THE LEGISLATIVE ASSEMBLY OF
BRITISH COLUMBIA

Enhancing the Province's Public Sector Access and Privacy Law

Special Committee to Review the Freedom of Information and Protection of Privacy Act

REPORT

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May 19, 2004

To the Honourable,
The Legislative Assembly of the
Province of British Columbia
Victoria, British Columbia

Honourable Members:

I have the honour to present herewith the Report of the Special Committee on the Freedom of Information and Protection of Privacy Act titled, *Enhancing the Province's Public Sector Access and Privacy Law.*

The Report covers the work of the Committee from July 21, 2003 to May 17, 2004.

Respectfully submitted on behalf of the Committee.

Blair Lekstrom, MLA
Chair

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COMPOSITION OF THE COMMITTEE

MEMBERS

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CLERK TO THE COMMITTEE

Kate Ryan-Lloyd, Clerk Assistant and Committee Clerk

COMMITTEE RESEARCHERS

Josie Schofield, Committee Research Analyst

Mary Walter, Committee Researcher (To March 10, 2004)

TERMS OF REFERENCE

On March 4, 2004, the House approved a motion that a Special Committee be reappointed to review the *Freedom of Information and Protection of Privacy Act* (R.S.B.C. 1996, c. 165) pursuant to section 80 of that Act, and that the Special Committee so appointed shall have the powers of a Select Standing Committee and is also empowered:

(a) to appoint of their number, one or more subcommittees and to refer to such subcommittees any of the matters referred to the Committee;

(b) to sit during a period in which the House is adjourned, during the recess after prorogation until the next following Session and during any sitting of the House;

(c) to adjourn from place to place as may be convenient;

(d) to retain such personnel as required to assist the Committee;

and shall report to the House as soon as possible, or following any adjournment, or at the next following Session, as the case may be; to deposit the original of its reports with the Clerk of the Legislative Assembly during a period of adjournment and upon resumption of the sittings of the House, the Chair shall present all reports to the Legislative Assembly.

ACKNOWLEDGEMENTS

All the committee members wish to express their sincere appreciation to those who have assisted us in our work over the past year. In particular, we would like to thank all the British Columbians who took time out of their busy lives to attend the public hearings or to send in written submissions. Their input was very helpful during our review of the Act.

We would also like to acknowledge the contribution of the witnesses who were invited to share their knowledge of the Act. They were the independent Office of the Information and Privacy Commissioner for British Columbia and the Corporate Privacy and Information Access Branch in the Ministry of Management Services, three key stakeholders and two privacy experts.

In addition, we received timely and helpful responses to our follow-up inquiries from government officials in the Ministry of Agriculture, Food and Fisheries and the Ministry of Attorney General, as well as from staff in the Royal British Columbia Museum.

Last, but certainly not least, we would like to recognize the collective efforts of Assembly staff. Hansard Services and the Legislative Library ably assisted us over the past year. The Office of the Clerk of Committees provided invaluable procedural guidance, research services and administrative support throughout the entire statutory review process. In particular, we would like to thank the Clerk, Kate Ryan-Lloyd and the research staff, Josie Schofield and Mary Walter.

THE STATUTORY FRAMEWORK

The province's *Freedom of Information and Protection of Privacy Act (*the Act) was passed unanimously in June 1992 and came into force on October 4, 1993. The Act grants British Columbians a legal right of access to records in the custody of public bodies, while at the same time protecting the privacy of citizens' personal information. Initially, the Act applied to all ministries, Crown corporations and provincial agencies, boards and commissions. In 1993 the legislation was amended to extend the scope of coverage to local government bodies and self-regulating professions.

1997-99 Statutory Review

In 1997, an all-party committee of the Legislative Assembly was appointed to conduct a comprehensive review of the Act and report its recommendations to the House, as required by section 80 of the Act. During the first statutory review, the committee heard 116 oral presentations and received 136 written submissions. Based on the input received from the public, the committee recommended 18 changes to the Act in its report tabled in July 1999.[1]

Recent Amendments to the Act

The recent amendment process began with the Premier's letter of June 25, 2001 instructing the Minister of Management Services to conduct a review of the Act "to increase openness in government and reduce compliance costs."[2] This ministerial review was conducted in two phases. The first phase was completed on April 11, 2002, with the passage of the *Freedom of Information and Protection of Privacy Amendment Act,* 2002 (S.B.C. 2002, c. 13). The legislative amendments were limited in scope and included the government's response to the recommendations made by the first statutory review committee in its 1999 report. They also addressed some immediate cost and compliance issues, and made adjustments to the operations of the Office of the Information and Privacy Commissioner to assist that office in meeting its legislative responsibilities while meeting fiscal restraint targets.

The second phase involved a more extensive review of the Act by ministries and key stakeholders. On March 13, 2003, the House approved the amendments proposed in the *Freedom of Information and Protection of Privacy Amendment Act,* 2003 (S.B.C. 2003, c. 5). From the perspective of the government, these legislative changes were designed to: reduce regulation to comply with the deregulation initiative; improve the Act's access and privacy provisions; address unintended consequences of the original wording of the Act; position British Columbia to lead Canadian jurisdictions in e-government initiatives; and better realize the Act's original intent.

2003-04 Statutory Review

Section 80 of the amended Act requires a comprehensive review of the legislation at least once every six years, with the first six-year period beginning on October 4, 1997. Accordingly, on May 29, 2003, the Legislative Assembly appointed an all-party Special Committee to review the *Freedom of Information and Privacy Act* (R.S.B.C. 1996, c. 165) and to report back to the

House within one year after the date of its appointment. As parliamentary committees in British Columbia are appointed on a sessional basis, the House reappointed the committee on March 4, 2004 and granted it the same terms of reference to complete its work.

The statutory review process happened to coincide with the passage and implementation of the province's new private sector privacy law, the *Personal Information Protection Act* (S.B.C. 2003, c. 63). This legislation came into force on January 1, 2004 and qualified as substantially similar to the federal private sector privacy law, in an Industry Canada ruling of April 10, 2004.[3] From the committee members' perspective, the recent introduction of private sector privacy legislation provided an added perspective to our examination of the privacy provisions of the public sector law than was perhaps anticipated at the start of the statutory review process.

THE CONSULTATION PROCESS

In reviewing the terms of reference issued by the House, the Special Committee to Review the Freedom of Information and Protection of Privacy Act (the Committee) decided to follow the precedent set by the first statutory review committee and hear directly from key stakeholders and the public at large to inform their deliberations on the content of its report. Out of the 18 meetings listed in Appendix A, eight were devoted to the consultation process.

Briefings

The Special Committee heard first from the two entities charged with monitoring and administering the Act: the independent Office of the Information and Privacy Commissioner for British Columbia; and the Corporate Privacy and Information Access Branch, Ministry of Management Services. On July 21, 2003, the Commissioner presented an overview of the policies underpinning the Act, how it works, and the oversight role of his office. At the meeting on November 5, 2003, the Corporate Privacy and Information Access Branch briefed the Committee on its role as the central coordinating agency for ministries and Crowns and on the key provisions and recent amendments to the Act. Both these entities also appeared before the Committee at several meetings during the winter and spring of 2004.

The Special Committee also received briefings from five other expert witnesses at its meetings on January 19 and 28, 2004. They were the B.C. Civil Liberties Association; the B.C. Freedom of Information and Privacy Association; Tamara Hunter, a lawyer practising in the area of access to information and privacy law; Dr. David Flaherty, the province's first Information and Privacy Commissioner; and Dr. Colin Bennett, a leading academic expert on privacy protection.

Conferences

Committee members and research staff also attended two conferences on information and privacy issues: "The State of Accountable Government in a Surveillance Society" (September 25-26, 2003), organized by the Office of the Information and Privacy Commissioner; and the fifth annual conference of the Ministry of Management Services, "Security and Privacy - Friends, Foes or Partners?" (February 10-12, 2004). [4]

Public Consultation

The Committee initiated the public consultation process in December 2003. Some 73 organizations and individuals who had participated in the first statutory review were contacted and invited to participate in the second review of the Act, by providing a written submission or appearing before the Committee at one of four public hearing scheduled for mid-January 2004. These stakeholders included provincial organizations representing municipalities, municipal police departments, school districts, post-secondary institutions, health authorities and professional associations; advocacy groups; journalists and individual citizens. As well, both the Ministry of Management Services and the independent Office of the Information

and Privacy Commissioner agreed to distribute electronic information about the public consultation process to their own contact lists.

During the second and third weeks of January 2004, the Committee placed advertisements in all the province's major daily and ethnic newspapers, inviting British Columbians to make a presentation at one of the four scheduled public hearings or to send a written submission by February 27, 2004. For the first time, the public was also given the option of completing an on-line questionnaire on the Committee's website. Although only a few responses were received through this medium, 961 hits were recorded on the on-line consultation page between January 16 and February 27, 2004.

The Committee heard from 22 presenters at the public hearings in Victoria and Vancouver but had to cancel the scheduled Kelowna and Prince George hearings, due to limited interest. The three people, who were affected by the cancellations, were offered the options of making their oral presentations via a teleconference or by attending the hearings in Victoria and Vancouver. Two individuals selected the latter option.

In total, the Committee heard oral presentations from 29 witnesses — including the seven experts — and received 50 written submissions. The participants included representatives of the broad range of public bodies involved in implementing the Act: ministries and Crown corporations, municipalities and municipal police departments, educational institutions, health authorities and self-governing professions. Equally important, the Committee also heard from advocacy groups and individual citizens with experience in requesting personal information or other records from public bodies. A complete list of witnesses who participated in the consulatation process is provided in Appendix B.

CONTEMPORARY TRENDS AND TOPICAL ISSUES

During the course of the consultation process, the Committee realized that it is not possible, or even desirable, to conduct a statutory review in isolation from the broader social and political context within which the Act operates. Accordingly, before reporting on the task assigned by the House, the committee members would like to comment briefly on two contemporary trends — changes in information technology and the outsourcing of public services — that are affecting the way British Columbians interact with public bodies in the province when exercising their access or privacy rights. Topical issues related to these trends are also discussed in this section.

CONTEMPORARY TRENDS

Changes in Information Technology

The Act came into effect over ten years ago at a time when "the Internet explosion" was just beginning. However, during the 1990s, the rapid changes in information technology made it difficult for legislators to fully grasp their impact on the public sector. For example, the first statutory review committee addressed the topic only briefly in its July 1999 Report and queried whether issues arising from "new or emergent technologies" fell under its mandate.[5]

In the past five years, the pace of technological changes has accelerated to the point where "the on-line age" is now a reality for many British Columbians, with over 70 percent of households having an Internet connection. The powerful tool of Internet technology has dramatically altered the way that citizens access information. Local government managers, for example, reported to the Committee that over the past decade there has been a progressive increase in citizens' requests for electronic records. The growth of electronic databases, in combination with software developments, has given public bodies the capacity to download records quickly and to generate reports in accessible formats. Improvements in their electronic records management systems have also dramatically reduced the time it takes to locate and retrieve records. This has reduced or even eliminated the fees that public bodies are authorized to charge for this service. On the other hand, as so many more records are available now than in the past, the costs involved in reviewing and severing excepted information from records before supplying them to the public have risen.[6]

Internet technology has also enabled the provincial government to develop electronic information services on ministry and other websites that are now easily accessible to the public. Since June 2001, when the current administration came into power, there has been a series of initiatives to enhance openness and transparency, and to improve the electronic delivery of services and programs. These include: open cabinet meetings, with agendas, cabinet submissions, slide presentations, transcripts and webcasts posted on the government website; and the creation of an Internet portal on the government website that provides British Columbians with an on-line entry point to government information, services and programs.

Finally, mention needs to be made of the technological developments that are designed to enhance privacy protection within the context of e-government — "on-demand government delivering information and services in real time." These privacy-enhancing technologies are

designed to permit secure and anonymous personal data transactions so as to allay citizens' legitimate concerns about the safety and security of electronic information systems and the adequacy of existing protection for personal information. They can also assist government managers across Canada to address the major issues they face in the area of privacy and security: identification, authentication and authorization.[7] However, national or provincial efforts to protect the privacy of citizens also face new challenges posed by the transmission of electronic data across jurisdictional boundaries.[8]

Outsourcing of Public Services

Another contemporary trend over the past decade involves the administrative restructuring of the public sector. Like other jurisdictions inside and outside Canada, the government of British Columbia is pursuing alternative means of delivering certain services to the public, often by transferring public sector functions to private sector companies. Alasdair Roberts, a Canadian academic expert in access to information matters, has described this trend as the growth of "shadow government."[9]

Topical Issues

During the last few months, two issues have come to the Committee's attention, which illustrate the local impact of the contemporary trends described above. One that has been widely reported on by the province's news media since February 2004 was not raised with the committee members directly. This issue relates to the prospect of the government hiring an American-based company to assist with the management of electronic databases for the delivery of health benefits. Some British Columbians — as well as privacy commissioners across Canada — are concerned that the U.S. anti-terrorism legislation provides the American government with the means of obtaining private medical records from multinational companies without their clients' knowledge or consent. On April 21, 2004, the Minister of Health Services announced publicly that the government would not award the contract until it obtains a guarantee that the confidentiality of patients' records will not be compromised.[10]

Another topical issue first surfaced during the Committee's consultation process and prompted further inquiry. This matter concerns the sensitivity ratings process used in the government's corporate records tracking system (CRTS), an electronic database that was installed in 2000 to track and monitor FOI requests. At the public hearing in Vancouver on January 21, 2004, the Sierra Legal Defence Fund questioned the legitimacy of this process and referred the Committee to a recent study by Alasdair Roberts on the treatment of sensitive requests under B.C.'s FOI law.[11]

Subsequent briefings by staff of the Corporate Privacy and Information Access Branch (February 9 and March 31, 2004) explained how the sensitivity ratings process works. Each ministry logs its FOI requests into the CRTS database, rating them as high, medium or low on the sensitivity scale on the basis of the applicant's political or professional affiliation and the complexity of the content. The Branch then scans all the incoming requests for a particular week and produces a summary of the significant ones, by simply flagging all requests from journalists, political parties or lobby groups as sensitive. This weekly update is circulated to ministry executives.

The names of requesters are not entered into the database by the public service. However, communications staff can obtain them from the ministry official that received the original application, if they perceive certain FOI requests on the weekly update list to require special treatment. Apparently British Columbia is the only known jurisdiction in Canada where names can be accessed in this way.[12] Currently the Office of the Information and Privacy Commissioner is looking into complaints regarding the naming of applicants and may release its findings by the end of May 2004.

Conclusions

The Committee believes that changes in information technology over the past five years have laid the groundwork for enhancing both citizens' access to public records and their privacy rights. Obviously, though, we can only respond to technological change, not predict it. Consequently, we will be proposing what are essentially "catch-up" legislative changes in the next sections of the report, since it is impossible to predict the developments in data processing and software that will occur prior to the next scheduled statutory review in 2009.

Usually, administrative policy and practice technically falls outside the purview of a statutory review. However, the Committee thinks the sensitivity ratings process used by government is an issue that warrants special mention. In our opinion, the use of the term "sensitivity ratings" reinforces the public perception that certain requesters are being identified solely on the basis of their names and/or affiliations. If it is indeed the case that these ratings simply identify more complex requests where there may be third-party involvement, legal or cross-government concerns, or large amounts of information requested, then there is a strong argument for calling them "complexity ratings," and for the Corporate Privacy and Information Access Branch and individual ministries to use complexity as the sole criterion for flagging requests throughout the tracking process.

The Committee is also concerned about the new practice of ministry-based communications staff having access to the names of requesters listed in the Branch's weekly update. We believe that this practice contradicts the basic principle of equal and fair treatment for all before the law and violates the privacy rights of certain citizens in the province. Therefore we would urge the government to act quickly on our first recommendation.

Recommendation No. 1— Change the administrative policy and practice regarding the sensitivity ratings process used in the corporate records tracking system to ensure that complexity becomes the sole criterion for classifying formal requests for government records, and that the new complexity ratings process treats all requesters equally and impartially and protects their personal identity.

THE STATUTORY REVIEW PROCESS

Before reporting on the outcome of the statutory review process, the Committee would like to acknowledge at the outset that the province's *Freedom of Information and Protection of Privacy Act* (the Act) is working well, by and large. Since coming into force in 1993, the broad scope of the Act's coverage and the strong privacy provisions have set high standards for other jurisdictions across Canada to follow. In addition, recent legislative amendments were designed to update and clarify certain provisions in order that the province's public sector access and privacy law could retain its model status.

For these reasons, the Committee decided that its review would focus on those sections brought to our attention by the witnesses during the consultation process, with the view to making the Act work even better for all British Columbians. Their proposals for legislative changes, if adopted wholesale, would have affected over half of the Act. They covered all six parts of the Act, as well as the *Freedom of Information and Protection of Privacy Regulation* (B.C. Reg. 323/93).

Key Principles

To guide our deliberations on the content of the Act, the Committee adopted the following principles:

1. Innovations in information technology can be utilized to enhance both access and privacy rights in the Act.
2. Openness is the proper way for government to conduct the public's business. Therefore government information must be routinely disclosed and the records of public bodies must be open to public scrutiny, subject to the necessary exceptions.
3. All British Columbians, regardless of their affiliations, have the right to expect that their formal requests for records will be treated equally, impartially and in a timely manner by public bodies.
4. The personal information of British Columbians must continue to be protected under the Act in the face of rapid technological change and the restructuring of the public sector.

Main Findings

The main findings of the Committee's review of the Act are based on the witnesses' testimony during the consultation process. They are organized under several broad themes:

- There is general agreement that the purposes and the scope of the Act are the right ones, that the Act achieves the appropriate balance between openness and privacy protection, and that the structure of the Act is sound. However, there is a need to modernize Parts 2 and 3 relating to freedom of information and protection of privacy, to clarify some provisions and to address unintended consequences of the Act's implementation.

- British Columbians expect to have ready access to government information and are making extensive use of the Act, compared with other jurisdictions in Canada. The main complaints of people who have made requests for public records are delays and fees.
- In a knowledge-based society, government information is a public resource and must be made available as widely as possible, through a variety of channels. Information technology provides cost-effective ways to disseminate a great deal of this information, without the need to make formal requests. However, the concept of routine disclosure of public records has not yet been fully integrated into the core values of public bodies in British Columbia or embedded in routine practices.
- General issues raised by the witnesses are strikingly similar to those raised in other jurisdictions in Canada that have recently reviewed access and privacy laws.[13] They are: the transparency of new service delivery public bodies, the management of electronic information systems, the timeliness of public bodies' responses, effective oversight and resolution of disputes, and the adequacy of resources for administration of the Act.
- Some British Columbians have specific concerns that certain exceptions to disclosure are preventing access to personal factual information (sections 13 and 22), while others, mainly legal practitioners, seek further protection for the privacy of third-party interests (section 21).
- While there is general agreement that fees should not be obstacles to FOI requests, both local and provincial public bodies have concerns about the hidden costs associated with processing requests for electronic records.

LOOKING AT THE INTRODUCTORY PROVISIONS

Overview

Part 1 of the Act contains three sections dealing with definitions, purposes and scope:

1: Definitions

Unlike other statutes, the definitions of terms used in the Act are not listed in section 1. Instead, they are contained in Schedule 1. The Committee received requests from the provincial bodies representing lawyers and school trustees to narrow the definition of "law enforcement", as well as a proposal from the B.C. Securities Commission to include administrative hearings under the definition of "prosecution". After due consideration, we have decided that the proposed changes in wording would adversely affect British Columbians' legal right of access to public records.

2: Purposes

Section 2(1) grants British Columbians a legal right of access to records, with limited exceptions, in order to make public bodies more open and accountable to the public they serve, while at the same time protecting the privacy of citizens' personal information. Almost without exception, the witnesses who commented on the overall working of the Act endorsed either implicitly or explicitly its stated purposes. They included the B.C. College of Chiropractors, the Corporation of Delta and the Patient Empowerment Society.

The Information and Privacy Commissioner was also enthusiastic about the purposes he inherited on his appointment in July 1999. He stated that for over a decade, the Act has served the vital functions of guaranteeing public access to information and protecting individual privacy. Furthermore, he hoped the statutory review process would ensure that the public's access and privacy rights remain strong and relevant in the face of advances in information technology and new policy initiatives respecting private sector delivery of public services.

From the Committee's perspective, the purposes outlined in section 2(1) are sound ones. Indeed, the principles they stress — openness, public accountability and privacy protection — have guided our deliberations during the review of the Act. However, like our colleagues on the first statutory review committee, we think the tone of section 2(2) is too negative. While it points out that the Act does not replace other procedures for access to information, subsection (2) does not actively promote routine disclosure, or recognize the role of Internet technology in facilitating informal access. In our view, acknowledging the latter would be a relatively simple step to take, since the government indicated in its initial briefing that the Act is providing the legislative structure necessary for the successful implementation of e-government and alternative service delivery options.

Before proposing a legislative amendment to section 2, the Committee would like to respond to the submissions from government ministries and Crowns, as well as the province's university presidents, to amend section 2(2) to prevent an access request from being initiated if

another process for accessing the same information is already under way. While we recognize that the proposed amendment would avoid duplicate costs, we are reluctant to endorse their suggestion on the grounds that it could limit British Columbians' legal right of access to records of public bodies.

Recommendation No. 2 — Add a new section 2(3) stating that the Act recognizes that new information technology can play an important role in achieving the purposes outlined in subsection (1), particularly with respect to promoting a culture of openness and informal access to information and by enhancing privacy protection.

3: Scope

Who is covered (and not covered) by the Act?

Section 3 discusses the scope of the Act and explains which records are covered by the legislation and which are excluded. Currently the Act covers approximately 2,200 public bodies in British Columbia. Qualifying as public bodies are all provincial ministries, agencies, boards, commissions, most Crown corporations, and offices or other bodies designated in, or added by regulation, to Schedule 2; and local public bodies. Schedule 3 identifies the governing bodies of a profession or occupation falling under the purview of the Act.

The Committee received a few requests to extend the scope of coverage to those entities no longer qualifying as public bodies under the Act. In particular, it was suggested that the records of former Crown corporations needed to be accessible. While we would not normally condone the practice of exempting the entire records of a public-private entity, because of its negative impact on access rights, we have come to the conclusion that the decision to extend or reduce the scope of the Act is a decision to be made by the governing party, rather than private members serving on an all-party parliamentary committee.

One case of exclusion, though, deserves special mention. The Committee was asked to consider bringing the B.C. Society for the Prevention of Cruelty to Animals (BCSPCA) under the scope of the Act due to the problems some individuals involved in the animal rights movement have experienced obtaining records of its activities. Upon further inquiry, we learned that the society has a unique status in terms of its organizational structure. The BCSPCA is a not-for-profit and mainly self-funded society organized under the *Prevention of Cruelty to Animals Act* (R.S.B.C. 1996, c. 372). This statute enables the society to provide animal welfare services through its administration centre, branches or shelters, or authorized agents.

The Ministry of Agriculture, Food and Fisheries provides a small annual grant ($71,500) specifically for the training of animal cruelty investigators. However, it has no authority to regulate the society's activities, except to require it to properly uphold an individual's civil rights when exercising its investigative powers under the Act. Municipalities have more regulatory power, under the legislation, through their contracts with the society to provide pound services.

From the Committee's perspective, it is clear that the BCSPCA is an anomaly. On the one hand, it is a public body in terms of having statutory authority to deliver its animal welfare

services. On the other hand, its legal status as a non-profit society exempts its records from the purview of the Act. Therefore we would urge the government to look into this matter.

Recommendation No. 3 —Investigate why the B.C. Society for the Prevention of Cruelty to Animals was assigned the dual status of a public body and a non-profit society in the first place and whether there is a case for clarifying or even changing its status.

What records are covered (and not covered) by the Act?

The Act supports the concept of public accountability by focusing on the records of the executive arm of government (i.e. cabinet and cabinet ministers), ministries, boards, councils and other public bodies. Section 3 states that all records in the custody or under the control of a public body are covered by the Act, including both personal and non-personal information contained in a record. Records specifically excluded from the scope of the Act in section 3(1) include: records related to active prosecutions; teaching or exam materials; records of elected officials of local public bodies, and personal material in the archives of a public body.

The Committee received several requests to consider exempting the following types of records: labour relations records, records of confidential policy discussions among members of an adjudicative tribunal, and records relating to active police investigations. After careful deliberation, we have concluded that adding these exemptions to section 3(1) would represent a step backwards in terms of the public's access rights and the accountability of public bodies.

We were also hesitant to endorse the government's request for a specific amendment to section 3(1)(a) to clarify the ambiguous status of an electronic "record in a court file". In our view, it is not necessary in this "on-line age" to change this section to establish that electronic documents are as acceptable as paper-based records. Indeed, we would concur with the Commissioner's conclusions in Order 03-16 (February 13, 2003) that electronic records are becoming the norm, and that the public has a right to expect that new information technology will enhance, not undermine, information rights under the Act.

The Committee also considered a proposal from the Office of the Information and Privacy Commissioner and the West Coast Environmental Law Association to clarify in section 3(1) that records of a service provider under contract to a public body are accessible. This section currently states that the Act applies to "all records in the custody or under the control of a public body…." While access rights to records of alternative service delivery agencies are not guaranteed, recent changes to the privacy protection rules in Part 3 seek to clarify that public bodies retain control of personal information collected, used and disclosed by private contractors.

The Committee is persuaded that there needs to be some explicit assurance in the Act that alternative service delivery does not affect access rights, particularly as recent amendments have established that privacy rights are protected. As the Commissioner points out, a legislative amendment would also clear up confusion in the minds of public bodies and contractors alike as to which party has control of records that contractors create, compile or take custody of in the course of carrying out their contractual duties.

Recommendation No. 4 — Amend section 3 to clarify that records, including personal information, created by or in the custody of a service provider under contract to a public body are under the control of the public body for which the contractor is providing services.

PROMOTING A CULTURE OF OPENNESS TO ENHANCE ACCOUNTABILITY

Overview

Part 2 of the Act focuses on freedom of information. Division 1 defines information rights; explains how to make a request; outlines the duty of a public body to assist applicants; defines what the time limit is for responding; describes what the contents of a response should be; explains how access will be given; and specifies the conditions for extending the time limit for responding and for transferring a request. Division 2 specifies the conditions under which information may be refused. Division 3 deals with notice to third parties, while Division 4 contains what is known informally as the public interest override clause.

Routine Disclosure

During the consultation process, various organizations pressed for more openness — including the B.C. Civil Liberties Association, the B.C. Library Association and the Sierra Legal Defence Fund, as well as the Office of the Information and Privacy Commissioner. Some witnesses presented the case for the addition of a new section in Part 2 of the Act to promote routine disclosure of records in the custody of public bodies. The government's written submission also endorsed the idea of more proactive release of public records, outside of formal access requests, but thought this could be addressed through policy changes rather than legislative amendments.

The witnesses who favoured amending the Act pointed out to the Committee that other jurisdictions have developed either statutory or voluntary schemes to facilitate the active dissemination of information by public bodies. The statutory initiatives include:

U.K. Publication Schemes

Section 19 of the U.K. *Freedom of Information Act,* which comes into force on January 1, 2005, requires each public authority to adopt and publish a publication scheme. The scheme must set out details of the types of information the authority makes available as a matter of course to the public, how the information can be obtained and must supply details of any fees for providing the information. Each authority will be required to post its publication scheme on its website, or provide the scheme on request, once approved by the U.K. Commissioner. Collectively, these schemes are designed to: significantly reduce the administrative burden of dealing with FOI requests; publicize the work done by public authorities; and encourage a spirit of openness and accountability throughout the public sector.[14]

U.S. Reading Rooms

Under the U.S. *Freedom of Information Act (*FOIA), federal agencies must make four distinct categories of " reading room" records available for public inspection and copying — including records disclosed in response to a FOI request that are likely to become the subject of subsequent requests. The FOIA requires that any "reading room" record created on or after

November 1, 1996 be made available electronically on the federal agency's website, as well as in paper format. Paper copies are also available for inspection and copying in a conventional reading room, the location of which is indicated on the agency's FOIA page.[15]

As stated earlier, one of the Committee's guiding principles is that openness is the proper way for government and other public bodies to conduct the public's business. Therefore we are receptive to the idea of incorporating a statutory scheme into the province's access law in order to promote a culture of openness and reduce the need for formal access requests. Our preference would be for the U.K. scheme because it is more proactive in its approach than the U.S. model.

Recommendation No. 5 — Add a new section at the beginning of Part 2 of the Act requiring public bodies — at least at the provincial government level — to adopt schemes approved by the Commissioner for the routine disclosure of electronic records, and to have them operational within a reasonable period of time.

4: Information Rights

Turning to requests related to specific provisions in Part 2, the Committee was asked to consider giving applicants and complainants the right to anonymity, and the option of deciding whether their identity should be made known. For example, in his written submission, a Vancouver lawyer explained that he has been involved in numerous inquiries before the Commissioner where a public body had engaged in speculation about the identity and motives of an applicant who had chosen not to make known his or her identity. In his view, such conduct offended the spirit of the Act regarding the right of anonymity. However, there is no provision that specifically entitles an applicant to make an access request anonymously, or forbids a public body from disclosing an applicant's identity to any other person. The latter practice was also a concern of other witnesses the Committee heard from during the consultation process who objected to their names being disclosed in e-mail communications among public bodies, without their consent.

As indicated in our earlier discussion on the naming of applicants during the sensitivity ratings process, the Committee believes that British Columbians have a right to anonymity, as well the right of access to the information referred to in section 4(1). We also concur with the witnesses that the practice of disclosing people's identity, via e-mail communications, without their knowledge and consent undermines the principle of privacy protection.

Recommendation No. 6 — Amend section 4(1) to establish that an applicant who makes a formal access request has the right to anonymity throughout the entire process.

5 & 6: How to Make a Request & Duty to Assist Applicants

The Committee received a few proposals related to the role of the head of a public body in responding to access requests. The government's submission, for example, requested an amendment to section 5(2) to give the head of a public body the authority to determine if an applicant can view an original file or receive a copy, pointing out that there is no provision to charge for staff time for preparing a file. Also, the B.C. University Presidents' Council asked

for amendments to section 6(2)(a) to reduce the workload involved in creating records manually. After due consideration, the Committee has decided not to endorse these suggestions on the grounds that they could potentially affect British Columbians' legal right of access to records in the custody of public bodies.

7: Time Limit for Responding

Complaints about delays in responding to formal requests were relatively common at the Vancouver public hearing, as well as in some written submissions. While we understand the sense of frustration some applicants feel, the Committee is not persuaded that it is necessary to change the existing time limit of 30 working days for responding. Statistical information supplied by the Ministry of Management Services shows that the annual total of requests received by all public bodies in the province is 20,000-plus. A high proportion of the straightforward requests are dealt with in a timely manner, with delays occurring mainly in relation to complex and/or large requests.

10: Extending the Time Limit For Responding

Provincial ministries and Crowns, local government managers and the Office of the Information and Privacy Commissioner each presented a strong case for amending section 10(1). They pointed out that the current criteria in paragraphs (a) through (c) do not permit the Commissioner to grant extensions for rare or unexpected events — such as natural disasters or labour disruptions. It was obvious to the Committee last summer that the devastation created by the firestorm in the interior had made it impossible for the public bodies responsible to perform their routine work, including responding to access requests. Therefore we fully support providing extensions under similar or other rare circumstances.

Recommendation No. 7 — Amend section 10(1) to give the Commissioner the authority to grant extensions for rare or unexpected events where the Commissioner considers it fair and reasonable to do so.

11: Transfering a Request

The written submission of the B.C. Local Government Management Association raised another issue related to Part 2. It pointed out that section 11(1) is not consistent with the recently amended section 7(1). Section 11(1) requires a public body to transfer a request to another public body within 20 days after a request for access to a record is received. However, section 7(1) states that "the head of a public body must respond not later than 30 days after receiving a request described in section 5(1)." The submission pointed out that the combined effect of these latter two provisions is that if an applicant submits a vague or confusing request, the 30-day clock does not start running until the applicant provides enough detail to identify the record. After due consideration, the Committee is persuaded that there is a strong case for consistency in the time limit.

The Commissioner recommended another change to section 11. He informed the Committee that the current wording of this section only allows a public body to transfer an access request to another public body covered by the Act. This means that a B.C.

municipality, for example, cannot transfer an access request to the RCMP, which is covered by the federal access law. Therefore the Commissioner proposed amending section 11 to allow a public body in British Columbia to transfer an access request to another jurisdiction in Canada.

While we fully support the idea of out-of-province transfers of records, the Committee also thinks it would be desirable to have reciprocal transfer arrangements. Upon further inquiry, we learned from the Commissioner that the ability of institutions in another jurisdiction to transfer requests to public bodies in British Columbia would depend on whether the other jurisdiction's access law permits such transfers. With this caveat in mind, the Committee would urge the government to pursue the idea of reciprocity with other jurisdictions across Canada.

Recommendation No. 8 — Amend section 11(1) to make the time limit for transferring a request consistent with section 7(1).

Recommendation No. 9 — Amend section 11 to authorize a public body to transfer an access request to any public sector entity that is subject to a federal, provincial or territorial access-to-information statute.

Recommendation No. 10 — Develop formal information-sharing agreements with each jurisdiction in Canada that already has the statutory authority to transfer files beyond its boundaries and encourage the other jurisdictions lacking such authority to make provision for reciprocal agreements.

REVISITING EXCEPTIONS TO THE RIGHT OF ACCESS

Overview

Division 2 in the second part of the Act deals with mandatory and discretionary exceptions to the public's right of access. The mandatory exceptions are contained in section 12 (Cabinet and local public body confidences), section 21 (Disclosure harmful to business interests of a third party) and section 22 (Disclosure harmful to personal privacy). The eight discretionary exceptions to the public's right of access are outlined in sections 13 through 20.

12: Cabinet and Local Public Body Confidences

The Committee received requests to narrow the existing protection for cabinet confidences, to permit cabinet itself to waive protection, and to reduce the time limit for refusing disclosure of confidential information in a record from 15 years to ten years. After careful deliberation, we have concluded that the first proposal could undermine key principles of parliamentary government. Under the Westminster model, cabinet secrecy is necessary to protect the confidentiality of cabinet proceedings and deliberations and to maintain the collective responsibility of the political executive for public policy decisions.

The Committee also thinks that subsections (1) to (4) of section 12 are working satisfactorily, and that there is no need to give cabinet legislative sanction to waive the protection of section 12(1) and release information. Indeed, its current practice of releasing background material for its open cabinet meetings suggests the executive council already has this power.

We also see no reason to change the time limit of 15 years in section 12(2)(a) and 12(4)(b). From a follow-up inquiry, we learned from the Office of the Information and Privacy Commissioner that Alberta has the same 15-year time limit as British Columbia for protection of advice, cabinet and local public confidences, (as well as for confidential documents relating to intergovernmental relations or negotiations). Moreover, both the Ontario and federal access laws are more stringent than the B.C. legislation, having a 20-year exclusion for cabinet confidences.

13: Policy Advice or Recommendations

Section 13(1)

The discretionary exception to disclosure in section 13(1) was not intended to cover non-personal and personal factual information — at least until a recent B.C. Court of Appeal ruling. Before discussing the impact of the court decision on this provision, the Committee would like to comment on the human dimensions of the issue at stake here.

During the consultation process we became aware of the stress some individuals and families in British Columbia are experiencing because of their inability to correct erroneous factual information about themselves obtained in the course of a public body's investigation. One grandparent, for example, complained about being denied the opportunity to challenge the

"hearsay statements" about her in an access custody report prepared by a psychologist for a court hearing. This "misinformation" had prevented her from seeing her grandchild without supervision for the past two years. We also heard similar heartfelt stories from injured workers and ex-patients about the impact that indirect collection of personal information has had on their lives. As a result, we were disturbed to learn that the 2002 court ruling in regard to section 13(1) has made it even more difficult for people to obtain personal factual information in third-party files from public bodies.

Nearly all the witnesses who raised the court case were strongly in favour of legislative amendment to restore the public's right of access to factual information relating to policy advice or recommendations. They included the B.C. Freedom of Information and Privacy Association and the Office of the Information and Privacy Commissioner. To assist the reader in following their technical argument, the current wording of section 13(1) of the Act is included here:

> *"The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister."*

The Commissioner described section 13(1) as "one of the most frequently invoked exceptions" — at least at the provincial government level. It is also a class-based exception, because there is no need to prove harm from disclosure of the information.

On December 2, 2002, the B.C. Court of Appeal issued an important decision about section 13(1) in the "Dr. Doe case" — or *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner).*[16] The court decided that expert medical reports obtained by the College for the purposes of investigating a complaint against a physician were protected, in their entirety, as "advice" under section 13(1). In its ruling, the court stated that "advice" includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact — including expert opinions on matters of fact on which a public body must make a decision for future action.

The Committee learned that the Court of Appeal's decision is binding on all public bodies, the Commissioner and lower courts in the province. The Commissioner also reported that with some justification, public bodies have taken the court's broad interpretation of section 13(1) to mean that factual information presented to provide background explanations or analysis for consideration in making a decision is now protected from disclosure to an applicant.

In the Commissioner's opinion, this interpretation seriously undermines section 13(2)(a), which expressly provides that a public body cannot withhold "any factual material" as advice or recommendations under section 13(1). Also, the court's decision means that public bodies can simply rely on section 13(1) to withhold investigative material relating to law enforcement and need no longer meet the harm-based requirements in the law enforcement exception (section 15). Another consequence of the decision is that individuals can be denied access to their own previously available information, for no other reason than that it was gathered, compiled or presented for the purpose of generating investigative or briefing material for a public body's consideration in making a decision.

Based on what we heard, the Committee thinks there is a compelling case, as well as an urgent need, for amending section 13(1) in order to restore the public's legal right of access to any factual information. If left unchallenged, we believe the court decision has the potential to deny British Columbians access to a significant portion of records in the custody of public bodies and hence diminish accountability. Furthermore, as described earlier, we have had the opportunity to hear firsthand accounts of the devastating impact the denial of access to factual information about themselves is having on some families in British Columbia. Regardless of whether these cases are directly related to the court decision, as a matter of principle, we believe that individuals have the legal right to access and correct personal factual information in third-party files, except in the most unusual circumstances. For these reasons, we urge the government to take speedy action to clarify the exception relating to policy advice or recommendations.

Recommendation No. 11 — 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.

Section 13(2)

Section 13(2) identifies the information pertaining to policy advice or recommendations that the head of a public body must not refuse to disclose under subsection (1). At the Vancouver hearing one presenter suggested that this information could be routinely released without a formal access request and posted on a public body's Internet site within a month of its creation. Other witnesses proposed in their written submissions that information sources not cited in section 13(2) could be made freely available — such as forest development plans (Granby Wilderness Society), results of environmental tests and completed background research of a scientific or technical nature (Raincoast Conservation Society).

The Committee thinks that the proposal to release the materials listed in section 13(2), on a routine and timely basis, provides all public bodies in the province with the opportunity to promote informal access to information, discussed earlier in the report. As the public bodies covered by the Act are already required to release the 14 different types of documents listed in paragraphs (a) to (n), we consider the proposed amendment to be a manageable way for them to move to routine and timely disclosure and an important stepping stone in developing an institutional culture of openness to enhance their accountability.

While we are reluctant to suggest any expansion to the existing list at this time, the Committee would like to encourage all the public bodies in the province to consider releasing other types of non-confidential information as a matter of course. For example, we see no reason for denying access to, say, policy and procedures manuals of municipal police departments, or copies of successful requests for proposals and contracts, subject to the necessary exceptions to

protect the privacy of third parties or personal information. We would also encourage the Ministry of Management Services to consider adopting a government-wide routine access policy like Nova Scotia's Department of Justice has recently done.[17]

Recommendation No. 12 — Amend section 13(2) to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public.

Section 13(3)

The B.C. Freedom of Information and Privacy Association also suggested an amendment to section 13(3) to reduce the time limit for the application of the policy advice or recommendations exception, proposing that it should not apply once the decision or course of action to which advice or recommendations relate has been made or taken. The proposal was endorsed by the Office of the Information and Privacy Commissioner, which suggested reducing the ten-year time period in section 13(3) to five years. However, after careful consideration, the Committee concluded that the existing time limit is a reasonable one.

14: Legal Advice

The legal advice exception in section 14 of the Act states that the head of a public body "may refuse" to disclose information that is subject to solicitor-client privilege. Requests for further protection of solicitor-client privilege came mainly from the legal community. The B.C. Law Society, for example, recommended making section 14 mandatory — by changing "may refuse" to "must refuse" — except when the client agrees to waive privilege. However, like our colleagues on the first statutory review committee, we are not persuaded that any change is needed to this provision. In our opinion, as well as the Commissioner's, solicitor-client privilege is well protected in sections 14 and 44(3) of the Act.

17: Disclosure Harmful to the Financial or Economic Interests of a Public Body

In a written submission, the B.C. School Trustees Association proposed broadening section 17 to give public bodies more authority to protect their financial and economic interests. It pointed out that school boards are increasingly involved in revenue-generation partnerships with the private sector. However, despite explicit confidentiality clauses, school boards and private sector partners have been unsuccessful in preventing disclosure of the terms of their contracts.

After due consideration, the Committee is not persuaded that any legislative change to section 17 is desirable, particularly one that that could restrict the public's legal right of access to information. We have also used similar reasoning to reject the school trustees' request for a legislative amendment to section 23 (Notifying the third party).

19: Disclosure Harmful to Individual or Public Safety

Section 19 gives the head of a public body the discretion to refuse to disclose information "if the disclosure could reasonably be expected to (a) threaten anyone else's safety or mental or physical health, or (b) interfere with public safety." The provincial government regards the threshold set by the Commissioner for withholding records as too high and requested that the threshold for harm under section 19 be altered. The Committee, however, is not persuaded that lowering the threshold for harm for ministries and Crown corporations to meet for withholding records is a desirable step to take, because it could undermine existing access rights.

20: Information that Will Be Published or Released Within 60 Days

Section 20(1) gives the head of a public body the discretion to refuse to disclose information "(a) that is available for purchase by the public, or (b) that, within 60 days after the applicant's request is received, is to be published or released to the public." The Office of the Information and Privacy Commissioner presented a strong case for deleting paragraph (a) and amending section 3(1) to state that the Act does not apply at all to records available for purchase by the public.

Before endorsing this proposal, though, the Committee wanted to make sure that the proposed changes respecting sections 20(1)(a) and 3(1) would not unintentionally provide an incentive for public bodies to choose the revenue-raising option for information compiled electronically, at the expense of making information accessible for all British Columbians. From a follow-up inquiry, the Committee learned that information currently available for purchase by the public is quite distinct from the records a public body must release in response to a formal access request. Examples of the latter are listed in section 13(2) of the Act and include any factual material, statistical surveys, environmental impact statements, final reports or final audits on a public body's performance, and field research results.

The government's policy and procedures manual provides public bodies with guidance in determining what information is saleable and gives examples of documents available for purchase — such as government publications, including topographical maps, that are readily available for purchase at Crown Publications, university bookstores or other retail outlets; articles that appear in commercial journals; commercially available syndicated polls; and court decisions. Individual ministries have also developed criteria to use in determining whether a record is available for purchase or in response to a formal FOI request.[18]

Having received this reassurance, the Committee fully supports the proposed amendments. However, we are reluctant to endorse the proposals of the Commissioner and the Raincoast Conservation Society to add a new section to the Act to facilitate meaningful access by public-interest groups to published information that is available for purchase, by charging them a reduced or a nominal cost. In our opinion, the introduction of differential fees would amount to special treatment for select groups of British Columbians, an idea we cannot entertain.

Recommendation No. 13 — Repeal section 20(1)(a) and amend section 3(1) to state that the Act does not apply to records available for purchase by the public.

21: Disclosure Harmful to Business Interests of a Third Party

A case was presented by some witnesses — including the government, the province's university presidents and Ms. Hunter, the Vancouver lawyer invited to brief the Committee — for further protection of contract information in the Act. Their submissions focused on the need to clarify in section 21(1)(b) whether information supplied in confidence during contract negotiations could be withheld from disclosure. After careful consideration, the Committee has concluded that the case for strengthening protection of third-party business information lacks concrete examples of harm suffered. Furthermore, we think the existing protection in the Act is adequate and consistent with other access laws in Canada.

22: Disclosure Harmful to Personal Privacy

This mandatory exception to disclosure seeks to protect the personal privacy of a third party in a number of circumstances listed in subsections (2) and (3). In this context, a third party is any individual whose personal information is contained in records about an applicant.

Like section 13(1), section 22 posed a big challenge for the committee members. The question we struggled with was whether the personal privacy of a third party — for example, a health professional or a social worker — should take precedence over an individual's legal right to access their own personal factual information. After extensive deliberation, we have decided to recommend no changes to subsections (1) to (3).

The Committee was receptive, though, to the small change proposed by the Office of the Information and Privacy Commissioner to amend section 22(4) to permit disclosure of personal information of a deceased person. In our view, this is a gap that needs to be closed in the Act.

Recommendation No. 14 — Amend section 22(4) to state that it is not an unreasonable invasion of third-party privacy to disclose the personal information of an individual who has been dead for over 20 years.

25: Information Must Be Disclosed if in the Public Interest

The final section of Part 2 is commonly known as the override clause. Section 25(1) permits the head of a public body to disclose, without any formal request, "information (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or (b) the disclosure of which is, for any other reason, clearly in the public interest." The main FOI advocacy groups suggested strengthening this section, claiming that it is underutilized. The Committee, however, thinks it is unnecessary to use section 25 as the spur for greater release of information, because there are other, more appropriate provisions in Part 2 of the Act. As well, we believe that the right balance is struck in the override clause between the competing principles of openness and privacy protection.

UPDATING PRIVACY PROTECTION

Overview

Part 3 of the Act contains the privacy provisions governing the public sector. Its 11 sections are designed collectively to prevent the unauthorized collection, use or disclosure of personal information by public bodies, as well as to ensure the accuracy and security of personal data.

Enhancing Privacy Rights

The extent of privacy protection available to British Columbians has long been regarded as the strongest in Canada. However, some witnesses claimed in their presentations to the Committee that the province's new private sector privacy law, the *Personal Information Protection Act* (PIPA), now sets the standard for privacy rights. The main FOI and privacy advocacy groups, as well as the two privacy experts (Drs. Bennett and Flaherty), presented the case for incorporating the privacy principles of the PIPA into the public sector privacy law — particularly the concepts of informed consent and the reasonableness test.

The essence of the presenters' argument was that the Act is deficient, in comparison to the PIPA and the federal private sector privacy law, in regard to five of the ten principles outlined in the Canadian Standards Association model privacy code — accountability, identifying purposes, consent, safeguards and openness.[19] The privacy experts also pointed out that the use of privacy-enhancing technologies has developed since the Act came into force over a decade ago. They urged the Committee to acknowledge this innovation in the Act as an effective means to protect the personal information of individuals in electronic databases.

In response to the witnesses' first proposal, the Committee has serious reservations about the wholesale adoption of PIPA-type principles and concepts into the Act, mainly because the private sector privacy law is new and untested legislation. We prefer at this time to adopt a cautious case-by-case approach and leave the task of a comparative evaluation of the province's two privacy laws to future statutory review committees. We are also reluctant to endorse the Commissioner's idea of having a separate privacy charter for British Columbians. This option is not that appealing, because we think it has the potential to create confusion among legislators and the public about what privacy law applies in a particular context.

Nonetheless, we fully support the case presented by privacy advocates and experts for greater promotion of new privacy-enhancing technologies in the Act. From our perspective, encouraging public bodies to consider technological solutions — such as encryption systems and filtering systems — before personal information is disclosed or stored is one way of meeting the public demand for more safeguards to prevent the unauthorized disclosure of confidential personal information in electronic databases. While we have opted for a voluntary approach, the Committee is expecting full compliance within a reasonable time line and proposes that the next statutory review committee assess the extent of progress made and consider whether a statutory deadline is required.

Recommendation No. 15 — Add a new section at the beginning of Part 3 of the Act encouraging public bodies to incorporate the use of privacy-enhancing technologies, approved by the Commissioner, into their privacy policies and practices within a reasonable period of time.

30: Protection of Personal Information

Section 30 states that the head of public body must protect personal information in its custody or under its control by making reasonable security arrangements. The B.C. Trappers Association asked the Committee to relax this provision so that that qualified individuals could access personal information in government records to interact with related stakeholders. Its written submission pointed out that a local office of the Ministry of Water, Land and Air Protection had refused to share the names and addresses of trappers with a forester who needed to notify them of impending logging operations that would be taking place on their traplines. While wanting their privacy to continue to be protected, the trappers wanted to ensure that all qualified stakeholders operating in the same geographical area had access to trapline registration or ownership information.

The Committee does not believe a legislative amendment to section 30 is necessary in this case. Instead, we would propose that the provincial bureaucracy and other public bodies adopt a more cooperative approach and offer to act as intermediaries for the distribution of personal information so as not to impede business activity.

33: Disclosure of Personal Information

Section 33 lists 20 specific circumstances where a public body can disclose personal information. The Committee received several proposals for legislative changes to this provision. First, the government suggested amending the Act to incorporate section 22(4) criteria for disclosing personal information into section 33. After careful consideration, we concluded that a legislative change is unnecessary, since public bodies are already required under section 33(a) to disclose personal information in accordance with Part 2 of the Act.

The provincial government also wanted to expand paragraph (g) to increase disclosure provisions between public bodies and the Ministry of Attorney General; and to add a new paragraph to section 33 permitting disclosure during a court proceeding of the fact that a similar application under the Act has been made by the same individual. Local government managers wanted another amendment to section 33(g) to allow local public bodies to reveal personal information to their own lawyers. They also pointed out that section 33 does not explicitly state that the names of licence holders can be disclosed on a routine basis. Finally, school trustees asked for an amendment to permit schools to disclose the names of students on honour rolls and awards lists without having to secure individual written consent. After careful consideration, the Committee has decided that all these proposals to amend section 33 would weaken British Columbians' existing privacy rights within the public sector.

35: Disclosure for Research or Statistical Purposes

Section 35 specifies the conditions relating to the disclosure of personal information for a research purpose, including statistical research. The Committee considered the proposal of the Office of the Information and Privacy Commissioner to repeal section 35(1)(a.1) or at least to amend it to permit disclosure of contact information for a researcher where it is not practicable for the disclosing public body to contact prospective participants. However, we are not persuaded that this is a desirable amendment. From our perspective, it would appear to weaken the privacy rights of individual patients, as well as the expectations of other citizens that their personal health information is kept confidential.

36: Disclosure for Archival or Historical Purposes

The final section of Part 3 identifies four circumstances permitting the archives of the B.C. government or of a public body to disclose records that contain personal information. The written submission of the B.C. School Trustees Association included a request for the implementation of two recommendations made by the first statutory review committee. The first was to reduce the 50-year time limit in section 21(3)(b) on the disclosure of archived third-party business information, a proposal that was duly considered but not accepted by the Committee at this time.

The trustees' second recommendation was to amend section 36(d) to allow the disclosure of archived personal information after 70 years. From a follow-up inquiry, we learned that the current wording of section 36(d) permitting disclosure if "the information is in a record that has been in existence for 100 or more years" means that the archived personal information of centenarians who are still alive can be released now, under the existing Act. This prompted us to consider the option of eliminating the minimum limit altogether so as to protect the privacy of the 1,000 senior citizens in British Columbia who are over 100 and to remove the age discrimination in paragraph (d). We believe that citizens expect their personal records to be protected under the Act — whether they are 40, 75 or 101 years old. At the same time we recognize that deleting any reference to the age of records would pose significant problems for archivists, genealogists and historians engaged in family-oriented research.

The Committee also gave careful consideration to the option of maintaining the existing rule of 100 years as the default, like other jurisdictions across Canada do. We were informed that personal information is in the vast majority of government archival records — ranging from Ministry of Attorney General correspondence and case files, child welfare and corporate registry files through to Premiers' papers and ministers' correspondence. We were reassured to hear that the disclosure of personal information in a record that has been in existence for 100 years or more can only be for archival or historical purposes, and that there are strict conditions governing access. Archived personal information includes documents containing vital statistics, such as birth or marriage certificates, that are of particular interest to family-oriented researchers.

After considering carefully the two different options, the Committee concluded that the existing cut-off date is a reasonable minimum limit and strikes the right balance between not making archivists and family-oriented researchers wait too long and protecting the personal information of centenarians who are still alive from inappropriate disclosure. While we are not

proposing any change to section 36(d) at this time, we would ask future statutory review committees to keep a watching brief on this topic, given the anticipated increase in longevity.

The Committee, though, was prepared to endorse another request of the B.C. School Trustees Association for a minor change in wording to section 36 to enable public school boards to preserve the memorabilia of closed schools beyond required student records. We accept their thesis that the current wording of section 36 does not promote the preservation of local history and also recognize the challenge school boards face in persuading other bodies, such as local museums, to assume responsibility for records that otherwise would be destroyed.

Recommendation No. 16 — Amend section 36 by adding "or a local school board" after "the archives of a public body".

STRENGTHENING THE COMMISSIONER'S POWERS

Overview

Part 4 of the Act (Office and Powers of Information and Privacy Commissioner) sets out the criteria for appointing the Commissioner and the structure of the office attached to that position. It also establishes the powers and responsibilities of the Commissioner and office staff.

42: General Powers of Commissioner

Section 42 sets out the Commissioner's general powers to monitor how the Act is administered in order to ensure that its purposes are achieved. The Committee learned that this section does not explicitly give the Commissioner the authority to require public bodies to submit statistical information related to their administration of FOI requests, including their compliance with time lines set out in the Act. As the Committee heard complaints quite frequently from the public about delays in responses, we are persuaded that granting this additional power would provide the Commissioner's office with a useful tool for monitoring compliance with the Act.

Another request from the Commissioner was for the authority to require applicants to first try to resolve their complaints and requests for review with the public bodies concerned. He informed the Committee that his office has already been using this approach as a way of dealing with budget cutbacks, and that it is turning out to be an effective method of resolving disputes informally. The Commissioner proposed using similar wording to that in sections 38(4) and 50(9) of the *Personal Information Protection Act,* the province's private sector privacy law.

From the Committee's perspective, incorporating the PIPA-type dispute resolution approach into the Act strikes us as a sensible idea, because it would enable the Office of the Information and Privacy Commissioner to make better use of its resources and also streamline its processes for monitoring both pieces of legislation. We therefore endorse the Commissioner's proposed amendments relating to sections 42 and 56. The Committee was also receptive to the request of the Commissioner for an amendment to combine the process for resolving complaints referred to in section 42(2) and the review process referenced in section 52(1). We think a unified process would be more efficient and simpler for the public to navigate and understand.

However, we were reluctant to endorse the idea that public bodies be required to provide draft legislation to the Commissioner for comment on the access and privacy implications. In our view, expansion of the Commissioner's existing power in section 42(1)(f) would undermine both the authority and role of legislators. Nonetheless, we support the idea of prior consultation and so would encourage public bodies to ask informally for the Commissioner's comments on draft bills before their introduction in the House.

Recommendation No. 17 — Amend section 42 to explicitly give the Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom-of-information requests, in a form and manner that the Commissioner considers appropriate.

Recommendation No. 18 — Amend section 42 to give the Commissioner the explicit authority to require applicants to attempt to resolve complaints and requests for review with public bodies in a manner that the Commissioner directs. The wording should be similar to that of section 38(4) of the *Personal Information Protection Act.*

Recommendation No. 19 — Amend section 56 to provide that the 90-day period it sets out does not include any time taken for an OIPC referral back to the public body. The wording should be similar to that of section 50(9) of the *Personal Information Protection Act.*

Recommendation No. 20 — Amend the Act to combine the complaint process and the review and inquiry process — referred to in sections 42(2) and 52(1) respectively — into a unitary process for the Commissioner to investigate, mediate, inquire into and make orders about complaints respecting decisions under the Act or other allegations of non-compliance with the Act.

43: Power to Authorize a Public Body to Disregard Requests

Section 43 was amended in 2002 to give the Commissioner the discretionary power to authorize a public body to disregard frivolous or vexatious requests. The Committee has considered the request of the B.C. University Presidents' Council for the removal of the requirement in this provision to obtain authorization from the Commissioner prior to disregarding such requests. We are inclined not to change a recent legislative amendment, particularly when only a small number of access requests fall into the frivolous or vexatious category.

44: Powers of Commissioner in Conducting Investigations, Audits or Inquiries

Section 44(1) gives the Commissioner clear powers to compel evidence for an investigation under section 42 or for an inquiry under section 56. However, the wording is ambiguous regarding his capacity to obtain records at the review stage or for an audit, even though paragraph (1) suggests that the Commissioner has powers equivalent to those given to a commissioner under sections 15 and 16 of the *Inquiry Act* (R.S.B.C. 1996, c. 224). Adding to the conceptual confusion is section 44(2) that states the Commissioner "may require any record to be produced to the commissioner and may examine any information in a record, including personal information."

In the Committee's humble opinion, section 44 qualifies as the provision needing the most clarification in Part 4. While not condoning their actions, we can see how the current wording of this provision provides public bodies with some justification for not turning over disputed records to the portfolio officers in the Commissioner's office that are necessary for a mediated settlement at the review stage or for an audit. In our view, the section needs to state

clearly that the Commissioner has equivalent powers to obtain records from public bodies at the mediation stage — whether it's for an investigation, an inquiry, a review or for an audit.

Recommendation No. 21 — Amend sections 44(1) and (2) to eliminate incorporation of powers by reference to the *Inquiry Act* and to provide express powers, applicable to public bodies and others, for the Commissioner to:

(a) order the production of records or things; and

(b) order the attendance of individuals and their oral or electronic examination on oath, affirmation or in any other manner, in connection with any investigation, audit or inquiry under the Act.

47: Restrictions on Disclosure of Information by the Commissioner and Staff

Section 47(1) states that the Commissioner and staff must not disclose any information obtained in performing their duties, powers and functions under the Act, except in limited circumstances outlined in subsections (2) to (5). However, this provision does not provide them with protection from being compelled to testify in a civil proceeding about the same information. The Commissioner presented a convincing case for the adoption of a provision, similar to the one Ontario has, that would provide assurance to public bodies, applicants and third parties in British Columbia that the information they communicate to the Commissioner and staff in connection with a dispute could not be disclosed through testimony in other proceedings.

Recommendation No. 22 — Amend the Act to give protection from testimonial compulsion to the Commissioner and those acting for or under the direction of the Commissioner.

CLARIFYING REVIEWS AND COMPLAINTS

Overview

Part 5 of the Act sets out a person's right to ask for a review of a public body's response to an access or correction request and the process for how to request a review. It authorizes mediation and/or an inquiry and sets out a process for an adjudicator to investigate a privacy complaint made against the Commissioner or to review a decision the Commissioner has made in response to an access request.

56: Inquiry by Commissioner

The current wording of section 56(6) states that an inquiry into a matter under review must be completed within 90 days after the Office of the Information and Privacy Commissioner receives the request for review. However, the Commissioner reported that it is often impossible for the parties to negotiate a mediated settlement of the issues within the 90-day period, given the realities of other work pressures and resource constraints.

While the Committee fully supports mediation as the best approach for the settlement of disputes, we are reluctant to endorse the Commissioner's request for the power to extend the 90-day time limit for reviews. Our approval in this context would be inconsistent with our earlier decision not to extend the time limit for public bodies to respond to FOI requests in section 7. We believe that existing time lines need to be respected unless there is a compelling case for legislative change; and the Commissioner's proposal that an amendment to section 56(6) would make the Act consistent with section 50(8) of the PIPA does not fall into this category.

58: Commissioner's Orders

Section 58(2) stipulates that the Commissioner must make an order if the inquiry is into a decision of a public body to refuse access to all or part of a record. The Committee learned that the B.C. Supreme Court has interpreted this provision as requiring the Commissioner, not a public body, to sever the disputed records, pursuant to section 4(2). As a result, the Commissioner has no authority under subsection (2), or even under subsection (3), to order compliance with the Act when a public body has neglected or refused to sever excepted information from an access request, even when the records are voluminous.

From the Committee's perspective, section 58 is in dire need of clarification. If we have grasped the Commissioner's argument correctly, here is a situation where the Commissioner has no actual enforcement power, even though order-making authority is the subject of the provision. What is even more troubling is learning that the Act currently has no mechanism for enforcing his orders. This lack of enforcement power seriously undermines the effectiveness of the Commissioner's office in carrying out its specialized mandate related to the administration of the Act. For this reason, we are prepared to also endorse the proposal to make orders of the Commissioner as enforceable as orders of the B.C. Supreme Court, along the lines proposed by the Administrative Justice Project.[20]

Recommendation No. 23 — Amend sections 58(2) and 58(3) to permit the Commissioner to order a public body to perform the s. 4(2) duty to sever excepted information and disclose the remainder of requested records.

Recommendation No. 24 — Amend the Act to provide a mechanism for the enforcement of the Commissioner's orders as orders of the Supreme Court of British Columbia.

59: Duty to Comply with Orders

Section 59 requires a public body to comply with an order of the Commissioner within 30 days of delivery of the order. If an application for judicial review of the order is brought within the 30 days, it imposes an automatic stay of the Commissioner's order, which is not time limited. The Commissioner informed the Committee that the automatic stay of an order has become a problem in the case of judicial reviews initiated by third parties and has been "an unconstructive drain" on the resources of his office.

Upon further inquiry, we learned that since 1999 there have been five judicial review challenges involving third-party petitioners. In four of these cases, third parties resisted moving or failed to move their petitions for judicial review forward for hearing in a timely manner. The Committee regards the process delay as unacceptable and supports the Commissioner's proposed amendments.

Recommendation No. 25 — Amend section 59(2) and add a new section 59(3) to inhibit abuse of the judicial review process by time-limiting the automatic stay of the Commissioner's order:

(2) If an application for judicial review is brought before the end of the period referred to in subsection (1), the order of the Commissioner is stayed for 60 days from the date the application is brought.

(3) A court may abridge or extend, or impose conditions on, a stay of the order of the Commissioner under subsection (2).

Division 2: Investigations and Reviews by Adjudicators

The Commissioner informed the Committee that there is no mention of his role in judicial review proceedings anywhere in the Act and asked us to grant him the status of a full party respondent to applications for judicial review, pointing out that Ontario is heading in this direction. As a result of a follow-up inquiry, we learned that granting the Commissioner's request would be a highly unusual move for British Columbia to make at this time. We also believe caution is the best approach in regard to the request for an amendment recognizing the Commissioner's expertise relative to the courts.

IMPROVING THE INFORMAL ACCESS PROCESS

Overview

Part 6 contains the general provisions underpinning the administration of the Act. The administrative aspects include the requirement for ministries to use the personal information directory and to make policy manuals and records available without request, offences and penalties, fees and the requirement for parliamentary review of the Act every six years.

69: Personal Information Directory

Sections 69(2) and (3) requires the Minister responsible for the Act to maintain and publish a personal information directory that contains the following information: the personal information banks that each ministry holds, ministry information-sharing agreements, any privacy impact assessments a ministry has conducted, and any other information considered appropriate. This directory was established as a result of the April 2002 amendments and is the first of its kind in Canada.

Both privacy experts we heard from criticized these provisions. Dr. Bennett, for example, argued that subsection (2) was not clearly understood by the people he knew or even being implemented and kept up to date by ministries. He also claimed that the concept of separate "personal information banks" is an outmoded idea because nowadays it is no longer possible to determine where one databank ends and another begins.

For Dr. Bennett, the development and publication of explicit privacy protection policies was a more important priority than the maintenance of a personal information directory. Therefore he encouraged the Committee to examine section 6 of the PIPA and consider recommending a parallel provision in the Act requiring privacy protection policies. The Committee recognizes that the proposal has some merit in that it would assist ministries gain a better understanding of exactly what personal information they hold, and why they hold it. However, we believe the question of whether there is a case for replacing the personal information directory with a directive to adopt privacy protection policies is essentially an operational issue for the Ministry of Management Services to consider, rather than a matter requiring a legislative amendment.

71: Records Available Without Request

Section 71 allows public bodies to prescribe categories of records that are available on demand without an access request and permits them to charge fees for providing such access. The Commissioner informed the Committee that the Workers Compensation Board and some other public bodies have taken the initiative of providing their clients with access to their own personal information, free of charge. He reported, though, that section 71 is not widely used by most public bodies, even though proactive disclosure without a formal request is consistent with the Act's goals of openness and accountability.

We fully support the Commissioner's proposal to make routine release of personal information mandatory for public bodies, because we see it is an important way of promoting an institutional culture of openness and granting individuals an explicit right of informal access

to their own personal information. Before proposing a legislative amendment, though, we would like to comment briefly on why public bodies seem reluctant to make use of proactive disclosure of records.

During the consultation process, the Committee learned that one impediment to routine release is the Act itself — in particular, the provisions in Part 2 explaining to the public how to exercise their information rights. The City Clerk for Chilliwack, for example, stated at the Vancouver hearing that one of the unintended consequences of the FOI process is that the city is now operating as "a discount discovery house" for the court system in relation to property owners' insurance claims for house fires. People wanting fire reports are insisting on making a formal request for copies of documents that his local government would probably just hand over as a matter of course. He also reported that lawyers had told him that the FOI process is a bargain, compared to the other processes available for collecting evidence in court cases related to insurance claims. The Committee shares his concern about ratepayers having to subsidize this so-called bargain. We also think the practice of using the formal FOI process as a cheaper alternative to the legal process of discovery is undermining the spirit of the Act.

Recommendation No. 26 — Amend section 71 to require public bodies to make available to an individual his or her own personal information free of charge and without an access request, but subject to any access exceptions under the Act.

74: Offences and Penalties

Section 74 identifies four types of offences that are each liable to a fine of up to $5,000, an amount set in the original Act. Environmental advocacy groups that have experienced considerable delays in securing responses to their FOI requests suggested strengthening this section in order to give public-interest groups some recourse when the Act is not followed. They included the West Coast Environmental Law Association, which favoured expanding the enforcement powers of the Commissioner. The Raincoast Conservation Society had a more specific suggestion, based on its protracted struggle to obtain hunting data on where grizzly bears are killed.[21] It proposed adding the following offences to section 74, "the alteration, falsification, concealment or destruction of records for the purpose of preventing disclosure," and raising the maximum penalty to $10,000 in line with Alberta.

In the course of the consultation process, the Committee learned that no penalty has been imposed since the Act came into effect over ten years ago. While this reinforces the witnesses' argument that section 74 is too weak, it also suggests that the imposition of fines is not really the issue here. After due consideration, we have concluded that any legislative change to this provision would not be an effective means to deal with non-compliance issues. Instead, we have opted for the option of stronger voluntary compliance. The Committee believes strongly that if there are violations of the offences listed in section 74(1), those responsible need to be dealt with in an open and transparent manner so as to hold public bodies accountable for their non-compliance with the Act.

75: Fees

Section 75(1) states that the head of a public body may require an applicant who makes a formal FOI request to pay fees for the following services: locating, retrieving and producing the record; preparing the record for disclosure; shipping and handling the record; and providing a copy of the record. Subsection (2) then makes it clear that fees are not charged for the first three hours spent locating and retrieving a record, or time spent severing information from a record. Under subsection (3), applicants who make formal requests for their own personal information are not required to pay a fee for the services listed above. The actual schedule of fees is contained in section 7 of the *Freedom of Information and Protection of Privacy Regulation,* which came into effect on October 4, 1993. Apparently it was based on the fee provisions under the federal access law and so in fact dates back to the early 1980s.

Earlier in the report, the Committee outlined how innovations in information technology had altered the way citizens make access requests and how public bodies respond to them. One complaint we heard from local public bodies during the consultation process was that the fee schedule has failed to take the additional hidden costs involved with producing and preparing electronic records for disclosure into account. The B.C. Local Government Management Association, for example, proposed an amendment to section 75(1)(b) clarifying that "preparing the record for disclosure" includes reviewing the record to determine whether information may be withheld. The Commissioner also asked for clarification of this provision to clear up the current confusion and lack of clarity as to its meaning.

Other suggestions reviewed by the Committee included a request from the City Clerk of Chilliwack for a fee to discourage people from making vexatious or repeat requests, particularly through e-mails. As well, the provincial government wanted a narrower definition of a record relating to “a matter of public interest" in section 75(5)(b) so as to minimize the number of fee waivers currently granted to the news media and public interest groups.

At this juncture, we would like to respond to an inquiry we received from the Corporation of Delta asking whether the Act would permit a memorandum of understanding (MOU) for cost recovery between a municipal police department seeking information from the B.C. Ambulance Service. Apparently there is a charge for the information, which is submitted for recovery from the Crown; however, the process creates extra administrative work for the police department. From a follow-up inquiry, we found out from the Commissioner that nothing in the Act seems to preclude public bodies from exchanging information, including making provisions in an MOU for cost recovery.

After careful consideration of all the proposals to increase revenues from fees, the Committee has concluded that there is no need to change section 75. We agree with the Commissioner's assessment that the current provisions in the Act reflect an appropriate user-pay approach that does not impose an undue cost burden on access applicants. We also support his general proposal to update the fee schedule to take into account the changes in computer costs over the past decade and the introduction of new storage media, such as CDs and DVDs.

Recommendation No. 27 — Amend the Act's Schedule of Fees in section 7 of the *Freedom of Information and Protection of Privacy Regulation* to reflect the use of electronic media, such as CDs and DVDs, since the Schedule was created over a decade ago.

1993 FOIPP Regulation

Finally, the Committee would like to endorse the proposal of the Office of the Information and Privacy Commissioner to update the 1993 regulation concerning who may act for others so as to add legitimate representatives, such as those with the power of attorney, to the existing list.

Recommendation No. 28 — Amend section 3 of the 1993 *Freedom of Information and Protection of Privacy Regulation* to make it consistent with sections 1 to 4 of the *Personal Information Protection Act Regulations.*

SUMMARY OF RECOMMENDATIONS

The Committee urges the government of British Columbia to implement in a timely manner our recommendations. These relate to administrative policy and practice, the six parts of the *Freedom of Information and Protection of Privacy Act,* and to the 1993 FOIPP Regulation:

Administrative Policy and Practice:

1. Change the administrative policy and practice regarding the sensitivity ratings process used in the corporate records tracking system to ensure that complexity becomes the sole criterion for classifying formal requests for public records, and that the new complexity ratings process treats all requesters equally and impartially and protects their personal identity.

Part 1 — Introductory Provisions:

2. Add a new section (2)(3) stating that the Act recognizes that new information technology can play an important role in achieving the purposes outlined in subsection (1), particularly with respect to promoting a culture of openness and informal access to information and by enhancing privacy protection.

3. Investigate why the B.C. Society for the Prevention of Cruelty to Animals was assigned the dual status of a public body and a non-profit society in the first place and whether there is a case for clarifying or even changing its status.

4. Amend section 3 to clarify that records, including personal information, created by or in the custody of a service provider under contract to a public body are under the control of the public body for which the contractor is providing services.

Part 2 — Freedom of Information:

5. Add a new section at the beginning of Part 2 of the Act requiring public bodies — at least at the provincial government level — to adopt schemes approved by the Commissioner for the routine disclosure of electronic records, and to have them operational within a reasonable period of time.

6. Amend section 4(1) to establish that an applicant who makes a formal access request has the right to anonymity throughout the entire process.

7. Amend section 10(1) to give the Commissioner the authority to grant extensions for rare or unexpected events where the Commissioner considers it fair and reasonable to do so.

8. Amend section 11(1) to make the time limit for transferring a request consistent with section 7(1).

9. Amend section 11 to authorize a public body to transfer an access request to any public sector entity that is subject to a federal, provincial or territorial access-to-information statute.

10. Develop formal information-sharing agreements with each jurisdiction in Canada that already has the statutory authority to transfer files beyond its boundaries and encourage the other jurisdictions lacking such authority to make provision for reciprocal agreements.

11. 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.

12. Amend section 13(2) to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public.

13. Repeal section 20(1)(a) and amend section 3(1) to state that the Act does not apply to records available for purchase by the public.

14. Amend section 22(4) to state that it is not an unreasonable invasion of third-party privacy to disclose the personal information of an individual who has been dead for over 20 years.

Part 3 — Protection of Privacy

15. Add a new section at the beginning of Part 3 of the Act encouraging public bodies to incorporate the use of privacy-enhancing technologies, approved by the Commissioner, into their privacy policies and practices within a reasonable period of time.

16. Amend section 36 by adding “or a local school board” after “the archives of public body”.

Part 4 — Office and Powers of Information and Privacy Commissioner

17. Amend section 42 to explicitly give the Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom-of-information requests, in a form and manner that the Commissioner considers appropriate.

18. Amend section 42 to give the Commissioner the explicit authority to require applicants to attempt to resolve complaints and requests for review with public bodies in a manner that the Commissioner directs. The wording should be similar to that of section 38(4) of the *Personal Information Protection Act.*

19. Amend section 56 to provide that the 90-day period it sets out does not include any time taken for an OIPC referral back to the public body. The wording should be similar to that of section 50(9) of the *Personal Information Protection Act.*

20. Amend the Act to combine the complaint process and the review and inquiry process — referred to in sections 42(2) and 52(1) respectively — into a unitary process for the

Commissioner to investigate, mediate, inquire into and make orders about complaints respecting decisions under the Act or other allegations of non-compliance with the Act.

21. Amend sections 44(1) and (2) to eliminate incorporation of powers by reference to the *Inquiry Act* and to provide express powers, applicable to public bodies and others, for the Commissioner to:

    (a) order the production of records or things; and

    (b) order the attendance of individuals and their oral or electronic examination on oath, affirmation or in any other manner, in connection with any investigation, audit or inquiry under the Act.

22. Amend the Act to give protection from testimonial compulsion to the Commissioner and those acting for or under the direction of the Commissioner.

Part 5 — Reviews and Complaints

23. Amend sections 58(2) and (3) to permit the Commissioner to order a public body to perform the s. 4(2) duty to sever excepted information and disclose the remainder of requested records.

24. Amend the Act to provide a mechanism for the enforcement of the Commissioner's orders as orders of the Supreme Court of British Columbia.

25. Amend section 59(2) and add a new section 59(3) to inhibit abuse of the judicial review process by time-limiting the automatic stay of the Commissioner's order:

    (2) If an application for judicial review is brought before the end of the period referred to in subsection (1), the order of the Commissioner is stayed for 60 days from the date the application is brought.

    (3) A court may abridge or extend, or impose conditions on, a stay of the order of the Commissioner under subsection (2).

Part 6 — General Provisions

26. Amend section 71 to require public bodies to make available to an individual his or her own personal information free of charge and without an access request, but subject to any access exceptions under the Act.

27. Amend the Act's Schedule of Fees in section 7 of the *Freedom of Information and Protection of Privacy Regulation* to reflect the use of electronic media, such as CDs and DVDs, since the Schedule was created over a decade ago.

1993 FOIPP Regulation

28. Amend section 3 of the 1993 *Freedom of Information and Protection of Privacy Regulation* to make it consistent with sections 1 to 4 of the *Personal Information Protection Act Regulations.*

ENDNOTES

[1] Legislative Assembly of British Columbia, Special Committee to Review the Freedom of Information and Protection of Privacy Act, *Report*, July 1999 (1999 Special Committee Report). Available at: http://www.leg.bc.ca/cmt/39thParl/foi/1999/review_act.htm

[2] Cited in Ministry of Management Services Briefing Document, "Freedom of Information and Protection of Privacy Act (FOIPP Act)," November 5, 2003, p. 1.

[3] Government of Canada Department of Industry, "Organizations in the Province of British Columbia Exemption Order," *Canada Gazette* Vol. 138, No. 15 — April 10, 2004. Available at: http://canadagazette.gc.ca/partI/2004/20040410/html/regle4-e.html

[4] A summary of the Security and Privacy Conference is available at: http://www.mser.gov.bc.ca/FOI_POP/Conferences/Feb2004/Default.htm

[5] 1999 Special Committee Report, p. 44.

[6] Submissions of the Local Government Management Association to the Special Committee to Review the Freedom of Information and Protection of Privacy Act, February 20, 2004, pp. 8-10.

[7] Robert Parkins, "A different spin: Three at the helm for Lac Carling Congress," *CIO Governments' Review* 6, 3 (April 2004): 6. Available via: http://www.ITworldcanada.com

[8] See Colin J. Bennett and Rebecca Grant (eds.), *Visions of Privacy: Policy Choices in the Digital Age.* (Toronto: University of Toronto Press, 1999); and Colin J. Bennett and Charles D. Raab, *The Governance of Privacy: Policy Instruments in a Global Age* (Aldershot, England: Ashgate Publishing Ltd., 2003).

[9] Alasdair Roberts, "Protecting Your Right to Information," Talk to the Founding Conference of Open Government Canada, Harbour Castle Hotel, Toronto, 11 March 2000. Available at: http://faculty.maxwell.syr.edu/asroberts/documents/presentations/ogc_2000.pdf

[10] Interview with Vaughn Palmer, *Voice of BC* Transcript, Shaw TV, April 21, 2004, p. 3.

[11] Alasdair Roberts, "Treatment of Sensitive Requests under British Columbia's Freedom of Information Law," *Freedom of Information Review* 109 (February 2004): 2-4. Available at: http://faculty.maxwell.syr.edu/asroberts/documents/journal/roberts_foir_2004_BC.pdf

[12] Ann Rees, "Watchdog probes claim that province violated privacy law," *Vancouver Sun*, 20 March 2004, p. A1.

[13] See Government of Canada, Access to Information Review Task Force Report, *Access to Information: Making it Work for Canadians*, June 2002 (http://www.atirtf-geai.gc.ca/report/report1-e.html) ; Legislative Assembly of Alberta, Select Special Freedom of Information and Protection of Privacy Act Review Committee, *Final Report*, November

2002 (http://www.assembly.ab.ca/pro/FOIP/report1.htm); Government of Nova Scotia, Advisory Committee on the Freedom of Information and Protection of Privacy Act*, Report*, Submitted to the Minister of Justice*,* October 4, 2003; and Government of Newfoundland and Labrador, Freedom of Information Review Committee, *Striking the Balance: The Right to Know and the Right to Privacy, Vol. 1: Report,* Submitted to the Minister of Justice and Attorney General, July 2001.

[14] See Office of the Scottish Information Commissioner, "Publication Schemes"(Available at: http://www.itspublicknowledge.info/pscheme.htm); and Campaign for Freedom of Information, *Central Government Publication Schemes: Good Practice*, February 2004 (www.cfoi.org.uk/pdf/ps_report.pdf).

[15] United States Department of Justice, "What You Will Find in the FOIA Reading Rooms." Available at: http://www.usdoj.gov/04foia/04_2_1.html

[16] Vancouver Registry CA028608 (B.C. Court of Appeal). Available at http://www.courts.gov.bc.ca/jdb-txt/ca/02/06/2002bcca0665.htm

[17] Ontario has also developed guidelines for voluntary disclosure. See Ontario Information and Privacy Commissioner, "Practices No. 22 – Routine Disclosure/Active Dissemination (RD/AD) of Government Information," Revised September 1998 (Available at: (http://www.ipc.on.ca/scripts/index_.asp?action=31&P_ID=11085&N_ID=1&PT_ID+11031&U_ID=0) As well, routine access has been proposed for Québec and the federal government. See Québec Commission d'àcces à l'information, Five-Year Report Summary, *Reforming Access to Information: Choosing Transparency*, 2002 (www.cai.gouv.qc.ca/06_documentation/01_pdf/resume_en.pdf); and Gladys L. Symons, *Constructing a Culture of Access in the Federal Public Service*, Report 10 – Access to Information Review Task Force, February 2002. (Available at: http://www.atirtf-geai.gc.ca/paper-culture1-e.html).

[18] For example, the Ministry of Sustainable Resource Management has a policy for the distribution and pricing of ministry-owned/managed natural resource information data products and services.

[19] The Canadian Standards Association's international model code is available at: http://www.csa.ca/standards/privacy/code/Default.asp?articleID=5286&language=English

[20] See Ministry of Attorney General, Administrative Justice Office, *Model Statutory Powers Provisions for Administrative Tribunals*, August 2003. Available at: http://www.gov.bc.ca/aip/down/ajo_aug25_03.pdf

[21] See *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)* April 16, 2004. Vancouver Registry CA030285 (B.C. Court of Appeal). Available at: http://www.courts.gov.bc.ca/jdb-txt/ca/04/02/2004bcca0210.htm

APPENDIX A: SCHEDULE OF MEETINGS

May 17, 2004	Victoria	Deliberations
May 11, 2004	Victoria	Deliberations
May 05, 2004	Victoria	Deliberations
April 28, 2004	Victoria	Deliberations
April 21, 2004	Victoria	Deliberations
April 14, 2004	Victoria	Deliberations *(Subcommittee)*
March 31, 2004	Victoria	Briefing
March 24, 2004	Victoria	Preparation of Draft Report
March 11, 2004	Victoria	Preparation of Draft Report
February 09, 2004	Victoria	Briefings
January 28, 2004	Victoria	Briefings
January 21, 2004	Vancouver	Public Hearing
January 20, 2004	Victoria	Public Hearing
January 19, 2004	Victoria	Briefings
November 26, 2003	Victoria	Planning
November 25, 2003	Victoria	Planning *(Subcommittee)*
November 05, 2003	Victoria	Briefing
July 21, 2003	Victoria	Briefing

APPENDIX B: WITNESS LIST

BC Civil Liberties Association Murray Mollard	19-Jan-04 (Victoria)
BC Freedom of Information and Privacy Association Michael Doherty Darrell Evans	19-Jan-04 (Victoria)
BC Unity Party Sal Vetro	21-Jan-04 (Vancouver)
British Columbia Association of Municipal Chiefs of Police Volker Helmuth	21-Jan-04 (Vancouver)
British Columbia College of Chiropractors Douglas Alderson	FOIPPA-Sub-20
British Columbia Labour Relations Board David Garner	FOIPPA-Sub-49
British Columbia Library Association Brian Campbell Barbara Jo May	21-Jan-04 (Vancouver)
British Columbia Public School Employers' Association H.J. Finlayson	FOIPPA-Sub-35
British Columbia School Trustees Association Gordon Comeau	FOIPPA-Sub-32
British Columbia Securities Commission Douglas Hyndman	FOIPPA-Sub-45
British Columbia Trappers Association Robert Frederick	FOIPPA-Sub-22
Dr. Colin Bennett	28-Jan-04 (Victoria)
Susan Boffy	FOIPPA-Sub-3
Jan Bush	FOIPPA-Sub-8
Cambie Boulevard Heritage Society Maurizio Grande	21-Jan-04 (Vancouver)
City of Chilliwack Rob Carnegie	21-Jan-04 (Vancouver)
Corporation of Delta John DuMont	FOIPPA-Sub-39
Kimberly Daum	FOIPPA-Sub-33
Nicole Denis	FOIPPA-Sub-6
Ms. Derksen	21-Jan-04 (Vancouver)
Stephen Dolan	FOIPPA-Sub-12
Patrick Dubois	FOIPPA-Sub-13

Edgeworth Construction Ltd. George Ferguson	FOIPPA-Sub-23
Employment Standards Tribunal David Garner	FOIPPA-Sub-47
Clare Fanning	FOIPPA-Sub-25
Lorrie Fast	FOIPPA-Sub-44
Dr. David Flaherty	28-Jan-04 (Victoria)
Lorraine Fralin	21-Jan-04 (Vancouver)
Friends of Cypress Provincial Park Society Katharine Steig	FOIPPA-Sub-30
Granby Wilderness Society Nadine Dechiron	FOIPPA-Sub-28
Greater Vancouver Regional District C. Mark Leffler	FOIPPA-Sub-43
Angus Gunn	FOIPPA-Sub-31
Eleanor Hadley	21-Jan-04 (Vancouver)
Gloria Hansen	21-Jan-04 (Vancouver)
Carol Hanson	FOIPPA-Sub-16
Ted Hayes	28-Jan-04 (Victoria)
Health Employers Association of British Columbia R.M. Louise Simard	FOIPPA-Sub-36
Philip Hoen	20-Jan-04 (Victoria)
John Hunter	21-Jan-04 (Vancouver)
Tamara Hunter	28-Jan-04 (Victoria)
Injured Workers of British Columbia Darwin Sorenson	21-Jan-04 (Vancouver)
Robert Johnson	FOIPPA-Sub-11
Reinier Kanis	FOIPPA-Sub-19
Els King	FOIPPA-Sub-9
Hans Larsen	FOIPPA-Sub-26
Law Society of British Columbia Jeffrey Hoskins	FOIPPA-Sub-29
R.C. Lawson	FOIPPA-Sub-15
Henry and Irene Layzell	20-Jan-04 (Victoria)
Local Government Management Association of British Columbia Tom MacDonald	FOIPPA-Sub-24
Gordon MacDougall	FOIPPA-Sub-10

Rita Mandel	FOIPPA-Sub-50
Elizabeth Mansour	FOIPPA-Sub-40
Ministry of Management Services	
Cairine MacDonald	31-Mar-04 (Victoria)
Chris Norman	9-Feb-04 (Victoria)
Sharon Plater	5-Nov-04 (Victoria)
Liz Gilliland	
Mary Murphy	FOIPPA-Sub-27
Office of the Information and Privacy Commissioner	
Mary Carlson	9-Feb-04 (Victoria)
David Loukidelis	21-Jul-03 (Victoria)
Bess Paleos	FOIPPA-Sub-21
Party of Citizens	FOIPPA-Sub-2
Zandu Goldbar	
Patient Empowerment Society	21-Jan-04 (Vancouver)
Roderick Louis	
Beatrix Patrick	FOIPPA-Sub-42
Fred Peet	FOIPPA-Sub-38
Sandy Plumptree	FOIPPA-Sub-18
Post-Secondary Employers' Association	FOIPPA-Sub-37
Guy Dalcourt	
Raincoast Conservation Society	FOIPPA-Sub-41
Stephanie James	
Gil Reynolds	FOIPPA-Sub-14
Les Sheldon	FOIPPA-Sub-4
Sierra Legal Defence Fund	21-Jan-04 (Vancouver)
Devon Page	
Bert Slater	FOIPPA-Sub-7
Edward Swetleshnoff	21-Jan-04 (Vancouver)
Jeremy Tatum	FOIPPA-Sub-5
Norman Trerise	21-Jan-04 (Vancouver)
Stanley Tromp	21-Jan-04 (Vancouver)
Michael James Tyson	FOIPPA-Sub-17
United Association of Injured and Disabled Workers	21-Jan-04 (Vancouver)
Ralph Dotzler	
University Presidents' Council of British Columbia	FOIPPA-Sub-46
Blair Littler	
Vancouver Island Health Authority	FOIPPA-Sub-1
Marybeth Corbeil	

Margaret Vanderberg	FOIPPA-Sub-34
West Coast Environmental Law Association Andrew Gage	FOIPPA-Sub-48
Peter Westwood	21-Jan-04 (Vancouver)
Tim Wittenberg	21-Jan-04 (Vancouver)