FOI Law Reform –Where are We Now?

By Stanley Tromp, for B.C. Information Summit, Vancouver, Sept. 27, 2018

Good morning, and happy Right to Know Week. My topic today is freedom of information law reform. Where are we today in BC and Ottawa? And where are we going?

The 1992 BC FOI law is one I most often use for journalism. On my website I have posted 100 of my FOI news stories. That is something, but, sadly it is only the tip of the iceberg of what I could have done. I know specifically of *hundreds* of FOI news stories in the public interest that are untold and untellable because of our dysfunctional laws – and that amounts to a world of lost opportunities.

This province's law has fallen far behind the rest of the FOI world. The urgent need for reform is detailed in my report on the BC law titled *The Vanishing Record*, and my book on the federal law called *Fallen Behind.*

Our hopes were boosted in the last B.C. election, when the NDP, in a questionnaire to B.C. FIPA on April 27, 2017, pledged to solve the four worst problems. It is vital to note that in the text, the NDP did not promise to *study* or *modify* the problems – they promised to *end* them, period.

It seemed as if Premier John Horgan wished to break the old patterns. Yet the hour is late and the clock is ticking, for it usually happens that incoming politicians' enthusiasm for FOI sags within one year, dampened by officials who will always oppose it.

The BC bureaucrats' briefing notes that April to the incoming minister state on FOI: "Further review and consultation is required." The authors must be well aware that public bodies already have had 20 years of chance to consult through four legislative reviews. Moreover, there was no deadline set. The federal scene under Justin Trudeau and Bill C-58 is even worse on FOI.

But first some general background.

I have spoken to all four BC legislative reviews of the law, and not one of my 67 repeated recommendations for reform have been passed.

The first was chaired by Rick Kapser in the Glen Clark era, in 1998. I recall speaking there in Richmond with Darrell Evans of FIPA. Here is their report. That was 20 years ago, and some of their advice is still unheeded. These committees can recommend but not prescribe. I only wish their power was equivalent to their good will – but it's not so.

I was surprised and grateful to be invited to meet with the new Minister for FOI and her deputy a year ago - with FIPA and Civil Liberties - which would never have happened under the last regime, but dismayed that she wanted to discover the whole subject anew, starting from scratch.

I was told last year that "the NDP are not politically opposed to FOI law reform; it's just that they are too busy now with other issues." I don't know if that is correct; it may be. But even if it was true, how much *longer* can they keep using that excuse? They have been in power for over a year – and that excuse has expired.

The Ministry also said it wanted to improve the FOI process, and did a quiet secondary review of this area. At first glance, I was grateful for this. But then . . . it made me a little unsettled. Because I wondered if their position was that "instead of structural law reform, all we really need is better enforcement of the *existing* law." That is, better process as a decoy, a kind of bait and switch.

Yet can someone please tell me: If a hundred pages of facts are blanked out under section 13, then what does it matter if they are sent to you in one week *or* one year, or if they cost $1,000 *or* are free of charge, or they're in Excel *or* PDF format – because they are still the same blank pages. And the fastest process in the world will not unblank those pages.

Of the four problems - first, consider Section 13 of the *Act*. This allows officials to seal records of policy advice. The trouble is that public bodies are applying the section far too widely, to include all "facts and analysis" that were used to create that advice. This is what I call the Bureaucratic Interest Override, which stands in opposition to the public interest override, sec. 25.

You can see a sample of sec. 13 overuse in your delegate package. Please note the stark contrast between two briefing notes that I obtained by FOI from the Ministry of Advanced Education. In the 2004 case, it was *all* released, every word of it – and did doing that ever caused any real world "*harm* to the deliberative process"? In 2012, the record was mostly withheld under sec. 13. It's crucial to realize that such redactions go on every day.

The trouble all stems from the famous Dr. Doe ruling of 2004, which was designed for one malpractice case (of whether a patient had been hypnotized or not) – and was then grossly overextended to cover policy creation across government. The former NDP attorney general Colin Gablemann who passed the law in 1992, said that was clearly *not* the intent of the legislature, and he pleaded for Section 13 revisions.

For instance, when I applied for records on the human health impacts of Liquified Natural Gas (LNG), a Ministry used sec. 13 to blank out 100 pages of facts and analysis. I wrote an op-ed in the *Vancouver Province* to complain about that. And that same afternoon, the Ministry reversed itself and released those records to me.

In another case, the Commissioner ordered the Provincial Health Services Authority to grant me access to its internal audits. The PHSA then appealed in court and overturned the ruling, using Sec. 13 and Dr. Doe. (Meanwhile, all the other health authorities give out such audits freely; and

why do the Premier and Health Minister not speak out on this case and publicly urge the PHSA to release their audits?) So, with such rulings, the FOI topic is shifted from the legal arena to the legislative arena - that is, law reform. Some might even see that shift as a blessing in disguise.

But the problem is everywhere now. In Ottawa, the policy advice exemption in their *ATI Act* was invoked 10,000 times per year. Why does it matter? Well, because it is now like an omnivorous black hole that will soon swallow up more and more, until the *Act* is rendered almost meaningless. For, when you think about, they could - and do - call almost anything a "fact" or "analysis" - even when it's not related to policy advice, *per se.*

Sec. 13 is discretionary. But as lawyer Rob Botterall said, it's as though discretionary exemptions have in effect been converted into mandatory ones - as though the word *"may"* withhold is being misread by them as *"must"* withhold. They shouldn't but they do.

On Sec. 13, facts and analysis, make no mistake – by now, officials have grown so dependent to the power and comfort it provides that to pry it out of their hands will be the toughest nut to crack, even for the Premier. They *know* that this was not the intent of the legislature, but they don't care. To them – "the courts have spoken, and that is the end of it." But for us, it's just the beginning of the struggle.

There is no doubt that over the years *thousands* of pages of facts and analysis in the public interest has been hidden from public view, by sec. 13 misuse. We need to amend the section to make clear that facts are to be released, and to add a harms test, such as the British have in their FOI law sec. 36.

Second, the Act needs to be extended to the subsidiary companies of universities and Crown corporations. These perform public functions and spend billions of dollars of your money, and yet are excluded from FOI laws. (Providence Health and the First Nations Health Authority need coverage also.)

In the last decade a new city has been quietly built up on UBC grounds by its company UBC Properties Trust – in secret, with no political accountability. In 2009 the Commissioner's office ordered UBC to disclose its companies' records to me – because UBC controlled them – but then UBC appealed in court and overturned it, as Justice Peter Leask said one must not "pierce the corporate veil."

What about reform? In the bureaucrats' memos in Victoria, they write that because the various subsidiaries have different corporate structures and ownership levels, this makes it very complex to design one standard for FOI coverage. But what if every country used that as an excuse to not act? If they did, then none of their subsidiaries would be covered, which they all are.

The ministry says that we need to consult them more – give them a chance. A chance? Well, they've had two decades already. What other sector gets 20 years of chance to consult on an

issue - that's more than 7,000 days - causing law reform to be blocked in the meantime? Nobody else gets that privilege.

In a press release of 2007, Victoria promised to extend FOI coverage to the companies owned by the Vancouver School Board – but this was never done. Why not? No answer. Then the minister for FOI, Margaret McDiarmid said in 2011 – "It seems seem reasonable to me that they would be covered. So we're certainly looking at it, but we need to a consultation because we have to watch for unintended consequences."

What happened there? The minister thought it's reasonable – which it is – and looked ready to act. *But* then the bureaucrats jumped in to say "No, stop, we need to study it more." That was seven years ago, and they're still using the exact same script today – and perhaps forever.

Concerning "risks"- well, there is a risk of stepping outdoors and being hit by lightning too. Because the law is not an exact science, there will always be unknowns. But is that, alone, a reason to never act? If so, what laws would ever be passed? There were also "risks" too when Premier Mike Harcourt's government passed the FOI law in 1992 – and they could have used that as an excuse to not introduce it, but they didn't. They acted.

In fact, in regards to spinoff company coverage, it later occurred to me that you could turn their logic around and ask – "Well then, what about the risks and consequences of *non-coverage*?" Such as with the fast ferries subsidiary company of the 1990s, with its half-billion dollar loss to taxpayers. Who wants that again?

And UBC Properties manages student residences. What if, say, this company had commissioned an engineer's report that found seismic risks, fire hazards and natural gas leaks in those residences? That report would stay locked in their vaults forever. Keeping the public in the dark as they do is a *"risk"* also – but on balance, it's a 100 times worse risk than any imaginary piffling commercial harm to these companies (which most likely wouldn't happen anyways, because of their monopoly position, and FOI law sec. 17 and 21 protections).

UBC residents have complained about that company's secrecy since it was founded in 1988. That's 30 years ago, before most students were born – so this old problem is inherited and passed on through the generations, like some ancestral curse. But UBC and others will fight to the death to keep their companies exempt from FOI - and via the backrooms, not in public.

Third, we need a legal duty to document decisions, so that never again can officials stop recording minutes of their meetings after being annoyed by my FOI requests for them - as did the 2010 Olympic Games Secretariat. Former Information Commissioner John Grace said that the oral government trend is "driven by ignorance" of the FOI law's broad exemptions. But the cure for that ignorance is enlightenment.

Fourth, is one problem that should be easily fixed within an hour - without law reform. That is eliminating the nasty and mischievous B.C. Liberal-era open-request website, whose main real purpose is to intimidate FOI applicants from filing requests. The NDP pledged to scrap it but did not. Why? It is the worst FOI relic of the Liberal era – and the NDP are debasing themselves by continuing it.

Some wonder of me - "Why do you have to be such a corporate veil piercer, and a deliberative process harmer?" And also – "Why do you focus only the worst examples? It's not always that bad." Because I believe that the FOI system overall is no better than the worst cases of it that we tolerate. And if we tolerate them, their influence will spread.

When we are told these topics are "too *complex*" - that word triggered a memory. Where have I heard that before? It was when I was at Langara College journalism school in 1993 - a year before FOI was extended to colleges. I heard the school had commissioned an engineer's report (at public expense) on the seismic earthquake readiness of the classrooms.

You see, I had this vague idea that students had a right and need to know if the building could collapse on our heads during a quake. So I asked the building manager to see this report. He looked down at me with icy scorn, and replied, "This report is too complex for *you* to understand, and I don't have time to explain it to you." Access refused. I never forgot that. And that event instilled in me a strong opposition to government secrecy, and launched me on my FOI crusade.

So what is next? I can imagine a day 20 years in the future, in 2038, when I sit on one of these panels again, with a long white beard, facing the same problems. I might discover some old papers in a dusty storage box, that is, the NDP pledge of 2017 - and say, "This paper shows election promises, unfulfilled. But that was 20 years go. Why were they never done?"

Then by reply, the reform obstructionists repeat their old script. In a bland, soothing, paternalistic, and ever-so-*reasonable*-sounding way, they may reply - "Well, you know, those are very interesting questions you've raised. But these are very *complex* issues, that require more *consultations*, because of the *risk* of unintended consequences." And so it goes - as the generations come and go.

This event may sound a little chilling or unlikely. But does anyone here believe – based on all that's happened, or not happened, so far – that this scenario is impossible, that it cannot happen?

I used to think so. Premiers Gordon Campbell in 2001, and Christy Clark in 2011, promised to create "the most open government in Canada" - and then did the opposite, as their offices used mass email deletions, and post it notes, and launched court challenges to the Commissioner's orders. And the direction for the whole public service comes from the top.

Please understand: Words are nothing – there is only action. On law reform, the proof is in the pudding – and here there is no pudding. This passive aggressive state is what the supremo bureaucrat Sir Humphrey Appelby, in BBC TV's Yes Minister, called "creative inertia."

With respect, we know the game and they are not fooling anyone. And they *know* that we are right. But that's not relevant. Because as Sir Humphrey said - as he blocked a policy he didn't like - "We know it's the right thing to do. It just *mustn't happen*."

He also said the minister must be steered away from an undesired political action by launching more studies: "It is the Law of Inverse Relevance – the less you intend to do about something, the more you keep talking about it." Hence we are frozen in a circuitous time warp, reinventing the wheel over and over again.

Yet what is amusing up on screen is often less so in real life. FOI reformers face a granite wall of obstructionism, one that never yields an inch. The fact that Canadians are by nature polite, passive and trusting will ever be cynically exploited.

So where do we stand today? To the BC public I say - that all depends on you. Do you care, or not care? This story is not about me, it's about *you*. It's your choice if you want to live in the light of information, or in the darkness of ignorance.

If you want access to the millions of records, produced with your tax dollars, and supposedly for your benefit, then speak out. If you do not, the government will interpret your silence – rightly or wrongly - as consent or indifference. They may say: "Well, we don't see any mass public rallies on the legislature lawn over FOI section 13. So what is the problem?" Instead, defeat the power of silence. (By the way, why are the Green and Liberal parties silent on this?)

Overall, on the FOI topic, there is a quite simple inverse ratio of truth to power. That is, FOI advocates have all the truth but no power, while the obstructionists have all the power but no truth. This requires a reversal.

"Too complex," they claim. For that reason that I've written about 30 editorials for the *Sun*, and *Province* and other media, trying to explain rather obscure FOI issues to the general public, in plain English – and why it matters to you. In the end, we all get the government we deserve – and whatever we allow them to do is a reflection on us.

Was Charles de Gaulle right when he said, "Since a politician never believes what he says, he is always astonished when other people do" ? Or is that too cynical? To Premier Horgan I say: If I am wrong on all this – and I really hope I am - then *prove* me wrong.

In sum, the NDP needs to fulfil its election promises, as well as implement the best recommendations of the 2016 report of the FOI legislative review. One legislative columnist called B.C.'s record on FOI "the shame of the province." The same words apply to the *ATI Act* in Ottawa, which is the shame of the nation. Let us now change it into a cause for pride.

Future generations may look back at this time and wonder how anyone could seriously argue that: No, Canada's FOI laws should *not* be raised up to accepted world standards. This is not a matter of leaping into the future – it is merely stepping into the present, to catch up with the rest of the world; is there anything less radical than that?

Yet I still retain a fond hope - That one day I can attend a global FOI conference, and people are comparing their national laws. They ask someone "where are you from?" She says "I'm from Finland." Another says "I'm from Romania." Then they ask me, "And what country are you from?" Today, the reply is one of hesitation, for Canada ranks 48th out of 112 nations on the Centre for Law and Democracy's FOI law rating.

But my hope is someday – only after our needed law reforms – that I might be not embarrassed anymore, but proud, to say . . . . "I am from Canada."

That's all for now. Thank you.
