because [the chief clerk and FOI head] is a lawyer we had totally different philosophies. I didn't take any sides. I just did my job and applied the *Act*.[98]

For the same article, I asked then deputy federal information commissioner Alan Leadbeater if Ottawa access officials face political stressors, and his reply has relevance to B.C. as well:

> Very much. When our office investigates complaints, we see the co-ordinator is trying to persuade senior officials to fill the *ATI* request; those officials want to do other work, and the *ATI* users are very hard to please. So the co-ordinators are stuck in the middle, and if they become very activist and try to insist the *ATI* role gets well handled, sometimes they do suffer.
>
> Some come up against the glass ceiling of career, or simply get reorganized out of the department. I think most access coordinators want to move on after they've been there a couple of years because it is rather stressful. Some of them decide to save their sanity and careers by simply become apologists for the department, and some are almost flaks who will go to any lengths to defend the secrecy of the department. And then some are very, very brave employees who stand up and do whatever they think their job is under the *Act*.

The B.C. FOIPP Act protects government employees who blow the whistle in good faith in section 30.3, but there have been repeated calls (including from the Auditor General) for broader protection for whistleblowers for releasing information *beyond* the *FOIPP Act*.

The interplay between whistleblowing and FOI processes - that is, the dialectic of the authorized (by FOI) versus the unauthorized release of information – is important. The two laws' relationship is reciprocal and complementary; if either an FOI or a whistleblower statute is strongly effective, it may partially compensate for the failings of the other; conversely, if one law is weak, this necessitates improvements in the other.

Hence if Canadian FOI laws were reformed to meet global standards and if they also worked well in practice, whistleblowing might still be necessary, but likely far less so. If the same results could be achieved by FOI, how much better for all parties to have information released under the FOI process rather than through the conflict-ridden last resort of whistleblowing.

A conscientious public servant might understandably perceive that the B.C. *FOIPP Act* (or its current application) is often failing to reveal problems of which the public has a need to know.

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[98] *FOI Directors Caught in Crossfire*. Bulletin of the B.C. Freedom of Information and Privacy Association. Nov. 1999

Even if vital information could be revealed under the FOI law, the government might never receive an FOI request for it; and even if it did, records may have been improperly altered or shredded. Finally, the *Act* only deals with records; now there is a pernicious trend, often decried by information commissioners, towards "oral government," whereby sensitive information is only relayed orally and not written down, to avert possible disclosure under the FOI.

As well, what if offenses such as bribes or assaults occurred but were never recorded - as they rarely would be - in any medium? Records can also sometimes contain errors: there is a common fallacy of placing too much reliance upon records, per se, to reveal the whole truth. All the problems noted above can increase pressures on public servants, who might then see no other option but to verbally reveal the wrongdoings.

In case of a conflict between the two laws, which should prevail over the other? For many reasons and all the factors cited above, especially the trend towards oral government, many believe a good whistleblower law should override the FOI statute.

We might consider the intent of the legislature expressed in the purpose clause of the B.C. *FOIPP Act*:

> 2. (2) This *Act* does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

Although the legislature intended the FOI law to be the "last resort," some public servants may perceive whistleblowing as the genuine last resort. The reason is that disclosure of government records under the FOI law can take months or years, and large parts of the records are often blacked out.

So journalists, necessarily, often circumvent the *Act* and turn to sources within the public service to receive more complete and timely information about the inner workings of government. Leaking records to the media or whistleblowing is a longstanding tradition, while still, of course, not being a means of access "available to the public."

The 1999 B.C. legislative FOI law review committee well advised:

> The Committee agreed that the province would benefit from general "whistleblower" protection, and that the protection of information and privacy administrators could be covered under general legislation. Suggestion: That a separate Act be considered for general "whistle-blower" protection.

Recommendation - That the B.C. government create a separate Act for general "whistle-blower" protection, as was done at the Canadian federal level – though the laws of UK and South Africa are better overall models. The penalties for violating this new Act should be at least $50,000 (as the OIPC advised for record destruction offenses).

(18) The dangerous diversion of faux transparency

If officials make public only what they want citizens to know, then publicity becomes a sham and accountability meaningless. - Sissela Bok**,** Swedish philosopher, *Secrets*, 1982

The current B.C. premier is a keen advocate of the new era of digital government, such as with the posting of datasets of information online, as well as the use of social media like Twitter and Facebook. Yet the unexamined consequences to our FOI law must be understood.

The B.C. government created DataBC, a catalogue of 2,500 data sets, while Conservative federal Treasury Board president Tony Clement hosted a so-called "Twitter town hall" to discuss using social media to make government more transparent. In all these discussions there was no mention of FOI law reform.

Of this latter event, Vincent Gogolek of the B.C. Freedom of Information and Privacy Association (FIPA) told CBC: "Everyone thinks it's so cool that the minister tweets, and talks about 'crowdsourcing' and other techie buzz, but it's like the government's saying: 'Look at the shiny new gee-gaws that we have here, and ignore the smell coming from the access to information system.'" Similarly, federal information commissioner Suzanne Legault wrote to the Treasury Board president on Sept. 19, 2014, to reiterate the point made by others that "that open data is becoming privileged at the expense of other areas of open government…."

Over the decades we have faced many threats to the FOI system, but this one in a curious way may be the most harmful of all. The other problems (e.g., shell companies, oral government) remain recognizable as problems. But this one is so damaging because it convincingly passes as a solution to the open government dilemma while actually – unnoticed - making it worse. Why? Because it can pacify or tranquillize the public with an illusion of transparency and empowerment, while its legal rights to obtain records through FOI laws are quietly regressing *at the same time*.

Yet a new deluge of self-selected and self-serving government internet fluff is no substitute for urgently needed FOI law reform. So, ironically, it may be that the pro-transparency rhetoric of open data activists is being dextrously exploited by governments for anti-transparency ends, making their efforts even worse than useless. The defense that this outcome was not the digital activists' intent makes it no less dangerous. (There is a positive alternative: if they focused their social media energies on mounting campaigns to gain needed FOI law reforms, this could indeed be a great public service.)

In most nations, as with this one, transparency advocates must wage hard uphill campaigns for at least two decades to have an FOI law passed - ever since B.C. NDP MP Barry Mather introduced the first draft FOI bill in Ottawa in 1965 - and then work over official obstructionism and in court battles to make it function – realities that most digital activists know or care nothing about. The mere fact that the state would so quickly and avidly embrace their "e-government" solutions

should be indicator enough to any politically aware person that this digital route signifies almost no concession of real power.[99]

With FOI advocacy, the road of least resistance is rarely the best one. Techno-utopians and digital-toy enthusiasts are dazzled and dazed by new technologies, first mistaking quantity of information for quality, then form for content, and finally the means for the ends. (As one critic put it, "technology is now driving government policy, not visa versa." Contrarily, FOI advocates in their view may appear a little as outdated fogeys or Luddites.)

One fatal delusion is that format alone somehow creates "value added" content. But common sense tells us that a B.C. cabinet report on a public disease risk that is 95 per cent blanked out due to a defective FOI law (such as with Section 13), and then all those blank pages are instantly posted to the B.C. Open Government website, or all the blogs and twitter feeds in the world, does not make readers a bit more informed as they gaze at their mostly whited-out screens; such is a case of "garbage in, garbage out."[100]

As well, the online data set and social media solution is not nearly so democratic as its boosters claim, for (as Kwantlen University criminology academic Mike Larsen said) one needs technical expertise to process and understand data sets, expertise that much of the public does not have. Environmental activist Gwen Barlee also noted the limitations of generic data sets, insofar as they tell you what decisions were made, but not how, or why.

Furthermore, how many homeless persons can afford iPhones and laptops? On this reality, although enhanced democracy was the professed goal, one may see a growing class split between the techo-rich and the so-called "techno peasants" - which leads not to more socio-political equality, but less. [101]

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[99] This point was most starkly illustrated in Newfoundland in 2012 when the government eviscerated its FOI law in *Bill 29*. Then, during the debate on that bill, government members boasted as proof that "we are committed to openness" that they were starting a program to digitize and post historical deeds, and more - gift boxes of info-candy. Likewise, Ottawa's online posted datasets are mostly (felicitously named) "document dumps," useful for commercial data-miners or app developers, and a delight for trivial pursuit players everywhere, including, for instance, a registry of all Canadian civil aircraft, as well as a history of federal ridings since Confederation.

[100] Yet I concede to e-government advocates that not all new governmental online postings are entirely inconsequential; for example, in March 2015 the B.C. Legislature began posting MLA expense receipts. "We asked for this for six years and it finally happened," said the Canadian Taxpayers Federation.

[101] Ministers announce they democratically seek "input" on issues through social media. But where is evidence that they will be at all influenced by that public input, any more so than to the power-brokering of backroom lobbyists?

Moreover, *Vancouver Sun* reporter Chad Skelton explained that most of the database stories produced at the *Sun* were based on data sets that the newspaper had to obtain by FOI requests and not by governments' routine release (one reason being that it is difficult for governments to redact data sets to protect individuals' privacy), "and so we need the legal backstop of the FOI law." Many other news media outlets have reported the same problem. This fact alone confirms the far lesser value of the voluntarily posted datasets than FOI laws.

Meanwhile, with such new-age "e-government," we drift ever further from reality into the cyberspace fantasyland of instant gratification where all things appear possible with no effort (a perspective some FOI advocates may perceive as shallow and immature). Governmental social media and datasets would ideally be a useful supplement to, but not a substitute for, strong FOI laws, as a sugary dessert is advisable only after a full nutritious meal and not in place of it.

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(19) Education and Promotion

The empowerment of the people by means of the passage of the B.C. *FOIPP Act* in 1992 can only be achieved if the public is aware of its rights and knows just how to exercise them in practice. [102] Yet, as former federal information commissioner John Grace wryly reported of the *ATI Act* in his annual report of 1994:

> Another early victim of government timidity in facing up to the rigors of openness was a public education program which might have better informed the public of its new access rights. This task was to be Treasury Board's. The government decided, however, that it could not be undertaken because the risk was too great. Horror of horrors, the campaign might be successful! More Canadians might use the *Act* to the greater irritation or embarrassment of members of the government.

For some journalists who have been reading access laws for decades and have made hundreds of FOI requests, it is easy to forget how difficult the process can be for one just beginning in the "game" - for such it is - and who has been taught nothing of this democratic right that should be considered as fundamental as voting. (In response to the state's distress over embarrassments, noted above, I would invoke the motto of the Colorado *Aspen Daily News*: "If you don't want it printed, don't let it happen.")

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[102] As noted too by the Commonwealth Parliamentary Association, in *Recommendations for Transparent Governance*, 2004: "(11.2) Parliamentarians have an important role to play in this process by making sure that their constituents are aware of their rights. A range of other bodies also have a role to play here, including the independent administrative body that is responsible for implementation of the law, human rights groups, the media (and the broadcast media in particular), public bodies themselves and civil society generally. Use should also be made of regular educational systems, including universities and schools, to promote civic understanding about the right to access information."

The challenge can be daunting indeed for even experienced applicants to identify the type and location of the needed records, to write and send request letters, and then to follow through, i.e., fight upstream against fees, delays, complex exemptions, and then navigate the appeal routes for months or years, all for the types of records that the citizens have already paid for with their tax dollars and most of which should be routinely releaseable. But when barriers of education, disability and foreign language are added, the obstacles can become insurmountable.

In critiquing the draft FOI bill of Mozambique, Article 19 noted that: "In our experience, a recalcitrant civil service can undermine even the most progressive legislation. Promotional activities are, therefore, an essential component of a freedom of information regime."[103] The need is evident; the British Columbia Freedom of Information and Privacy Association (FIPA) - the only Canadian organization working full time on FOI advocacy – regularly receives calls from members of the public asking how to exercise their information rights.

Several nations thought it important enough to mandate these activities in statutes, and this is advisable for an amended B.C. *FOIPP Act*. India's transparency law imposes duties to monitor and promote the act. Moreover, in Ecuador's FOI law:

> Bodies are required to adopt programs to improve awareness of the law and citizen participation. University and other educational bodies are also required to include information on the rights in the law in their education programmes.

The Mexican FOI law charged the Federal Institute for Access to Public Information - a body of the Federal Public Administration which is independent in its operations, budget and decision-making - with promoting and publicizing the exercise of the right of access to information.

Education is also mandated in the FOI law of Iran, in Sec. 3, Art. 5: "Beside the existing means [in the law for publication of information], the information containing public rights and duties shall be presented to the public through publication and public announcements and media."

Federal information commissioner Suzanne Legault in 2015 well advised of the *Access to Information Act: "*5.8. The Information Commissioner recommends that the Act provide for the power to carry out education activities."

In the B.C. *FOIPP Act* Sec. 42, the Commissioner "may" monitor and "inform the public about the Act," but this is not mandatory. To make it an obligation might place too much of a burden on the OIPC, and so such a duty could be placed upon the ministry that administers the FOI system instead.

[103] Public promotions are necessary in radio and television advertisements, and more detailed "how-to" guides require publication in newspapers and government websites, such as that of Scottish Information Commissioner Kevin Dunion who ran a strong advertising campaign just before Scotland's Freedom of Information Act came into effect in 2005, declaring "I made sure the public was aware of its new rights." - *Firm hand with a big stick. The New Zealand Herald*, Dec. 22, 2007

Alternatively, the Commissioner could be encouraged to educate and promote the FOIPP process to the general public. If so, government must provide adequate funds for this task, and it would be a dedicated, stand-alone part of the Commissioner's budget. The education and promotion task is within the government's mandate, and should not fall just to information commissioners and non-governmental organizations, whose financial and human resources are limited (although the commissioner could well take the lead role in practice).

As well, one might task the ministry of education to include modules on FOI in school curricula, as part of citizenship training. This has been done, for example, in countries such as Nicaragua, Honduras and Ecuador.

In Mexico children are taught in high school how to file FOI requests. This idea brings me back full circle to how I began my FOI journey 23 years ago, when seeking the quake seismic report at Langara College: at a Mexican high school, if a similar seismic report was commissioned yet withheld, students there would have been educated on how to obtain it – but not so in B.C. (yet).

Recommendation – Create a policy directive for the ministry that administers the FOIPP system to educate and promote the FOIPP process to the general public.

Conclusion - Moving Forward

> *The best project prepared in darkness, would excite more alarm than the worst, undertaken under the auspices of publicity. . . . Without publicity, no good is permanent; under the auspices of publicity, no evil can continue.* - Jeremy Bentham, 1768

> *I defy anyone to come up with a law that will force good access to information on a public body that doesn't want to do it.* - Frank Work, Alberta Privacy Commissioner

After Premier Mike Harcourt's FOI law came into force in 1993, it worked fairly well for the first two years. Then, perhaps inevitably, the honeymoon soured when FOI requests began revealing governmental failings. Harcourt's genuine support for the transparency concept was sharply reversed when Glen Clark took over in 1996.

In fact, the new premier, made a joke (or was it?) at an event with media present, that "If I had my way in cabinet, we wouldn't have an FOI Act." On that point, the first Commissioner David Flaherty upon retiring in 1999 disturbingly wrote that he had considered the possibility of the Clark government "abolishing" the B.C. *FOIPP Act* as being "by no means an idle threat."

Now we face the current government's heavy, creative recalcitrance, with the supreme irony being that while in opposition, the Liberals were the single biggest user of the FOI law, and in 1998 Gordon Campbell wrote, "When government does its business behind closed doors, people will invariably believe that government has something to hide."

This is just as true today as it was when the NDP was in power. After years of effort, I have found prospects for raising Canada's *Access to Information Act* up to world FOI standards to be virtually hopeless.[104] But I have somewhat higher hopes for British Columbia law reform.

In America, debates over the same issues occur continuously. The conclusion of U.S. Senator Daniel Patrick Moynihan's 1998 book, *Secrecy: the American Experience* was succinct: "Secrecy is for losers." Why? First, he wrote, because it shields internal analyses from the scrutiny of outside experts and dissenters. As a result, some very poor advice is used to inform many government decisions. Second, secrecy distorts the thinking of the citizenry, giving rise to unfounded conspiracy theories and an unnecessarily high level of mistrust of governments. As George F. Will wrote in a review of Sen. Moynihan's book: "Government secrecy breeds stupidity, in government decision making and in the thinking of some citizens."[105]

Might political leaders, on occasion, seriously consider not just the liabilities but also the many benefits of real transparency, and that, conversely, "Open government is for winners"? Rather than having secrecy project weakness and insecurity, genuine openly government projects honest and competent administration, confidence in one's own vision, and trust in the people.

Unfortunately with FOI in Canada, bureaucrats and politicians often act as if they have little or no faith in the public's intelligence or judgement – yet at the same time they want the public to trust them. This expectation is unworkable, for trust is a two-way street.

Some two decades after its enactment, some bureaucrats still frankly abhor the B.C. FOI statute and wish it had never been passed; to hope for these to ever accept the spirit of the law, one might sooner expect to see gravity reversed and water flow uphill. Information control is a key source of power, prestige and profit – and whoever wished to yield those? Meanwhile, politicians resist FOI not so often from desire to gain or consolidate power as from the fear of losing it (which explains their initial enthusiasm for FOI cooling off after assuming power) – a concern that one can, if not share, at least understand.

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[104] Until this year. After the darkest decade for open government in Ottawa by far (2006-15), there may be hope, as seen in the new Prime Minister's mandate letter to the Justice Minister of Nov. 13, 2015 - "Work with the President of the Treasury Board to enhance the openness of government, including supporting his review of the *Access to Information Act* …. " - a order a bit reminiscent of U.S. President Obama 's FOI openness directive to the American public service upon his first day in office in 2009. http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter

[105] *Newsweek*, Oct. 12, 1998. Cited in Information Commissioner John Reid's *Annual Report 1999-2000*

One form of this outlook was expressed in a recent editorial written by former B.C. attorney general Geoff Plant (2001-04) in the *Globe and Mail:*

> We say we want open government, but there's ample reason to doubt we would ever actually know what to do with it. Is open government about looking for fun new ways to embarrass politicians, or is it about giving ourselves as citizens the tools to improve how we are governed? . . . . We should not be surprised if the government takes policy discussions back behind closed doors. Not because politicians have easily bruised feelings, but because experience too often teaches them that people don't have much to offer except criticism.[106]

Consider too the BBC TV fictional character Sir Humphrey Appelby, the supremely suave British bureaucrat, who famously warned, "Minister, you can have good government or open government – but you can't have both."

In one *Yes Minister* episode of 1981 entitled Open Government, he and his ally Arnold rebuke a naïve junior named Bernard who supports more transparency: "Bernard claims that the citizens of a democracy have the right to know. We explained that, in fact, they have the right to be ignorant. Knowledge only means complicity and guilt. Ignorance has a certain dignity." Hence some bureaucrats are trying in their view, benevolently and with Orwellian doublespeak, to grant the public freedom *from* information (rather as the Speaker's office initially blocked my access to the B.C. Legislature's quake seismic report because it might disturb the public).

Senior bureaucrats, political advisors and crown lawyers may advise cabinet - "The FOI law is just fine the way it is now – it isn't broke so don't fix it. In fact, it's already a bit too open and needs some more restrictions." These advisors have the inner ear of ministers continuously, in stark contrast to a member of the public who may give input on FOI law reform for 30 minutes one day every six years to a legislative committee – which is a near-total power imbalance.[107]

And so we remain stuck with all the creative obstructionist devices (with new ones perhaps yet to come) – whether it be Crown copyright, or post-it sticky notes, or out of scope, or the refusal to apply section 25, or the misuse of section13, or puppet shell companies, or oral government, or passive aggressive delays, or online faux transparency, and so on and on.

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[106] *We want an open government, but we're far too critical for it*, by Geoff Plant. *The Globe and Mail*, Dec. 07, 2015. (This complaint prompted one pithy commentator: "Poor babies. If you can't take public criticism, work in the private sector.")

[107] In the United Kingdom, the FOI law is undergoing a governmental review at this time. The British Campaign for Open Government pointed out that the FOI Act had been fully examined only three years ago, by the Justice Select Committee in its post legislative scrutiny of the Act. That committee reported in 2012 that FOI had proved "a significant enhancement of our democracy", that the Act was "was working well" and concluded that "We do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service, and in our view the additional burdens are outweighed by the benefits."

Future generations may look back upon this era in wonderment that anyone could seriously argue that Canada's FOI laws should *not* be raised to the accepted global standards (even to the point of wondering if, at times Canadians may be too passive and polite in insisting upon their basic rights). Yet there is no complexity, mystery or controversy to the issue. The need to do so is so obvious and common sense as to be - as the term goes - a "no-brainer."

In sum, on FOI reform, we know what needs to be done – there is no need to study more and to reinvent the wheel.[108] All we need is political will, of the kind shown with Newfoundland's sweeping FOI reforms of 2015. This must come from the Premier and cabinet, for with their support nothing positive can happen.

We hope they will not view this exercise mainly as a forum for the public to blow off some steam harmlessly and the government goes back to business as usual, which is the old status quo or worse. This is my fourth presentation at a B.C legislative FOI review since 1999, and far too little has improved since then, while not one of my 67 recommendations have been implemented. What else could this appear but hopeless?

The hour is late but not too late.

In fact, *if* it wanted to, British Columbia could be the world leader on FOI law and practice. The government letterhead proclaims this province to be as "the Best Place on Earth." If so, this is cabinet's chance to confirm that claim by passing "the best Freedom of Information Law on Earth." It is certainly not so now, but it could be, and the choice is yours. The current premier based her leadership campaign on open government and transparency. Now is her chance to demonstrate it.

One of the most appealing features of FOI law is that it is a subject that completely transcends political parties and ideologies.[109] Opposition parties are prolific users of the Act, and any

[108] In the BBC TV comedy *Yes Minister,* in a 1980 episode, the subject of "Open Government" policy comes up, and Sir Humphrey says the bureaucracy will have to steer the minister away from it, using more studies, explaining: "It is the Law of Inverse Relevance: The less you intend to do about something, the more you keep talking about it." Yet what is amusing on the screen is often less so in real life.

[109] The dichotomy is not so much between right or left wing as it is between elitist "insiders" and populist "outsiders," characteristics which might be claimed, accurately or not, by any party. One might expect that most conservative parties would be less inclined towards FOI, insofar as they favour the traditions of past eras, when FOI law were absent. This is indeed often the case but not necessarily so, for ideology is not always tied to governing style. In B.C. the worst period for government transparency in many ways occurred during the reign of NDP premier Glen Clark (1996-2000), who openly disparaged the FOI concept and never even feigned support for it; here one might appreciate only the complete "transparency" of his intentions. With several others, one might recall the words of Charles De Gaulle: "Since a politician never believes what he says, he is always astonished when other people do."

current governing party content with inaction on an outdated law could itself be in opposition again one day, trying to use it and wishing it was more effective.[110]

This great province surely needs to at least raise its own FOI laws up to the best standards of its British Commonwealth partners - and then, hopefully, look beyond the Commonwealth to consider the rest of the world. This is not a radical or unreasonable goal at all, for to reach it, B.C. legislators need not leap into the future but merely step into the present.

I do not have a monopoly on the truth, nor does any other individual or institution. I do not have all the answers, and most FOI advocates never expect to get everything they want. But we can, and must, do far better. MLAs serve the public in their way as the news media do in ours. Here you have an opportunity to create a fine historical legacy for your constituents that will endure long after you depart office.

Respectfully yours,

Stanley L. Tromp

FOI caucus coordinator, Canadian Association of Journalists (CAJ)
Vancouver, B.C., January 2016

_____

[110] As former Information Commissioner John Reid said in 1999: "It amuses me to see the profound change in attitude about access to information which occurs when highly placed insiders suddenly find themselves on the outside. And vice versa!"

A Postscript - World FOI promotions

In other nations, governments promote public FOI usage by short inspirational TV messages, as Canada could do as well. For samples, please click on the links below. (The first one is truly memorable.)

From Scotland - https://vimeo.com/8333506

From Jamaica - https://www.youtube.com/watch?v=5LFM-pNks48

From India - https://www.youtube.com/watch?v=6sVeo3G0Gio

From Nigeria –https://www.youtube.com/watch?v=aY9E3UwzjZQ

From Morocco – https://www.youtube.com/watch?v=Z4G4CDjGUbY

Appendix 1

The growing misuse of Section 13, policy advice

Each year, public servants in B.C. send hundreds of subject-expert "briefing notes" to ministers on a vast array of topics, a very important resource for the public interest. But these are becoming more difficult for the public and press to obtain.

Sample 1 (pages 96-97) shows a briefing note to the Minister of Advanced Education on *UBC Research Ethics* that was released in full to me under FOI in 2004, with not one line blanked out.

Contrast that to Sample 2 (pages 98-99), a briefing note to the same minister, entitled *Scan of Private Degree Granting in British Columbia,* released some years later under FOI. Most of this record is blanked out under Section 13, even background facts which are not real "advice."

Under current practices, if the first briefing note of 2004 was FOI-requested today, most of it likely would have also been blanked out under Section 13, as the second later example was.

ADVICE TO MINISTER

CONFIDENTIAL ISSUES NOTE	UBC Research Ethics
Ministry: Advanced Education **Date:** February 24, 2004 **Minister Responsible:** Hon. Shirley Bond	

KEY FACTS REGARDING THE ISSUE:

- Margaret Munroe, a research reporter at the Can West News, conducted a study on medical clinical trials at Canadian universities, with a focus on uncovering conflict of interest activity between drug companies and university researchers. (Munroe's research for the study was funded through a Michener Fellowship.) During her research, Munroe interviewed a number of people at UBC on issues involving research ethics.
- The Vancouver Province, National Post and Edmonton Journal are featuring research ethics issues in their "Drugs, Money and Ethics" series that was written by Margaret Munroe. The papers are advertising that the February 25, 2004 article will be *"University of British Columbia broke rules for years, failing to warn patients of dangers"*.
- UBC is the only university with a medical school so this issue is unlikely to come up with respect to other BC universities.
- Guidelines and/or standards for research involving human subjects are set by Canada's Tri-Council, a consortium of three research councils covering most federal granting agencies. A formal review initiated by UBC's VP Research in 2001 found that UBC was only partially compliant in meeting ethical standards because its Clinical Research Ethics Board only reviewed summaries of research protocols for clinical trials rather than the full protocols as outlined in the Tri-Council standards. The review also recommended that more administrative support be provided and that the membership of the board be expanded to broaden its expertise. Health Canada was alerted to the situation.
- As a result of the review, 399 clinical trials were audited. While no trials were shut down, concerns about patient consent required amendments to 37 consent forms and in two cases, patients needed to consent again. In addition, two studies were found non-compliant with regard to DNA/tissue testing, resulting in a request for re-consent or tissue destruction.
- UBC put remedial steps in place to comply more fully with the standards and reported them to the Tri-Council and Health Canada, both of which were satisfied with UBC's actions. In addition, the National Council on Ethics in Human Research followed up on the review in 2003 and found the university fully compliant.
- Another research issue that may be raised by Ms. Munroe is the multi-centre trial on Fluid Conservative vs. Fluid Liberal Management of Acute Lung Injury (FACCT). It is one of a series of trials run by the Acute Respiratory Disease Network, which is sponsored by the National Heart Lung and Blood Institute of the US National Institutes of Health.
- The trial began in 1999 and involves 30 well known US sites and one in Canada at UBC, to investigate two ways of managing in-patients with acute breathing problems often associated with trauma conditions such as car accidents. As this is not a drug or medical device trial, Health Canada approval was not required. Trials were conducted on 13 patients at VGH and 3 patients at St. Paul's.
- The trial was halted in both the US and Canada by the US Office of Human Research Protection amid concerns that patients were being exposed to unnecessary risks. While the investigation into the trial revealed that the trial was ethically appropriate and that patients were not being exposed to unnecessary risks, it was found that none of the sites had received adequate information from the Acute Respiratory Disease Network to properly assess risks and potential benefits. Therefore, all sites were required to modify their informed-consent forms, particularly with regard to the

descriptions of the trial's purpose and risks, which included death. UBC complied with the request that went to all sites modify their consent forms and the trial was permitted to continue.

ADVICE AND RECOMMENDED RESPONSE:

As a major Canadian research facility UBC adheres to all established guidelines and practices in ethical research.

On the Clinical Research Ethics Board issue:

- **In May 2001 UBC initiated an external review of its ethics procedures and I understand that it took all necessary steps to rectify non-compliant procedures to the satisfaction of both Health Canada and the Tri Counsel's ethical research standards.**
- **UBC also amended its ethical research policy to ensure future compliance.**

On the multi-centre FACCT trial:

- **This trial was sponsored by a an American grant and UBC was the only Canadian site of the 31 research centres involved**
- **UBC acted appropriately with the information that was provided to them at the time the trial was undertaken and acted quickly to comply with subsequent requirements once the shortcomings of information provided by the trials sponsor was known.**

STRATEGIC LINKAGES:

- Top-notch education
- Becoming a magnet for research and development

Communications Contact:	Kathryn Macdonald	356-6948
Program Area Contact:	Julie Williams	387-6157
	Connie Johnston	356-7865

File Created:
File Updated:
File Location:

Minister's Office	Program Area	Deputy	Comm. Dir

Drug companies pay doctors big bucks for volunteers

Margaret Munroe

Tuesday, February 24, 2004

Scan of Private Degree Granting in British Columbia DRAFT

Background

In 2003, BC public universities and former university-colleges were the only institutions authorized to grant degrees. There was no mechanism for Canadian private post-secondary institutions to grant degrees unless they were established under a private act of the legislature. Post-secondary institutions based outside of Canada could operate a branch campus in BC and grant degrees if they were registered with the Private Post-secondary Education Commission (PPSEC).

Admissions standards (GPA) for entrance to university undergraduate degree programs were very competitive and student demand far outweighed the number of spaces available. s.13

In November 2003, the *Degree Authorization Act* (DAA) was brought into force and offered an avenue for private and out-of-province public institutions to apply for ministerial consent to offer, advertise and grant degrees and use the word "university" in BC. Degree granting institutions registered under PPSEC were required to obtain consent under the DAA if they wished to continue to operate in BC. s.13

Also in 2003, amendments were made to the *Colleges and Institutes Act* (CIA) to expand degree granting authority to BC public colleges and institutes, thus increasing the number of degree program offerings in BC. This allowed BC public colleges to offer applied baccalaureate degree programs and public provincial institutes and former university-colleges to offer baccalaureate degree programs and applied master's degree programs. In 2004/2005, Government announced plans to add 25,000 new full-time student spaces over six years to BC's public post-secondary institutions.

System Challenges

Over the past several years, the BC economy has improved and the number of students pursuing post-secondary education has decreased.

s.13

s.13

Several countries posted warnings for students wanting to pursue education at private institutions in BC. The list that China references when determining whether a degree would qualify for recognition in China excludes most private post-secondary institutions, even those that have authority to operate in BC under the DAA.

s.13

In 2008, the Off-Campus Work Permit Program was expanded on a pilot basis to include approved programs at privately funded institutions with consent under the DAA.

Appendix 2

Oral government and the vanishing public record

In 2007 two key source of information about the finances and management of the 2010 Vancouver Olympic Games were abruptly cut off. Minutes of the meetings of the B.C. 2010 Olympic and Paralympic Winter Games Secretariat (a branch of the B.C. Economic Development Ministry), the entity that politically oversees the Games, were once recorded, then no more. Samples of those minutes appear on pages 101-102.

For news stories, I had twice obtained hundreds of pages of minutes from the Secretariat through quarterly requests under the B.C. *FOIPP Act.* But in reply to my third identical attempt, I was told: "We have not located any records in response to your request." A spokesman for the secretariat told the media, "The secretariat was keeping minutes but found they were not an effective management tool." He added that the secretariat's approach to keeping records is "consistent with cross-government practices and legislation."

When the minutes were obtainable, it would take five months to receive them, and about one-third were blanked out, yet what remained still gave insight into the Games, which accounted for $2.5 billion of public funds.

In addition, VANOC was not itself covered by the B.C. *FOIPP Act,* but I used to obtain copies of the minutes of VANOC meetings that it had forwarded to the Secretariat, but then VANOC stopped forwarding those, so this tenuous supply route of information was cut off too.

A sample of VANOC minutes (a rarely seen bird indeed) appears on pages 103-104. Consider the amount of detail we have lost.

This problem was further highlighted in the very interesting OIPC Order F15-65 in December 2015 that found that even archived VANOC minutes held by other public bodies were excluded from the *Act*'s scope, for various reasons. See https://www.oipc.bc.ca/orders/1889

The *Asian Pacific Post* editorial that follows is fairly representative of the media response.

MEETING NOTES

Group	2010 Partners' Meeting		
Attendees	Name	By Phone	
	Annette Antoniak Andrea Shaw Terry Wright Dave Rudberg Jim Godfrey Donna Wilson Dave Robinson Dorothy Byrne Renee Smith-Valade Gary Young for George Duncan Tewanee Joseph Emma Gibbons John Furlong	Bruce Dewar	
Guests	Christine Little Jane Burnes Burke Taylor Don Black		
Date	February 21, 2007	Time	8:00am (PST) 11:00am (EST)
Location	BC Secretariat – 7th Floor	Prepared by	Serena Innes

Agenda

1. Beijing Update
2. Update on Education
3. Adoption of the Agenda*
4. ICI Performance Tracker Update
5. Approval of Minutes from February 7, 2007*
6. Review of Action Items Summary*
7. Communications Announcements & Issues*
8. Travel Schedule*
9. Roundtable Discussion*
10. New Business*

Meeting Notes

1. Beijing Update

Christine Little and Jane Burnes from the BC Secretariat provided an update on Beijing and the BC-Canada Pavilion. A copy of the presentation was sent to all Partners prior to the meeting.

2. Update on Education

Burke Taylor and Don Black from VANOC gave a presentation/update on the Education program for the 2010 Olympics. The program will be an online interactive web based program with four key aspects in mind:

1. to provide every child an opportunity to engage in the Olympics
2. to provide teachers with resources
3. to showcase the best in BC and the best in Canada
4. to set a new standard for Olympic and Paralympic education

The website will be launched in September with a soft launch in May and will come out on a monthly basis.

ACTION: Annette to discuss with Minister Emery the opportunity to make an announcement.

3. **Adopt the Agenda:**

Motion: To adopt the agenda. **Carried.**

4. **Approval of the Minutes:**

Motion: To approve the minutes from the February 7, 2007 meeting. **Carried.**

5. **Review of Action Items Summary**

Venue Business Plans – there's a trust meeting scheduled for Friday. They're optimistic they will get the decision they asked for.

Master Planning Schedule – on the Partners agenda for March 7th.

First Nations Proposal (Pavilion) – FHFN is working on the next phase of the business plan and will provide an update in April.

ICI Performance Tracker. Donna gave an update and will bring forward on a quarterly basis. A copy of the update has been sent to all the Partners. Donna will also provide an evaluation of each of the commitments.

Partnerships Plan/Matrix. Will bring to next Partners on March 7th.

Non Commercial Use Agreement. Dorothy has answered all of the IOC's questions. Both Vancouver and Whistler are ready to sign. Once signed VANOC will set up briefing sessions for all the Partners.

Live Sites. They've had a couple meetings and will have a couple more prior to Burkes update on March 14th.

6. **Communications Announcements & Issues**

- Renee would like to give a broader perspective of announcements at one of the Partners meetings.
- Everyone should have a copy of the brief on the Sea to Sky Hwy. School closure. There is another one on Accommodation that should be going out shortly.
- Clock security has been extended from one week to two weeks. VANOC will be discussing with Omega how to manage it in future.
- John and Dorothy are heading to the Canada Winter games.
- VANOC is working with the Federal Secretariat on the Hillcrest Event.
- There is a workforce and partners ball hockey game taking place in the parking lot at the VANOC campus. Further information will be provided.
- The unveiling of the Aboriginal posters will take place on March 5th in the atrium.
- COCOM invites will be sent out in the near future. Is low key this year so should be taken off the Premier's calendar.
- Preparation for release of the business plan and sustainability plan is in the works.
- VANOC will make sure that athletes have the proper information on 'Own the Podium' and are properly prepared for speaking engagements.

DRAFT
VANOC
MINUTES OF THE MEETING OF THE FINANCE COMMITTEE
Location: Room 200 - 2nd Floor - VANOC Boardroom
3585 Graveley Street
Vancouver BC

Monday, March 12, 2007
3:00 PM – 5:35 PM

Committee Members Present:

Ken Dobell, co-Chair	Peter Brown	Jim Godfrey
Chief Gibby Jacob	Patrick Jarvis*	Michael Phelps*
Judy Rogers		

Regrets:
Annette Antoniak

Guests:
Jeff Mooney, VANOC, Director
Jaqueline Evans-Atkinson, Director of Finance, BC Olympic and Paralympic Games Secretariat
Jeff Garrad, BC Olympic and Paralympic Winter Games Secretariat
Paul Henderson, Olympic Operations Office, City of Vancouver
Rob Toller, 2010 Olympic and Paralympic Games Federal Secretariat

Staff:

John Furlong	Dorothy Byrne	Ken Bagshaw
Ward Chapin	Dave Cobb	Dan Doyle
John Eastman	David Guscott	Ron Holton
John McLaughlin	Rex McLennan	
Cathy Priestner Allinger	Donna Wilson (4:30pm)	Terry Wright
Todd Kobus	Shirley Shankar (recorder)	

**Participated by teleconference.*

These Minutes reflect the order of the Agenda.

Mr. Dobell called the meeting to order at 3:00pm.

1. **ADMINISTRATION**
   a) Approval of Agenda
   The agenda was approved as circulated.

   b) Approval of the Minutes of Finance Committee Meeting of February 5, 2007
   MOVED AND SECONDED THAT the minutes of the Finance Committee meeting held February 5, 2007 be approved as circulated.

CARRIED

2. VENUE DEVELOPMENT

a) Venue Development EVP Report (including allocation of contingency), Procurement Plan and Budget Summary

Management presented an overall venue development budget update, including status of program, schedule, risk register, contingency status and highlights of various projects including:

- Whistler Creekside Alpine Venue
- Whistler Sliding Center
- Whistler Nordic Competition Venue
- Cypress Mountain
- UBC Winter Sports Centre
- Richmond Oval
- Hastings Park
- Hillcrest Curling Venue
- Trout Lake and Killarney training venues
- Vancouver Olympic & Paralympic Village

It was noted that a detailed project analysis of the Whistler Athletes' Centre is ongoing and would be presented to the Committee at its next meeting. It was also noted that the Hastings Park forecasted completion budget showed a surplus of s.21 from the previous forecasted budget.

The Committee was asked to approve a recommendation to the Board for approval of venue-specific budget transfers from contingency to cover current forecasts of costs at completion. After discussion by the Committee, the following resolution was **MOVED AND SECONDED:**

BE IT RESOLVED THAT the Finance Committee recommend to the Board that a total of s.21 be approved for transfer from the venue development central contingency account to the budget account for individual venues in the amounts shown below:

Venue	Contingency Transfer	New Authorization
Whistler Sliding Centre		
Whistler Alpine Venue		
Cypress		
UBC Ice Hockey		
Richmond Oval		
Training Venues		
Whistler Nordic Centre		
TOTAL	s.21	s.21

AND THAT a total of s.21 is approved for transfer from the Hastings Park budget account to the venue development central contingency account, resulting in a net draw from the central contingency account of s.21

Secrecy and the 2010 Olympics

The Asian Pacific Post.
Editorial - April 22 2008

On Feb 11, 2008, the eve of the two year countdown to the 2010 Olympics, Premier Gordon Campbell took to the stage and proclaimed proudly to the people of BC; “these are your games”
.

What he did not say was that you, the people of BC have no right to know how your money will be spent on the games. Wrapping another cloak of secrecy around the games, the B.C. Olympic Winter Games secretariat, which manages public funds for the event, has stopped recording minutes of its meetings.

At the same time the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games aka VANOC, has stopped supplying the minutes of its meetings to the government secretariat. There is only one reason for this. Both VANOC and the secretariat do not want nosy reporters and members of the opposition from getting access to these minutes using the FOI process.

The minutes, blanked out in many sections and often delayed, were one of the few places the public was able to gauge and assess what was being planned for your money. The Canadian Taxpayers Federation believes the secretariat stopped keeping minutes to prevent access through Freedom of Information saying when “people find a way of getting information, those channels are shut down."

NDP Olympic Games critic, MLA Harry Bains said the secrecy surrounding the use of $2.5 billion of taxpayers’ money is unacceptable. The secretariat said keeping the minutes were “not an effective management tool" whatever that means. The move it says is "consistent with cross-government practices and legislation." Translated, VANOC officials and the BC Government want you to believe their spin doctors.

The *Asian Pacific Post* and the *South Asian Post* are big supporters of the 2010 Olympic Games in Vancouver. We have always believed that the games will entrench Vancouver and its panoramic diversity on the global stage reaffirming its position as one of the best places to live on the planet.

However, the increasing secrecy surrounding the 2010 games is creating a credibility gap between VANOC and its supporters, let alone its detractors. Now with the minutes gone, the media and the public has to rely on oral governance of VANOC. That means if anything or anyone screws up, we will have to rely on hearsay on who authorized what and when.

There will be no raw records, except perhaps for carefully doctored final versions, to review the decision making processes involving $2.5 billion of taxpayer’s money. The zeal for secrecy by VANOC is in defiance of the spirit of the Freedom of Information laws which was created to ensure transparency of governance.

If Premier Campbell is serious about accountability and this being the people’s games, his government should order the secretariat and VANOC to keep meticulous records and minutes of all that transpires with the taxpayer’s money. VANOC should not deprive the taxpayer of the transparency required for democracy to work.

30-

Appendix 3

The use of section 12 to withhold agenda topic headings

For the first two examples (pages 107-108), the caucus committee agenda topics of 2006 were initially withheld under section 12, with the claim - rejected by the OIPC and court – they would reveal the "substance of deliberations." But to comply with Justice B.M. Joyce's ruling of 2011, they were eventually disclosed, hence one can read them here.

Yet later, in reply to my latest request for the same kind of agenda items, for cabinet, the FOI branch ignored the guidance of the court ruling, and are still applying section 12 in the old erroneous manner today - as one can see in the 2013 samples on pages 109-110.

[B.C. Supreme Court ruling 2011 BCSC 112 (Jan. 31, 2011), in response to the government's judicial review application, stated: "In my view, the conclusion of the IPC delegate, that headings that merely identify the subject of discussion without revealing the 'substance of deliberations' do not fall within the s. 12(1) exception, was a reasonable decision."]

Government Caucus Committee
Social Development

Agenda

Thursday, September 28, 2006
10:00 – 12:00 a.m.
Cabinet Chambers

Coffee/Tea/Beverages will be available.

Item	Minister/Official Responsible	Time	Tab
A. GCC SD MINUTES:			
Minutes for Members' Approval: September 7, 2006	Katherine Whittred, Chair	10:00	1*
B. ITEMS FOR DECISION:			
Ministry of Employment and Income Assistance Employment and Assistance Act and Employment and Assistance for Persons with Disabilities Act	Minister Richmond	10:05	2*
Ministries of Health and Small Business and Revenue Tobacco Sales Act Regulation	Ministers Abbott and Thorpe	10:20	3*
Ministry of Small Business and Revenue A. Tobacco Tax Act B. Home Owner Grant Act; Land Tax Deferment Act; Property Transfer Tax Act; Taxation (Rural Area) Act – information sharing C. Financial Administration Act	Minister Thorpe	10:45	4*
Ministry of Children and Family Development Child Care Subsidy Act	Minister Christensen	11:45	5*

* Material enclosed
TBD Material to be distributed
VER Verbal report

Next Meeting: Thursday, October 12, 2006 (4:00 to 6:00 pm) in Chambers

Approved for Distribution by: EM

Date: Sept. 22, 2006

Government Caucus Committee
Natural Resources and Economy

Agenda

Tuesday, September 26, 2006
9:00 a.m. – 12:00 p.m.
Cabinet Chambers

Item	Minister/Official Responsible	Time	Tab
A. GCCNRE MINUTES:			
September 13, 2006 Minutes for Members' Approval	Kevin Krueger	9:00	1*
B. ITEMS FOR RECOMMENDATION:			
Ministry of Environment Spring 2007 Legislation RFL Review: Protected Areas of British Columbia Act (including draft legislation)	Honourable Barry Penner	9:05	2*
Wildlife Act (HCTF)	Honourable Barry Penner	9:30	3*
Ministry of Community Services Spring 2007 Legislation RFL Review: Vancouver Charter, Community Charter	Honourable Ida Chong	9:45	4*
Local Government Act	Honourable Ida Chong	10:00	5*
Ministry of Small Business and Revenue Spring 2007 Legislation RFL Review: Social Service Tax Act (discounts)	Honourable Rick Thorpe	10:15	6*
Social Service Tax Act (binding rulings)	Honourable Rick Thorpe	10:30	7*
Taxation (Rural Area) Act (penalty extension)	Honourable Rick Thorpe	10:45	8*
Taxation (Rural Area) Act and Mineral Land Tax Act	Honourable Rick Thorpe	11:00	9*
Property Transfer Tax Act	Honourable Rick Thorpe	11:15	10*

* Material enclosed
TBD Material to be distributed
VER Verbal report

Next Meeting: Tuesday, October 17: 9:00 a.m. to 11:00 a.m. in Cabinet Chambers

BRITISH COLUMBIA

REVISED

PRIORITIES AND PLANNING COMMITTEE

Agenda

Wednesday, October 9, 2013
1:30 p.m. to 3:30 p.m.
Premier's Vancouver Office

Decision Items

1:30	25 min			
1	Electoral Boundaries Commission		Honourable Anton	Tab 1 *
1:55	25 min			
2		S12	Honourable Polak	Tab 2 *
2:20	25 min			
3		S12	Honourable Polak	Tab 3 *
2:45	25 min			
4		S12	Honourable de Jong	Tab 4 *
3:10	20 min			
5	Update to the Provincial Housing Strategy: Housing Matters BC		Honourable Coleman	Tab 5 * Tab 05a Tab 05b Tab 05c Tab 05d

* Material enclosed
TBD To be distributed
VER Verbal presentation

BRITISH COLUMBIA

Cabinet Working Group on LNG

AGENDA

Monday, September 9, 2013
1:00 p.m. to 3:00 p.m.
Premier's Vancouver Office

Decision Items

1.	S12	Honourable Coleman	Tab 1 * Tab 01a Tab 01b Tab 01c Tab 01d Tab 01e

Information Item

2.	S12 Peter Milburn, DM – FIN	Honourable de Jong	Tab 2 VER

* Material Enclosed
TBD To Be Distributed
VER Verbal

Appendix 4

"Out of scope"of request claims

For many years, in response to FOI requests filed by myself and others, the government sent back records with sections blanked out, with a little "o/s" handwritten upon the blanks. This was meant to denote "out of scope of the request," i.e., the subject matter is not relevant and so "the information is 'not responsive' to your request."

Order F11-34 from the Information and Privacy Commissioner's office stated that the B.C. government cannot hide parts of ministers' calendar records from my FOI requests with the claim that these are out of the scope of the law. A sample is shown on page 112.

Then in a series of decisions released on June 19, 2015, the OIPC ruled that governments and public bodies can no longer withhold information in a record on the basis that it is outside the scope of the FOI request.

"This is a huge victory for FOI requesters in B.C.," said BC FIPA executive director Vincent Gogolek. "The Commissioner's office has emphatically told public bodies in this province that they can't use this loophole ever again."

September 12 - September 18

September 2005

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

October 2005

S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

Mon, September 12

HOUSE SITS

9:00am 9:30am Pre- Brief with Tamara for meeting with BCGEU (Room 153)
9:30am 10:00am George Heyman, President, BCGEU. Introductory. Tamara (Room 153)
10:00am 11:00am Election of Speaker (all on duty)
11:30am 12:00pm
12:00pm 1:00pm Lunch/ Return Calls/ DO NOT DISTURB
1:00pm 2:00pm
2:00pm 3:00pm
3:00pm 3:30pm Speakers' Reception for Throne Speech (Library Rotunda)
4:00pm 4:45pm Pre-Brief for PSEC Mtg with Tamara, Bob de Faye and Janine Reed from PSEC. The actual meeting is on Sept
4:45pm 5:45pm Present at LRC- Minister de Jong's LRC Pres. date, but
6:00pm 9:00pm DO NOT BOOK FROM 6PM onwards...
7:30pm 9:00pm

Tue, September 13

7:30am 8:30am Confirmed: Meeting- MA's also invited (Room 310)
9:00am 11:00am BUDGET -Tamara, Nick, Dave S. Dave G. Murray- Tamara has conflict and will come at 10am ish (Rm 153)
11:00am 11:30am QP Prep
11:30am 12:30pm Office Time
12:30pm 12:45pm Pre-Budget "Shoes" Media Availability (Room 153)
1:00pm 2:00pm
2:00pm 3:00pm Question Period
3:30pm 5:30pm Hold for Last Minute Budget Prep
5:30pm 6:30pm Office Time
6:30pm 9:00pm

Wed, September 14

BUDGET UPDATE

FYI- House Sits from 2-9pm on Wednesdays

FYI- TBD Staff Post-Budget Reception at the Sticky Wicket runs from 3:30-7

8:00am 12:00pm Cabinet (Chambers, breakfast and lunch provided)
10:00am 11:25am Leave Cabinet, Tamara and Robert to arrive in MO at
11:25am 11:35am Travel to Empress Hotel with Steve, enter through
11:42am 1:30pm Attend Media Lockup for Budget Update: Presentation
1:40pm 2:00pm
2:00pm 2:45pm
2:50pm 3:45pm Deliver Budget Update after QP, approx 2:50pm
3:45pm 4:15pm IF REQ'D: Follow up briefing from Communications,
4:15pm 4:25pm Confirmed: Comm Clips with Tara Foslien (Room 153)
4:35pm 4:55pm Confirmed: Live telephone interview with Terry Moore
5:08pm 5:11pm Confirmed: Live on Camera Interview with Hudson
6:00pm 6:30pm TBC: Live on camera, 5 minute interview with Tony
6:15pm 6:20pm TBC: Live on camera for 5 minutes with Jim Beatty,
More Items...

Thu, September 15

Charles Campbell (Vancouver Magazine) day in the life, shadowing interview

FYI- House Sits from 10am-6pm on Thursdays

7:30am 8:00am Briefing for conference call - update on market
8:00am 8:40am Teleconference - Province's global sydicates & fixed
9:05am 9:30am Confirmed: CFAX with Joe Easingwood (By phone
9:35am 10:00am Confirmed: Live via telephone, interview with CKNW
10:00am 11:00am
10:00am 10:30am Confirmed: Kate Mar Show (Cat Studio Line at 10am)
10:30am 11:00am "Power Issue- Women in Business" Profile Piece
11:00am 12:00pm
11:00am 11:30am QP Prep
12:00pm 12:15pm Steve to drive you to studio
12:15pm 12:45pm Confirmed: Live in Studio with CH News "Your Say"
1:00pm 2:00pm
2:00pm 3:00pm Question Period
4:30pm 5:00pm NEW: Tamara to CALL (Room 153)
More Items...

Fri, September 16

8:35am 9:00am Confirmed: Live by telephone interview CKOV Kelowna "Open Line" with John Michaels (Call studio line at 8:35am, 250 763-4212)
8:55am 9:30am Confirmed: Live telephone interview: Shere Punjab Radio India AM 1550 with host Harjinder Thind (Call Studio Line at 604 247-1550 at 8:55am.)
10:15am 10:50am Helijet Flight #706 (Vic-Van)
12:00pm 1:30pm Agenda Development Committee- Light lunch provided (Premier's Vancouver Office, Boardroom # 3)
1:30pm 2:15pm Meeting with Ministers Hansen, Neufeld, Bennett and DMs- Tamara by phone (604 775-2079) (Vancouver ED Offices, suite 730-999 Canada Place)
6:30pm 9:00pm Confirmed: Dinner with Chinese President hosted by Senator Austin and Minister Emerson (Vancouver, Pan Pacific: R Level- Oceanview Suites 5-7)

Sat, September 17

10:30am [illegible] President- Tickets being couriered to office (1601 Bayshore Dr. at the Westin Bayshore Hotel, Grand Ballroom on the Main Floor)

Sun, September 18

1:00pm 7:00pm
5:40pm 6:00pm Arrive at Channel M at 5:40 for make-up
6:00pm 7:00pm Channel M – Punjabi Interactive in Studio TV interview (Live and Open Line) with host Mr. Devinder Dillon (Parm to attend Parm's cell (Channel
8:00pm 9:00pm Channel M Cantonese Interactive: In studion, live and with calls- with host Charles Mak (Parm to attend) (Channel M ground floor studio, 88 East Pender St.)

Appendix 5

Crown Copyright warnings, and their discontinuance (for now)

For several years I - and many others - received "notices" inside packages of documents mailed to me in response to some of my FOI requests. These letters warned me that: "These records are protected by copyright under the federal Copyright Act, pursuant to which unauthorized reproduction of works is forbidden." See page 114.

After several years of this practice, I complained to B.C.'s information and privacy Commissioner in 2008. Positively, the Commissioner responded in a letter that the government had agreed to discontinue doing so (except in certain special cases). See page 115.

While this current voluntary B.C. suspension of Crown copyright claims is welcome, there is no guarantee the censorious problem could not arise again, hence it needs to be prohibited by statute, as the United States government does.

STATEMENT ON CROWN COPYRIGHT

We wish to notify you that this response letter and the enclosed records are being provided to you in accordance with the *Freedom of Information and Protection of Privacy Act*. These records are protected by copyright under the federal *Copyright Act*, pursuant to which unauthorized reproduction of works is forbidden. Permission of the copyright holder must be obtained prior to any reproduction, dissemination or sale of these records (including the posting of such records on the Internet). If you wish to reproduce a record or a portion of a record that is subject to Crown copyright, you must send a copyright request to the Province's Intellectual Property Program.

Government Core Policy Manual regarding Crown Copyright and Disposal of Intellectual Property can be obtained from the following URL:
http://www.fin.gov.bc.ca/ocg/fmb/manuals/CPM/06_Procurement.htm#1634e.

In addition, a copy of the Copyright Permission Request Form can be obtained from the Intellectual Property Program Web site, URL www.gov.bc.ca/com/copy/req.

For further information specific to Crown Copyright, please contact:

Intellectual Property Program
2nd Floor, 548 Michigan Street
PO Box 9492 Stn Prov Govt
Victoria BC V8W 9N7

Telephone: (250) 356-5055
Fax: (250) 356-0846
e-mail: ipp@mail.qp.gov.bc.ca

Office of the Information and Privacy Commissioner for British Columbia
June 1, 2009

Dear Stanley Tromp:

Complaint—Duty required by Act—Ministry of Transportation and Infrastructure ("Ministry") File TRA-06-158—OIPC File F07-31 011

I am writing about your complaint that the Ministry included a copyright advisory notice with its disclosure of records in response to your access request under the Freedom of Information and Protection of Privacy Act ("FIPPA").

As part of our investigation of your complaint, I had discussions with the ministry responsible for intellectual property within government, the Ministry of Labour and Citizens' Services. Government has decided to cease including copyright notices in access to information disclosures and has confirmed that, effective immediately and government-wide, copyright notices will no longer be issued in conjunction with disclosure of records in response to access requests under FIPPA.

The Province has advised us, for clarity, that the fact that it will no longer include copyright notices in FIPPA disclosure packages does not change the fact that it "reserves the right to assert and/or enforce copyright in its materials in appropriate cases, including situations where such material is subject to an existing legal obligation of the Province (i.e., a licence) or someone makes copies of something purporting to be the official version of Provincial material, but which is out of date, and distribute those copies to others, thus creating the potential for inconvenience, or worse, to third party recipients of that material."

I appreciate the government's willingness to revisit this issue and applaud its decision to change its policy on the matter.

In view of this development, we will be closing our file relating to your complaint. I appreciate your having brought this matter to my attention and thank you for your contributions to its successful resolution.

Yours sincerely,

David Loukidelis,
Information and Privacy Commissioner for British Columbia

Appendix 6

Miscellaneous FOI "creative avoidance" methods

Unfortunately, beyond "oral government," there are yet other pernicious practices employed to undermine the FOI process. Perhaps an amendment to the B.C. *FOIPP Act* or a new *Archives Act* should explicitly prohibit many of these, with penalties for violations. Mere policies or regulations to bar them are insufficient, because such rules can too easily be dropped at any time by a future administration.

Some officials sadly evidence a fertile imagination for "creative avoidance" as one commissioner called FOI resistance. Besides recalling my own FOI experiences, such cat-and-mouse games have been widely reported from various nations, and from sources such as information commissioners' reports, public inquiries, books and news articles. Practices can include:

• Changing the title of a record sought by an FOI applicant, sometimes after a request for it is received, then wrongly telling the applicant "we have no records responsive to your request."[111] The law should make it make it absolutely clear it is only the subject matter that counts, not the record's title per se. (Thankfully some FOI laws prohibit the destruction of a record after a request for it has been received, even if the record had already been scheduled for destruction.)

• Post-it sticky notes. Such notes affixed to documents can contain the most important information on a topic. Yet when an FOI request comes in, some officials have removed the sticky notes, photocopied the denuded original, mailed that copy to the applicant, and then later reattached the notes to the originals – all in the false assumption that such notes are not covered by FOI laws.[112] Officials can also write penciled notes that can be easily erased.

• Storing records offsite - or at a site owned by a private company partnering with government - and so claiming they are not in the state's "custody" and cannot be accessed. (See the Quebec FOI's law solution.[113])

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[111] This was noted in the Somalia Airborne inquiry report of the 1990s, whereby documents called "Response to Queries" (RTQ) were simply renamed by officials as "Media Response Lines" (MRL), with the officials then denying to the media *ATIA* applicant that the sought RTQ records existed.

[112] Commissioner Denham's 2015 report noted an FOI coordinator in the premier's office used disposable Post-it notes to avoid generating records. Yet in the B.C. FOI regulations, any marginal note made upon a document transforms that record into "a new record," and a separate photocopy is made of it for FOI applicants: "Marginal notes and comments or "post-it" notes attached to records are part of the record, not separate transitory records. If the record is requested, such attached notes are reviewed for release together with the rest of the record." Ideally, such FOI regulations would be placed in law.

[113] Quebec's FOI law notes this issue: "1. This Act applies to documents kept by a public body in the exercise of its duties, whether it keeps them itself or through the agency of a third party."

• Sending illegible photocopies, which can delay the FOI replies for months as the applicant appeals, or applies over again for legible copies of the same records.

• Incorrectly claiming that documents are not available in a readable format, or records are in too fragile a condition to be accessed.

• Providing only a positive summary of the records instead of the original records sought, offering other information as a compromise, or burying the applicant with positive but not really relevant records.

• Mingling exempt and non-exempt records together, then claiming an exemption for them all; for example, incorrectly placing records into files of cabinet or international relations documents Mislabeling records, which is a major problem in federal *ATIA* requests for cabinet records.

• Stonewalling, i.e., incorrectly claiming that records do not exist when they do; or not searching properly and then claiming documents cannot be found

• Inflated fee estimates. This was detailed during the 1997 inquiry on the Canadian military scandal in Somalia, along with established cases of improper document alteration.

• Mislabeling records as "preliminary" or "investigatory," and so forth; or arguing that the records need not be released under the FOI law because they will be published within 60 days – and then not publishing them, or delaying replies until after the applicant's deadline to appeal to the commissioner has run out.

• B.C. *FOIPP Act* Sec. 6 prescribes that an agency must produce a record for an applicant if "the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer," and "creating the record would not unreasonably interfere with the operations of the public body." But some agencies could overstate the difficulty of doing this, and so refuse to create records, or heighten fees.

• Interpreting the wording of an applicant's request too narrowly, or even altering it and then replying to the agency's re-worded version; delaying the release for months with clarifications and re-clarifications until an issue is stale, or until after an election.[114]

• Still other methods were detailed by former Australian FOI official Don Coulson. These included "pumping applicants for extra information to find out why they want documents, before briefing ministers and advisers; delaying the release by saying an application has been overlooked, the department is overloaded with requests and is under staffed; hiding behind the excuse that requests are too voluminous or time-consuming to process, often without helping applicants to narrow down exactly what they want; others did not notify applicants of their rights of appeal."[115]

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[114] In 2007 Alberta's privacy commissioner ruled the provincial government for political purposes withheld information about the government's use of aircraft until after the 2004 provincial election.

[115] Chris Tinkler, *The FOI's bag of dirty tricks*. Sunday Herald Sun (Australia), November 10, 2002

Appendix 7

Lessons from the UBC-Coca Cola contract dispute

In regards to B.C. *FOIPP Act* Sections 17 and 21, which were misapplied in the case below, free access to public-private partnership contracts is essential to the public interest. I became familiar with this topic, after waging a five-year legal battle to view the 1995 UBC-Coca Cola exclusive marketing contract while I was a student and working at the *Ubyssey* student newspaper, my first FOI legal dispute and a formative influence for my later cases.

Much was at stake because it was the first such exclusive public-private marketing deal with a public body in Canada, and I filed the first FOI request to view one; in such a partnership between the two sectors, the question arose - whose culture would prevail, that of corporate secrecy or public transparency?

UBC refused, I appealed to the OIPC, and voluminous arguments were made (while UBC assured us that "the contract itself is securely locked in a Chubb safe"). Then a disaster ensued. B.C. Information and Privacy Commissioner David Flaherty in Order 126 ordered the contact to remain sealed, accepting the university's and companies' Sec. 17 and 21 claims of financial and economic harms.

The *Ubyssey* appealed that order in judicial review in B.C. Supreme Court. We were widely expected to lose the case (and even I was not hopeful), for the power and funding was weighted so heavily on the other side. Yet we won after the newspaper's lawyers demonstrated in court that at American universities, unlike those in Canada, such contracts are freely publicized even without FOI requests, and with no demonstrable harms incurring. The judge also stated the first commissioner should have, but did not, consider my pleas on Section 25, the public interest override.

Mr. Flaherty's term expired and he was succeeded by David Loukidelis in 1999, and a new inquiry was held. In his influential Order 01-20 of 2001, the new commissioner wrote the contract should be released because it contained information not *supplied* in confidence, but only *negotiated* in confidence between UBC and the company: "The parties, in effect, jointly created the records." (I believe the *Act* should be reformed to place this principle into Sec. 21(1)(b).) He also insisted on specific evidence for potential harms – of which none was produced - whereas his predecessor had just accepted bald assertions of harm from the company. Thus the landmark initial OIPC ruling was followed by a landmark reversal. Henceforth, no public body could withhold such contracts from the public. (UBC also repealed its much-criticized Policy 116, which gave its corporate partners too much influence in the FOI process.)

The matter then took a darker turn in three unexpected ways. In his submission to the first OIPC inquiry, UBC president David Strangway[116] promised that "almost all" of the contract's profits

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[116] The same President Strangway, who - reminiscent of several premiers - wrote in the *Vancouver Sun* (Dec. 5, 1985): "Above all, I want the university community and the public to feel that UBC is a place

($8.5 million over 10 years) would be spent on improving disabled access at UBC, and that my publicizing the contract by FOI might scuttle the contract and so imperil their funds – perhaps to induce guilt in the applicant (and at times almost succeeding) so as to dampen his efforts. Yet, five years later, I investigated and reported that UBC had spent *less than 10 percent* of the total contract profits on disabled access; and amongst the incidental beneficiaries, 21 percent - more than $1 million - had instead gone to the contract negotiating firm Spectrum Marketing (led by a former Coca-Cola vice president) – news that unsettled many readers.

There is an important principle in FOI work: negative old governmental habits die hard, and no single victory can be taken for granted: Two years after the Coca Cola contract was liberated from its Chubb safe, the ever intransigent UBC simply refused to accept that precedent, and so denied my later FOI requests to see its similar exclusive supply contracts with a bank, an airline, an internet provider, and Spectrum Marketing; hence I had to appeal in an inquiry *again*, whereupon the OIPC ordered those contracts opened too (in Orders 03-02, and 03-03, and 03-04). Such obstructionism on contracts is hopefully *passe* by now.

Then came fallout in Victoria. In 2006 the B.C. government tried to pass Bill 30 that would have exempted designated contracts and projects with private sector partners from FOI requirements.[117] Concerted opposition scuttled the bill. That proposal was not surprising, for public bodies such as UBC were obviously much displeased at the OIPC orders, and in 2004 the B.C. bureaucracy complained to a legislative FOI review that the commissioner's rulings which had opened up public-private business contracts had "undermined fair and open procurement processes that will result in the best deal for the province." The commissioner's aide refuted this claim and objected: "This serious allegation is a calculated appeal to politics, and we note that no particulars or evidence have been provided to support this sweeping claim."

At educational institutions, not all lessons are to be found in the classroom. In this onerous five-year UBC endeavour (a dispute that likely cost all sides a combined total of over $100,000 in legal fees), students learned to fight for their basic legal rights, including their rights to information. At the time, I was told our court appeal was belittled in senior UBC executive circles as "mischievous and doomed to fail." In the end, it was neither. The lesson was that on such points of principle - never give up.

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with no secrets and that information about it and its activities is open and accessible. . . If we apply that yardstick to the academic life of the university, why should it not apply equally to its administrative and business life?"

[117] The woeful Bill 30 – which had no such statutory precedent in Canada – would have amended the B.C. *FOIPP Act*'s Section 21, so that the government must (not may) refuse to release information, for 50 years, that is "jointly developed for the purposes of the project," and that is "shared or jointly developed explicitly in confidence," and could harm "the negotiating position of the third party," along with other sorts of supposed harms. As *Vancouver Sun* noted, "This Bill is intended to erect a legislative framework around the Liberal experiments in having private companies assume contractual responsibility for providing government services," that is, the so-called P3s. Many nations post such records online.

Appendix 8

Student societies and financial accountability

Excerpts from the following news stories illustrate the need to cover student societies under a much stronger accountability mechanism that the current *Society Act* - perhaps through the B.C. *Freedom of Information and Protection of Privacy Act* or some other equally effective route – so to guarantee students' access to the societies' financial and other records.

Student association in hot water; University board wants power to intervene to control how money is spent. By Jennifer Saltman, *The Province* [Vancouver] Sept. 19, 2011

Kwantlen Polytechnic University is asking the province to change legislation so universities can intervene in student association business to protect the millions of dollars in student fees they collect.

The Kwantlen Student Association has a history of financial problems and is involved in three active lawsuits - two of which were filed in August.

Recent allegations about how money is being spent, how the student association is operating and ties between the current executive and a former board member who is accused of mismanaging funds has the university concerned.

John McKendry, president of Kwantlen, said the university needs some control of an association its students support with their hard-earned dollars.

"It's the independence of the body that allows them to go off in various directions that the institution may not feel are in the best interests of the institution, its reputation and the students that come here for an education," said McKendry.

All students who take credit courses are required to be members of the Kwantlen Student Association and three years ago their annual dues totalled about $2.3 million. That amount has increased, but neither the university or the student association were able to give a new figure.

The university's board and administration doesn't have control over how that money is managed or how the association conducts its affairs because the student association is autonomous and governed by the Society Act.

Twelve years ago legislative amendments were made in response to requests from the Canadian Federation of Students and many B.C. student societies requesting more autonomy. Before that time, institutions had more oversight respecting the collection of student fees.

In an emailed statement, Advanced Education Minister Naomi Yamamoto confirmed that student societies in B.C. operate independently. [….]

The association's credibility problems began in May 2005 when the B.C. Supreme Court appointed new directors after a botched election. In August 2006, the court ordered a new election after complaints about bylaws and the expulsion of association members.

Two years later, the association sued former directors Aaron Takhar, Danish Butt, Jatinder Atwal and Jaivin Khatri and ex-senior employee Yasser Ahmad, alleging they made more than $140,000 in unsupported payments and more than $820,000 in high-risk and unapproved loans. [….]

In August, the student association withheld funding from the student newspaper, *The Runner*, which has been a vocal critic of the association. The funds have since been restored and a mediator engaged. Some students are also skeptical of how the association does business - there are Facebook pages dedicated to critiquing its operations.

Former UVic manager wanted for stealing: Student society noticed money missing last year. By Lee King, *National Post*, Oct. 31, 2002

Saanich police have issued an arrest warrant for a former University of Victoria Student Society manager wanted for stealing funds.

Vivek Sharma, 28, had been employed with the society as business operations manager from 2000 to 2001. The charges against Mr. Sharma include fraud, theft and causing a person to use a forged document. Police began investigating in late 2001 after the university student society noticed money was missing. [….]

A figure of $316,000 in missing funds - first reported as missing by the university's student newspaper, *The Martlet* - has been downgraded by police, who would only say that the amount is "substantially less." A routine audit late last year turned an expected $41,000 surplus into the large deficit.

Also discovered was the fact that the student society's lack of checks and balances left its financial reporting mechanisms open to abuse.

CNC to release money to student association: Organization hoping to get back on track after earlier allegations of misuse of funds. Prince George Citizen, Nov. 29, 2001

Eight months after it froze funds to its student association over issues of audit reporting, the College of New Caledonia is preparing to release the money, an official said. Until this month, when new elected representatives took office, the association had been inactive after an internal dispute came to a head in March.

The college can turn the money over once financial statements and an auditor's report are presented to the student association's members, at its annual general meeting next week, said Penny Fahlman, the college's director of finance and bursar.

Since around March, the funds - derived from student association fees of $30 per semester and collected by the college on behalf of the association - have been held in trust, she said. Under the College and Institute Act, the college can cease to collect or remit student society fees if the association fails to make its audited financial statements available to its members in a "timely manner." [….]

An annual audit is mandatory, but Fahlman said the college recommended the association begin the process early - prior to the year-end of July 31 - for a number of reasons. Part of the internal conflict involved allegations of misuse of funds, she said. As well, the association had received poor audit reports for the previous three years, due to inadequate documentation. "The whole combination of things alarmed us then," she said. RCMP Const. Gary Heebner said the allegation of fraud was never substantiated and the file is closed.

College holds back student union fees. By Blais Simone, *Coquitlam Now*, Nov. 4, 2006

Douglas College is holding more than $1.5 million in student fees back from its student union - money collected since May 2005 - amid allegations of improper financial practices and mismanagement by the student union.

Brad Barber, spokesperson for Douglas College, confirmed Thursday that the college filed an application for the B.C. Supreme Court to appoint a receiver manager to oversee Douglas College Students' Union finances.

"The college board found out in May 2005 that the student union had not been making their audited financial statements available to students. That is the one way that students can check that their fees that go to the student union are being used properly," Barber said.

"When the board was told the audits weren't being done, they froze the transfer of fees to the student union, effective immediately." The board decision came on the heels of a forensic review conducted by Ron Parks, an auditor with Blair Mackay Mynett Valuations Inc., which was submitted to the Society of the Douglas Students' Union (DSU) on April 18.

Barber said college board members learned new details of the DSU's financial situation from the review. "Previously there were concerns and hearsay, but the forensic audit confirmed the fears," he said. "The board and college administration have been very concerned about whether or not student fees have been properly managed. That concern remains and is heightened by what's in the forensic report."

The nine-page report, obtained by The NOW, details 10 areas where auditors found "financial transactions and other issues related in part to significant deficiencies in internal controls and accountability."

One of those transactions includes a $20,000 cheque issued to the girlfriend of the financial services co-ordinator of the student union on Dec. 6, 2004. The money was "intended to be a temporary loan for the purpose of making a down-payment on a house." The amount was repaid to the student union on Dec. 22, 2004. "Notwithstanding the repayment, this is an example of blatant misuse of DSU member funds," the review states.

Parks also found that the student union's "accounting records, particularly the general ledger, are not kept up-to-date; no bank reconciliations have been done since August 2004; the filing system for financial documents and accounting records is almost non- existent; no budgets have been prepared since 2001."

The student union is also behind on its taxes, according to the review. Parks wrote that a list of employee income tax, Canada Pension Plan and employment insurance withholdings for student union staff remain payable to the Canada Revenue Agency as of March 31, to the tune of $27,000. [….]

"The audited financial statements for DSU indicate an excess of expenditures over revenues in every year from 2001 to 2004, and an accompanying deterioration of DSU's financial position over these periods," the review states. […]

Parks recommended that "a revamping of the entire system" of DSU financial practices may be necessary, and segregation of cash handling, cash deposit, accounting, bank reconciliation, cheque preparation and cheque signing duties be implemented "in order to minimize DSU's exposure to potential fraud, misappropriation of funds and error."

Regional Roundup: New Westminster. Vancouver Sun, Apr. 27, 1998

Charges have been laid against a Douglas College student society member suspected of improperly cashing 10 cheques worth over $6,000.

New Westminster Crown counsel has approved charges of theft over $5,000 and fraud over $5,000 against a society executive member, whose name has not been released.

New Westminster police fraud investigator Constable Carmel Keenan said the suspect allegedly violated the cheque-writing policy of the society, and obtained co-signatures for the cheques from other executive members by "verbally falsifying statements."

Langara student union ratifies controversial referendum; B.C. bureaucrats called for more accountability and enforcement for non-profits. By Stanley Tromp, *Vancouver Courier,* Dec. 21, 2012

The Langara Students Union has ratified the results of a referendum making controversial changes to the organizations bylaws.

The Dec. 5 referendum, which passed narrowly, introduced changes that could allow the LSU to bar students from attending society board meetings, prevent in camera meeting minutes from being taken, and prevent students from making copies of student union records. It also extends the terms of some directors.

The resolution to implement more secrecy passed by just 19 student votes out of 661 students voting, with 11 spoiled ballots. In a meeting last Monday, after a recount that confirmed the original vote results, the LSUs elected board of directors voted to ratify the referendums passage with a vote of four against and

eight in favour, just meeting the two-thirds majority needed to pass. The new bylaws will go into effect early next year but will be defined more in future policies.

Starting next semester the LSU will hold meetings with general members and constituency groups in order to write a great policy, LSU media liaison Gurbax Leehl told the Courier. Bylaws are the highlights but policy will be very, very detailed.

Each semester, the LSU collects $390 in mandatory fees from every student, for an income of more than $2 million per year. The B.C. Society Act, which governs non-profit organizations like the LSU, is undergoing a review in Victoria. The Act covers 26,000 societies in B.C., and according to the reviews website is outdated and in need of reform.

Lorne Brownsey, assistant deputy minister of advanced education, wrote to the Act's review in 2010 to say of student societies: "It is submitted that any new or amended Society Act must include provisions that require not-for-profit organizations to accurately share information about their governance, finances and operations at particular intervals. There must be appropriate investigative mechanisms included in the new legislation to enable the registrar to investigate, and act upon, potential abuses or deceptions."

Student and referendum opponent Muneori Otaka believes the new LSU bylaws are contrary to the public interest. "Although a bit drastic, how to dissolve the LSU was one of the ideas some of us have been talking about," Otaka told the Courier.

A spokesperson for Langara College administration declined to discuss LSU issues or Societies Act reforms, as did the ministers of advanced education and finance, and the NDP critics for those ministries. Vancouver-Langara Liberal MLA Moira Stilwell and the board members of Langara College also did not respond to requests for comments.

[Two other 2012 stories on this LSU topic can be found at: http://www.vancourier.com/news/langara-students-union-to-do-a-vote-recount-1.389689 and http://www.vancourier.com/news/langara-students-vote-on-barring-students-from-meetings-1.375375]

Student union cash crunch looms: Langara threatens to stop collecting LSU fees. By Lynn Moore, *Vancouver Sun*, Feb. 4, 1992

Unless Langara's troubled student union cleans up its act - and soon - it will lose its major source of funds. Citing financial and personnel problems, administrators at the Vancouver Community College campus have decided that effective Aug. 26, they will no longer collect student fees for the association.

The fees account for about two-thirds of the association's annual revenue of about $310,000 and cancellation of the fee-collecting agreement could kill - or at least weaken - the Langara Student Union.

The association represents students' views to the college and other student associations. It also provides information services and an ombudsman, as well as running book swaps and a weekly pub. Documents obtained by *The Sun* and interviews with 13 people familiar with the situation reveal that these are among the factors that have put one of B.C.'s largest college student associations in jeopardy:

* An amount of cash estimated by association auditors at almost $19,000 went missing between October 1990 and March 1991.

* A Vancouver police officer investigating the missing money found the association's policies and procedures involving cash were "totally bizarre" and he couldn't determine where the money went.

* The real power at the association was held by unionized staff, not the revolving slate of elected students, say some of its former and current executive members. There are now three full-time staffers.

* A key student union staff member for about six years, Philip Link, was a focus of controversy at the student union during 1989, 1990 and 1991. He was ordered off student union property by the student association and banned from Vancouver Community College campuses by Langara's principal in 1991.

The ban - still in effect - followed complaints by Langara students and student union staff of harassment and assault by Link and Link's alleged involvement with libelous posters on the campus. According to Link, he was not banned by either body and his involvement with libelous posters along with allegations of harassment and assault "are wild unfounded accusations."

* A rash of grievances by staff represented by the Vancouver Municipal and Regional Employees Union was filed with the student union. The most costly involved Link, who is still being paid instalments of a $30,000 overtime settlement reached in April 1990.

Every term, the college collects student union fees from its 6,000 students - as much as $40 per student - along with tuition and remits the money to the association. Last August, as financial and personnel problems piled up in the association-owned student union building, the college served 12-month notice of cancellation of fee collection, citing eight problem areas.

Concordia student union's financial chaos defeats even auditors. By Peggy Curran, *The Gazette* [Montreal], Jan. 14, 2009

Tens of thousands of dollars are either missing or unaccounted for. Bills weren't opened for months, taxes and payroll deductions weren't paid for years. Bank accounts were seized while the accounts manager stayed at home and her bosses allegedly turned a blind eye. [Etc.]

Recommendations for Raising British Columbia's *Freedom of Information and Protection of Privacy Act* to World Standards, by Stanley Tromp, January 2016

(Attachment to a submission to the British Columbia Legislative Special Committee to Review the Freedom of Information and Protection of Privacy Act)

Complete list of 67 Recommendations

Recommendation No. 1

Change the *Act*'s title to *The B.C. Right to Information and Protection of Privacy Act*

Recommendation No. 2

Amend Section 2 to state that the B.C. *FOIPP Act'*s purposes include increasing public participation in policy making, scrutinizing government operations, and reducing corruption and inefficiency; and add phrases on the models of purpose clauses in the FOI laws of Nova Scotia or Finland.

Recommendation No. 3

Add a clause to Section 2 to state that access to government information is to be regarded in British Columbia as "a basic human right."

Recommendation No. 4

Amend the Act so that the B.C. government may not enter into a "shared jurisdiction" arrangement or contract, or create a new institution with federal, provincial, municipal or other governmental partners, unless the records of that arrangement, etc., are available under a freedom-of-information law of at least one of the partners.

Recommendation No. 5

Retain the terms "custody or control" of public entities in Sec. 3, but add definitions of the terms.

Recommendation No. 6

Amend the B.C. *FOIPP Act* to state that the *Act*'s coverage extends to any institution that is controlled by a public body; or performs a public function, and/or is vested with public powers;

or has a majority of its board members appointed by it; or is 50 percent or more publicly funded; or is 50 percent or more publicly owned.

This includes public foundations and all crown corporations and all their subsidiaries. The OIPC should be granted extra resources when its mandate is expanded to include such subsidiaries.

Recommendation No. 7

Amend the *Act* so that government and public agencies must post all P3 partnership and large supply contracts on their websites within one week of their finalization, subject only to *FOIPP Act* exemptions (which may be appealed to the OIPC).

Amend the *Act* to prohibit *any* restrictions on readership of these records. Copying or redistribution rights should conform to the terms of the "Crown copyright" Recommendation No. 10 in this report.

Recommendation No. 8

If recommendation No. 6 is not followed, there is an interim measure: To ensure better FOIPP Act coverage, regarding the addition of entities, amend Section 76.1(1), "The minister responsible for this Act may, by regulation, amend Schedule 2 to do one or more of the following […]" by changing "may" to "must."

Recommendation No. 9

State that government and agencies may not invoke the rationale of "out of scope" (or any equivalent term) to withhold any part of any record requested under the *FOIPP Act.* Records or parts of records may only be withheld if they fall under an exemption in the *FOIPP Act,* not if the government asserts that they fall outside the *Act*'s scope.

Recommendation No. 10

Add a clause to the *FOIPP Act* to state that government and agencies may not assert "crown copyright" regarding records released in response to *FOIPP Act* requests.

The only exceptions to this clause would be very limited and must be detailed in the *FOIPP Act* (not regulations), and could include situations where "such material is subject to an existing legal obligation of the Province, i.e., a licence, or someone makes copies of something purporting to be the official version of Provincial material, but which is out of date, and

distribute those copies to others, thus creating the potential for inconvenience, or worse, to third party recipients of that material."

Applicants would retain the right to appeal a wrongful or overly broad assertion of "crown copyright" in regards to *FOIPP Act* responses to the Commissioner, who could prohibit the government from asserting copyright claims in cases where such assertions do not conform to this relevant section of the *Act.*

Recommendation No. 11

Amend the Act to mandate an initial reply in 20 days (instead of the current 30 days), extendable for another 20 – the standard in the FOI laws of Quebec, New Zealand, the United Kingdom and the United States.

Recommendation No. 12

In November 2006, the B.C. Information Commissioner launched an effective new 'expedited inquiry' process to curtail delays. Consider amending the Act to enshrine this "expedited inquiry" plan into law.

Recommendation No. 13

Amend the Act to mandate that when a department's response falls into deemed refusal (i.e., failure to meet lawful deadlines), it loses the right to collect fees (including application fees and any search, preparation, and photocopying charges).

Recommendation No. 14

Amend the Act to implement the approach in some laws (e.g. Mexico), so that if an agency is in a deemed refusal situation, it is required to gain the approval of the Commission before withholding information.

Recommendation No. 15

Amend the law to mandate that where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, a response must be provided within 48 hours (a model found in many other FOI laws).

Recommendation No. 16

Restore the term calendar days – as it was initially – in place of working days, in regards to B.C. *FOIPP Act* response and appeal times.

Recommendation No. 17

Amend the Act to mandate that B.C. *FOIPP Act* performance measurements including response times will be recorded, and that these measurements shall be published online in an annual FOI report card of all public bodies.

Recommendation No. 18

Amend the Act to mandate that failures to respond would be reflected in the reduced bonuses of the "head of the public body" on FOIPP issues (such as deputy ministers in ministries).

Recommendation No. 19

To reduce delays, "sign off' authority levels and processes must be streamlined and simplified. Consider vesting such authority at the lowest reasonable level, normally with the information officer if there is one.

Recommendation No. 20

To lessen overall response times, public bodies must give records to the applicant in staged releases if he or she requests it.

Recommendation No. 21

Amend the Act to permit "continuing" or "rolling requests" on the model of Alberta's FOI law Sec. 9.

Recommendation No. 22

In Section 11, "Transferring a request," restore the original 10 day limit (not 20 days).

Recommendation No. 23

Add a harms test for the Sec. 12 cabinet records exemption, modeled upon the terms used in Scotland's FOI law Sec. 30.

Recommendation No. 24

Amend Sec. 12(2) to state that the Sec. 12 exemption does not apply to agendas or topic headings, including such examples as "items for discussion" and "legislation review." Such records could still be withheld under other sections of the Act.

Recommendation No. 25

Consider posting the cabinet meeting topic headings on the internet - as several public bodies' boards do, subject to an exception for emergencies.

Recommendation No. 26

Amend the Act to state that "government caucus committees" are not committees for the purposes of Sec. 12.

Recommendation No. 27

If the recommendation above is not accepted, there is a second option: Amend Sec. 12 to state that at least 2/3 of the members of the committee must be members of the Executive Council (not 1/3), and the cabinet members of the committee must have attended at least 50 percent of the meetings in the calendar year in order for the committee records to qualify for Sec. 12 coverage. Include all cabinet or caucus committees dealing with climate change.

As well, state that parliamentary committees fall within the scope of the B.C. *FOIPP Act*, though excluded from Sec. 12.

Recommendation No. 28

Change Sec. 12 on cabinet records from a mandatory exemption to a discretionary one, whereby deliberative records may be released if cabinet consents.

Recommendation No. 29

Delete clause "or prepared for submission" from Sec. 12(1). Records can only be withheld under Sec. 12 if they were actually submitted to and considered by cabinet, not if they were "prepared" to be but never were. (They could still be withheld under other exemptions.)

Recommendation No. 30

Amend Section 12 to state that the cabinet records exemption cannot be applied after 10 years (as in Nova Scotia's FOI law), instead of the current 15 year time limit.

Consider proactively releasing cabinet minutes on a government internet page 20 years after their creation (subject to *FOIPP Act* exemptions, other than Sec. 12), eventually moving to 10 years after their creation.

Recommendation No. 31

An amendment to the B.C. *FOIPP Act* should remove all potential uncertainties in the wording around cabinet documents, making it clear that they are defined solely by their substance, not by their titles.

Recommendation No. 32

As FIPA advised in 2004, amend the Act so that Section 12(3), which applies to local public bodies, has parallel provisions to s. 12 (2)(c) which applies to Cabinet confidences. The lack of similar qualifying language in 12(4) allows local public bodies to withhold background materials or analysis in conditions not allowed to Cabinet, and this omission should be corrected.

Recommendation No. 33

Add a provision to the B.C. *FOIPP Act* Sec. 12 to state that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public within five years after the decisions have been taken and the matter is complete.

Recommendation No. 34

Amend Sec. 13 to include a section on the model of Quebec's FOI law Sec. 38, whereby the B.C. government may not withhold policy advice records after the final decision on the subject matter of the records is completed and has been made public by the government.

If the record concerns a policy advice matter that has been completed but not made public, the B.C. government may only withhold the record for two years.

If the record concerns a policy advice matter that has neither been completed nor made public, the B.C. government may only withhold the record for five years (on the model of Nova Scotia's FOI law, Sec. 14).

Recommendation No. 35

Amend Section 13 to include a harms test, wherein a policy advice record can be withheld only if disclosing it could cause "serious" or "significant" harm to the deliberative process. The best

models can be found in the FOI laws of South Africa (Sec. 44), and the United Kingdom (Sec. 36). Also clarify and emphasize that Section 13 cannot be applied for facts and analysis. Enact FIPA's recommendation that "the section 13 advice and recommendation exception be amended to include only information which recommends a decision or course of action by a public body, minister or government."

Recommendation No. 36

Amend Section 14 (legal advice) to state that the exemption cannot be applied to records 30 years after they were created (per the model of the UK FOI law's Sec. 43). As well, add a harms test, to state the exemption can only be applied to withhold records prepared or obtained by the agency's legal advisors if their release could reveal or impair procedural strategies in judicial or administrative processes, or any type of information protected by professional confidentiality that a lawyer must keep to serve his/her client.

Recommendation No. 37

Amend Sec.16(1)(a) by changing the word "relations" to "negotiations." Also change the term "harm" to "serious harm based on reasonable expectations of secrecy."

Recommendation No. 38

Amend Sec. 16(1)(a) and (b) to state that, upon receiving an FOI request that might trigger this section, the B.C. government must consult with the other government to ask if it would object to disclosure of the records, as likely to cause "serious harm based on reasonable expectations of secrecy" to negotiations, not just unilaterally presume that it might do so without inquiring.

Recommendation No. 39

Amend Sec. 16 (1)(b) to state that information may be withheld if it would

"(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies" and add "where there is an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information, and where disclosure would cause serious harm based on reasonable expectations of secrecy."

Recommendation No. 40

Amend Sec. 20 to state that if the government does not release requested information within 60 days if it promised to do so, then upon the 61st day, it must release all the sought information immediately, without exemptions or costs to the applicant, unless doing so would cause "grave harm" to the public interest..

Recommendation No. 41

Amend Sec. 22 to state that a B.C. *FOIPP Act* applicant's identity must not be revealed within government without a strict need to know (which is, mainly to locate the records being sought).

Recommendation No. 42

Amend Sec. 22 to state that bonuses of named officials and employees of all entities covered by the *FOIPP Act* are not the private information of individuals, and encourage the government to post them online, as it does for salaries and expenses.

Recommendation No. 43

Amend the Act to state that all salaries and expenses of officials and employees of all entities covered by the *FOIPP Act* must be available for routine release, without an FOI request, and encourage all such entities to publish such figures online annually, as the B.C. government does for ministries for salaries over $75,000.

Recommendation No. 44

The government must publish all winning and losing bids for supply and service contracts, outside the FOI process. Amend Sec. 21 (1.)(b), re: "that is supplied, implicitly or explicitly, in confidence." Change to – "that is supplied or negotiated, implicitly or explicitly, in confidence."

Recommendation No. 45

Delete Sec. 22.1. Disclosure of information relation to abortion services. Such information is already protected by other exemptions.

Recommendation No. 46

Add student societies of educational bodies to the Act's coverage.

Recommendation No. 47

Clarify that government statistics and datasets – if all personal identifiers have been removed - cannot be withheld under any exemption.

Recommendation No. 48

Retain the term "for any other reason" in Sec. 25, but add further illustrative examples to it, such as those noted in this report from other nations.

Recommendation No. 49

Amend Section 25 in accordance with the Commissioner's recommendation to remove the temporal requirement. Encourage the Commissioner to devote a chapter of his annual report to describe serious cases of failure (whether or not an FOI request for access was made) where the government and agencies had an obligation to proactively disclose information in the public interest per Sec. 25, but did not. Seek and consider input on further measures to guarantee the Sec. 25 duty of proactive publication.

Recommendation No. 50

The deadline to appeal to the Commissioner on a B.C. *FOIPP Act* related matter should be doubled to 60 days. The deadline to file an appeal of a FOIPP ruling to Judicial Review should also be doubled to 60 days.

Recommendation No. 51

Amend the Act so that upon the conclusion of an investigation, the Commissioner's office will have the power to recommend to the Attorney General's office that it lay charges and fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal. These amounts will be determined in further amendments or regulations.

Recommendation No. 52

Place a provision in the Act to preserve pre-existing access to information, on the model of Ontario's FOI law Sec. 63 (2).

Recommendation No. 53

Amend Sec. 70 to mandate that B.C. cabinet minutes be routinely released onto government websites after 20 years, a period gradually moving to the 10 years advised in this report for the termination of the cabinet records exemption.

Recommendation No. 54

Amend Sec. 70 to add a much longer list of records that must be routinely released or proactively published, on the examples of Article 19's Model of Freedom of Information Law (2001), and those of many other nations and commentators noted in this report.

Recommendation No. 55

Amend the B.C. Act's Section 74 to prohibit and penalize persons for the unauthorized record destruction and handling in the FOI process, perhaps with the wording of the Canadian *Access to Information Act,* Sec 67.1.

Recommendation No. 56

Regarding penalties, consider amending the B.C. Act's Section 74 along the models of Article 19's *Model Freedom of Information Law (*2001) and the Commonwealth Secretariat's *Model Freedom of Information Bill (*2002). Penalties for offences committed by individuals under the B.C. *FOIPP Act* should be raised to be up to a maximum of $50,000 for both general and privacy offences."

Recommendation No. 57

Amend Section 74 to raise the fine for obstructing the Commissioner to $50,000. Consider the advisability of prison terms for the same offense.

Recommendation No. 58

Amend Sec. 75 (2)(b) to change the wording from "time severing…" to "time reviewing the record and severing information from a record."

Recommendation No. 59

Consider extending the free time "spent locating and retrieving a record" from the current 3 hours up to 5 hours (which is the standard in the federal *Access to Information Act,* Sec. 11).

Recommendation No. 60

First option: Repeal B.C. *FOIPP Act* Sec. 79 and its related schedule.

If that is not accepted, there is a secondary option (which was FIPA's recommendation in 2005): Extend coverage to categories of records exempted by "notwithstanding clauses" in other statutes.

Recommendation No. 61

Consider a policy directive for the ministry that administers the FOIPP system to educate and promote the FOIPP process to the general public.

Alternatively, the Commissioner could be encouraged to educate and promote the FOIPP process to the general public. If so, government must provide adequate funds for this task, and it would be a dedicated, stand-alone part of the Commissioner's budget.

Recommendation No. 62

The B.C. government should pass an effective *Archives and Information Management Act*, designed to regulate the entire life-cycle of government-held information.

Recommendation No. 63

Add to Part 2 of the B.C. *FOIPP Act* a duty for public bodies to document key actions and decisions based on the definition of "government information" in the *Information Management Act*. Enact all the recommendations of *Implementing Investigation Report F15-03* by David Loukidelis.

Recommendation No. 64

Either the B.C. *FOIPP Act* or a new *Archives Act* should set record retention rules on cell phone and blackberries and all communication technologies (and which accounts are private or public), and computer backups of these – and be reviewed often to keep current with new technologies.

Recommendation No. 65

Pass a B.C. Open Meetings Act, to establish which agencies must hold open meetings, and set rules on what they must discuss matters in open session, and may discuss in closed session. Certain smaller or specialized agencies could continue to meet entirely in private (although their minutes could still be requested by FOI). Alternatively, such rules could be set in the B.C. *FOIPP Act*, or in the legislation currently governing each agency.

Recommendation No. 66

That the B.C. government create a separate Act for general "whistle-blower" protection, as was done at the Canadian federal level – though the laws of UK and South Africa are better overall models. The penalties for violating this new Act should be at least $50,000.

Recommendation No. 67

That the Committee request that the B.C. Premier ask the Prime Minister and other premiers to begin discussions on amending the Canadian Constitution to include the public's right to obtain government information - which is a provision that 42 other nations have in their Constitutions or Bill of Rights, and one that was urged by B.C.'s first information and privacy commissioner.

A Note on the Author

Stanley L. Tromp is a graduate of the University of British Columbia Political Science department (B.A., 1997), where he completed the course in international law at the UBC Law Faculty, and won the 1996 essay prize on the Responsible Use of Freedom from St. Mark's College at UBC. He graduated from the Langara College journalism program (Vancouver, 1993), and was awarded the best Langara journalism student prize from the B.C. Yukon Community Newspaper Association (BCYNA).

He has been nominated for a Webster Award (2015), a Canadian Association of Journalists award (1997), a B.C. Newspaper Foundation award (1999), and won a Canadian Community Newspaper Association prize in 2013.

While a reporter for the UBC student newspaper the *Ubyssey,* his freedom of information act request for the UBC-Coca Cola marketing contract in 1995 prompted a five year legal dispute, a successful B.C. Supreme Court appeal, and an influential ruling for disclosure by the B.C. Information and Privacy Commissioner. His appeals have also been the subject of 22 other rulings by the B.C. Commissioner.

For news articles, he has made hundreds of FOI requests, including to foreign countries and American states, and has been called "one of the more diligent and creative practitioners of access-to-information reporting" by columnist Vaughn Palmer. His news stories have been published in the *Globe and Mail*, the *Vancouver Sun*, the *Georgia Straight*, *Vancouver Magazine*, the *Vancouver Courier*, *The Province* (Vancouver), the *Financial Post*, *The Canadian Press, The Courthouse News*, and many other publications.

In 2006 and 2009 he gave three oral presentations to the House of Commons and Senate committees in Ottawa considering access to information amendments. He spoke on two expert panels at Right to Know Week in Ottawa in fall 2009, an event hosted by the Information Commissioner of Canada. He has also made four presentations to British Columbia legislative reviews of the provincial *FOIPP Act* (1998, 2003, 2010, 2015), and a submission to the Alberta FOIPP review of 2010.

He initiated the FOI caucus of the Canadian Association of Journalists at its annual general meeting in 2004, and was one of the founders of the group B.C. Journalists for Freedom of Information (BCJC) in 1998.

In 2007-08, as an aid to FOI scholars and advocates, he spent a year compiling the first *World FOI Chart*, an Excel spreadsheet comparing all the world's FOI laws, with NGO commentaries, posted at his website. The Chart was the foundation of his book *Fallen Behind: Canada's Access to Information Act in the World Context.*

On the same site is also posted his global *Index of FOI Rulings* of commissioners and courts, searchable by keyword or FOI law section, an index that low income FOI applicants and lawyers could utilize to seek precedents for their legal appeals.

His site has been consulted by the general public, journalists, university professors, courthouse and parliamentary librarians, politicians, senior bureaucrats and government lawyers from 40 nations. Email: stanleytromp@gmail.com Website: http://www3.telus.net/index100/foi

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Links to works by the author

News stories by Stanley Tromp produced through FOI requests - http://www3.telus.net/index100/trompfoistories

Fallen Behind: Canada's Access to Information Act in the World Context, 2008. http://www3.telus.net/index100/report

Users Guide to author's *Global FOI Chart* - http://www3.telus.net/index100/chartnotes

Articles on FOI topics - http://www3.telus.net/index100/tyeefoi

Campus news stories by the author- http://www3.telus.net/index100/ubcstories

Speeches on ATIA reform, and Environmental FOI, Right to Know Week, Ottawa, 2009 http://www3.telus.net/index100/environmentalfoi

Speech to Vancouver Police Board on FOI practice - http://www3.telus.net/index100/vpb2011

Speech on the *Public's Right to Know*, 2012 - http://www3.telus.net/index100/trompspeech.mp3 and http://www3.telus.net/index100/trompspeech2012

The Hallmarks of Fairness: Improving Alberta's Freedom of Information and Protection of Privacy Act. With 79 recommendations for reform. 80 pages, 2010.
http://www3.telus.net/index100/albertafoipact

Address to Alberta legislative review of the *FOIPP Act*, 2010.
http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/committees/he/legislature_27/session_3/20100902_0902_01_he.pdf

What Price Accountability? Funding cutbacks and the current financing of the B.C. Freedom of Information process (1997-2000), 2000

OIPC orders and court rulings on FOI requests by Stanley Tromp -
http://www3.telus.net/index100/tromprulings

Reviews of the report "Fallen Behind: Canada's Access to Information Act in the World Context," 2008

"This report is by far the most comprehensive comparative analysis to date of Canadian and international access to information laws. It is an invaluable resource to those seeking to assess the various Canadian laws in this area, and indeed to anyone interested in comparative research in this area."

- Toby Mendel, law program director of London human rights organization Article 19

"I've now had the opportunity to review your report. I want to congratulate you for this initiative, its quality and exhaustive scholarly content. It will stand as a significant reference for all who are interested in the FOI field, but more importantly for those who advocate that Canada should be at the forefront as a governance model for the rest of the world."

- Robert Marleau, Information Commissioner of Canada

“In the fall, with Right to Know Week, your report might well be an important catalyst as the centerpiece of the week. . . . This is a very good piece of work - I learned a great deal from it myself.”

- John Reid, former Information Commissioner of Canada

"This will be a key reference globally for those fighting for freedom of information. It's thoroughly researched and very clearly written. This is a significant achievement in the field."

- David Loukidelis, British Columbia Information and Privacy Commissioner

“Stanley Tromp has done us all a great service in compiling this thoughtful analysis of freedom of information law and policy around the world. Its remarkable scope and its detailed analysis of the key issues are staggering. His spread sheet, *World FOI Chart,* alone is worth the price of admission. In a sense, he has become our conscience in this crucial policy field. . . . Freedom of information is a right worth fighting for. Stanley Tromp has been a real champion of this right: he leads the way for the rest of us to follow.”

- Murray Rankin, MP, QC, Adjunct Professor of Law, University of Victoria, author of Freedom of Information in Canada: Will the Doors Stay Shut? (Ottawa: Canadian Bar Association, 1977)

“From the comparative law perspective, Mr. Tromp’s report is an extremely valuable resource document, containing a large amount of interesting information regarding FOI regimes around the world.”

- Internal memo prepared by counsel for Public Law Policy Section, Canadian Department of Justice. Dec. 15, 2008.

"Collecting and analyzing information about the burgeoning number of open government laws is extraordinarily hard work. Stanley Tromp has provided a valuable service is showing the emerging international standards, and what Canada must do to regain its status as a leader on transparency."

- Alasdair Roberts, Jerome L. Rappaport Professor of Law and Public Service, Suffolk University Law School, Boston, author of Blacked Out: Government Secrecy in the Information Age. (New York: Cambridge University Press, 2006)
