Turning Back the Clock – Freedom of Information Rights in British Columbia, 2022

A report on needed improvements to

British Columbia's *Freedom of Information*

and Protection of Privacy Act

With 135 recommendations for reform

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

Legislative Committee to review the *FOIPP Act*

2022

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Executive Summary

The passage in 2021 of Bill 22 (the *Freedom of Information and Protection of Privacy Amendment Act)* was the most bold and reckless assault on the public's right to know and its privacy rights ever seen in British Columbia, a betrayal of the fine legacy of NDP Premier Mike Harcourt, who passed the B.C. *FOIPP Act* in 1992. Most of its provisions should be repealed immediately, notably one that permits officials to charge a fee for FOI applications.

There are three other urgently needed reforms (amongst many others) for B.C.'s *FOIPP Act.* The first concerns the misuse of *FOIPP Act* Section 13, policy advice and recommendations, which is being overapplied in ways never approved by the B.C. legislature when it passed the law.

The *Act* needs to be amended to clarify and emphasize that Section 13 cannot be applied for facts and analysis, only for genuine advice. The section also requires a harms test, wherein a policy advice record can be withheld only if disclosing it could cause "serious" or "significant" harm to the deliberative process.

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

The *Act* needs amendment to state that the its coverage must (not may) extend to any institution that is controlled by a public body; or performs a statutory function, and/or is vested with public powers; or has a majority of its board members appointed by it; or is 50 percent or more publicly funded; or is 50 percent or more publicly owned. The InBC Investment Corp. is a prime example. Include public foundations and all crown corporations and all their subsidiaries.

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

The case of the triple deletion of emails related to the missing women on the Highway of Tears was expertly analyzed in the report *Access Denied* in 2015 by the B.C. Information and Privacy Commissioner Elizabeth Denham. Then former Commissioner David Loukidelis thoroughly reviewed the matter in a new report, with exemplary recommendations for future record best practices - all of which should be implemented. The B.C. *FOIPP Act* should be amended to mandate that officials must (not may) document key actions and decisions based on the definition of "government information" found in the *Information Management Act*.

In sum, British Columbia in many ways has fallen behind the rest of the world in FOI law and practice. Yet if it wished to, this province could be the world leader on these subjects. This Committee is well placed at this historic time to effect real change.

15 key recommendations for reforms to the British Columbia *Freedom of Information and Protection of Privacy Act*

See more detail on these items in Stanley Tromp's list of 135 recommendations to the B.C. Legislative Special Committee Review of the *FOIPP Act*, 2022

[1]

Repeal the most negative clauses passed in *Bill 22*, the *Freedom of Information and Protection of Privacy Amendment Act (2021).* These are: Sec. 3(3), excluding metadata; Sec. 33.1, allowing a public body to disclose personal information outside of Canada; Sec. 27, allowing government to disregard an FOI request if "it is excessively broad" or is "repetitious or systematic"; and Sec. 75 (1), permitting officials to charge a fee for FOI applications. Re-state that the premier's office is covered under the *Act*, to remove any doubts raised by *Bill 22*.

[2]

Add a harms test to B.C. *FOIPP Act* Sec. 12 (cabinet records) replicating the terms found in Scotland's FOI law, whereby information may be exempted if its disclosure -

> (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of Ministers
>
> (b) would, or would be likely to, inhibit substantially (i) the free and frank provision of advice; or (ii) the free and frank exchange of views for the purposes of deliberation

[3]

Amend the B.C. *FOIPP Act* Sec. 13 (policy advice) so that a public body may withhold records only where to release them would be likely to: (a) cause serious prejudice to the effective formulation or development of government policy; (b) seriously frustrate the success of a policy, by premature disclosure of that policy; (c) significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views. This section does not apply to facts, analyses of facts, or technical data. Add a definition of "advice" to Sec. 13.

[4]

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

If the record concerns a policy advice matter that has been completed but not made public, the B.C. government may only withhold the record for two years. If the record concerns a policy advice matter that has neither been completed nor made public, it may only withhold the record for five years.

[5]

Narrow the scope of Sec. 14 (legal advice). It should be limited to a litigation privilege – not for policy advice or other issues. Add a harms test to state it can only be applied to withhold records prepared or obtained by the agency's legal advisors if their release could reveal or impair procedural strategies in judicial or administrative processes, or criminal cases, or any type of information protected by professional confidentiality that a lawyer must keep to serve his/her client, or must be withheld to ensure a fair trial.

[6]

Amend the B.C. *FOIPP Act* Sec. 14 to state that the exemption cannot be applied to records under legal privilege 30 years after they were created, per the model of the UK FOI law – or better yet follow the American *FOIA* that sets a 25 year limit for such records.

[7]

The B.C. *FOIPP Act* reads: "21 (1) The head of a public body must refuse to disclose to an applicant information [….] (b) "that is supplied, implicitly or explicitly, in confidence." Add the clause: "Information negotiated in confidence is not exempt from disclosure." (In order Order 01-20, the OIPC ruled that the UBC-Coca Cola contract should be released, despite Sec. 21, because it contained information not *supplied* in confidence, but only *negotiated* in confidence between UBC and the company: "The parties, in effect, jointly created the records.")

[8]

On government subsidiaries - amend the B.C. *FOIPP Act* to state that all such entities must be automatically covered by the *Act*: Any institution that is controlled by a public body; or performs a statutory function, and/or is vested with public powers; or has a majority of its board members appointed by it; or is 50 percent or more publicly funded; or is 50 percent or more publicly owned. This includes the $500 million InBC Investment Corp., public foundations and all crown corporations' subsidiaries.

[9]

Amend the Act so that government and public agencies must post all P3 partnership and large supply and service contracts on their websites within one week of their finalization - except for small portions where genuine commercial confidentiality or other legitimate interests may be protected, and only per B.C. *FOIPP Act* exemptions, which may be appealed to the OIPC. At the

very least, they should be released routinely (when appropriately redacted) upon request, with no FOI application required.

[10]

The Government should adopt legislation *mandating* that public servants fully document governmental functions, policies, procedures, decisions, recommendations, essential transactions, advice, and deliberations. Make it an offence to fail to do so or to destroy documentation recording decisions, or the advice and deliberations leading up to decisions. Include records of any matter contracted out by a public office to an independent contractor. (This law would replace the failed B.C. *Information Management Act* of 2019, with its discretionary rules.)

[11]

Include a provision in the B.C. *FOIPP Act* that all emails and communications sent from the personal email addresses and from the work email addresses of employees, directors, officers, and contractors, and which relate directly or indirectly to workplace matters, are subject to the access law. Ban public officials using private email accounts, personal cell phones and tablets for carrying out government business. The B.C. *FOIPP Act* should be amended to include electronically stored information (e.g. voice-mail, E-mail, computer conferencing etc.) explicitly in the definition of recorded information.

[12]

For the B.C. *FOIPP Act*, set a 20 day initial response limit for records – the standard in the FOI laws of Quebec, New Zealand, the United Kingdom and the United States. Also replicate the 10 day FOI extension limit in Quebec's statute.

[13]

The B.C. *FOIPP Act* should be amended to prohibit the use of any discretionary exemption if the department is in a deemed refusal situation due to delays. In this situation, it would be required to gain the approval of the Commissioner before withholding information under mandatory exemptions. At the least, follow the federal Information Commissioner 2002 advice that an FOI law be amended to preclude reliance upon the policy advice and legal privilege exemptions (i.e., the B.C. *FOIPP Act*'s Sec. 13 and 14) in late responses.

[14]

To curtail delays, in 2006 the B.C. information and privacy commissioner created a fine new "expedited inquiry" and "consent order" process, which works effectively today, and some equivalent of this should be prescribed in the B.C. *FOIPP Act*.

[15]

The Federal Court stated that Ottawa can no longer charge fees for the search and processing of electronic government documents covered under the *ATI Act*, per the 2015 ruling of Justice Sean Harrington. This principle should be set in law in the B.C. *FOIPP Act*. For paper records, extend the free time "spent locating and retrieving a record" in B.C. *FOIPP Act* Sec. 75(1)(b)(i) from the current 3 hours up to 5 hours (which is the standard in the federal *ATI Act*).

THE RIGHT TO KNOW

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

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

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

- *Jeremy Bentham, British philosopher, 1768*

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

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

I defy anyone to come up with a law that will force good access to information on a public body that doesn't want to do it.

- *Frank Work, Alberta Information and Privacy Commissioner, 2010 speech*

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

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

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

Politicians become ministers, and they become easily seduced by the attractions of secrecy.

> - *Murray Rankin, QC, Keynote address, B.C. Information Summit, Sept. 29, 2006*

Introduction

I am pleased and honoured to be here today to speak, in these challenging times. Freedom of information and protection of privacy law is one of the most important and interesting subjects you will ever consider, as it concerns the health of our democracy and the citizen's relationship to the state. Let me just note that I am speaking personally and not behalf of any organization.

I recall addressing the original version of this Committee reviewing the *FOIPP Act* chaired by MLA Rick Kasper in 1998, then one by MLA Blair Lekstrom in 2004, then MLA Ron Cantelon in 2010, then MLA Don McRae in 2015, and now we are at the fifth such review today.

I began preparing this presentation in early 2021, to plead that the three most urgently required reforms for B.C.'s *FOIPP Act* are: the gross overuse of the policy advice exemption (for facts and analysis), FOI-excluded quasi-governmental entities, and oral government – each one a black hole that could swallow up the FOI system.

But I was then thrown off track by the government's unexpected introduction last October 18 of its *Bill 22*, the B.C. *Freedom of Information and Protection of Privacy Amendment Act*. This reckless new assault on our access rights compelled me to change focus. Any such drastic changes to the *FOIPP Act* should have first been submitted to this Committee so it could hear testimony and forge recommendations; the obvious intent of passing *Bill 22* was to pre-emptively subvert this process.

Moreover, the timeline for the Committee's work has been mercilessly curtailed. Whereas previously Committees had about a year to study the issue, this one must report by this June 15, 2022, i.e., about five months of study. Because of the higher than usual level of public interest due to the *Bill 22* backlash, it may be as though the members have been told to manage about twice the work in half the time. If so, it seems like just one more way for the government to undermine the FOI law, beyond *Bill 22*.

Back on October 1, 1993, the hopeful day when the *FOIPP Act* came into effect, and after the standard two-year governmental FOI honeymoon period ended, I knew this would be a very long

road. In 2009 I proposed 67 recommendations for reform; I had to re-attach all 67 to my 2015 submission because none were implemented. Not one. Will the same outcome occur again upon the sixth FOI review in 2028, and beyond? This year my new list of 135 recommendations - pared down from my first draft of 200 items - is attached as an attachment to this report, and posted at my new B.C. FOI website https://canadafoi.ca/british-columbia-foi/

The discussion continues everlastingly and circuitously. The B.C. government is required by law to appoint a legislative committee to review our *FOIPP Act* every six years. Those reviews tend to bear no fruit because Victoria is not bound to implement the advice given. While I believe you mean very well, the best recommendations of the last four legislative FOI review committees were disregarded by the premiers and cabinets, and never implemented – and without their support, no progress can occur.[1] I only wish your power was equivalent to your good will.

Freedom of information in legal study and journalistic practice has been my life's main work for the past quarter century, and perhaps it will be for years to come. From the beginning, beyond my FOI news stories, I have attempted to act as a translator or bridge on access to information issues between the public and the senior bureaucracy. The perspectives of these two parties has been hitherto mainly insular, as of those residing in gated communities.

Firstly, I have explained some esoteric points of FOI law in plain English to the public, with speeches and 30 editorials since 2004 (posted at https://canadafoi.ca/authors-foi-stories-and-editorials/), many about the triple affliction of oral government, Section 13 policy advice, and FOI-exempt subsidiaries. This approach derives from my news reporting background, where I have no choice but to clarify topics for the general readers, a discipline I have never regretted.

At times, bureaucrats and crown lawyers have suggested that FOI law reform is "too complex" for the general public to understand, and so it had best not even try. Such paternalistic and self-serving nonsense, of course, runs counter to the professed purpose of an FOI law – to enlighten the citizenry.

Secondly, conversely, I try to convey to politicians and senior bureaucrats what FOI means to the average citizen. This is necessary because the former parties routinely and cynically try to belittle the law's value, and its users as being mostly frivolous or mischievous. That is why I created and posted a file of 30 important news stories based upon FOI requests made by citizens (in Appendix 1).

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[1] This was lamented by NDP then-MP Murray Rankin, in words even more apt today: "Most important of all, it has so far failed to implement the very thoughtful recommendations of the [2004] special all party committee of the Legislature chaired by Mr. Blair Lekstrom. It has been over two years since the committee issued its unanimous recommendations. The silence from the government so far is deafening." He added: "If [FOI] is as important as human rights, which the Court also found to be a quasi-constitutional right, how can we allow it to be treated that way?" - Keynote address, B.C. FIPA Information Summit, Sept. 29, 2006

In the end, each side might still not agree with the others' point-of-view, but might hopefully at least understand it somewhat better, which is always a basis for some hope. This plea for cooperation has assumed a new urgency after October 18, 2020, when John Horgan's B.C. NDP government introduced *Bill 22* so as to amend the B.C. *Freedom of Information and Protection of Privacy Act*. Such was announced in "BC Government News" in Orwellian doublespeak: "Amendments strengthen access to information, protect people's privacy."

In reality, this *Bill* was by far the boldest assault on the public's right to know and its privacy rights ever seen in this province, cynically trashing the fine legacy of NDP premier Mike Harcourt, who passed the *FOIPP Act* in 1992. As Vaughn Palmer wrote: "The New Democrats should. . . feed the entire bill into one of their shredders, and start again." The Horgan administration had created an arbitrary, needless and wholly self-inflicted political nightmare, one that lingers today.

Its most contentious feature was to newly permit government to charge people an application fee for filing FOI requests, which was later set in regulations at $10. There are many other pernicious items in *Bill 22*, as well detailed by B.C. information and privacy commissioner Michael McEvoy, who released a 7-page letter of concerns.

Obviously, Premier Horgan would never have dared to introduce such a Bill so scrofulous and rebarbative in his first term, when he clung to a minority by one seat. The Machiavellian calculation is likely that if unpopular acts are done in the first year of such a large majority term, the public is likely to forget these when the next election occurs in three years hence.

If so, this gamble might have been misjudged, and may later be regretted, for the public will be living with and reminded of the impacts of this cynical *Bill* continuously, even during the election period. In fact, I believe its passage was a hollow Pyrrhic victory, with its resulting loss of public faith far outweighing any political gain.

Many citizens, some self-described as former NDP supporters, wrote to the Premier to protest these moves. (Their comments are collected in Appendix 6). For example:

> We understand it is a pain for the ruling party to have to explain their actions from the past, but this is what democracy is all about. . . . This will not be forgotten in a couple of weeks, which seems to be what government hopes for. This change to FOI will haunt you in the next election. When the NDP are back in opposition, which will happen eventually, you will be kicking yourself.

Such comments were representative of public opinion: "Please withdraw this Bill and recognize the role of the all-party special committee and allow it to complete its work. . . . Secrecy does not work as a governing policy, so remember your values, Premier. Your legacy should be that you strengthened our democracy, not weakened it."

Why FOI matters

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

question. I believe claims on FOI need to be demonstrated rather than just asserted, and so as a kind of answer, I spent a year full-time in collecting items for a *B.C. FOI News Story Index*.

This Excel database contains my 100-word summaries of 2,000 B.C. news stories, every significant one I could find that was produced from records obtained through requests under the B.C. *FOIPP Act* since the law took effect on October 1, 1993, until the end of 2020. The topics of the 24 categories are diverse, including health, safety, government waste, public security, and environmental risks.

The search was extensive, through mainstream newspapers, radio and TV – as well as small rural newspapers, student, alternative and online media. (The *Index* was made possible by support from former FIPA treasurer Thomas Crean, and is posted at my website - https://canadafoi.ca/british-columbia-foi/ See Appendix 2 of this report for more details.)

Every British Columbian who browses this database for an hour will find it time well spent, I guarantee; and it was also designed to provide story ideas for journalism students. To dispel the idea that FOI is mainly utilized by the big city press, I searched all B.C. local newspapers from the *Agassiz-Harrison Observer* to the *Williams Lake Tribune* to find dozens of local stories from every part of this province. The articles share two common features: all reveal issues vital to the public interest - *i.e.,* not merely topics the public "might find interesting" - and all were made possible through B.C. *FOIPP Act* requests.

These texts of the *Index* require a second look, for when they appear in a daily newspaper they may be forgotten within days, but many should not be, because we could be living continuously with the unresolved problems that they have raised.[2]

Governments often deride the worth of FOI with, "Those malicious and time-wasting gadflies swamp us with hundreds of systematic requests – at the taxpayers' major expense - for every lunch and taxi expense chit, receipts for office carpet replacements, computer screenshots, etc. etc."

Such requests might indeed occur, but at the same time such critics always remain *silent* upon the many creditable revelations - of human abuse, wasteful spending, environmental damage, and other grievous public harms – which were only made possible through FOI.

The latter was surely the goal of Premier Mike Harcourt who passed the law, and whom told the Jack Webster journalism awards dinner in 1993, as I well recall, "We passed an FOI law so you folks could do more stories." (One wishes these words would be heeded by Premier Horgan, "who admits to having once contemplated a career in journalism."[3])

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

[3] *Politicians must work with social media in mind*, by Vaughn Palmer. *Vancouver Sun*, June 1, 2016.

On occasion we need to view the human face on abstract legal questions, as we can here. The range of FOI topics is vast, covering the whole spectrum of B.C. society, from the cabinet office to Vancouver's Downtown Eastside, from farms to coal mines, from nursing homes to logging roads. Most powerful are the sections on the troubling mistreatment of children, seniors and animals. The old adage of journalism's mission being "to afflict the comfortable and comfort the afflicted" has been well realized here, with news that can bring some degree of justice to the powerless, and voice to the voiceless.

Overall, these stories on issues as diverse as health, safety, financial waste, public security, and environmental risks share two common features: all reveal issues critical to the public interest - *i.e.,* not merely topics "the public might find interesting," as some officials cynically belittle it - and all were made possible only through FOI requests. They belie the most self-serving and pernicious myth of all: "What the people don't know won't hurt them."

In Appendix 3 of this report I post what I consider the 65 most essential examples of these 2,000 stories, several of which alone would have justified the passage of the access law.

For instance, in 1997, in the days when the FOI law still worked well, Stewart Bell of the *Vancouver Sun* reported that pimps, rapists and other convicts had been cleared to work with children by the B.C.'s government's $1 million criminal records screening panel. It had deemed 127 people with records for serious sexual offences and/or violent crimes to be "no risk." Some of these had criminal records for sexual assault, living off the avails of child prostitution, drug trafficking, and kidnapping. The story was based on data obtained by FOI from the Ministry of the Attorney General. The next day, NDP Attorney General Ujjal Dosanjh appointed former UBC law dean Lynn Smith to fully investigate the program.[4]

We need to imagine the real-life consequences if the information above had never been released and the shocking story not told. Yet with the erosion of our FOI law since then, some such data on criminal records screening, and countless other vital subjects, might easily be withheld today.

How so? First, by "oral government," whereby government officials do not create or preserve records of their decisions or policy development – conceivably on this criminal records issue - because they do not wish such records to be publicized through the FOI process. Here we may recall the NDP's broken pledge to pass an effective "duty to document" law, and deputy premier Ken Dobell statements of 2003 that "I don't put stuff on paper that I would have 15 years ago," and "I delete [my emails] all the time as fast as I can."

Second, via the *FOIPP Act* Section 13 (policy advice and recommendations), "facts and analysis" are now being withheld, after the flawed Dr. Doe ruling of 2003. The misuse of this exemption occurs despite the NDP's unfilled promise to close this loophole so that facts and analysis would be released again, such as on the topic above.

Third, if any data on criminal records screening were held in entities such as the First Nations Health Authority (spending $650 million annually) or Providence Health Care (managing St.

[4] *Rapists, pimps allowed to keep jobs working with children*. Stewart Bell. *Vancouver Sun*, Oct. 23, 1997

Paul's and St. Vincent's hospitals), the data would remain sealed because these entities are fully exempt from any FOI statute, despite being taxpayer-funded and managing vital public services - a gap which no other nation with an FOI law would accept.

Fourth, consider the potential outcomes of *Bill 22*. The government could now seal metadata on such criminal records screening per Section 3(3); or it could apply Section 27 to disregard FOI requests on this topic if it labels these "excessively broad" or "repetitious or systematic"; or it could charge FOI application fees, which many downsized newsrooms cannot afford.

In sum, the outcome of this situation could be a tragedy for the public interest.

This *Index* story catalogue is also a necessary corrective to the ruling party's zealous loyalists and the bureaucracy's dextrous obstructionists. These often try to trivialize and discredit the FOI law by fixating on what they call the "frivolous and vexatious" usage of it. Such requests might indeed occur, but at the same time such critics always remain *silent* upon the many creditable revelations - of human abuse, wasteful spending, environmental damage, and other grievous public harms – which were only made possible through FOI.

Here we can see politicians contradicted by policy experts, warnings not heeded, the hypocrisy of preaching one course in public and doing the opposite in private, draft reports watered down for their final public versions, and more (particularly for those adept at reading between the lines). In stark contrast to the bland, vague reassurances of government public relations, we encounter the sharp bite of reality as we read in graphic detail inspectors' reports from the trenches.

As well, sometimes to enhance the story, the media post the original records on their websites, and Chad Skelton of the *Vancouver Sun* laudably constructed searchable databases for the public on government salaries, and nursing home and daycare inspections – most useful for people preparing to place their children and elders in these institutions.

The most common theme that emerges from the stories is the hidden misuse of power. Its exposure by FOI is usually (but not always) followed by justice, restitution, and improvements. On governmental failings, it has been well said, "sunlight is the best disinfectant." Whenever officials claim they wish to withhold records because of fear the public might "misunderstand" them, it is more often the case they fear the public will understand them all too well.

The right to know as the right to live

FOI activists in India (some of whom have been killed for their work) have adapted the slogan "the Right to Know is the Right to Live." They invoked the term in the broad human rights sense, but it later occurred to me that it could be applied in a literal manner as well, particularly in the age of COVID 19 and heat domes. In response to FOI requests, the B.C. media have reported that:

• British Columbia Coroners Service statistics obtained through FOI note that at least 54 people have died on SkyTrain tracks and platforms since 1985, yet there is no plan to retrofit any Skytrain platforms with barriers to stop people from falling or jumping on tracks.

• A briefing note prepared for the B.C. Housing and Social Development Minister advised there would be “significant" fire safety concerns with five and six storey wood-frame buildings - yet the government still moved ahead with its plan to permit the construction of those buildings.

• Many of the trucks used to make B.C.'s highways safe are themselves unsafe. The violations committed by the private heavy commercial vehicles are the type of infractions targeted under a new safety program announced by the provincial government.

• B.C.'s Agriculture Ministry warned the poultry industry two years ago that if farmers didn't take biosecurity measures more seriously, B.C. could face a bird-flu outbreak within months of the 2010 Olympics.

• Documents show that scores of accidents at B.C. ski resorts go unpublicized and that visitors are far more likely to be injured while loading, unloading, or just falling off a lift. The B.C. Safety Authority recorded 106 "reportable incidents" at ski hills in 2008.

• Many B.C. doctors are not reporting on the children they immunize, and children could be at risk of an "outbreak of vaccine preventable diseases" if immunization rates drop too low due to health workers who disparage vaccinations to parents, an audit by the Ministry of Finance’s comptroller general said.

• An audit by the B.C. comptroller general highlighted many safety violations - including fire hazards, potential carbon monoxide poisoning and natural gas leaks, with “general neglect over a long period of time” - at Vancouver Community College. (But after these articles appeared, officials started withholding some such comptroller general audits, as “advice to cabinet” per *FOIPP Act* section 12.)

From such examples, one may realize that while debating esoteric points of the B.C. *FOIPP Act* that there is a fact that one can easily lose sight of but what would ideally remain the primary focus: how often freedom of information is not about documents in filing cabinets nor data in digital storage, but about real issues impacting everyday people. Yet now these records will be harder to obtain.

The cases above also belie the most pernicious myth of all: “What the people don’t know won’t hurt them.” The costing debate could then shift from “Can we afford to have an FOI law?” to “Can we afford *not* to?”

A new urgency for B.C. health transparency

Bill 22, which curtails British Columbians’ transparency rights, could not have been worse timed. Sprung without warning in October 2021 at about the same time as the super-contagious Omicron variant of COVID 19 arose, it was launched when the public desperately needed *more* information on health issues, not less.

There are many examples of public fears and ire needlessly raised by excessive COVID 19 secrecy:

• Gary Mason in the *Globe and Mail* noted that British Columbians have looked on with envy at the amount of pandemic-related data being shared with Canadians living elsewhere.

"The fact is, Dr. Henry and the government have been very paternalistic when it's come to sharing more specific COVID-related data with the public. . . . They've justified not giving it out, in some cases, on the grounds it might lead to some communities being stigmatized and exposed to abuse. But does that warrant keeping information out of the hands of the public that could help people make better decisions about where they travel and shop, for instance?"[5]

• In March 2021 Rob Shaw noted that it could take days, perhaps even more than a week, for the Provincial Health Officer's written public health order to be posted online, and for the nuances of what she's doing to be explained. "Through no fault of Dr. Bonnie Henry, getting clarity on public health orders is slow at best, and impossible at worst. There must be a better way."[6]

• If the NDP complains of the cost of increasing numbers of FOI requests (so to help justify *Bill 22*), Maclean Kay noted that this rise may be partially and needlessly self-inflicted:

"There's no way of knowing what percentage of FOI requests are made for [COVID-19] information other provinces routinely disclose proactively, but it's safe to say this has increased in the pandemic, as the province has consistently clamped down on basic data. In other words, a lot of FOI requests in BC wouldn't be made in other provinces, because that information is a quick Google search away."[7]

• Just how many British Columbians are actually in hospital with COVID-19 is a tightly-held secret, with few privy to the true number as health officials keep two sets of numbers: one public, the other internal.[8]

• Two internal reports from the B.C. Centre for Disease Control showed the government has been assembling far more information about the COVID-19 outbreak than it made public. The

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[5] *The public has the right to access all COVID-19 data*, by Gary Mason. *Globe and Mail*, May 12, 2021

[6] *Thou shalt not get clarity on 'thou shalt nots.*' By Rob Shaw. *The Orca,* March 13, 2021

[7] *Foiled at Last? The NDP's reasons to limit or charge for Freedom of Information requests don't seem to hold water*. By Maclean Kay, *The Orca.* Oct. 21, 2021

[8] *Secrecy over B.C.'s true number of hospitalized COVID-19 patients*, by Penny Daflos, *CTV News*, Sept. 22, 2021

leaked reports are four times longer than the weekly reports published by the centre, as reported in *The Vancouver Sun* (and if these had been requested under our defective FOI law, much would very likely have been withheld).

"They delve into the details of COVID-19 case counts and vaccinations at the neighbourhood level, breakdowns about variants of concern, and more . . . . a level of detail the centre has so far refused to make public despite repeated calls from academics and researchers. The level of detail in the reports would be helpful in alerting communities to the risk and building support for the immunization drive. Reporters and researchers have been asking in vain for such information for weeks and sometimes for months."[9]

• Kyenta Martins, spokeswoman for Safe Schools Coalition BC, said lack of timely and complete COVID 19 information prompted volunteers in the parent-run group to file FOI requests for all 60 school districts.

"We're asking for electronic copies of all records of confirmed cases of COVID-19 by school for the requested school districts. All they're putting up is the school and the applicable dates, so we don't know if that's 10 cases per school or one case per school. And that really is important to families who have other health concerns, who have to be a little more careful or who just don't want to take that risk."[10] She added that parents should not newly have to pay FOI fees for such data, and couldn't afford to.

• The longtime intractable secrecy of the Provincial Health Services Authority (PHSA) – which oversees the B.C. Centre for Disease Control - is all the more pernicious today.

It was the PHSA that was ordered in OIPC ruling F12-02 to release its internal audits via FOI; this Health Authority then appealed to B.C. Supreme Court, which overturned the order. The PHSA applied B.C. *FOIPP Act* section 13, arguing that "facts and analysis" should be sealed just as policy advice is, thus reinforcing the egregious precedent of the Dr. Doe ruling of 2002. It is very likely that some such audits today deal with COVID-related matters. For years access advocates have pleaded for the Health Minister to ask the PHSA to release its audits under FOI - which by contrast all the other B.C. health authorities voluntarily do - but with no response.

• Moreover, the complete exclusion from FOI coverage of Providence Health Care and the First Nations Health Authority - whilst aboriginals are far more heavily impacted by COVID 19 - is all the more indefensible and dangerous in this era.

Beyond COVID 19, the B.C. *FOIPP Act* has always been essential to inform the public of myriad health risks and needed improvements.

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[9] *COVID-19: Leaked reports show B.C. health authorities withholding data from the public*, by Nathan Griffiths. *Vancouver Sun,* May 6, 2021

[10] *B.C. premier defends application fee for freedom-of-information requests*. Canadian Press, Oct. 21, 2021

After the deadly June 2021 heat dome that claimed the lives of 569 people in B.C., the *Globe and Mail* via FOI requested all communications about the disaster between the Premier, the Health and Public Safety Ministers, the Provincial Health Officer and Chief Coroner Lisa Lapointe. The response came back: "Although a thorough search was conducted, no records were located in response to your request,"[11] – all which highlights the pitfalls of "oral government."

Yet last October, the Liberals released a tranche of e-mails obtained under the *Act* that revealed that senior executives at the province's drastically under-resourced 911 dispatch centre tried to ring the alarm over paramedic shortages ahead of the heat dome.

"When asked in the legislature why the warnings had gone unheeded, Health Minister Adrian Dix had no explanation," Gary Mason noted. "I'm sure he and his colleagues were thinking this new FOI legislation [*Bill 22*] can't be enacted fast enough."[12]

Caught in the crossfire - the average citizen requestor

Beyond the FOI usage by opposition parties or the news media, we need to focus primarily on the average B.C. citizen, on whose behalf the *FOIPP Act* was supposedly passed. These can least afford the request application fees permitted in *Bill 22* and would be most harmed by that and its other measures, for these are the innocent people caught in the eternal political crossfire between the ruling party and the opposition.

The government assures us that no application fees will be charged for personal requests, just for non-personal "general" ones; one problem we have is that the NDP implies that because most of the public do not file general requests, the public interest would not be harmed by possible prohibitive fees. This concept is entirely wrong.

Premier John Horgan claimed that "there will be no fee for individuals looking for information." Columnist Vaughn Palmer responded: "Not so. The only exemption announced to date is for individuals requesting information about themselves. Individuals seeking non-personal information - from government ministries, health regions, universities, school districts, crown corporations - would be subject to an application fee."[13]

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[11] *Changes to freedom-of-information legislation will weaken B.C.'s democratic infrastructure, says Privacy Commissioner*. By Xiao Xu, Globe and Mail, Oct. 25, 2021.

[12] *B.C. government's proposed freedom-of-information changes are cynical and self-serving*, by Gary Mason. *Globe and Mail*, Oct. 30, 2021

[13] *Freedom of information? Who cares, says B.C. premier.* By Vaughn Palmer, *Vancouver Sun*, Oct 21, 2021

As B.C. information and privacy commissioner Michael McEvoy told the *Vancouver Sun* about the fee: "It poses an obstacle to access and accountability, and not just for media," he said. "It could be a parent group, for example, that finds itself making access to information requests to multiple health authorities and to the Ministry of Health and other ministries. You could see how that number could add up awfully quickly and be a deterrent to people making legitimate requests."[14]

In my *FOI News Story Index*, there are 70 stories in Category 6 concerning records obtained directly by citizens - which affirms that FOI is not solely within the purview of experts. Because these stories are based only on records that the citizens chose to share with the media, there are likely many other examples that we never hear about.

From those 70 items, I created a file of 30 articles (in Appendix 1[15]) based on citizens filing general requests for their whole community's benefit, beyond their own personal interests. Yet as a result of *Bill 22,* the non-consulted-upon new fees, and the NDP's broken FOI electoral pledges of 2017, we will surely see fewer of those stories.

Whose interest is served by this? For the Premier and cabinet ministers, who together sprung *Bill 22* upon the unsuspecting public, we could inquire: Which one of these stories in the *Index* might your FOI requestor constituents would be better off *not* knowing about? Any, or all? Could it be, for instance:

> * The engineering reports obtained via FOI by the South Park Parent Advisory Council Safety Committee that showed the risks of some Victoria schools collapsing in even moderate quake, records that prompted parents to remove their children from those schools, or
>
> * The 2010 report *Chronic Lyme Disease in British Columbia* from the Provincial Health Services Authority (marked "not for distribution") laying out the nature of the disease and giving recommendations, obtained and distributed by two Lyme disease sufferers, or
>
> * The Fraser Health Authority's plans to remove all but a handful of acute-care beds from Delta Hospital despite being warned against this by its own experts, as discovered by the people of Delta through FOI, or
>
> * The Abbotsford residents gravely injured in an auto crash at a high-risk intersection, who found via FOI requests to police that this corner, dubbed the *"Sumas Prairie Speedway"* had had a staggering number of 233 crashes and seven deaths within six years, or
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> * Environment ministry statistics showing the Howe Sound Pulp and Paper Mill was not in compliance with its emission permits for sulphur dioxide and nitrogen oxide, collected "after a

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[14] *Watchdog says some changes to B.C. privacy laws 'inappropriate.*' By Lisa Cordasco*, Vancouver Sun,* Oct 18, 2021

[15] This is also posted at - https://canadafoi.ca/citizens-fine-usages-of-the-b-c-foipp-act/

> merry chase" through the bureaucracy via FOI by former singer Terry Jacks, upon being tipped off by a mill worker

The other 40 articles were indeed focussed solely on the applicant's personal issues, but in any event, by extension their own cases at times reveal a hidden problem that may be shared by thousands of others also, especially on health issues. These were based on FOI requests that were filed not by journalists but by individuals or their family members, often in some form of distress.

Working to improve their own lives, these FOI applicants obtained records that helped some to clear their names of false allegations; or aided adoptees to find their true parents; or enabled others to obtain redress for their workplace injuries, childhood abuse, police beatings, botched surgeries, hepatitis C infections, unsafe roads, land flooding, house fires, military accidents, privacy invasions, schoolyard bullying, land appropriations, and rental evictions.

Will their voices be heeded? To promote *Bill 22*, during a press conference on Oct. 21, 2021, Premier Horgan flamboyantly pulled out his iPhone and displayed game apps upon it, while railing against what he said were ridiculous FOI requests by the Opposition BC Liberals to view "screenshots" of his and others' electronic devices: "I mean get real! I think the vast majority of British Columbians could care less."

That last point is likely correct. Yet none of these citizen requestors ever asked to see screenshots of the Premier's cellphone (nor did I); why should they and others be penalized for the very few partisan requestors that did so?

To the Premier's cavalier query of "Who cares?" public frustration on FOI failings is evident. On Nov. 25, 2021, in question period, Liberal MLA Todd Stone tried unsuccessfully to move an amendment to a severing clause in *Bill 22* to state that, as he put it, "in no case, shall information relating to wildfire suppression be severed." He did so because rural citizens had been stonewalled in trying to find out more on the devastating White Rock Lake wildfire at Monte Lake, and Liberal FOI requests had been met with a "no records" response.

Then Liberal MLA Jackie Tegart passionately spoke about a young family whose home was lost in 2017 when a backfire at Pressy Lake went wrong:

> Now they've got questions - lots of questions - about who made the decision, based on what. Of course, my constituent was told to file an FOI. No house. No livelihood. Devastated. Simply asking for some kind of common sense around what could have possibly happened, and feeling absolutely blocked from information. I'm saying to you today that that has to change.[16]

Moreover, to the Premier and cabinet members: if you indeed wish for everyone to "get real," then please explain why has the B.C. New Democratic Party – the self-proclaimed champion of

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[16] *FOI debate becomes an indictment of 2021 wildfire response,* by Mel Rothenberger, *CFJ Today*, Nov 27, 2021

the poor and disempowered – abruptly imposed a fee without consultation (initially planned for $25) for the exercise of a basic democratic right upon those who can least afford it, to view records they already own? These constituents elected you to serve them and pay your salaries. They may be excused for wondering: Who can we trust? Indeed, all of the foregoing sadly raises the inevitable question for government MLAs: Why are you there?

High hopes, then a long descent

The B.C. *Freedom of Information and Protection of Privacy Act* took effect on October 1, 1993. On this propitious day, it appeared as though the gates to government records were unlocked and swung open, inaugurating a new right for the public and media to understand official business.

The system worked fairly well for the first two years. Then, perhaps inevitably, the honeymoon soured when FOI requests began revealing governmental failings and scandals. It may be a tragic paradox that whenever a freedom-of-information statute functions as it was meant to, then the law becomes, in effect, a victim of its own success.

Harcourt's genuine support for the transparency concept was sharply reversed when Glen Clark took over in 1996. The new NDP premier quipped at an event with media present, that "If I had my way in cabinet, we wouldn't have an FOI Act." (He later professed he was only joking.) On that point, the first Commissioner David Flaherty in his final annual report in 1999 disturbingly wrote that he had considered the possibility of the Clark government "abolishing" the B.C. *FOIPP Act* as being "by no means an idle threat."[17]

Next, Liberal premiers Gordon Campbell and Christy Clark promised to create “the most open government in Canada,” and then promptly did the opposite, as their offices used mass email deletions and post it notes, and launched court challenges to the Commissioner’s orders (amongst countless other games). The direction for the public service who process FOI requests came from the top.

Our hopes were boosted in the last B.C. election, when the NDP, in a questionnaire to B.C. Freedom of Information and Privacy Association, FIPA, on April 27, 2017, pledged to solve the three worst problems. (See Appendix 5) 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. Although the NDP’s pledges were not oral and vague but written and specific, one of the greatest blessing for politicians is that their electoral promises are not enforceable in law.

With the B.C. Liberals in power, the prospects for FOI reform were - and almost surely would remain - absolutely hopeless. We had naively hoped for better with the B.C. NDP, who when in

[17] Although the worst period for FOI in some ways was during the term of NDP premier Glen Clark (1995-2000), one could harken further back: Premier Horgan’s overall attitude to transparency by now seems not vastly dissimilar to that of Social Credit premiers Bill Bennett and Bill Vander Zalm.

opposition had introduced private members bills (voted down) that would have solved these very problems.

In July 2017, after two months of a suspenseful post-election limbo, the NDP attained a minority government by just one single seat with the support of the Green Party. The bureaucrats' briefing notes 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 25 years of opportunities to consult through four legislative reviews.

Deeply worrisome is a comment from the Premier while he was a candidate in the 2011 B.C. NDP leadership race. The *Vancouver Sun* reported that "Horgan wrote that he supported some changes to the Act, such as making university spinoff companies subject to FOI requests. But he was less enthusiastic about reforming the Act's policy-advice exemption, saying it had 'stood the test of time.'" Yet unjust practices are never legitimized merely by time passage.[18]

When the NDP assumed power in 2017, Premier Horgan's mandate letter to citizens' services minister Jinny Sims tasked her to "improve access to information rules to provide greater public accountability" and to "improve response and processing times for freedom of information requests." But in 2020 when the re-elected Premier appointed Lisa Beare as the new minister, his mandate letter to her included no such instructions.[19]

Consultations versus "Consultations"

The Minister of Citizens Services, which oversees the *FOIPP Act*, during House debate on Bill 22, proudly reiterated that the Bill was endorsed by the popular will, for, in the lead-up to it, the Ministry had held broad "consultations" on FOI and privacy issues in the spring and summer of 2021. This included some of the 2,900 public bodies, and public surveys with 1,700 individuals responding; it led to a 28-page report (*Stakeholder Consultation Overview April–August 2021),* which contains not the original texts, but instead a slick, sanitized, edited summary of these.

It is preposterous that I and others are still have to work through FOI requests to obtain the full texts of the submissions. These should have all been released proactively (with perhaps only Sec. 22 material exempted, regarding personal experiences[20]). In American states and many nations such records would be routinely posted on the internet.

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[18] *Vancouver Sun*, February 11, 2011. Yet one can grant the Horgan government credit for one improvement in FOI procedure: granting a longer two-week exclusivity time for applicants before records released via their FOI records were posted online, a move to benefit struggling weekly newspapers.

[19] *NDP Government Backs Off Pledge to Cut Government Secrecy*, by Andrew MacLeod. The Tyee, Dec. 7, 2020

[20] In Appendix 2, the Ispos survey results, we read: "10. Do you have any other comments regarding B.C. Government Information Access and Privacy? (Written responses not shown to

Obviously, this two year "consultation" was only a political façade of pseudo-listening, a ploy to legitimize and sell *Bill 22* that deluded almost no one. For one thing, fees were never raised as a discussion topic – and if it had been, the response can be fairly well imagined. The last time when FOI fees actually *were* discussed with the public, the resulting 2016 Special Committee report - which the minister ironically praised as an inspiration - firmly advised *against* imposing them.

An FOI request by FIPA produced records that suggest the plan was set, long before *Bill 22*'s Oct. 18 tabling. The Citizens' Services Minister's script for a June 15, 2021 caucus meeting noted:

> Some measures we are planning to reduce the impact of these increasing FOI requests include: a minor application fee for general requests that would not apply to individuals requesting their own information; limits to FOI requests not related to government business; and expanded criteria under which a public body can apply to the commissioner to disregard a request.

FIPA executive director Jason Woywada said the records prove his point: "On the day that they launched the public engagement, asking British Columbians for their opinion, they're telling caucus they've already made their decision. That, to me, is the height of hypocrisy and the greatest example of the illusion of public consultation that I've ever seen."[21] On Nov. 25, 2021 during Legislative question period, Liberal MLA Todd Stone lambasted the government over these revelations, stating that "every key element [in *Bill 22*] was decided before consulting with the Privacy Commissioner, before consulting with the public and before consulting with Indigenous peoples."

The documents also referred to the Legislature's all-party committee struck in December 2020 to review the law. It suggested whatever public consultation those MLAs might undertake "could lead to some consultation fatigue." This seems yet another sign of Victoria downplaying this Committee's value. I for one have no "fatigue" on this topic and, ironically for the NDP, its *Bill 22* has markedly heightened public interest on this subject instead of diminishing it.

Moreover, all my statements about FOI are presented in the open, as here, and I am prepared to defend them publicly. Agencies should do likewise. Yet with the pusillanimous mechanism of these private policy consultations, anyone can claim anything. For example, a crown corporation representative could overstate the cost of processing an average FOI request by three times or more, and we would not even know this claim was made; it could then be used as a basis to amend FOI law or regulations on fees.

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protect the privacy of respondents.)" Yet these comments could have been carefully anonymized and still published.

[21] "The height of hypocrisy": NDP hid FOI tax plan during sham public consultation. By Bob Mackin, *The Breaker,* Nov. 24, 2021

By contrast, I recall that in this Committee's public hearings of 2004, a lawyer representing the B.C. police chiefs' association pleaded for three new restrictions to protect police records. These included amending the *FOIIP Act* "to exempt agencies that are subject to the *Police Act*," and that "section 15(1)(a) should be amended to include as a separate exception that records may be withheld that would reveal a record related to an ongoing investigation."

Then a panel member, NDP MLA Joy McPhail, resolutely countered that such protection already existed under *FOIPP* section 15, and challenged him to explain just why that exemption was inadequate: "I will start by saying I'm taken aback completely by your presentation…. I totally understand the sensitivity around requests for information that would harm the outcome of an investigation, but you've presented no evidence to us that any harm has occurred with FOIPP."s[22] (Such indeed is an oft-heard complaint about FOI law submissions emanating from public agencies; and similarly in legal disputes OIPC rulings often refer to governmental "bald assertions.")

Yet in the private "consultations" of 2020-21, such an exchange would have been absent, and his claim would have remained unknown and unquestioned. Les Leyne noted the familiar perception of this year's review process – an outlook that could, in principle, only be rectified by this government's next actions.

> [*Bill 22*] makes it clear the government does not care what the [*FOIPP* legislative review] committee does or says. It's the gratuitous insult to people who would be appearing before the committee to provide input on how to make FOI better. Maybe the committee will hold a few hearings nonetheless, just to observe the law. But that would put people in the position of making suggestions long after the government has already done what it wanted. . . . . If the government can blatantly stiff the information and privacy commissioner, which it did with important parts of the bill, then ignoring the regular folks is just another day at the office.[23]

The indispensable bridge

The news media act as a surrogate for the citizens, who have neither the time nor expertise to obtain the records for themselves. With Canada's ineffectual FOI laws, we can produce far fewer FOI news stories than the American press does. I often utilize Washington State's FOI system and the contrast in responses with B.C. is like night and day. The loss of hundreds of such untold and untellable news articles in the public interest that might have been possible amounts to a world of lost opportunities. If our FOI laws were raised to global standards, the *Index* story list would have been *twice* as long.

Even in these calamitous times for the industry, the news media still work as an indispensable bridge between government and the public; the vast majority of Canadians will never file an FOI

[22] Hansard, January 21, 2004

[23] *Note to freedom-of-information law reviewers: Don't bother*. By Les Leyne, *Victoria Times Colonist*, Oct. 20, 2021

request, and so, by default, the records that the media requests will generally provide what the public sees. Although the press in Canada generally file only between five to ten percent of FOI requests, the benefit to the public interest is felt far beyond these statistics.

All that is changing. Politicians and officials are very well aware (and some without regret) that newspapers have shrunk to a fraction of their former size, with half of some newsrooms laid off and freelance budgets at zero. Many weekly newspapers and magazines for whom I once produced FOI stories, such as the *Vancouver Courier* and the *Westender,* are now extinct. (The former one lasted 112 years; but then internet competition eroded it, then COVID 19's depletion of its advertisers finished it off.)

More of the public now search Facebook and other social media for their "news" - i.e., one-sided with no fact verification - in this Trumpian "post truth" age, where consumers create their own realities; the news media structure and power balance has radically shifted since I spoke to this Committee in 2015, and soon may be almost unrecognizable. Meanwhile the ratio of state public relations information controllers or "propagandists" (some paid $80,000 of public funds annually) to wage-reduced news reporters is five-to-one, an ever-swelling gap.[24]

In the early days of Canadian FOI laws, the media would often need to file just three requests to yield one good publishable article. Now - as reporter Chad Skelton said about a decade ago - due to ever-growing official obstructionism, that balance has shifted to at least 10 requests for one story.

Thus 10 FOI requests (which might yield no results) at the current $10 application fee allowed by *Bill 22* would necessitate $100 per story. This cost can simply not be afforded by many smaller news outlets, nor even by some mainstream ones, and surely not by freelance writers. Hence the media will now send in far fewer requests than before, and so the public will become grievously less informed.

Moreover, while critics complain of the cost of administering the FOI law, it is really a miniscule fraction of the B.C. budget. In fact, the FOI system often saves public funds, because public outrage over misspent money exposed via media requests has induced government to trim the waste and tighten controls, for funds that are always desperately needed for worthier purposes elsewhere. The first and longest category of the *News Index,* with 172 articles, concerns taxpayers' money. Examples abound of staggering losses publicized via FOI requests:

The B.C. government could have sold ailing forest company Skeena Cellulose Inc. back to the private sector in 1999 for 16 times what it eventually got for it, after spending an extra $100 million to prop it up. The total debt of the tourism agency expanding the Vancouver Convention Centre ballooned to $108.4 million in 2013. Let us recall the granddaddy of all white elephants: in the 1990s under NDP premier Glen Clark it took $450 million (i.e., *$700 million* in 2022

[24] My proposals on how to improve the B.C. government public relations process – a potentially worthwhile communications system in addition to, but never a substitute for, good FOI laws - are here: *New government can rebuild trust in PR system. Victoria Times Colonist* (July 15, 2017) https://www.canadafoi.ca/file203.htm

dollars) to build three ships in the glitch-plagued "fast ferry" fleet, but they were later sold off for just $19 million.

On the last example, the subsidiary company that built the fast ferries was excluded from B.C. *FOIPP Act* coverage (and the records were found through its parent ministry); so too is the Horgan government's new $500 million InBC Investment Corporation. Can we do nothing else but pray that the latter entity might not incur losses anywhere comparable to the former?

"Remember that it is the taxpayers who pay for the information that was created," as noted by Murray Rankin.[25] So they are for that reason as much the public's *property* as are roads, schools, and bridges. It hence should not have to pay for their production twice, through FOI fees. We should not accept the records as being the private property of the ruling party of the day, to be hoarded and manipulated for its own political advantage.

Government secrecy expanding under Premier Horgan

The B.C. NDP government's approach to transparency in *Bill 22* is displayed in many other ways across government. These range from its refusal to release the business plan for its FOI-exempt InBC Investment Corp. to its tight manipulation of press conferences (colloquially known as "control freakery"). For instance:

* B.C.'s NDP government plans to replace the aging George Massey Tunnel, after cancelling a planned bridge approved by the previous B.C. Liberal government. The Ministry of Transportation released its business case for a new eight-lane immersed tube tunnel, but much of the document - including key segments summarizing a risk analysis and value for money calculations - have been redacted. This was necessary to protect business interests, said Transport Minister Rob Fleming.[26]

* In their fight against the Site C project, the West Moberly First Nations and Chief Roland Willson had to secure a B.C. Supreme Court order giving them access to the full report of Peter Milburn, the former deputy minister of finance who oversaw the review of the troubled BC Hydro project.[27]

[25] Keynote address, B.C. FIPA Information Summit, Sept. 29, 2006. He added: "I think, more than 10 years into our marriage to freedom of information, we need to rekindle the passion in what has become a stale relationship. At the beginning of this new century, the right to information is now being regarded as the prerequisite for the exercise of other rights to democracy."

[26] https://globalnews.ca/news/8267209/bc-ndp-take-heat-business-case-new-massey-tunnel/

[27] *NDP fails three tests in a week of its promise of openness*, By Vaughn Palmer, *Vancouver Sun*, May 7, 2021.

* Reporters' questions are being cut off at the fewer press conferences held by Premier Horgan. Such was noted by Liberal MLA Jordan Sturdy in the Hansard debate of Oct. 26, 2021[i28] - "The Premier's predecessors and even the Premier, earlier on in his term, held press avails where you could bring on all comers and where there were a couple more people on the phone, and everybody got all of their questions answered.

"Nowadays . . . you get one question and one follow-up, and somehow we run out of time after 20 minutes. Now, some reporters never even get picked for a question. Many questions never get answered. The tough questions don't get asked, because the media handler will make sure that you never get another question. Limiting media avails is about restricting access to information - maybe not as formal as what this *Bill 22* is about but just as insidious."[29]

* In November 2021, Victoria's Royal B.C. Museum abruptly announced that it would close its third-floor core galleries and the beloved Old Town in January as part of the "decolonization" process. This prompted a wide public outcry, which was utterly ignored. In the normal course, such a profound change would have first been fully explained and occur only after two years of public consultations. Worse yet, it was revealed in February that officials had known long before that the Old Town should have been torn down for asbestos removal and quake upgrades, an entirely different rationale, withheld from the public.

* Consistent with his FOI stance, the overbearing style of the quick-tempered premier has a lengthy history, which may partially explain why not a peep of dissent was heard on *Bill 22* from any government MLAs, despite their private misgivings (if any).

For example, recall this report in the *Victoria News*: "B.C.'s own big Irish bully, NDP leader John Horgan, put on a similar show at the News1130 studio in Vancouver last week. I lost count of the number of his interruptions and shout-downs of B.C. Liberal leader Christy Clark."[30]

British Columbia in the world context

When it was passed in 1992, B.C.'s *Freedom of Information and Protection of Privacy Act* was hailed by some FOI commentators as "the best in North America." Yet since then, in its practice, several flaws and shortcomings have become apparent. While it remains overall amongst the best FOI laws in Canada, it is still a very modest achievement within the world context.

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[28] https://www.leg.bc.ca/documents-data/debate-transcripts/42nd-parliament/2nd-session/20211025pm-House-Blues

[29] Such complaints are familiar today, e.g., "The days of reporters being able to simply call up a government official for a straight answer are long gone, with even simple questions or interview requests now being routed through a byzantine network of uncommunicative communication specialists." - *B.C. moves to take the 'free' out of Freedom of Information*, by Andrew Fleming. *IPolitics*. Oct 26, 2021

[30] *Hulk Horgan' hides health hole; John Horgan's Irish bully routine avoids key NDP questions,* by Tom Fletcher, *Victoria News*. April 25, 2017

In fact, it is even not the finest in Canada in every aspect, for some provinces' FOI laws, e.g., that of Quebec and Nova Scotia, have several sections much advanced over B.C.'s statute, and all are well surpassed by Newfoundland's new FOI law.

On its respected international Right to Information Rating system, the Halifax-based Centre for Law and Democracy in 2010 ranked B.C.'s statute second in Canada only to Newfoundland's law, with a qualitative score of 98 out of a maximum 150.[31] Writing for the CLD, lawyer Michael Karanicolas stated then:

> This [B.C.] law is relatively strong by Canadian standards, with a reasonably broad scope and a well-empowered oversight body. While this law came out at the top of our limited provincial study, there remain significant problems with it, including several overly broad exceptions and a somewhat threadbare promotional regime. It is worth noting that, compared against the international ratings, B.C. would only come in tied for 25th. So a good score for Canada, but from a global perspective there remains significant room for improvement.[32]

Yet in 2021 the CLD found that the passage of *Bill 22* would "significantly undermine the right of individuals to access information held by public authorities"; the amendments would drop B.C.'s score from 98 points to 92 points; causing it to fall to 4th place, nearly 20 points behind 1st place Newfoundland.[33] (This Committee might wish to ponder: is the global context significant to B.C.'s law, as well as the Canadian one?)

In considering improvements, exemplary sections of our *FOIPP Act* have been adopted in other jurisdictions' FOI laws, so why not visa versa? Some senior bureaucrats and politicians habitually warn of the grievous harms that could occur if the public's FOI rights were expanded in law. From the experience of other nations, we can see if these speculative injuries actually came to pass, or not.

If the B.C. government insists upon confining itself within the political comfort zone of the Commonwealth box as regards FOI laws, this choice would still not justify retaining the status quo of the B.C. *FOIPP Act*.[34] The best Commonwealth examples for Canada to generally follow

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[31] Launched in 2011 by the CLD and Access Info Europe, "the RTI Rating (rti-rating.org) is the leading global tool for assessing the strength of national legal frameworks for accessing information held by public authorities (or the right to information, RTI). It is widely used by inter-governmental organisations, RTI advocates, reformers, legislators and others." The Rating consists of a set of 61 indicators, each with a range of possible scores typically between 0-2 points, for a possible total of 150 points, a higher score being better. An Advisory Council of renowned experts on the right to information provided detailed advice to CLD and AIE on the development of the Indicators.

[33] CLD critique of Bill 22 - https://www.law-democracy.org/live/british-columbia-proposed-amendments-significantly-weaken-access-to-information-legislation/

[34] It is worth remembering that comparative study as we do here can also be utilized for the opposite goal, i.e., for secrecy, not openness. Hence FOI advocates worry about FOI statutory regressions occurring anywhere, for they may be cited by secrecy proponents as new models to pull the laws downward. For example, in 2012 during the legislative battle in Newfoundland over

for inspiration are, I believe, the access laws of India,[35] Kenya and South Africa (in most but not all their respects).

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

The truly astonishing irony is that Afghanistan, a nation that Canada has laboured at such high cost to transform from a theocratic dictatorship to a modern democracy (before the Taliban's re-conquest in 2021) passed an FOI law in 2014, then rated #1 in the world in the CLD-AIE ranking while Canada was ranked #58.[36] A reverse statutory influence would be welcome here. I am aware that a sterling FOI law is not the sole measure of a democracy. Nonetheless, why do we keep supplying critics with such obvious and abundant material with which to admonish Canadians as global hypocrites?

As Halifax human rights lawyer and CLD director Toby Mendel said of the federal *Access to Information Act*: "As someone who travels around the world promoting the right to information, it is frankly a source of profound embarrassment to me how poorly Canada does on this human right. Given that everyone who uses this system regularly is aware that it is profoundly broken, it is inexplicable that it does not get fixed." These words should be about as applicable to the B.C. *FOIPP Act.*[37]

Broken pledges, and the reversible jacket

> Politicians become ministers, and they become easily seduced by the attractions of secrecy. . . . Can we not find bipartisan support to restore our freedom of information?
>
> - *Murray Rankin, QC, Keynote address, B.C. Information Summit, Sept. 29, 2006*

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an appallingly FOI reform bill, the opposition house leader said the government had "cherry picked" some of the most restrictive aspects of information laws in provinces such as Alberta and was calling it "jurisdictional alignment." (*Record filibuster on N.L. access-to-info restrictions ends on sour note,* by Sue Bailey, Canadian Press, June 14, 2012)

[35] In their internal reviews of *Fallen Behind* in 2008, Justice Department analysts had the keenest interest in the FOI law of India, writing many pages of notes upon this. If that is any indicator they view it as a model for Canada to follow, this would be hopeful indeed.

[36] The second ranked FOI law is found in Mexico, followed by (in descending order) Serbia, Sri Lanka, Slovenia, Albania, India, Croatia, Liberia and El Salvador.

[37] Toby Mendel, preface to *Fallen Behind: Canada's Access to Information Act in the World Context.* By Stanley Tromp, 2nd edition. Vancouver: BC FIPA, 2020.

> It amuses me to see the profound change in attitude about access to information which occurs when highly placed insiders suddenly find themselves on the outside. And vice versa! - *Information Commissioner John Reid, Ottawa, 1999*
>
> I find it quite laughable, because if I didn't laugh, I would probably want to cry for the inability of this government to follow through on the promise of openness and accountability. - *NDP MLA Maurine Karagianis. B.C. Hansard, March 8, 2007*

In the eternal cycle of nature, as the seasons change from summer to autumn and leaves turn green to brown, so too can we expect politicians' outlooks on freedom of information law to fluctuate when in and out of power. One might also consider the chameleon, a creature that changes its colors to blend in with its environment and evade predators.

So I listened on Hansard TV to the opposition objections in Hansard on *Bill 22* with a mixture of gratitude and skepticism. The most eloquent speaker on the Liberal opposition bench in excoriating *Bill 22* was the longest serving MLA (three decades), Mike De Jong, QC. Yet it is seldom recalled that as Attorney General in the B.C. Liberal government of 2001-2017 no one else had done more harm to government transparency.

Amongst many other FOI missteps, in 2006 De Jong introduced *Bill 23*, the *Public Inquiry Act*, which would have permitted cabinet to seal the final reports of public inquiries; and *Bill 30*, which would have allowed government to keep records from its public-private P3 business partnerships secret *for 50 years*.

This forced FOI advocates to launch a desperate opposition campaign, one nearly as onerous as that for *Bill 22*. Then in a surprise move, and citing concerns that were raised by the public, media and the privacy commissioner, De Jong respectfully told the Legislature in May 2006 that the bills would be deferred indefinitely: "Government believes it would be beneficial to hear further from those with views." His announcement was greeted with applause in the House and these execrable proposals were never raised again.[38] If only such a deferral in response to public objections had greeted *Bill 22*.[39]

So the prolix lamentations of opposition NDP MLAs a decade ago are being quoted today, such as those of NDP MLA Doug Routley, who would wax poetic for hours in Hansard on FOI

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[38] *Government Secrecy Bills Pulled,* by Stanley Tromp. *TheTyee.ca* (May 11, 2006) Yet even De Jong and other Liberal MLAs had resolutely stood up in House and defended their own FOI bills at length - unlike NDP's unprecedented total silence Oct. 26 on a Liberal amendment to rightly refer *Bill 22* changes to the Special Committee, a passive-aggressive muteness that De Jong accurately scolded as "despicable."

[39] One wonders if an earlier version of *Bill 22* might have been even worse than its final version (and if so, we may shudder to consider what that might have been). To seek answers through a B.C. *FOIPP Act* request, we must wait 15 years for its Section 12 cabinet secrecy exemption to expire, that is the year 2037 – that is unless, if the trend toward "oral government" grows, the substance of debates is sanitized out of the minutes.

failings such on the urgent need for subsidiary company's FOI coverage but is silent today on InBC Investment Corp.'s exclusion from the law. Similarly, I wonder if the words of Liberal MLAs protesting *Bill 22* in the House might be quoted to haunt them in a decade or so, after a future turn of the electoral wheel, if they form government and try to pass similar measures (or, so help us, even worse ones).[40]

Hence perhaps every MLA upon his and her swearing-in ceremony at the Lt. Governor's mansion might be presented with a multicolored reversible jacket, one with flashy red cloth on one side and funereal black on the other. This would be donned whenever FOI issues arise, after being turned inside-out for each change of government. None of the inverted former idealists would dare wear the wrong side in public, and would be severely scolded if they did so even by error.

> *See Appendix 5 – B.C. NDP responses to FIPA electoral questionnaires on FOI issues, 2009 and 2017; with quotations from NDP MLAs and Liberal premiers on FOI law, 2007-2021*

Creative Inertia, per *Yes Minister*

After new politicians are sworn into power, they and senior bureaucrats such as deputy ministers may be grateful to find at least one common purpose: the desire to keep records of their activities and plans private. Their interests often merge into one, for they share and defend the same fortress, and yet the public is locked out in the cold and the darkness.

Because it entails the ceding of power, no other political reform topic has been more masterfully deferred than FOI reform, through a process that the supremely suave British bureaucrat Sir Humphrey Appleby in the BBC TV series *Yes Minister* has knowingly recommended as "creative inertia," that is, holding eternal studies.[41]

For now, ministers still yield to their obstructionist officials' vacuous script with its eternal three C's: "These are very *complex* issues, which require more *consultations*, because of the risk of unintended *consequences*." Incorrect. The reforms are simple, they have been studied to death

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[40] One might regret, of course, the support for *Bill 22* from B.C. NDP indigenous affairs minister Murray Rankin, one of Canada's primary advocates for FOI law since 1977. I remain entirely bewildered; although aware that ministers are sworn to confidentiality about cabinet discussions, *per se,* I still hope that some day he will explain the reasons for his own reversal, as these may be worth hearing.

[41] Regarding FOI policy, one might almost wonder about an inverse ratio of truth to power, with the more of one accompanied by less of the other. In the BBC TV series *Yes Minister*, after the minister pleads at length that a course of action is clearly right, with no more studies needed, his deputy minister Sir Humphrey finally sighs and responds: "We *know* it's the right thing to do. It just mustn't happen."

for decades, and other nations have not been harmed by passing them as per the global norms. (Yet while statesmen can legislate some conduct, they can never legislate attitudes.)

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

In its submission to the 2004 review, the provincial bureaucracy had claimed that it was only trying to "fine-tune" the *Act*'s language, so that its "original intent" would be better expressed. In response, the information commissioner's aide, in a spirited letter, noted "very grave concerns":

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

Instead, Canadian politicians and bureaucrats have chosen a bait-and-switch game of offering the proactive release of travel expenses and datasets, plus a wider social media presence (such as a "Twitter town hall" to make government more responsive). The purpose, of course, is to pacify the public with an illusion of transparency and empowerment, while its legal rights to obtain records through FOI laws are quietly regressing *at the same time*. Yet a new deluge of self-selected and self-serving government internet filler is no substitute for urgently needed FOI law reform.

Politicians resist the letter and spirit of FOI laws not so often with the goal of gaining or consolidating power but from the fear of losing it (a concern that one can, if not share, at least understand), which explains their gradual post-election chill. By conveying such politically irresistible arguments - all in private, of course - the unelected Canadian bureaucracy has ever thwarted FOI reform attempts by ministers. One such outlook was voiced in an editorial by former B.C. Liberal attorney general Geoff Plant (2001-04) in the *Globe and Mail:*

> We say we want open government, but there's ample reason to doubt we would ever actually know what to do with it. Is open government about looking for fun new ways to embarrass politicians, or is it about giving ourselves as citizens the tools to improve how we are governed? . . . . We should not be surprised if the government takes policy discussions back behind closed doors. Not because politicians have easily bruised feelings, but because experience too often teaches them that people don't have much to offer except criticism.[42]

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

The view of many officials is summed up by Sir Humphrey in the 1981 *Yes Minister* episode titled Open Government. He and his ally Arnold rebuke a naïve staffer named Bernard who supports more transparency:

> Arnold pointed, out with great clarity, that Open Government is a contradiction in terms. You can be open – or you can have government. Bernard claims that the citizens of a democracy have the right to know. We explained that, in fact, they have the right to be ignorant. Knowledge only means complicity and guilt. Ignorance has a certain dignity.[43]

Prof. Alasdair Roberts concludes his landmark FOI book *Blacked Out* with these words: "Transparency itself is not enough. Do we have a right to information? Certainly. But we also have a responsibility to act on it."[44] Sir Humphrey's point seems to be that if, say, FOI-based news stories reveal appalling mistreatment of the most vulnerable groups, this revelation prompts societal guilt and an inescapable obligation to fix the problems. And who wishes that? If "out of sight is out of mind," and ignorance is indeed bliss, then some bureaucrats are attempting - benignly in their view, and with Orwellian doublespeak - to grant the public freedom *from* information.

Yet I generally work from the presumption that faith in the public's ability to "handle reality" is underestimated and preferable to the alternative course to be decided by others, and that government should not patronize adult citizens like children. In his final annual report, of 1996-97, David Flaherty, B.C.'s first information and privacy commissioner, wrote that:

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

One hopes this hard line may have moderated since then. Above all, I entreat the bureaucracy not to oppose needed B.C. *FOIPP Act* reforms. The FOI training video for B.C. civil servants entitled *Finding a Balance* (1993) states, "We must realize that embarrassment is not an exemption. Our culture is changing to one of openness." Yet this point has been forgotten by many.

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[43] *Yes Minister.* London: BBC publications, 1981. On this point, we might hope the bureaucratic view as voiced by the droll Sir Humphrey would not prevail, as he said when proposals were being raised to introduce a freedom of information statute: "I explained that we are calling the White Paper 'Open Government' because you always dispose of the difficult bit in the title. It does less harm there than on the statute books . . ."

[44] *Blacked Out: Government Secrecy in the Information Age*, by Alasdair Roberts. Review by Stanley Tromp, *The Tyee,* Jan. 11 2007

There are other approaches. On his first day in office in 2009, U.S. President Barack Obama issued an Executive Order to all government agencies to reverse the default secrecy position of his predecessor: "All agencies should adopt a presumption in favor of disclosure . . . to usher in a new era of open Government." A similar public order from the Premier to the B.C. public service would be most welcome.

The Newfoundland FOI model

One serious flaw of this nation is that open government is simply an un-Canadian concept, and it has never been a part of our political culture.

In fact, Canada's most prolific and expert access requestor Ken Rubin asserts that Canadian freedom of information laws are misnamed, for their main undeclared purpose is not to grant the public access to records, but to *codify secrecy*. Our FOI laws are so top-heavy with overbroad exemptions, which are in turn so heavily overapplied in practice, he says, that statute might as well be, in effect, another *Official Secrets Act* by another name.

Even if this is not so, it appears that the law is too often interpreted and applied by Canadian officials as though it was*, i.e.,* almost as if the exemptions portion of the statute was lifted up and inserted into the law's purpose clause, or if donuts and Swiss cheese were valued less for their substances than for their iconic cavities.

Murray Rankin in his preface to my report *Fallen Behind*, upon noting that Canada's FOI laws have not kept pace with the rest of the world's, reflected: "Reading this book will no doubt make you angry: why do Canadians tolerate this state of affairs?" A good question.

Canadian politicians have long calculated on a fairly passive and contented (or at least unaware) population to act as their enablers, one that will forget or excuse their broken FOI electoral promises. That is where the FOI problem begins, and could end. Political trust and docility are luxuries we can no longer afford; an attitude of robust, involved, healthy skepticism is the one Canadians most urgently need.

That is where Newfoundland arises as an inspiration.

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

An uproar of protestation ensued, with public rallies on the Legislature lawn in St. John's – an unprecedented public response in Canada to an FOI issue. A marathon three day opposition filibuster followed in the House, yet the bill passed anyways.

In response to the public, Tom Marshall, a new premier *from the same party* appointed a panel to review the law, which produced a report with 90 recommendations on how to improve the *Act.* In a new *Act* that came into force on June 1, 2015, the government repealed all the worst features of

Bill 29 and *passed the draft legislation that had been written by the panel directly into law* – an advisable model for B.C.

The people had objected to a plan to convert their FOI law into the worst in Canada, and instead pushed to make it the best, as top-rated by the CLD. Why could the same not be done in every province? (See Chapter 5 of this report on how Newfoundland's new FOI law could inspire B.C.'s.)

Other examples demonstrate that progress on FOI law reform is not impossible in Canada. Even in New Brunswick, which for four decades had the most hapless FOI statute in the nation, movement occurred. In 2017, Liberal premier Brian Gallant surprised some by keeping his electoral pledge to improve the province's FOI law, adding a public interest override and converting some exemptions from mandatory to discretionary.

In Ottawa, Prime Minister Justin Trudeau fulfilled his 2015 electoral commitment to grant the federal Information Commissioner the power to order records released - a major sea change that frankly I had not expected to see transpire in my lifetime. If the Prime Minister of Canada kept his FOI electoral vow, them the B.C. NDP can surely do the same.

Conclusion – the road forward

> Never in my wildest dreams did I expect that foot dragging and a penchant for secrecy would prevail to the extent that it has. No matter how good the law might be, it won't work if people in power are out to subvert it.
>
> *- Former B.C. NDP Attorney General Colin Gablemann, who introduced B.C.'s FOI law, 2007 speech*

Over the past two years of the COVID 19 pandemic, one may feel as though life is suspended in limbo, and one is continually reminded us of the value of lost time, which can never be regained at any price. Yet such is not an unfamiliar feeling for Canadian FOI advocates at any time, as decades of obstructionist state inaction have meant a world of lost opportunities.

I presented my same 67 recommendations to this Committee in 2009, then Sisyphean-style in 2015. Not one was passed into law, and I am aware that my words here might again be forgotten within a day or two. Some of my colleagues chided my naivety, advising that I was wasting my time on a fool's errand, for it seems as though B.C. FOI advocates are speak into a void, one that returns no echo. Yet I still believe that silence is fruitless and there is nothing to be lost by repeating all the necessary truths for the record, whatever the consequences.[45]

[45] I emphasize that my cause of raising Canada's FOI laws up to accepted global standards should not be viewed as particularly original, inspired or grandiose; I regard it merely as Democracy 101 housekeeping, to ensure a right as basic and uncontroversial as voting or free speech.

So to British Columbians I would inquire: Do you believe that you should have the right to view records on health and education, or crime and the environment, or official spending and public safety - records whose production you paid for with your tax dollars, and which were presumably created for your benefit? If so then speak out, lest the B.C. government interpret the silence, rightly or wrongly, as consent or indifference.

How much longer should Canadians to need launch five-year FOI legal battles to obtain the same kinds of records that American state governments post freely on their websites? In the end, most FOI misfortunes occur mainly because we permit them to. Every public will have the FOI system it deserves, and one can choose to live in the light of information or in the darkness of ignorance.

In many nations, including Canada, FOI laws are passed only after a steep 20-year struggle against political cowardice and hypocrisy, for a statutory milestone that is always driven from the bottom up, not granted from the top down. On FOI reform, we know what needs to be done, and there is no need reinvent the wheel.[46] All we require is political will, of the kind shown with Newfoundland's FOI reforms of 2015. We hope our Premier and cabinet will not view this exercise mainly as a forum for the public to blow off some steam harmlessly and the government goes back to business as usual, that is, the old FOI status quo or worse.

One longtime legislative columnist called B.C.'s record on FOI "the shame of the province."[47] Why not change that record to one of pride? To this end, the Premier need only fulfill his party's reform promises, so as not to confirm the old maxim of Charles De Gaulle: "Since a politician never believes what he says, he is always astonished when other people do."

U.S. Senator Daniel Patrick Moynihan's book, *Secrecy: The American Experience* (1998) had a succinct conclusion: "Secrecy is for losers."

Why? First, he wrote, because it shields internal analyses from the scrutiny of outside experts and dissenters. (In B.C., this occurs via the *FOIPP Act*'s sections 12 and 13, with facts and analysis newly exempted.) As a result, some very poor advice is used to inform many government decisions.

Second, needless or excessive secrecy distorts the thinking of the citizenry, giving rise to unfounded conspiracy theories and an unnecessarily high level of mistrust of governments; if this

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

[47] *One journalist's failed (so far) efforts to reform B.C.'s FOI law.* By Vaughn Palmer, *Vancouver Sun*. Nov. 17, 2015

cause and effect process occurs, the administrations would have only themselves to blame, and, as we can clearly see, never was this approach more hazardous than in a pandemic age.[48]

As George F. Will wrote in a review of Sen. Moynihan's book: "Government secrecy breeds stupidity, in government decision making and in the thinking of some citizens."[49]

It is profoundly important that enthusiasm for FOI law and practice be conveyed to the younger generations so they will not lose this essential right due to unawareness, disuse, or official antipathy.

The *FOI News Index* contains hundreds of stories on educational institutions in categories 17 and 18, on issues such as campus health and safety, financial and administrative misdeeds, and academic fraud. Most of such articles were produced by the mainstream media (with some by the student press), but because of shrinking newsrooms, fewer of these will now be possible. This renders it all the more vital that the young earn how to empower themselves via FOI.[50] For instance, in Mexico children are taught in high school how to file FOI requests; why not here?

There are hopeful signs. In response to *Bill 22* just days after it was introduced, B.C. high school students launched a campaign to pass "Canada's first secondary student journalism protection legislation." They objected that "*Bill-22*'s regressive changes to BC's already broken FOI system that would prohibit student journalists across the province from accessing government records."[51]

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[48] This is relevant for the two leaked internal reports from the B.C. Centre for Disease Control that showing the government has far more information about the COVID-19 outbreak than it made public. "By having the information come out through leaks - instead of posting the two reports openly on a public health websites - the secrecy mongers risked playing into the hands of the COVID-19 deniers and their suspicions about government cover-ups. 'By controlling the message so strongly, I think it backfires a bit, said Dr. Sarah Otto, Canada research chair in theoretical and experimental evolution at UBC." - *NDP fails three tests in a week of its promise of openness*, By Vaughn Palmer, *Vancouver Sun*, May 7, 2021.

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

[50] BC FIPA has endeavored to do so since 1998, and Murray Rankin said in his 2006 speech: "I salute it for its success in recruiting a number of younger people, who are carrying the torch for a new generation: bravo!"

[51] Student Press Freedom Act BC, Oct. 24, 2021 @SPFAcampaign.
https://www.ehnewspaper.ca/articles/editorial-bill-22-foi-fee-transparency-matters
"Bill-22 would fundamentally distort BC's media landscape, creating an imbalance of the journalistic capabilities of small outlets, including regional/community, high school and post secondary, and ethnic and cultural newspapers, disproportionately disadvantaging them compared to corporate/commercial media. It would amplify existing socioeconomic barriers and concentrate access to information to a smaller, wealthier, and less diverse segment of British Columbians."

The Ubyssey newspaper of UBC protested that *Bill 22* could impair their work, for "FOIs have allowed us to tell stories that otherwise would have never been told," such as the lack of COVID-19 data at UBC.[52] As well, Langara College journalism students urged this Committee in 2015 – unsuccessfully - to extend *FOIPP Act* coverage to the sometimes fraud-ridden student societies that are funded by millions of dollars in mandatory student fees. (See Appendix 7)

In fact, my own FOI journey began when I was a Langara journalism student in 1992 and I heard that the college had commissioned a report on the seismic condition of the building. But the building manager at the time refused to release it, despite the students' right and need to know if the roof could collapse on our heads during an earthquake.

In an imperious and scornful manner, as though addressing small children (even though I was then 30 years old) he told us, "The report is technically too complex for you to understand, and I don't have time to explain it to you. Even if I did, you might take details out of context and distort it anyway." The B.C. FOI law came into force a year later, which meant that such a refusal would have been impossible thereafter. But the event instilled in me a profound opposition to government secrecy from then on.[53]

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

Are there at times frivolous or wasteful B.C. FOI requests sent in, at some public expense? Yes, and there always will be. Will FOI revelations cause the government some embarrassments and political inconveniences? Yes again. It would be idle to deny this is so, and it is abundantly

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[52] *BC's proposed $25 fee for FOI requests will hinder access to information at UBC*. Editorial in *The Ubyssey*, Oct. 22, 2021. https://www.ubyssey.ca/opinion/editorial-BC-FOI-fee/ - "FOIs have allowed us to tell stories that otherwise would have never been told. In the last year alone, FOIs allowed us to dig into changes to UBC's cash payment policies after provincial concerns about money laundering, the harmful impacts of Greekrank on Greek life and public health violations by the frats. We also were the first outlet to question the lack of COVID-19 data at UBC - reporting spurred by information found in documents we requested under FIPPA."

[53] It sadly occurred again in 2011 with the Victoria legislature's seismic report, one that revealed that, unless it spent $250 million in upgrades, the buildings could partially collapse during an earthquake upon the people who work there. The Speaker's office blocked access to the report by misapplying four exemptions of the FOI law, but upon my appeal gave it up 14 months later (later saying it kept the report private because it "didn't wish to upset the public"). Still it continues, as *Vancouver Courier* reporter Bob Mackin was denied Vancouver city hall's seismic condition on the Burrard Street Bridge, until he appealed, and the Commissioner in 2014 ordered it released in Order F14-37, after city hall had, in a try-anything manner, misapplied *five* exemptions of the *Act*. (This seems an obvious time to apply Section 25, the public interest override.) Yet does anyone believe there is any legitimate excuse to withhold quake reports from the public?

evident in the 2,000 stories, yet we might also reflect upon the motto of the Colorado *Aspen Daily News*: "If you don't want it printed then don't let it happen."

Journalism professor Sean Holman had perhaps the most apt metaphor: "An FOI law is like an artificial organ transplanted into the governmental body, one that body rejects." Yet broad FOI exemptions - some of these permitting 95 percent of a document to be whited out - were added to render this transplant bearable.

Consider the cost-benefit trade-off. The British House of Commons Justice Committee held hearings on its *FOI Act* and produced an exemplary report in 2013[54], which concluded:

> We do not believe that there has been any general harmful effect at all on the ability to conduct business in the public service…. Greater release of data is invariably going to lead to greater criticism of public bodies and individuals, which may sometimes be unfair or partial. In our view, however, this, while regrettable, is a price well worth paying for the benefits greater openness brings to our democracy.[55]

There is good news: this B.C. descent is reversible. To this end, the NDP can and should forthwith repeal the negative clauses passed in *Bill 22*, and fulfill its 2017 electoral pledges to plug the three FOI legislative black holes.

In the meantime, MLAs from any party can propose FOI amendments in private members bills. One of the most appealing features of access law is that it is a subject that entirely transcends political organizations and ideologies.[56] Opposition research branches are prolific users of the *Act*, and any current governing party obstructing reform of an ineffectual law could itself be in Opposition again one day, trying to use it and wishing it was more effective. One MLA echoed that point in a Legislative debate:

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[54] House of Commons Justice Committee *Post-legislative scrutiny of the UK Freedom of Information Act 2000*. First Report of Session 2012–13

[55] Not all Britons agree. e.g., "Freedom of Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it." These are the words of former UK prime minister Tony Blair addressed to himself in his memoirs while reflecting on his government's introduction of the FOI Act in 2000. - *Why Tony Blair thinks he was an idiot*, by Martin Rosenbaum, BBC News. Sept. 1, 2010

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

> You know what? I say this to the government: You never think of this when you're in government, but sometimes political parties are in government, and sometimes they're in opposition. It is dangerous for a government to act towards a fundamental law of our province, freedom of information, as if they're going to govern for a thousand years.

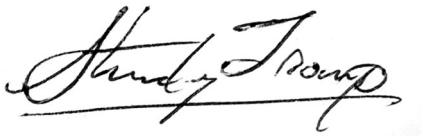
This was Adrian Dix, the current NDP Heath Minister, while in Opposition, speaking to the House on April 1, 2008. We might also recall the modest words of our less-autocratic former NDP premier Mike Harcourt, who said of his role: "I'm just a temporary employee here."

This great province surely needs to at least raise its own FOI law up to the best standards of its British Commonwealth partners - and then, hopefully, look beyond the Commonwealth to consider the rest of the world. This is not a radical or unreasonable goal at all, for to reach it, B.C. legislators need not leap into the future but merely step into the present. In fact, if it wished, British Columbia could become the world leader on FOI law and practice – a model for the rest of the nation, and perhaps even the world. The choice is ours.

I do not have all the answers, nor does any one individual or institution, yet in this report I hope to have raised the right questions; ultimately, readers will make up their own minds. Most FOI advocates never expect to get everything they want, but we can, and must, do far better.

In sum, MLAs serve the public in their way as the news media do in ours. Here, even in this challenging pandemic era, you have an opportunity to create a fine historical legacy for your constituents - as those legislators who passed the original B.C. *FOIPP Act* did in 1992 - one that will endure long after you depart office.

Respectfully yours,



Stanley L. Tromp
Vancouver, British Columbia, 2022

Chapter 1

The grievous betrayal of *Bill 22*

On the afternoon of Monday, October 18, 2021, I was seated at my desk when an email marked Urgent popped up in my inbox. Its subject heading was one I could not ignore: "The NDP are killing FOI. Check the news."

I did so, and in the process discovered the NDP's just-introduced *Bill 22*, the *Freedom of Information and Protection of Privacy Amendment Act (2021).* I read the bill's text with a mounting sense of dread and near-disbelief, and by the time I had finished reading it, I came to believe that the email's subject heading had not been far overstated.

This *Bill* has been widely discussed by many others at length, so I will just outline its main points here.[57] The most adverse clauses passed in *Bill 22* – which definitely should be repealed today - are:

* Sec. 33.1, allowing a public body to disclose personal information outside of Canada. (Former NDP premier Ujjal Dosanjh stated on the data residency amendment: "It is absolutely reprehensible for a government to [change the requirement]; it's a betrayal of our sovereignty."[58])

* Sec. 27, allowing government to ask the Commissioner's permission to disregard an FOI request if "it is excessively broad" or is "repetitious or systematic." (The OIPC called this former criterion "troubling.")

* Sec. 75 (1), the most contentious feature, which newly permits government to charge people an application fee for filing FOI requests. Any amount (e.g., $25 or other) could be set later in regulations.

* Sec.3(3) would provide that Part 2 of the Act – the *FOIPP Act*'s access to information provisions - no longer applies to any of the following records:

> ~ a record that does not relate to the business of a public body
> ~ a record of metadata that
> (i) is generated by an electronic system, and
> (ii) describes an individual's interaction with the electronic system;
> ~ an electronic record that has been lawfully deleted by an employee of a public body and can no longer be accessed by the employee.

[57] Initially there were worries that the premier's office might no longer be covered under the *Act*, due to some ambiguities in *Bill 22*; yet the Premier's Office has since been reinstated in the schedule by government amendment.

[58] *Critics Blast Information and Privacy Law Changes*, by Suhani Dosanjh. The Griffin's Nest. Eric Hamber high school newspaper, Nov. 8, 2021

* The government proudly states that Sec. 46 (d)(iv) of *Bill 22* newly provides that the minister *may* add exempt entities to FOI coverage, if he or she "determines that it would be in the public interest." But there is, of course, a world of difference in law between "may" and "must." (In fact, if the minister ever chooses to apply FOI coverage to the $500 million InBC Investment Corp. - where it is most urgently needed - this move would be surprising but always welcome.)

This wholly discretionary new section, which contains no criteria, was likely designed to create the illusion of solving the subsidiary problem without actually doing so, and thus push it off the public's agenda. If that is the case, then the actual effect of Sec. 46 (d)(iv) is to be worse than useless.

Regarding Sec. 27, the B.C. Liberal Opposition has been filing countless request per year.[59] This clause was likely prompted because the NDP government in 2019 had failed in its attempt to get Commissioner McEvoy to allow it to ignore hundreds of those Liberal requests as "frivolous or vexatious," as per Sec. 43.[60]

It is also a most dangerous fallacy to suggest that all "repetitious or systematic" FOI requests are without public merit and so should be barred. A journalist might send quarterly requests to a city council for minutes of its in-camera meeting, or for a health authority's internal audits; these requests are repetitious *and* systematic, indeed, but they also vitally serve the public interest (and are obviously not "frivolous or vexatious").

Strong critiques of these features appeared in a seven page letter sent by B.C. information and privacy commissioner Michael McEvoy to the Minister of Citizens Services Lisa Beare.[61] He added: "An overriding concern with Bill 22 is the unknown impact of key amendments because their substance will only be filled in through regulations, *about which we know nothing*." Moreover, "To move forward with these amendments, in a year that the Special Committee is tasked to do this work, is baffling."

Yet he also noted several positive clauses in Bill 22, which I acknowledge too:

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[59] Via FOI, the Liberals "started to score some hits. Internal worries that a letter from Agriculture Minister Lana Popham to fish farms sounded too much like a not-so-veiled threat. A Premier's Office plan to place political staff in non-partisan constituency offices. Documents that showed the provincial government had created 5,717 childcare spaces, and not the touted 22,000. Most dramatically, Jinny Sims had to resign from cabinet." - ***Foiled at Last? The NDP's reasons to limit or charge for Freedom of Information requests don't seem to hold water***. By Maclean Kay, The Orca. Oct. 21, 2021

[60] OIPC order F19-34. https://www.oipc.bc.ca/orders/2342 The adjudicator ruled: "The Opposition has a genuine and serious interest in requesting and receiving these records. I am satisfied the Opposition's access requests were not made in bad faith or made primarily for a purpose other than gaining access to information."

[61] OIPC letter to Minister Lisa Beare, Oct. 20, 2021

The new requirements relating to privacy impact assessments; the new privacy breach notification rules; the duty for public bodies to have privacy management programs; the inclusion of snooping offences; the provisions dealing with data-linking initiatives; a clause on disclosure harmful to interests of an Indigenous people; the designation of the BC Association of Chiefs of Police and the BC Association of Municipal Chiefs of Police as public bodies under Schedule 2 of the Act; fines for destruction of records (as discussed in my chapter on oral government).

What price democracy? The FOI application fee

No amendment to the B.C. *FOIPP Act* since its passage 30 years ago has caused such anxiety and indignation.

"The most difficult and disappointing change is the new fee to get information," said former NDP premier Ujjal Dosanjh. "There was no fee before. I believe that this is a backwards step; people should be able to access government information free of charge. In a democratic government, this should not be allowed."[62]

"The New Democrats admit privately that the fee is intended to discourage applications, not promote them," wrote Vaughn Palmer,[63] adding "the New Democrats should finish the job McEvoy started, feed the entire bill into one of their shredders, and start again."

The Commissioner wrote in his letter to Minister Beare that "I am unable to understand how this [fee] amendment improves accountability and transparency when it comes to public bodies that operate in a free and democratic society. To add another barrier of access at a time when transparency is critical is deeply troubling. Further, I am troubled that there would be no ability for my office to waive an application fee if it is in the public interest."

There is no real mystery as to why the fee was implemented. Since 2017 the Liberal caucus have swamped the government with requests,[64] and had learned the FOI trade by watching how the NDP did it, as noted by Les Leyne:

> In opposition, the NDP carpet-bombed Liberal governments with thousands of freedom-of-information requests. Now they're going to start charging anyone who files one. The fee is

[62] Suhani Dosanjh, ibid

[63] *Freedom of information? Who cares, says B.C. premier*. Vancouver Sun. Oct. 21, 2021

[64] "I believe that thousands and thousands and thousands of requests are not designed to better understand why decisions are being made, but instead they're acting as surveillance, looking over the shoulder of public officials," said Premier Horgan, adding there has been "an extraordinary proliferation in requests for information from political parties." But he did acknowledge that while in opposition, his party made many requests. - *Changes to freedom-of-information legislation will weaken B.C.'s democratic infrastructure, says Privacy Commissioner*. By Xiao Xu, *Globe and Mail*, Oct. 25, 2021

> peanuts and won't raise much revenue. It's just designed to swing the doors slightly shut, after they spent years prattling about how important it was to keep them open.[65]

Internally, the government blamed a backlog on the Opposition B.C. Liberals, which it said filed more than 4,000 FOI requests in 2020, costing the system $13 million. Minister Beare also admitted that the fee was partly crafted to discourage a journalist who had filed 397 applications in one year alone. Privately, the New Democrats said the offending media applicant was Bob Mackin, investigative journalist and proprietor of The Breaker online site.

In response to this, Commissioner McEvoy made two points. "We can't be making laws about one person," he told broadcaster Jill Bennett on CKNW. He also noted that under Section 43 of the existing *Act*, the commissioner can authorize public bodies to disregard requests that are "frivolous or vexatious."

If the fee was intended to constrain Mackin, it would indeed be grossly unjust to penalize everyone else, for as lawyers say: "Hard cases make bad law." Moreover, Liberal party caucus members would simply pay FOI fees with public money, and so it would not stop them from applying.

A fee of $25 was initially proposed by Minister Lisa Beare, who described it as "modest," explaining, "Other jurisdictions have a fee between $5 and $50. I recommend a number right in the middle."'

That concept is false and duplicitous. Half the provinces in Canada have some FOI application fee; only Alberta and Nunavut charge $25, with Ontario's and the federal access system set at $5. Yet none charges $50, and I asked the ministry who else in the world does so.

It replied with the only example it had, that of Alberta's $50 so-called "continuing request." This is a kind of continual "open request", such as a one-time request to receive an agency's internal audits every quarter year into foreseeable future; it is not the B.C. form of "initial request," as apples are unlike oranges.

Asked by CTV News if she had referred to other provinces having a $50 fee to deliberately mislead the public, Minister Beare replied, "The fees across the jurisdictions are five to 50, yes that's for a subsequent application, but yes that is part of the application fees across the provinces."[66] One longtime Alberta journalist told me - "Nobody but sophisticated users even know about the ongoing $50 fee. And it's rarely used. I bet I am the only person in Alberta who has ever used it."

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[65] *Halloween horror tales from the FOI crypt*. By Les Leyne, *Victoria Times Colonist*, Oct 30, 2021

[66] https://bc.ctvnews.ca/freedom-of-information-changes-will-disproportionately-affect-first-nations-indigenous-leaders-ubcic-1.5642454

A number of free FOI requests?

Consider the case of a very impecunious applicant who might file fewer than five FOI requests a year, on a subject of desperate importance to him of her, but cannot afford any FOI application fees.

To aid such needy requestors, the idea has been floated of permitting FOI applicants to file a certain number of requests cost-free as before, but then charging an application fee for requests above that threshold number. (The fee itself should be capped at $5, the same figure set for the federal *Access to Information Act* for the past 40 years.) I would not oppose this innovation in principle, and would recommend strongly considering it.

When asked, Premier Horgan said his government might consider changing the rules to instead set a limit on the number of free FOI requests: "I like the idea of your 'tenth coffee is free' card. That sounds like a good idea."[67]

In practice, a threshold of 50 or 75 per year would be reasonable for a journalist, yet if the province adopted the idea it would likely prefer a number such as five or 10, this seeming to be more reasonable for everyday requesters as distinct from media and activists. If the latter figure was set for each agency, which it probably would be, this standard might be tolerable (i.e., an applicant could annually file 10 requests to the central government, 10 to UBC, 10 to Fraser Health Authority, etc.).

This plan might have some practical challenges that would need to be resolved first (e.g., tracking applicants, averting one from applying on behalf of colleagues or relatives).

While I am not aware of any jurisdiction in the FOI world that employs this free-request-threshold solution, there is indeed a first time for everything. Does this concept not seem more fair than indiscriminately charging the same application fee for all requests for all applicants, commercial and non commercial alike, across the board?

Many have wondered, Why did *Bill 22* arise? Whose idea was this?

For many years I believed that the primary obstacle to good FOI law and process was the senior bureaucracy. But in 2021 a larger one may have arisen. There is a widespread and persistent belief that Bill 22 was designed and pressed into law by political aides in the Premier's office (which has yet to conclusively deny this conjecture).

[67] *Watchdogs, human rights groups decry B.C.'s freedom of information fees*. By Lasia Kretzel, CityNews.ca, Oct 22, 2021

"The NDP's hypocrisy on Freedom of Information is grotesque, but also coldly calculated," Rob Shaw noted. "John Horgan understands only too well he's undermining a system designed to hold government to account." Moreover,

> There are many senior figures in the BC NDP who relied on both FOIs, and journalists, to excel as opposition critics, and they know full well what they are doing. Ministers like Adrian Dix, David Eby, Selina Robinson, Nick Simons, Mike Farnworth and Rob Fleming made a name for themselves by scrounging up records of government malfeasance and then going public with journalists to tell the story. They spoke out against fees in the past, but now they sit quietly (or worse, actively participate in) undermining the system. It's a shameful betrayal, and reflects poorly on all of them. [68]

Pushing Back

The introduction of *Bill 22* on Oct. 18 initiated a five week, fulltime, frantic and enervating struggle to halt its passage. If advocates had not done this, I am absolutely certain that the FOI application fee would be set at $25 today.

It seemed quite strange how the NDP was so obdurately indifferent to their traditional allies, such as unionists, aboriginals, the working poor, and environmentalists. Within days of *Bill 22*'s introduction, the B.C. Freedom of Information and Privacy Association (FIPA) had created a coalition of at least 24 groups to block its passage. (In its outraged and oppressed aura over the loss of democratic rights, that month reminded me a bit of the formative event in my political education in 1983, the tumult over Premier Bill Bennett's Restraint Budget.)

There were just a very few parties that had successfully (and privately) urged these amendments, such as data tech companies keen to expand their businesses, and mayors, universities and crown corporations weary of processing "too many" FOI requests.

Yet there was no paucity of countervailing voices:

* Brent Jolly, president of the Canadian Association of Journalists, protested that, "in one fell swoop, we have gone from the 21st century back to the Stone Age." A group of B.C. journalism professors publicly objected that the fee could be prohibitive for student reporters.

* A most scathing rebuke came from the Union of BC Indian Chiefs, who jointly signed an open letter to the Premier urging him to scrap *Bill 22*, for multiple consequential reasons.

> The introduction of an application fee for all Freedom of Information requests will disproportionately harm First Nations requesters since they experience higher levels of poverty and often lack resource capacity. Your characterization of the new fee as "modest" displays astounding ignorance and insensitivity since legal processes of redress for historical losses require

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[68] *When freedom of information is neither free nor informative*, by Rob Shaw. *The Orca,* Oct. 19, 2021

First Nations to make multiple formal requests for records from various public bodies in order to obtain evidence.[69]

* From Ottawa, Democracy Watch co-founder Duff Conacher said the public "shouldn't have to pay twice for information," and that in addition to media and advocacy groups, students, professors, and other professionals doing research would feel the impact of the fees.[70]

* Andrew Gage, a lawyer with West Coast Environmental Law, said that while the Bill added penalties for some offences, it needed penalties for FOI delays; moreover the government should have allowed the legislative committee to complete its work before moving ahead with changes.[71]

* Caitlin Shane with PIVOT Legal Society said her group regularly relies on FOI records for its community work, such police policy and reports, overdose information, bylaw enforcement, and financial plans of local governments. "A flat fee presumes we all have the same capacity to pay it . . . But that's patently untrue and the BC NDP knows this. It has always claimed to know this, at least when it publicly prides itself on understanding systemic inequality."[72]

* BC Civil Liberties Association (BCCLA) policy director Meghan McDermott has worked with high school students who are trying to get information about some online learning modules and facing pushback from the school district, but "I'm really disappointed in the idea that fees are going to be used as a disincentive, depending on who the person is who's making requests.[73]

* Ken Rubin, Canada's most expert FOI applicant and researcher for news media, told me: "From my experience, higher initial fees do act as a barrier: it turns people off who would apply (like citizen groups, people seeking to discover government effects on their health, income, environment, consumer products, etc.); and some limit their use of FOI in Alberta given the $25 application fee price tag.

"Back in 1982-83, the feds began with a $5 application fee but draft regulations that I found said it would be $10. The publicity on this changed the application fee back to $5. I have often

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[69] Open letter: Call for the Immediate Withdrawal of Bill 22, Freedom of Information and Protection of Privacy Amendment Act, 2021. On behalf of the Union of BC Indian Chiefs. November 23, 2021

[70] Lasia Kretzel, ibid

[71] *BC's FOI Changes Widely Condemned, Called 'Morally Bankrupt' NDP's legislation would introduce fees and fail to improve a broken system, say critics*, by Andrew MacLeod, *The Tyee*, Oct. 25, 2021

[72] Lasia Kretzel, ibid

[73] Lasia Kretzel, ibid

wondered if the fee was $10 (or up to the possible legal limit of $25 – still a possibility), what would have been the effect on usage."

* CBC Alberta journalist Charles Rusnell told me: "The $25 application fee has always posed a financial barrier in Alberta. This is particularly true for independent researchers affiliated with environmental groups and other non-profits, small and even large media outlets and private citizens most of all."

* David Cuillier - president of the U.S. National Freedom of Information Coalition and an associate journalism professor at the University of Arizona - told me that B.C.'s planned fee "is the worst thing I've seen proposed anywhere in a long time." He added an application fee of $25 would put many citizens at a disadvantage in their interactions with their government and would have a greater impact on people who are poor, thus widening society's information gap. "Not only is the idea deviant, but it is also morally bankrupt.[74]

"The public records request system is a way for citizens to interact with their government, and simply should be considered a cost of doing business. So why start making it harder for citizens to know what their government is up to on this front?" He has also never heard of an FOI application fee in any American state: "It's strange idea down here."

Indeed, in the rest of the FOI world, application fees are extremely rare, as it is perceived as undemocratic. Ireland implemented one such fee at €15 (about $22 Can.), after a tough dogfight, but then dropped it in 2014. Parliamentarian Stephen Donnelly said that fees reinforce the notion that public access to information "is a luxury, but it's actually a right" and Ireland is one of the few countries that charged upfront fees. He added: "The removal of these fees is a step in the right direction, and the Minister deserves credit for taking this decision, which hopefully moves us towards greater openness and transparency." (If only the B.C. NDP would consider this. . . .)

Many found the NDP's legislative process just as objectionable or worse than the *Bill 22*'s contents - a kind of double blow to democracy.

"It didn't take long for B.C.'s NDP government to display the level of arrogance and contemptuousness it once accused the Liberals of when they ran things in the province," wrote Gary Mason, expressing a common view. "All the NDP needed was a majority (which it obtained a year ago) to feel impervious to criticism, ignore political convention, and gleefully trample over the democratic process."[75]

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[74] Andrew MacLeod, ibid

[75] *B.C. government's proposed freedom-of-information changes are cynical and self-serving.* By Gary Mason, Globe and Mail, Oct. 30, 2021. One might also consider how much more easily B.C. Liberal Premier Gordon Campbell (2001-2011) could have passed the same FOI law or worse – after his landslide win had netted him every legislative seat but two - but chose not to.

In the legislature, the debate was often bitter and distressed, and always one-sided. Former B.C. Liberal Leader Andrew Wilkinson said the NDP is "using fees to keep people's noses out of the government they own. It's a source of huge disappointment to me that some of the members opposite I consider to be friends are prepared to look at me with a straight face and support this legislation. I think it's utterly shameful."[76]

Some opposition MLAs began by objecting that *Bill 22* had bypassed and undermined the legislative review panel set to consider the *FOIPP Act* just months later. They cited a critique from Colin Gabelmann, the former NDP attorney general who had passed the law in 1992.

> If the cabinet and the bureaucracy wanted this kind of change, they should have presented their views to the committee. The committee could have heard from the public and then, in the spring of the legislative session, introduced appropriately publicly discussed amendments if they still thought they should."[77]

The opposition introduced a motion to defer the FOI reforms of *Bill 22* until after the review Committee had studied and reported back. But this effort in the House (near Halloween night) was utterly futile, as wryly noted in the *Times Colonist*:

> The Opposition in the Belleville Street Crypt was so appalled, it moved a motion to postpone the bill. In most horror stories, someone would put a hex on them. But this time, someone put Beare and everyone on her team into a coma! They didn't say a word for two days. Mute zombies sat frozen in chairs, waiting for the anguished Opposition to talk themselves out. It was like Night of the Living Dead. It has never happened before.[78]

Moreover, B.C. Green Party MLA Adam Olsen asked the House Speaker to rule on whether the introduction of *Bill 22* had infringed upon his parliamentary privileges as a member of the *FOIPP Act* review Committee. The Speaker considered the question, and responded with a thinly veiled rebuke to the government:

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[76] *Opposition finds plenty to fault in NDP's freedom-of-information proposals,* by Les Leyne. *Victoria Times Colonist*. Oct. 21, 2021. Still, under these very onerous circumstances, the opposition Liberals - far less practiced in the art of emoting moral outrage than the ruling party – seemed notably diplomatic and temperate. Undoubtedly, if the shoe was on the other foot, and some form of *Bill 22* was even proposed by governing Liberals, the opposition NDP would have gone ballistic.

[77] Hansard, Oct. 28, 2021. To which Liberal MLA Mike de Jong added: "There used to be a day when a member of an NDP government would genuflect in the direction of Colin Gabelmann and encourage others to say a prayer of thanks for his vision and foresight in sponsoring the act the minister is now seeking to amend."

[78] *Halloween horror tales,* ibid

> Parliamentary committees fulfil a very important function within our democratic process. In certain circumstances, the effectiveness of the work of such a committee could be undermined by the introduction of a bill that relates directly and substantively to the work of that committee.
>
> There are instances when the timing of the introduction of a bill could be discourteous to the house or one of its committees. Timing of the introduction of legislation should be carefully considered so as not to diminish or be perceived to diminish the important work that this house and its committees undertake outside of core legislative functions.[79]

During debate on the application fee, Nathan Cullen, NDP minister of state for lands and natural resources, argued, "I think a $25 fee - up to and around that range - or as little as $5 - seems worthwhile. Will you put 5 bucks down? If someone is unwilling to pay $5, then are they sincere in their efforts?"[80]

Back when Cullen and B.C.'s indigenous affairs minister Murray Rankin were serving as NDP MPs in the federal parliament, Rankin had denounced Ottawa's $5 FOI application fee "as a tollgate on the public's right to know." In 2009, Rankin had also cited government testimony that it would cost the federal bureaucracy $55 to collect a $5 fee. Both are now silent on the $10 B.C. FOI fee, and how much it would likely cost to process here.[81]

After five weeks of this self-inflicted agitation, the NDP drove its *Bill 22* on to its woeful conclusion. On Thursday, Nov. 25, 2021, it used its majority to cut off debate on the statute, rushing passage of 30 clauses of the legislation without allowing any questions. Then it passed the Bill by a vote of 49 yeas to 24 nays. As Rob Shaw recalled:

> After the vote, there was a long moment of silence in the legislature. Normally the government claps at the passage of one of its bills, giving kudos to itself and the minister responsible. B.C. Liberal MLAs started heckling, asking why the government wasn't congratulating itself after such a long and bitter fight over FOI. A couple of New Democrats

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[79] *B.C. NDP putting the cart before the horse*, by Vaughn Palmer. Vancouver Sun, Jan. 26, 2022

[80] Cullen was one of many longtime FOI advocates, such as Murray Rankin, Doug Routley, Adrian Dix, David Eby and John Horgan himself, who had long railed against other governments' undermining of FOI, as incompatible with core NDP values of equity and social justice.

[81] Maclean Kay dismissed the NDP's cost-recovery rationale for the new FOI fee as bogus. "FOI requests don't 'cost' anything except time. The people responding to FOI requests are salaried employees or appointees; they don't charge overtime. And unless the request is deemed to be particularly excessive and time-consuming, there's no bill attached – and when there is, it's paid by the person or organization making the request, not the taxpayer." - *Foiled at Last? The NDP's reasons to limit or charge for Freedom of Information requests don't seem to hold water*. The Orca. Oct. 21, 2021

> laughed awkwardly and started to clap. But the vast majority sat silent. Deep down, they know what we know: It was a hollow victory that made liars of them all.[82]

Later, there arose a harsh controversy on Minister Beare's position on the FOI application fee on the day of Bill 22's royal assent. Liberal MLA Mike de Jong introduced emails obtained through FOI (ironically); among them was an approved decision note, explicitly described by the minister's staff as "MLB approved", for the $10 fee. The problem was that for another four days after the note, the Minister continued to tell the legislature that no decision had been made and more public consultation was to occur.

Her last pledge to listen was delivered in the House shortly after 4 p.m. Nov. 25, and an hour later, *Bill 22* was given royal assent. Just after 5 p.m., the house adjourned, and later that evening, Minister Beare, joined by environment minister George Heyman, signed a cabinet order approving an application fee of $10. Obviously, the real decision had been made well before.

In response to the opposition parties' complaint on a point of privilege, the Speaker ruled on very narrow technical points that her statement did not amount to a literal falsehood; but it was still widely believed thereafter that the minister's credibility had been gravely impaired.[8384]

Then in February 2022, Premier Horgan's government received the non-coveted *2021 Code of Silence Provincial Award for Outstanding Achievement in Government Secrecy.* "The B.C. government's bold efforts to significantly walk-back transparency legislation has undermined freedom of the press and the public's ability to monitor the government's actions," said Patti Sonntag of Canadian Journalists for Free Expression (CJFE).[85]

So here we are. Must British Columbians – those who still retain a hope that, despite *Bill 22,* politics could be an honourable profession - wait resignedly for another three decades, in some more enlightened future age, for the law to be updated, or might they wish to accelerate these

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[82] *Deliberate misdirection*, by Rob Shaw, The Orca, Nov. 30, 2022

[84] See: *Opposition accuses FOI minister of misleading legislature. Lisa Beare might not have been lying but she sure was being sneaky*, By Vaughn Palmer. Vancouver Sun, Feb. 10, 2022; *Grin and Beare it*, by Maclean Kay. The Orca, Feb 11. 2022; *Deliberate misdirection: If what Citizens' Services Minister Lisa Beare told the legislature about FOI fees isn't a lie, it comes awfully close*, by Rob Shaw, The Orca, Nov. 30, 2022; *Provincial minister in a jam of her own making*, by Les Leyne. Victoria Times Colonist, Feb. 15, 2022; *Ask me no questions: Though the Speaker ruled he'd take her at her word, Citizens' Services Minister Lisa Beare's credibility is ruined in the real world,* by Rob Shaw. The Orca, Feb. 16, 2022

[85] CJFE press release, February 8, 2022. The Code of Silence Awards are presented annually by the Canadian Association of Journalists (CAJ), the Centre for Free Expression at Ryerson University (CFE), and Canadian Journalists for Free Expression (CJFE). Surrey mayor Doug McCallum received a 2021 Code of Silence "dishonourable mention," for his ban on citizens attending in-person meetings. The mayor had also written a letter to the Premier praising him for imposing the FOI application fee.

improvements? Or might the B.C. government finally wish to pass an FOI statute that is a cause for pride rather than shame? In the end, the Premier and cabinet can decide what they wish their legacy to be.

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

> [The section] permitting the exemption of advice and accounts of consultations and deliberations, is probably the *Act*'s most easily abused provision. - *Information Commissioner Inger Hansen on federal ATI Act Section 21 (the equivalent of B.C. FOIPP Act Section 13), 1987–1988 Annual Report.*
>
> The policy advice FOI exemption "has the greatest potential for routine misuse." - *Open and Shut, MPs report, Ottawa, 1987*.
>
> Every access law in Canada contains a massively overbroad exception for internal government deliberations that fails to conform to international standards. - *Centre for Law and Democracy, Halifax, 2012.*

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

How did we arrive here? The B.C. Court of Appeal set a dangerous precedent in 2002 when it ruled on an FOI request dispute: the "Dr. Doe" case of the B.C. College of Physicians and Surgeons. The court held that Section 13 of *FOIPP* was not limited to recommendations. Instead, the investigation and gathering of facts could be exempted from access pursuant to Section 13, regardless of whether or not any decision or course of action was actually recommended.

In brief, the facts were that an employee of the physician Dr. Doe had complained to the B.C. College of Physicians that he had sexually harassed her and attempted to hypnotise her. During the investigation of the complaint, the College's lawyer obtained the opinions of four experts on hypnosis. The applicant applied to the College through FOI for all documentation on these records. When the College refused, she appealed to the B.C. Information and Privacy Commissioner, who then ordered the records disclosed, because the experts' reports did not constitute "advice or recommendations" as per Section 13.

The College appealed the OIPC ruling to the B.C. Supreme Court, but lost. It then appealed to the B.C Court of Appeal, and won. The court stated the records did constitute "advice," and that "recommendations" includes "the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action."

"This interpretation expands the scope of the s. 13 exception to an alarming degree," wrote lawyer Michael Doherty in a report to FIPA on the case.[86] "The result is that a sweeping new

[86] *A Prescription for "Dr. Doe"- Proposed Revisions to s. 13 of the Freedom of Information and Protection of Privacy Act in Response to the Decision in College of Physicians of British*

exception to access to information has been created. Legislative action is required if the original intention of the Legislature and integrity of the Act are to be restored."

He also noted that such an amendment was practically invited by the Court of Appeal in its ruling, when it observed that s. 13(2) excludes many kinds of reports and information, and stated:

> If the Legislature did not intend the opinions of experts, obtained to provide background explanations or analysis necessary to the deliberative process of a public body, to be included in the meaning of "advice for the purposes of s. 13, it could have explicitly excluded them.

The B.C. Commissioner tried to appeal to the Supreme Court of Canada to overturn the ruling, but he was denied leave to appeal, without explanation. Reform seemed a forlorn hope; *The Richmond News* reported in 2007 that the minister for B.C. FOI policy said "the government disagrees with him, and agrees with a court decision that upholds the government's right to deem policy advice confidential." In 2011, John Horgan, then an NDP MLA, wrote that he was not enthusiastic about reforming the Act's policy advice exemption, saying it had "stood the test of time."[87] (This is a fallacy: deleterious practices are never legitimized merely by time passage.)

Then, in a bold power grab, B.C. officials and crown lawyers grotesquely overextended this one flawed ruling on a private hypnotism dispute to newly seal background facts on public policy advice all across government, upon any topic they chose - health, education, policing, finance, etc.

From the Dr. Doe case, the bureaucracy pulled off a legal coup with arcane, ingenious arguments that bare facts somehow implicitly prompt a policy direction, and the two are inseparably "intertwined." This ruling buoyed officials, but created incalculable havoc for B.C. FOI applicants over the past 17 years, as hundreds if not thousands of pages in the public interest have been newly sealed.

What is the outcome of this situation?

Doherty noted a few examples in which access to records hitherto available could now be denied to the public (and even individuals directly affected) under Section 13 as a result of Dr. Doe:

> • Injured workers applying for Workers' Compensation might now be unable to obtain copies of opinions concerning the level of post-injury pain that they are experiencing;

Columbia v. British Columbia (Information and Privacy Commissioner). By Michael Doherty, BC Public Interest Advocacy Centre, 2004.

[87] *Dix, Farnworth pledge reforms to Freedom of Information Act*. By Chad Skelton, Vancouver Sun, Feb. 15, 2011

> • Injured motorists seeking copies of opinions of traffic analysts who have examined their motor vehicle accident sites could be denied access to those opinions;
>
> • Assessments of individual students developed by or for educational institutions could now be withheld from those students and their parents;
>
> • The technical opinions of biologists and foresters about the status of endangered species and their habitat may now be kept secret;

I regularly encounter the problem in my journalistic work. For instance, briefing notes from the Ministry of Advanced Education of the sort that were released to me in full (with all facts *and* "recommendations" open, which it has the discretionary freedom to do) before 2004 were by 2012 being mostly withheld under Section 13. (See Appendix 4)

Later, when I applied for records on the human health impacts of Liquified Natural Gas (LNG), the Natural Gas Development Ministry invoked Section 13 to blank out about one hundred pages of facts and analysis.[88] Journalist Bob Mackin was denied access to a technical report on the state of B.C. Place stadium under Section 13.

A pamphlet on the HST sent to every household in British Columbia was labelled by the government as "policy advice"; and a university's request that the government bring in a retroactive law to make illegal parking fines legal was counted as giving the government policy advice rather than just lobbying.

A robust protest against the impact of the Dr. Doe ruling on Section 13 came from one well versed on the matter, former NDP Attorney General Colin Gablemann, who had introduced the FOIPP Act in 1992, and who told an FOI conference in a 2007 speech:[89]

> There has been an incredibly astonishing perversion in the last few years of the plain language meaning of the words: "advice and recommendations." This has resulted in the reversal of the legislature's intent, as originally expressed in the legislature and in the Act.
>
> The wording and intent was clear -- at least we thought it was. In Section 13. . . . we meant that to mean -- and I believe it does mean -- that "advice or recommendations" was limited to those parts of documents or reports that advocated that government choose a particular course of action or make a particular decision.

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[88] This story had a very rare and agreeable surprise ending. I wrote a newspaper editorial to complain of this discretionary Section 13 application to LNG records, it was published, and later the same day the Ministry released all these records to me. See: *B.C. government is quietly closing down our freedom-of-information system,* by Stanley Tromp. *The Province,* Oct. 20, 2016

[89] *Fight Against Secrecy Failed - Why BC's 'open government' laws need fixing*. By Colin Gabelmann. *TheTyee.ca*. October 15, 2007. http://thetyee.ca/Views/2007/10/15/FOI/

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

Another notable objection came from Murray Rankin, QC, currently B.C. Minister of Indigenous Relations, then an NDP MP, who delivered a speech to a FIPA conference rebutting the Dr. Doe ruling's legal errors point by point. He noted:

> I'm particularly concerned about the B.C. Court of Appeal's decision in the *College of Physicians and Surgeons* case (also known as the "Dr. Doe" case), where the policy advice or recommendations exemption in the *Act* was, in my view, extended remarkably and too far.
>
> I do hope that the government agrees that this is a regressive development and, consistent with its recent re-affirmation of a commitment to open government, will amend the section to overcome the Court of Appeal's overbroad reading of Section 13(1). It is now up to the government to ask the Legislature to change the *Act* and restore the original intent of the legislation and I hope the Opposition will be watching - I know all of us will - to ensure the government does not listen to its officials and try to duck this one.[90]

By now officials across this nation utilize the policy advice exemption as a *de facto* all-purpose master key that can lock up almost any FOI door, or a catch-all net hanging beneath all the other exemptions, for officials have nothing to lose by trying it as a last resort, in flexible and creative ways. It seems to be a well-known joke amongst officials that if all else fails, just invoke Section 13 and hope for the best. This surely happened because the drafters of the B.C. *FOIPP Act* in 1992 did not foresee Section 13's usage spreading so far.

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

The 2004 FOIPP Special Review Committee concluded that there was an "urgent need" to amend Section 13, for the Dr. Doe judgment had "the potential to deny British Columbians access to a significant portion of records in the custody of public bodies and hence to diminish accountability."

Moreover, As the B.C. *FOIPP* Commissioner told your committee in 2015: "This interpretation broadens the application of Section 13 such that any document compiled in the course of

[90] Murray Rankin, keynote address, B.C. FIPA Information Summit, Vancouver, Sept. 29, 2006. More NDP pledges to fix Section 13 can be found in Appendix 5 of this report.

considering alternative options is effectively exempt from disclosure under FIPPA. This frustrates the intended balance that the Legislature sought in enacting the provision."

The NDP pledged to FIPA in an election survey in 2017 that: "The B.C. Liberals' use of section 13 to deny even factual information has led to widespread call for reform, including by the Information Commissioner, and we support the Commissioner's advice, reflected in the May 2016 report of the Special Committee to Review the Freedom of Information Act, that the meaning of this section should be restored to its original, pre-B.C. Liberal, intent."[91] This pledge was shamefully broken.

Why is this situation occurring? Perhaps because records such as internal audits reveal serious internal failures and the need for costly solutions, but these more often can generate political embarrassments and inconveniences, and (as former Information Commissioner John Reid said) secrecy is a tool of power and control.

The PHSA audits

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

For many years (in my view), UBC and the BC Lottery Corporation[92] were tied for the status of the most obstructionist FOI branches in the province, but that prize has now been claimed by the Provincial Health Services Authority, the PHSA. This body oversees the B.C. Cancer Agency, the B.C. Centre for Disease Control, the B.C. Mental Health Society, the Children's and Women's Health Centre, and more, all with $2 billion in annual revenue.

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

I listened in the courtroom as lawyers argued the Dr. Doe. ruling was binding. Utilizing lawyers billing $149,535 of taxpayer's funds, the PHSA made its arguments using in-camera affidavits, which we could not view or challenge. Madame Justice Dardi agreed with the PHSA (in Ruling 2013 BCSC 2322[93]) and the health authority won. Yet the public lost. After that ruling, I applied

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[91] NDP reply to election campaign questionnaire by the B.C. Freedom of Information and Privacy Association (FIPA), April 27, 2017 (https://fipa.bc.ca/wpcontent/uploads/2018/01/BC-NDP-Response.pdf)

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

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

for four new audits, and PHSA denied them all in full, citing that ruling on Section 13. This precedent further emboldened other agencies to withhold factual records under the same exemption. And so it goes.

It is crucial to note here that, by stark contrast, all the other B.C. health authorities gave out their internal audits by FOI and did not claim Section 13. This exemption is discretionary, and so agencies are called upon here to exercise their own judgement, and their spirit of open government. So then often it becomes not so much a legal problem as an attitudinal one; in fact, all the other five B.C. health authorities granted me access to their internal audits under FOI and did not claim Section 13.

Meanwhile, Vancouver City Hall posts its internal audits online. It may also be telling that in the LNG case, the ministry responsible for promoting the industry chose to withhold records on LNG health impacts under Section 13, whereas I filed an identical request to the Health Ministry and it did not apply the exemption.

It seems apt here that Rob Botterell, the senior public servant who developed the *FOIPP Act* in 1992, told your Committee in 2015 that in practice in B.C., "discretionary exemptions effectively have been converted into mandatory exceptions," as though the term "may withhold" is now being routinely misread by officials as "must withhold."

This would also have been the ideal time to apply Section 25, the Public Interest Override, as the records concern public health. As a last resort, I hope the Premier would publicly urge the PHSA to release its audits. I have appealed to Health Minister Adrian Dix for years on this issue, with no response.

There are countless samples of the growing misuse of section 13, such as:

> • The B.C. government hired consultant George Macauley to do a highly secretive review of the FOI act in 2005. I filed an FOI request for the 27 public and private entities' submissions on their preferred FOI-reforms, and the government denied half the texts, claiming Section 13. The Commissioner's office ruled against the section's application, and the B.C. government appealed this ruling to judicial review.[94]
>
> • The Health Ministry used Section 13 to censor Fraser Health Authority chairman Keith Purchase's resignation letter. Purchase resigned in 2006, expressing frustration with inadequate funding for the health authority. The white-out rationale is nonsense, for a resignation letter is not "policy advice developed by a public body" as per section 13.
>
> • In the *Province* newspaper, Michael Smyth's headline to his 2006 story was apt: "Liberals take secrecy to insane new heights." The government was now refusing the NDP's routine FOI

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

requests for Premier Campbell's question-period briefing notes (i.e., pre-rehearsed sound bites), citing Section 13, despite always having released them before.

How to reform Section 13

Clearly the *Act* needs to be amended to clarify and emphasize that Section 13 cannot be applied for background facts and analysis. As Michael Doherty wrote, "We propose that s. 13 be amended in such a way as to clarify that factual materials are subject to access, while recommendations about proposed or alternative courses of action are exempt from access until after the government decision on the appropriate course of action has been made."

He also proposed that that expert reports, which are really a means of establishing facts, be specifically indicated to be treated like other factual information in this regard, unless they do, in fact, make recommendations about proposed or alternative courses of action.

I also strongly believe that Section 13 requires a harms test, whereby a policy advice record can be withheld only if disclosing it could cause "serious" or "significant" harm to the deliberative process. The best models can be found in the FOI laws of South Africa (Sec. 44), and the United Kingdom (Sec. 36).

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

> **Recommendation:** Amend Section 13 to include a section on the model of Quebec's FOI law Sec. 38, whereby the B.C. government may not withhold policy advice records after the final decision on the subject matter of the records is completed and has been made public by the government.
>
> If the record concerns a policy advice matter that has been completed but not made public, the B.C. government may only withhold the record for two years. If the record concerns a policy advice matter that has neither been completed nor made public, the B.C. government may only withhold the record for five years.

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

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

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

> 36. (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act [….]
>
> (b) would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation, or (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.[95]

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

> Amend section 13(1) to clarify the following:
>
> (a) "advice" and "recommendations" are similar terms often used interchangeably that set out suggested actions for acceptance or rejection during a deliberative process,
>
> (b) the "advice" or "recommendations" exception is not available for the facts upon which advised or recommended action is based; or for factual, investigative or background material; or for the assessment or analysis of such material; or for professional or technical opinions.

A harms test for Section 13 is essential. Access should be denied only when disclosure would pose a serious risk of harm or injury to a legitimate aim, with the harms explicitly described. Unfortunately, some FOI laws include exemptions that are not subject to harm tests, which are often referred to as "class exemptions."

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

Positively, one Canadian administration put a harms principle into writing. But such guidelines have not the legal force of a statute, of course, and could be annulled any day; hence an FOI law amendment to guarantee this right is essential. There is more guidance from the Commonwealth Secretariat (of which Canada is a member) and its *Model Freedom of Information Bill,* 2002:

> Formulation of policy. 26.(1) A document is an exempt document if the disclosure of the document under this Act would prejudice the formulation or development of policy by government, by having an adverse effect on (a) the free and frank provision of advice; or (b) the free and frank exchange of views for the purposes of deliberation.
>
> (2) Where a document is a document referred to in subsection (1) by reason only of the matter contained in a particular part or particular parts of the document, a public authority shall identify that part or those parts of the document that are exempt.

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

> (3) Subsection (1) does not apply to a document in so far as it contains publicly available factual, statistical, technical or scientific material or the advice of a scientific or technical expert which analyses or gives an expert opinion of such material.[96]

In an important case of 2017, the Federal Court confirmed that factual information appearing alongside advice and recommendations does not amount to these. In addition, decisions based on advice or recommendations do not constitute these.[97] Neither facts nor decisions, therefore, qualify for the Section 21 exemption. This principle should be explicitly set in a reformed B.C. *FOIPP Act*.

(Beyond Section 13, other B.C. *FOIPP Act* exemptions are also clearly overbroad and, as the group Article 19 has observed, "A strong harm requirement undoes much of the damage potentially caused by overbroad exceptions. This is because, where an exception is cast in excessively broad terms, much of the information in the zone of overbreadth would not, if disclosed, cause any harm to a legitimate interest."[98])

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

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

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

[97] *Canada (Office of the Information Commissioner) v. Canada (Prime Minister), 2017 FC 827*

[98] Memorandum on the Ugandan draft Access to Information Bill, 2004, by Article 19, London, 2004. The problem has been officially conceded here: the Conservative Party of Canada's (broken) election promise of 2006 reads: "A Conservative government will: Ensure that all exemptions from the disclosure of government information are justified only on the basis of the harm or injury that would result from disclosure, not blanket exemption rules."

Time limits for the policy advice exemption

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

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

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

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

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

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

(As lawyer Michael Karanicolas well told your committee in 2015: "I will note that India has ruled that disclosure should happen as soon as the decision has been made. . . on the issue of the deliberative exception, generally speaking, in the United States, public bodies looking to invoke this exception are expected to identify a specific decision-making process in order to justify their refusal.")

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

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

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

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

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

Officials may try to reassure us with: "The policy advice exemption is well drafted, yet in some cases it may have indeed been misapplied. But if so, just trust us to correct such misapplications on a case-by-case basis, and we can also provide better regulations and guidance for it." This claim is spurious, for the problem is now far too systemic and widespread in practice for such ineffectual measures, and so the section needs to be re-worded in law.

I expect it will be politically the most difficult section to change, the FOI privilege most treasured by unelected bureaucrats, who far outlast elected politicians. I emphasize that I am not calling for the repeal of the policy advice exemption but only its reform, so its usage is constrained and sensible, unlike today.

Why does it matter? Because this exemption is now akin to an omnivorous black hole that will soon swallow up more and more, until our FOI laws are rendered almost meaningless. To most British Columbians, this issue may appear to be a dry and obscure point of administrative law, and so it falls under the public radar, which is how the government prefers it. Yet the potential of Section 13 to quietly close down the B.C. FOI system cannot be overstated.

A note on legal process

Even when the government well knows that doing so is morally indefensible and legally spurious, they will often apply Section 13 anyways – as a cynical tactical game, aware that it has the power to outspend and outlast the applicant for years. If the applicant appeals to OIPC, it takes two years for a ruling. Then if the ruling goes against the agency, it promptly and

reflexively appeals to BC Supreme Court, and then to BC Appeal Court, then to the Supreme Court of Canada after that (often using in-camera affidavits which the disadvantaged applicant may not view or challenge when forming arguments). Hopefully by then the applicant will grow weary, with depleted interest or funds, and just go away.

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

As noted by a *Vancouver Sun* columnist[99], in 2009 the Commissioner sought a $400,000 legal budget to cover the growing number of court challenges to his rulings by the B.C. government and other public bodies, up by 50 per cent over 2008. Noting the Liberal premier's reversal of his 2001 openness pledge, and his own office's two court challenges of OIPC orders, the column concluded with a commendable idea:

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

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(3) Peering through "the Corporate Veil"

The second major B.C. FOI problem is that public bodies, particularly universities and crown corporations, have been creating wholly-owned and controlled puppet companies to perform many of their functions, and manage billions of dollars in taxpayers' funds, whilst claiming these companies are not covered by FOI laws because they are private and independent – a form of *pseudo-privatization* that FIPA has referred to as "information laundering."

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

The government proudly states that Sec. 46 (d)(iv) of *Bill 22* newly provides that the minister *may* add exempt entities to FOI coverage, if he or she "determines that it would be in the public

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

interest." But there is, of course, a world of difference in law between "may" and "must." (In fact, if the minister ever chooses to apply FOI coverage to the $500 million InBC Investment Corp. - where it is most urgently needed - this move would be surprising but always welcome.)

This wholly discretionary new section, which contains no criteria, was likely designed to create the illusion of solving the subsidiary problem without actually doing so, and thus push it off the public's agenda. If that is the case, then the actual effect of Sec. 46 (d)(iv) is to be worse than useless.

In 2015, a ministry official told your Committee that "British Columbia's *Act* provides the broadest coverage in Canada. At our last estimate there are 2,900 public bodies that are covered under the legislation."

The B.C. government often boasts on this point, suggesting that this seemingly impressive number should largely compensate for the entities that are not included, yet. Firstly, only the very naïve would be awed by such a figure, because it simply substitutes *quantity* of coverage for *quality,* i.e., a single FOI-excluded entity, the $500 million InBC Investment Corp., likely handles vastly more public funds than, say, the hundred smallest FOI-covered entities combined (such as the B.C. College of Hairdressers and the Okanagan-Kootenay Sterile Insect Release Board). Secondly, many of these were added solely via the government's whim and caprice, not by defining criteria.

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

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

On the potential for such entities to multiply (as a result of SFU and UBC legal victories), lawyer Dan Burnett acting on behalf of FIPA told the media: "When you think about it, the potential for abuse is huge. It could be the black hole that swallows up FOI."[100] One expects this arises because B.C. legislators in passing the *Act* in 1992 did not foresee this quandary. This fear was echoed by Murray Rankin:

> But consider privatization, the P3 phenomenon, and outsourcing. One sometimes thinks that the present business of government more and more consists of managing consultants. The philosophy

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

> of "steering the ship" rather than "rowing the boat" has meant that much is now done outside government, and this has had a devastating impact in some fields with respect to one's ability to examine records that were previously "public" in nature.[101]

The kind of accountability that these entities need can only come from public transparency.[102] After the Vancouver School Board's private companies lost public money in failed overseas business adventures, the education minister in 2007 sent out a press release pledging to add these companies to the *FOIPP Act*'s coverage, but this was never done. Why not? Yet B.C. local municipalities' subsidiaries are covered by the *Act* (although regrettably the level of "ownership" is not specified there; I urge that it be set at a 50 percent minimum).[103]

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

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

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

As well, the B.C. government excluded 2010 Olympics Organizing Committee (VANOC) from FOI coverage, even though in the U.K. a similar entity that managed the 2012 London Olympics, the ODA, was covered by the British FOI law.[104]

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[101] Murray Rankin, QC, Keynote address, B.C. Information Summit, Sept. 29, 2006

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

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

[104] Moreover, when quasi-governmental entities do business amongst themselves, the opacity can be absolute. In 2008, the Vancouver Organizing Committee for the 2010 Olympic and

Such entities' FOI coverage was urged by the B.C. legislative review committees, the Information and Privacy Commissioner, FIPA and many others – all to no avail. In a 2011 media interview, the minister for FOI policy Margaret MacDiarmid said: "It seems reasonable to me that they would be covered. So we're certainly looking at it, but we need to do a consultation, because we have to watch for unintended consequences." Deplorably, the government then voted down NDP MLA Doug Routley's private members bills that would have fixed the problem. (Where does he stand on the issue today?)

In Hansard on May 18, 2016, Routley pleaded with Mike De Jong, the Liberal minister overseeing FOI policy: "Will he be moving to bring subsidiaries under the scope?" De Jong replied: "Short answer is yes. It is something that we are examining, that I am seized of . . . . So the idea, the notion of extending the umbrella more broadly, is something that I see wisdom in."[105] Then nothing ensued.

Governments usually resist a criteria-based approach because they wish to enjoy the discretionary power of excluding any entity they wish from the FOI law's scope.[106] "The very purpose of the *Access to Information Act* was to remove the caprice from decisions about disclosure of government records," said former Information Commissioner John Reid. "Now we must remove the caprice from decisions about which entities will be subject to the Act."[107] The same principle applies to the B.C. *FOIPP Act,* and Victoria's caprice of "may."

We need to first make a distinction between two forms of FOI entity coverage:

[Category A] The entire entity, with its subsidiaries, is covered *in toto*, now designated in FOI law as a "public body," added to the Schedule 2 list, with its own FOI office

[Category B] The entity is not designated in law as a "public body," and so it is not added to the listed Schedule 2 list; without its own FOI office, records are retrieved for applicants by some

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Paralympic Winter Games (VANOC) contracted the Vancouver International Airport authority (YVR) to be an official supplier. Both of these entities were not covered by FOI laws, provincial or federal, and so their contract and records can be secreted.

[105] Hansard - https://www.leg.bc.ca/content/Hansard/39th4th/20111025am-Hansard-v26n6.htm

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

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

other FOI office; its records are covered by the FOI law *only* to the extent of its "public functions"

Definite examples of Category A:

Any entity whose focus is public health and safety (e.g., all B.C. health authorities, blood agencies); InBC Investment Corp.; majority owned subsidiaries of universities and crown corporations (e.g., UBC's land management company, BC Hydro's Powertech and Powerex); government foundations.

All these fall into gaps that no other nation with an FOI law would tolerate. Indeed, even the most secretive prime minister in memory, Stephen Harper, amended the federal *Access to Information Act* to cover all national crown corporations *and their subsidiaries (*and even some government-created foundations). These would be the national equivalents of BC Hydro's Powerex and Powertech. He effected these "quick fixes" because the need was so overwhelming obvious, even to him.

Possible examples of Category B:

The entities in these FOI grayer areas serve a "public function" of sorts, yes, but one rather more abstract than those in Stage 1, usually for improving the general quality of life, less concerning life and death issues.

It seems highly doubtful that FOI coverage should extend to many records of: entities managing diversity training, non-profit housing renovations, political advocacy, arts and music education, human rights societies, sociological research, immigrant language and literacy training, youth employment.[108]

Human rights specialists often make a distinction between "two generations" of human rights: (1) basic civil and political rights, and (2) economic, social and cultural rights; Category B more often conforms to the second generation.[109]

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[108] A clarifying point is needed here: an entity should only be covered by FOI only to the extent of its designated *public* functions; but if that entity also had a branch that managed programs funded by a charity, those activities would not automatically be covered (although they might under certain other criteria).

[109] Some have advocated that an entity should be FOI-covered if public access to its records is "necessary for the protection of a right"; I would not advise this, because citizens now have access to their own records from private entities via private sector privacy laws such as PIPPEDA federally and the PIPA in B.C; that should suffice for now, and if those are insufficient then they can be amended.

The concept of "public function" must be carefully detailed in the FOI law. i.e., If every entity performing *any* kind of "public function" were to be FOI-covered, then hundreds if not thousands of non-profit societies and charities would be newly subject to the law, an absurd prospect.[110]

It becomes more complicated if we start to look at NGOs that fill gaps in public service areas, such as mental health services for COVID (the example raised by MLA Yap below). I would argue that these are not public functions. Indeed, they are often services that the government has carefully and specifically decided not to provide, hence the need for supplementary provision of these services.

Of course this is complicated and would essentially need to be fought over case by case. I certainly do not consider human rights work, which is about holding the government to account for its obligations, to be a public function (or any other accountability role).

My new consideration of this dilemma was prompted by exchanges during the Feb. 3, 2022, meeting of this *FOIPP Act* review committee in Hansard.[111]

> **Henry Yao, Liberal MLA:** If a non-profit organization is receiving grants based on taxpayers' money, do you foresee that as also some kind of organization that should also be subject to FIPPA, in regards to those kind of circumstances?
>
> **Michael McEvoy, B.C. Information and Privacy Commissioner**: I think the short answer to you question as you describe it is no. I mean, many, many thousands of organizations get government grants. It wouldn't make their organizations subject to FOI. . . . "If the entity is doing, in effect, the government's business, so to speak….. that's a different thing." […..]

I fully agree with the B.C. Commissioner that the mere fact of receiving a grant, no matter how large, should not automatically mandate FOI coverage of an entity; yet I believe such coverage might be considered for public funding of its regular operations (above a certain cost threshold, e.g., $50,000 yearly).

> **MLA Yao**: So if a non-profit organization receiving a grant from government, providing a service such as mental health support for individuals struggling through COVID, and there are people questioning whether that money is being properly utilized to support the

[110] In fact, these entities already have several accountability mechanisms - the B.C. *Society Act* disclosures for the former sector (albeit for the society's members only), and the Canada Revenue Agency public disclosure Form T3010 for charities. It could be legitimately questioned whether those measures are adequate for the public interest (and if not, those mechanisms could be enhanced), yet prescribing FOI coverage here would be an error. The only exception to this rule would be the special need to cover B.C. student societies under FOI, as explained in Appendix 7

[111] https://www.leg.bc.ca/parliamentary-business/committees-calendar/20220203-FOI-1200

program designated, does this still go under FOI, based upon your criteria you mentioned earlier?

Commissioner McEvoy replied that although such entities should not be FOI-covered, applicants fortunately today have the right to apply for their own personal records via private-sector privacy acts (such as PIPA and PIPPEDA). I would note the government should of course have its own records to provide accountability about those funds (i.e., reports from the recipient), and these should generally be publicly accessible through FOI requests.

"I suppose somebody could always ask government whether they've investigated a certain agency and what they've found," the Commissioner added. "Whether that would then be disclosable would then be a whole other question, but not the agency itself." In fact, the news media have sometimes based stories upon audits that they had obtained via FOI, which had been conducted by health authorities and the Comptroller General about non-profit societies contracted to perform public works. Here is my advice for now:

Recommendation on B.C. *FOIPP Act* subsidiary coverage

The entities below would be designated a "public body" in B.C. *FOIPP Act* Schedule 2

(a) any institution that is controlled by a public body, at any ownership level, or

(b) performs a statutory function, or

(c) is vested with public powers; or has a majority of its board members appointed by a public body, or

(d) is 50 percent or more publicly owned via its shares[112]

The entities below would not be designated a "public body" in Schedule 2, *per se,* but their records would be accessible by the FOI law only to the extent of their public functions, if:

(e) they perform a public function – after this term is considered and carefully defined

(f) where public funding in effect covers 50% of regular operational costs, whatever the formal nature of the flow of funds (e.g., if the operational costs are funded by grants or other)

[112] Regarding (d), it is absolutely crucial that such entities be at least 50 percent publicly owned, and not "fully owned," for if the latter course was the law, the government could just sell off 5 percent of the entity and still own the remaining 95 percent, as a dexterous way to escape FOI coverage. In fact, it might best be set to a degree less than 50 percentage, since in some cases 20 percentage ownership could mean control. e.g., the South African FOI law assumes control with 20 percent ownership although that can be defeated if control is not in fact present. Obviously one controls with 50 percent but often control is present at much lower levels.

We need to overcome the common Canadian political and bureaucratic fallacy on FOI law reform, present in its ultimate form on the subsidiary question: "We should not *do anything* until we first *know everything*." In our national spirit of over-caution, such an "all-or-nothing" bottleneck has been utilized as an excuse for inaction on this topic for three decades, as state actors bemoan its "structural complexity." We should instead counter with: "Do not let the pursuit of perfection impede you from doing whatever good you can now."

By this I mean that none of this study should forestall the immediate addition of the most obvious and indisputably cases, such as InBC Investiment Corp. (urged by the Privacy Commissioner) and B.C.'s two FOI-excluded health authorities, at the bare minimum. With a bit of political will, these can be added to the *Act*'s Schedule 2 any day, as *Bill 22* did with the BC Association of Chiefs of Police and the BC Association of Municipal Chiefs of Police.

By now, I have come to rather appreciate the politicians' and bureaucrats' lament of the "structural complexity" of the scope of entity coverage issue. Yet the choices must still be made, and I would counter this appeal only insofar as it is used as an excuse for eternal inaction, which it has been.

So I suggest that a stand-alone panel be tasked to study and recommend on the scope of FOI coverage for entities, because this review Committee can only scratch the surface of it, being tasked to deal with so many other issues at once.

Shielding UBC's wholly-owned corporate entities

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

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

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

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

The university denied my FOI request, claiming that the entities are all "independent," and so not under the "control" of UBC as required by the Act. I appealed to the Office of the Information and Privacy Commissioner. UBC and its entities then hired lawyers at public expense to quash the public's right to know. Yet in 2009 the Commissioner's delegate Michael McEvoy ruled that I should have access to the records, writing, "UBC is found to have control of the requested records.... All three bodies were entities created and owned 100 per cent by UBC and accountable to it."[113]

The case was won mainly because had I quoted from a dozen of UBC's own official websites, which in fact boasted that UBC had a high degree of control over its entities and had appointed their boards.[114]

Students celebrated the outcome – to the point of the UBC AMS student union issuing a premature press release to announce that the total secrecy of these pseudo-private mini-empires had finally ended forever. But it was too good to last. UBC, as inevitably as the sun rising, appealed the McEvoy ruling to judicial review, as did Simon Fraser University in a similar case.

Then B.C. Supreme Court Justice Peter Leask ruled that such entities were not covered by the *FOIPP Act* because one must not "pierce the corporate veil." UBC's lawyers argued that the Commissioner's office is "an inferior court," and so the Justice Leask ruling should now be regarded as "the law of the province."[115] (I believe this court ruling is so heavily flawed in several ways that it should be disregarded when considering amendments.)

Five days later in the legislature, NDP MLA Doug Routely, as noted above, tried to amend the FOI law to fix the problem, and the minister replied that, although appreciative of "the spirit of the amendment," she opposed it, because it would not accomplish its goal. His amendment was rejected.[116]

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

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

[115] It may be noteworthy that SFU spent $157,144 in legal fees fighting the subsidiary case, even more than the PHSA did on its Sec. 13 appeal - money that might have been better spent aiding students or the ill. Yet I acknowledge that others may argue that the fact these entities won the cases in court somehow legitimizes such legal spending.

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

Ample protections already exist

What are Canadian governments' standard arguments against FOI coverage of these pseudo-independent entities?

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

Secondly, this Committee's then chair Don McRae asked a very good question of a witness in 2015: Does it matter for FOI if the entity has a monopoly position or not? I have an answer to that, which is the key to the matter:

It does not even matter whether they face competition or not – because they are already fully protected from competitive harm in the FOI law, in section 17 and section 21. The key question to ask these subsidiary companies that oppose FOI coverage can be summed up thus: "Why, exactly, do you assert that B.C. *FOIPP Act* sections 17 and 21 are insufficient to protect your economic interests?"

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

If this illogical and indefensible claim of "competitive harms" was accepted, then no federal or B.C. crown corporation would be covered by any FOI law, and *yet they all are*.

So all of the foregoing shows that vague, dark warnings of so-called "unintended consequences" of FOI coverage are (with respect) absolute nonsense.[117] The sole purpose of the call for further study is an eternal stalling tactic, which is the graveyard of reform – as is already shown from the VSB coverage that was promised 15 years ago and never done. The government likely hopes this issue will just quietly go away and die, but as you can see from the many urgent submissions

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

people have given the Committee in 2015 about UBC Properties Investments who function as a feudal baron in a gated fortress, there will never be peace until this problem is fixed and accountability realized.

From long practice it seems as though these companies' FOI exclusion has hardened into a tradition, which they have come to expect as their due. Yet consider that UBC residents and students have been complaining of UBC's secrecy about this company ever since it was created as UBC Real Estate Corp. (later renamed as UBC Properties Investments) in the year 1988. That is more than 34 years of pleading, all to deaf political ears and the entity's self-serving, granite-like obstructionism. Must they now wait for another 34 years? To premier and cabinet, I ask: Please do not let them down again. Finally heal this long festering sore.

Why it matters

The outcome is that public bodies today can still "veil" their records in the vaults of these pampered, cloistered fiefdoms (which the British call "quangos"), while the secrecy creates potential breeding grounds for waste, corruption, and risks to public health and safety. Such an outrage cannot be blandly rationalized away by officials and crown lawyers. This exclusion is also contrary to the spirit of *FOIPP Act* Section 25, the Public Interest Override. Apart from the law, UBC students, staff and the general public in a larger moral sense should be regarded as the companies' "shareholders" as much as the legal owner UBC is.[118]

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

For example, UBC Properties Investments manages student residential buildings. In 2011 an audit that I obtained from the B.C. finance ministry through the B.C. *FOIPP Act* formed the basis of a cover story[119] I wrote for the now-defunct *Vancouver Courier*. It revealed that Vancouver Community College had hired building management company KD Engineering for 31 years, without a bidding process, paid it over $1 million a year, and stood by as many safety violations occurred, such as major fire hazards, potential carbon monoxide poisoning, and natural gas leaks.

"No effective oversight of this contractor's performance, leading to significant non-compliance with life-safety laws," the audit concluded; the health and safety of 25,000 students (and children in the VCC daycare) may have been placed at risk for years, with potentially tragic consequences.

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

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[119] https://www.canadafoi.ca/story22.htm

Officials warn about the "risks" of subsidiary FOI coverage. Yet one could just as well turn this logic around, as in the case above, and ask: "What then about the risks of *non*-coverage?" Keeping the public in the dark as they do is a "risk" also, but on balance, it is a far greater risk than any trifling or imaginary commercial harm to these companies (which most likely would not occur anyways, because of their monopoly position, and FOI law sec. 17 and 21 protections).

B.C. legislators in 1992 knew that the calculation of supposed harms for FOI releases is never an exact science. How could it be? There will always be a speculative aspect to it, and yet the choices must be made.

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

> **"government agency"** means an association, board, commission, corporation or other body, whether incorporated or unincorporated, if
>
> (a) the body is an agent of the government,
>
> (b) in the case of a corporation with issued voting shares, the government owns, directly or indirectly, more than 50% of the issued voting shares of the corporation, or
>
> (c) a majority of the members of the body or of its board of directors or board of management are one or both of the following:
>
> (i) appointed by the Lieutenant Governor in Council, by a minister or by an Act;
>
> (ii) ministers or public officers acting as ministers or public officers;

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

> (2.1) The obligations set out in access to information legislation should apply to all bodies that carry out public functions,[120] regardless of their form or designation. In particular, bodies that provide public services under public contracts should, to that extent, be covered by the legislation. The Group commends the situation in South Africa, whereby even private bodies are obliged to disclose information where this is necessary for the exercise or protection of any right[121]

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

[121] On the South African extension, Alasdair Roberts in *Blacked Out: Government Secrecy in the Information Age* (2006) adds that, due to intense and well-funded opposition from the private

Federal information commissioner Suzanne Legault, in her 2015 report *Striking the Right Balance for Transparency*,[122] made 85 recommendations for amending the antiquated 1982 *Access to Information Act*, and many of these should be adopted into the B.C. *FOIPP Act.*

> **Recommendation 1.1** - The Information Commissioner recommends including in the Act criteria for determining which institutions would be subject to the Act. The criteria should include all of the following:
>
> [1] institutions publicly funded in whole or in part by the Government of Canada (including those with the ability to raise funds through public borrowing) (this would include traditional departments but also other organizations such as publicly funded research institutions);
>
> [2] institutions publicly controlled in whole or in part by the Government of Canada, including those for which the government appoints a majority of the members of the governing body (such as Crown corporations and their subsidiaries);
>
> [3] institutions that perform a public function, including those in the areas of health and safety, the environment, and economic security (such as NAV CANADA, which is Canada's civil air navigation service provider);
>
> [4] institutions established by statute (such as airport authorities); and
>
> [5] all institutions covered by the *Financial Administration Act*.

Amongst Canadian provinces, Newfoundland has partly caught up to the world with its reformed 2015 access law, in which these entities are FOI-covered: "a corporation, the ownership of which, or a majority of the shares of which is vested in the Crown."[123]

The world standards

Below are indicators of global standards. I am well aware of the fact that because FOI rights exist on paper in other nations, it does not mean they are always followed in practice (but then again, neither are Canadian FOI statutes), and that good laws can even at times be used for

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sector, "We know that any attempt to introduce comparable legislation in an established democracy would be doomed to failure."

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

[123] Even the cautious Justice Department of Canada – in *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, 2005 – conceded the problem: "Since the *Act* came into force, government functions have been increasingly outsourced to consultants or contractors, or assigned to alternate service delivery organizations, such as NAVCAN. This suggests that improvements should be made to the federal access to information system to ensure that more entities that perform government-like functions are accountable under the *Act*."

negative purposes. I do not assert that our law need follow all of what appears below, but it is at least interesting to be aware of what occurs elsewhere in the world.

• The FOI law of the United Kingdom includes companies "wholly owned by the Crown."[124]

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

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

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

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

• The FOI law of India – ranked #7 in the world by the CLD-AIE - is often held up as a model for Canada, and with good reason. It explicitly covers all public authorities set up by the constitution or statute, as well as bodies controlled or substantially financed by the government, and non-government organizations which are substantially funded by the state.[125]

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

• One of the world's newest FOI laws, that of Kazakhstan, covers state, quasi-state and some private entities (such as monopolies and budget beneficiaries).[126]

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

[125] Yet the Justice Initiative noted of India in 2008: "However there is little clarity and hardly any implementation guidelines for identifying bodies in the private and NGO sectors under these criteria. . . . The *Right to Information Act*, section 2(f), extends the right of access to 'information' relating to private bodies, even when they are not covered directly by the *RTI Act*, if a public authority can access the information under any other law in force. A citizen must seek such information from that public authority and not from the private body directly." These terms would need to be clarified in an amended B.C. *FOIPP Act*.

[126] As noted by the OSCE Representative on Freedom of the Media, Dunja Mijatović in Vienna.

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

> Scope – A public institution is any Legislative, executive, judicial, administrative or advisory body of the Government, including boards, committees or commissions of the state which are supported in whole or in part by public fund or which expends public fund - also includes private bodies providing public services, performing public functions or utilising public funds.[127]

• Broader subsidiary coverage than in Canada is also found in the FOI laws of Uganda, Nepal, Uzbekistan, Malaysia, Liberia and Rwanda.

• In 2006 an FOI law was passed in the Islamic Republic of Iran.[128] In Article 2 part H, the definition of public institution includes "each institution, company or foundation whose whole share or more than 50 percent of its share belong to the state or government."

• According to the CLD's RTI Rating and Access Info Europe, state-owned enterprises are covered in the Russian Federation. Coverage in the Russian FOI statute[129] includes "information, created by government bodies, their territorial bodies, bodies of local self-government, or organizations subordinate to government bodies […]"

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

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

I was buoyed to discover one good point upon which Iran and Israel agree. But not so in B.C., yet, under our current "open government premier." This, one regrets, can hardly be a source of

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

[128] The Iranian law text in English is fascinating reading .('Many thanks to Kowsar Gowhari at Integrity Watch Afghanistan and Monir Ahmadi at Internews Afghanistan for their help in translating the document." - Toby Mendel, CLD, Halifax)

[129] The Russian law text in English is at http://legislationline.org/documents/action/popup/id/17759

provincial pride. Under the definitions above, UBC Properties Investments and BC Hydro's PowerTech could never escape FOI coverage as they now do.

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

In 2015, the B.C. Chief Information Office told your Committee, regarding FOI and subsidiaries: "This has been something that has been on our to-do list for a number of years. There have been conversations with the different entities . . . It is a very complex issue, and it is one of the many, many things that we are working on." Yet most of the world does not find the issue complex at all.

What are the prospects for change? One might imagine this should not be so politically onerous to achieve - unlike, say, policy advice or duty to document – for such subsidiaries are relatively remote from the core government in Victoria, and so FOI coverage of these entities has far less chance to embarrass it with disclosures.

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

With respect, I cannot agree with several 2015 submissions to your Committee that simply extending the definition of a "local government body" to all public bodies would be sufficient, for that definition in the 1992 *FOIPP Act* is too narrow today. [130] The amendment must be very carefully worded, to remove ambiguities and any potential escape hatches (which some public bodies, unfortunately, will endlessly search for).

Contracting Out

In 2004 the B.C. Information and Privacy Commissioner, David Loukidelis, raised the serious concern that "outsourcing" initiatives by the B.C. government were eroding the B.C. *FOIPP Act*. He recommended that the law be amended to clarify that records created by or in the custody of

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

any service-provider under contract to a public body remain under the control of the public body for which the contractor was providing services. The Special Committee of the B.C. Legislature reviewing the FOI law in 2004 and 2010 agreed.

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

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

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

Yet another intransigent problem is that dozens of Canadian entities have a "shared jurisdiction" amongst federal, provincial and other governments; since it is claimed that these bodies do not fit the within scope of any one partner's FOI laws, they fall between the cracks and are covered by none. (Examples include the Canadian Centre on Substance Abuse, the Canadian Energy Research Institute, and the First Nations Health Authority.[131])

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

(4) Oral government, and "duty to document"

The disastrous trend towards "oral government" – whereby government officials do not create or preserve records of their decisions or policy development because they do not wish such records to be ever made public through the FOI process – is growing each year. The *Information*

[131] This last entity dubiously claims some kind of voluntary self-coverage on its website: "For non-BC First Nation applicants, an application fee in the amount of $50 will be charged. In addition, fees will be charged for the response commensurate to the costs incurred for processing the request and providing access to records. Because FNHA is not a public body and thus not under the auspices of FOI legislation, the organization is not resourced to conduct these activities. However, in the interests of transparency and accountability we provide this service but on a cost recovery basis. Cost recovery ensures that community funds are not redirected from BC First Nations to perform a function outside FNHA's legal obligations." https://www.fnha.ca/about/data-and-privacy/corporate-and-community-records

Management Act passed by NDP in 2019 does not create a true "duty to document" government actions and decisions, despite the government's voluble claims; it mere gives the Chief Information Officer the *discretion* to bring in "directives and guidelines" on the creation of adequate records.

Yet while in opposition, NDP MLA Doug Routley's private member's *Bill M-207* of 2016 stated: "Every public body and service provider *must* create and maintain full and accurate records of government information."[132] (Italics mine.) The party, when running for election in 2017, in response to a questionnaire to FIPA, promised "to create a positive duty to document government actions for greater accountability to the public." Yet this was never done. Such inaction counters the advice of the B.C. Information and Privacy Commissioner, past Legislative Special *FOIPP Act* Committee reviews, and many others.

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

The problem burst onto the public consciousness in 2015 via the worst B.C. FOI scandal to date, one that made national headlines.

The media had filed FOI requests for emails in the B.C. Ministry of Transportation about the so-called Highway of Tears (in a region of northern B.C. where for years many travelling aboriginal women have gone missing and are presumed killed). Then, as the requests were being processed, whistleblower Tim Duncan revealed that his fellow political aide in the minister's office, George Gretes, grabbed Duncan's computer keyboard and "triple-deleted" key emails on the topic, to scrub them permanently from systems, and so scuttle the FOI process.

This case was probed in depth by B.C. Information and Privacy Commissioner Elizabeth Denham. In her landmark report *Access Denied*[133] she found widespread problems among Liberal staff beyond Gretes, including the premier's deputy chief of staff who mass deleted virtually all her emails daily and the premier's own FOI director who used disposable sticky notes to avoid a paper trail on records searches. For years, millions of emails had been wiped out, with officials believing this was nothing wrong.

She and her staff caught the Liberals doing more: "Deleting emails responsive to access to information requests and preventing others from producing these records. Wilfully or negligently failing to produce records that are potentially responsive to an access request. Failing to keep any sent emails, irrespective of the topic. Failing to clarify a request with an applicant. Implementing

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[132] *Bill M-207* of 2016, the *Government Records Accountability Act*

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

a verbal process for responding to access to information requests that avoids personal accountability."

The report emphasized that Gretes was just part of the general norm of hyper-partisan young staffers doing whatever it takes to protect their political bosses. "Taken together, these practices threaten the integrity of access to information in British Columbia," wrote Denham as she called for a broad "change of culture" across the Liberal government.

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

Government can indeed legislate some conduct, but it is dangerously naive to assume that it can ever legislate attitudes. Still, external constraints are needed if internal ones are lacking. Hopefully some good will come from the email triple deletion debacle, and it be relegated to a dismal memory.

(In 2016, Gretes pled guilty to lying to the commissioner. He was fined $2,500 - half the maximum then under the *FOIPP Act* for obstructing an OIPC investigation - for what the provincial court judge said was "a silly mistake" and "a stupid lie" that was unnecessary because deleting records sought through FOI was not illegal and many other government staffers admitted under oath they did it, too. The Commissioner asked the RCMP to investigate, and it did, but declined to recommend charges. "[Gretes] was the guy that got caught," said Duncan. "There were a lot of others doing that type of thing, and none of that has been addressed."[134])

Shamed by Denham's findings, Liberal Premier Christy Clark finally took action. She banned triple deleting, and ordered a freeze on email deletion until new rules were drafted. Finance Minister Mike de Jong placed non-partisan civil servants in FOI oversight positions in ministerial offices to make sure records are accurately kept and recovered. He also boosted funding for FOI. Yet she stopped short of a duty-to-document law.

Then Denham's predecessor as commissioner, David Loukidelis, was brought in to translate her concerns into a broader plan of action. He supplemented her recommendations with twice as

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[134] *Former political aide George Gretes fined $2,500 for misleading B.C.'s privacy commissioner*, by Rob Shaw. *Vancouver Sun*, July 14, 2016

many of his own. His report[135] had exemplary recommendations for future record best practices (all of which should be implemented).[136]

Positively, premier Christy Clark said that "I am announcing that we are accepting all of Mr. Loukidelis' recommendations," and "the practice of 'triple-deleting' will be prohibited, ministers and political staff will continue to retain sent emails and a new policy and specific training will be developed."[137] Yet she pledged only to "study and consider" a duty to document.

Political pressure was mounting to such an extent that the government had to fix the problem (or appear to). So De Jong consulted with B.C.'s acting commissioner, Drew McArthur, who asked for the law to give him oversight powers into any duty to document rules. In March of that year, two months before the 2017 provincial election, De Jong proudly introduced Bill 6, which he stated amends the *Information Management Act*[138] so that "British Columbia will become the first Canadian province to legislate a duty to document." This claim was widely ridiculed. "This creates no duty on anybody," wrote Vincent Gogolek, FIPA executive director. "It's not even half measures. A legal duty uses the words 'must' or 'shall', not the word 'may.'"[139]

Bill 6 only gave the chief records officer - a government appointee who reports to the finance minister - the discretion to bring in "directives and guidelines" on the creation of adequate records. The information commissioner - an independent officer of the legislature – would not be

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

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

[137] While it seems lamentable here that only a scandal or crisis prompts positive change, in response, perhaps the tide is finally turning somewhat in Victoria against the arbitrary use of power and more towards the rule of law. Some BC FOI applicants tell me that after the two reports, the ministerial FOI offices (as though in response to these events) seemed more helpful than usual, for a time. As well, the reports will hopefully effect a powershift, and psychologically empower more whistleblowers, and also help dutiful FOI public servants to push back against aggressive political aides, keyboard grabbers and triple deletors.

[138] In B.C.'s *Information Management Act* (current to July 31, 2019): "6 (1) The chief records officer may issue directives and guidelines to a government body in relation to a matter under this Act, including, without limitation, the following: (a) the digitizing and archiving of government information; (b) the effective management of information by the government body; c) the creation of records respecting the government information referred to in section 19 (1.1) *[responsibility of head of government body]*, including, without limitation, directives and guidelines respecting the types of records that constitute an adequate record of a government body's decisions."

[139] *BC government bill does not create a duty to document government decisions*. B.C. FIPA. March 8, 2017

able to review any of these decisions. This runs contrary to the Special Committee's advice, which wanted a mandatory duty placed in the FOI law instead; and *Bill 6*'s small measures did not even apply to all public bodies.

Bill 6 of 2017 had been preceded by *Bill 5* of 2015, the *Government Information Act,* which had included much-needed measures to improve electronic preservation and access to government records. (It replaced the 1930s *Document Disposal Act*, which used to govern how information could be handled, kept or destroyed.) But this *Act* was grievously lacking in three key aspects:[140]

> [1] *Bill 5* failed to bring in a legal duty to document
>
> [2] Where the *Document Disposal Act* created a provincial offence for violations, Bill 5 abolished those penalties
>
> [3] *Bill 5* did not apply to the broader public sector beyond ministries (e.g., municipalities, school boards and universities).

In 2019, the new NDP government passed an amended *Information Management Act.* It said these changes respond to five of Mr. Loukidelis' 27 recommendations, as well as two concerns raised by Commissioner Denham in her report *Access Denied*.

In a press release, FIPA scoffed that these "new" legislative changes that NDP Minister of Citizens Services Jinny Sims were promoting were actually initiated by the Liberal party in 2017.[141] "The statements from the NDP and Liberal MLAs, made two years apart, are remarkably similar and entirely misleading. FIPA wants to see the creation of a meaningful duty to document — more in line with what the NDP was proposing two years ago" — which would include:

- The creation of mandatory documentation procedures. A discretionary duty to document is not sufficient.
- Clear oversight from the Information and Privacy Commissioner.
- The legislative change should be to the FIPPA, which affects over 2,900 public bodies, not the Information Management Act, which merely affects 41

[140] The B.C. Commissioner also related a lack of needed powers to your Committee in 2015: "Currently, in British Columbia, my Office has narrow authority to investigate the destruction of records. We may only investigate if the alleged destruction of records occurred after an access request was made. This lack of oversight runs contrary to the spirit of FIPPA. Effective oversight would permit my Office to investigate any complaint concerning the destruction of records - even in the absence of an access request."

[141] *NDP celebrates Liberals' ineffective "Duty to document,"* B.C. FIPA. April 1, 2019

Furthermore, in a statement of May 17, 2019, Commissioner Michael McEvoy said:

> As it now stands, the *Information Management Act* designates the Minister herself as primarily responsible for ensuring her Ministry's compliance with the duty to document its decisions. Citizens would find it very surprising that, on its face, the current law makes a Minister responsible for investigating their own conduct. This is unacceptable and falls short of the independent oversight required to ensure public trust and accountability.
>
> It is time for government to amend FIPPA to ensure that the vitally important duty to document has the oversight of my office, which is independent of government. The public interest requires this.[142]

Yet governments of all stripes (including the current one) continually obfuscate the issue. In a letter of 2015, Amrik Virk, the minister responsible for FOI policy, wrote to the legislative review committee: "British Columbia has enacted more than 400 'duty to create' requirements within legislation," and attached a list of these examples.

If the ministry's purpose in presenting this list was to plead that a new comprehensive record creation law is unnecessary, then it did not succeed - for many of those examples have absolutely nothing to do with decision making. e.g., one includes including "giving notice of the exclusion zone for abortion clinics" for protesters, while others regard "giving notice of a bylaw." That is not documentation of the policy process; it is advising the public about infringements or their rights or information about where to find enactments.

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

The problem of oral government is hardly new. Indeed it has been widely known in B.C. for at least two decades.[143] The reason I describe the problem at such length below is to underline how deeply ingrained the oral culture is, so much so that penalties are required to end it, as we cannot rely mainly upon good will.

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[142] Statement from BC Information and Privacy Commissioner, May 17, 2019

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

For example, in 2005 the provincial government initiated a highly and ironically secretive review of the FOI law by bureaucrats; due to the growing trend towards oral government, no written report was delivered to government by the consultant George Macauley who reported on the process. Most of all, startling comments by Ken Dobell, then B.C. deputy premier and head of the provincial public service, to an FOI conference in 2003, confirmed one's worst suspicions.

Mr. Dobell said he ran the government via informal meetings or telephone conversations, seldom keeping working notes of either. He did make thorough use of e-mails - his on-line correspondence with the premier was said to be voluminous - but he said "I delete those all the time as fast as I can."[144] Mr. Dobell continued that the intent is not to hide "necessary information" from the media and public, but to avoid having internal e-mails caught up in media fishing expeditions.

"I don't put stuff on paper that I would have 15 years ago . . . . The fallout is that a lot of history is not being written down. Archivists of tomorrow will look for those kinds of things, and none of it will be there. It will change our view of history."[145] (Indeed.) *Vancouver Sun* columnist Vaughn Palmer echoed most of those observations:

> Not long after the introduction of freedom of information legislation in B.C., a senior bureaucrat predicted the emergence of a "nothing-in-writing" style of government. Civil servants and political appointees deliver their most important advice and instructions in person or over the phone…. "Never put real policy in writing," was a laughline for politicians and journalists alike.
>
> Within a couple of years, some of the most controversial business of government was being conducted at one-on-one meetings with no notes taken, no minutes kept. Likewise, some of the most powerful officials began to disappear from written documentation, the better to exclude open-ended requests for "all memos written by or addressed to" so-and-so.[146]

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

[145] Some of Mr. Dobell's statements seem eerily a bit familiar at least in spirit to those found in George Orwell's novel *1984*: Here, Ministry of Truth propaganda staffer Winston Smith drops politically undesirable records into a pipe called "the memory hole," whereupon they are promptly incinerated, all with this goal: "Those who control the present control the past, and those who control the past control the future." This was the chilling outcome: "Everything faded into mist. The past was erased, the erasure was forgotten, the lie became truth. Every record has been destroyed or falsified. . . . History has stopped. Nothing exists except an endless present in which the Party is always right."

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

Mr. Dobell added that fear of FOI inquiries only marginally hinders the free flow of ideas within the civil service as phone calls and informal meetings make up the gap. "Where FOI permits reasonable access, it's good. Where it allows fishing expeditions and cheap research, it forces the careful handling of information." (The term "reasonable" he left undefined.) After this speech, a verb was then whimsically coined in Victoria: to "Dobell" a record, and a noun: the Dobell Doctrine.[147]

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

During the BC Rail corruption trial in 2010, former Liberal aide Dave Basi told the court he assured others not to worry about their e-mails to him emerging under FOI, because he just printed out his emails and then deleted them; he quipped that "FOI is for purists."[148]

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

For news stories, I had twice obtained hundreds of pages of minutes from the Secretariat through quarterly requests under the B.C. *FOIPP Act.* But in reply to my third identical attempt, I was told: "We have not located any records in response to your request." A spokesman for the secretariat confirmed to the *Vancouver Province* that meeting minutes were no longer taken: "The secretariat was keeping minutes but found they were not an effective management tool." (I do not know what was meant by this.)

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

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

He added that the secretariat's approach to keeping records is "consistent with cross-government practices and legislation."[149] But what is the consequence of that statement? A whole provincial government of non-minute-taking departments? Colin Hansen, the Liberal minister responsible for the Games, then publicly defended the Secretariat's practice, thus in effect green-lighting it across the public service.

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

The loss of FOI access to the minutes is "reprehensible", the B.C. NDP Olympic Games critic, MLA Harry Bains, told the *Georgia Straight*. "It's like pulling teeth. This secrecy is absolutely unacceptable. This is billions of dollars of taxpayers' money. It's also paramount to the success of an organization to keep minutes so that we can review the past history of decision-making, and improve it in the future."

Well said. He also later debated this affront for 20 minutes in the House with minister Hansen. So why does Mr. Bains, now a minister, not support passing a law to enforce such minute-taking, to ensure that such an outrage could never occur again?

Beyond the gap in public accountability, there is a second grievous loss for the public interest: a lack of written records leads to poor governance, and when that happens, we are all in trouble. Conversely, the benefits of good record keeping are felt internally as much as externally.[150]

The taxpaying public needs and deserve much better; whole dimensions of our political and historical consciousness have vanished due to such practices, and the loss to the common good is incalculable.[151] In his 1996-97 annual report, federal information commissioner John Grace issued a sharp rebuke to the "oral government" concept, in words worth pondering by our B.C. leaders:

> As to the "don't-write-it-down school," any effort to run government without creating records would be humorous if it were not so dangerously juvenile. . . . Left without written precedents

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

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

[151] As MP Murray Rankin and Vincent Gogolek put it: "Major policy decisions should not have to be re-created by interviewing retired deputy ministers at the Old Bureaucrats Home in the faint hope they remember why government acted the way it did." - *British Columbians Have a Right to Know*, The Tyee, May 12, 2013

> and decisions, other officials are deprived of the benefit of their predecessor's wisdom - or folly. The misguided effort to avoid scrutiny by not making records is driven by ignorance of the law's broad exemptive provisions.

This last point is crucial, and the solution to such ignorance is to begin an education program for all public servants about how the B.C. *FOIPP Act* exemptions work, exactly what information can be legally withheld, and why the FOI law need not be so feared.

Regarding record creation

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

The Highway of Tears review by former commissioner David Loukidelis advised a new legal duty to create records of key decisions. So did the all-party legislative review of the FOI law in May 2016. While in opposition, the B.C. NDP introduced several bills to this end (such as the *Public Records Accountability Act*, 2017), before its promise to pass such a law during the last election, including $50,000 fines for breaching it. I fully support Recommendation No. 19 of Mr. Loukidelis' report:

> 19. Government should give the most serious consideration to Commissioner Denham's recommendation[152] that a duty to document be created, specifically, it should seriously consider introducing legislation creating such a duty (with the details being worked out in policy at a ministry, even program, level). Government should consider adopting a risk-based approach, with the nature and significance of decisions, actions and transactions being used to determine which records have to be documented and in what manner.

The OIPC also told your Committee in 2015 that a general duty to document exists in other jurisdictions (and that the *FOIPP Act* is the best place to mandate this). In the Canadian context the Committee reviewing Newfoundland's *Access to Information and Protection of Privacy Act* recommended the adoption of a duty to document and the government has committed to do so.

Although not yet quite a global standard, mandated record creation may hopefully in time become one. New Zealand's *Public Records Act* of 2005, states that "every public office and local authority must create and maintain full and accurate records of its affairs" in accordance

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

with “normal, prudent business practice.” Similar rules are present in some Australian states and Denmark.

In 1950 the United States enacted the *Federal Records Act*, which states the head of each agency shall cause to be made records on the agencies’ “decisions, procedures and essential transactions” so as to protect both the government and “persons directly affected by the agency’s activities.” Another approach is the Treasury Board of Canada Secretariat’s policy directive that deputy heads ensure:

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

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

We might note that although there is no overall mandate to create records, the *B.C. FOIPP Act* Sec. 6 (2) helpfully includes a duty to create a record in reply to a request under the *Act* if this can be done without much hardship.

> **Duty to assist applicants**
>
> **6** (2) Moreover, the head of a public body must create for an applicant a record to which section 4 gives a right of access if
>
> > (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
> >
> > (b) creating the record would not unreasonably interfere with the operations of the public body.

Private email channels as an FOI gap

It has been widely observed across Canada and beyond that some politicians and officials routinely use their private email channels and other digital new routes to conduct government business, which places these communications beyond the reach of FOI laws. This pernicious practice is enabled by inadequate laws and enforcement.

For example, in 2019, Commissioner McEvoy discussed an allegation that a Minister had used personal email and other non-government applications to conduct government business, yet was unable to act upon it.[153]

[153] Statement from BC Information and Privacy Commissioner, May 17, 2019. file:///C:/Users/user/AppData/Local/Temp/2019-05-17%20Statement%20FINAL-1.pdf

"As stated in my office's guidance, 'Use of Personal Email Accounts for Public Business,' FIPPA does not explicitly prohibit public body employees or officials from using personal applications and, by extension, non-government applications. For this reason, the individual's concern is not, by itself, evidence of a violation of *FIPPA* that would cause my office to investigate.

> However, I can't emphasize strongly enough, yet again, that it is extremely poor practice to use personal communication tools for public business. This kind of behaviour poses considerable challenges for proper documentation of government decisions and for accountability through freedom of information. I call on all public bodies to prohibit such practices wherever possible.
>
> "I also remind all public body officials that using personal email or messaging doesn't oust the public's right of access to information. When an access request is made, I expect government officials to produce all responsive records for the public body to decide on their release. Retaining records of public business, regardless of medium, underscores the need for the duty to document to be located in FIPPA.

Hence I recommend: "Include a provision in the B.C. *FOIPP Act* that all emails and communications sent from the personal email addresses and from the work email addresses of employees, directors, officers, and contractors, and which relate directly or indirectly to workplace matters, are subject to the access law."

As well, more detailed standards on this topic urgently need to be established and applied (at least in regulations if not the FOIPP law), for confusions may arise. For instance, all MLAs and caucus staff are given legislative assembly email addresses, generally *your.name@leg.bc.ca*. These are mostly exempt from FOI requests. However, cabinet ministers – and staff working specifically for ministers – are given government emails (*your.name@gov.bc.ca*). These are informally referred to as "ledge" and "gov" emails, respectively.

"It may not seem like much of a distinction, but the gulf between the two is massive – only gov emails are subject to FOI requests," noted Maclean Kay.[154] The constituency assistant in this case would have been given a ledge email. In theory, she would work on non-partisan constituency issues, but in practice, would be one of an integrated team of political staff.

Anything to do with constituency-based has to be done on the ledge phone, said the minister, but it's not clear why she didn't use her assigned legislative assembly email, but instead used a personal email, WhatsApp, and iMessage. Government business conducted on private messaging services, are still subject to FOI requests – but again, in practice,

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[154] *NDP minister in trouble for using private emails – and more*. By Maclean Kay. The Orca, May 15, 2019

almost nothing prevents government staffers or ministers from deleting or simply not submitting them.[155]

Regarding penalties

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

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

Some measure of deterrence is necessary beyond ineffectual means such as verbal reprimands or letters of rebuke placed on one's personnel file. Apologists may plead that justice should be tempered with mercy and warn that strong penalties can effectively ruin an official's life. But to forgive everything afterwards means to permit everything in advance. Those who deliberately choose to violate the law must accept some consequences, and others contemplating the same actions be discouraged.[156] (The CLD noted that in jurisdictions that have these penalties in place they are very seldom applied - just their presence is enough to deter mischief.)

In 2021 several good measure measures were finally added, in *Bill 22*:

> ***Offence to wilfully evade access provisions***
>
> 65.3 A person who wilfully conceals, destroys or alters any record to avoid complying with a request for access to the record commits an offence.
>
> ***Penalties***
>
> 65.6 (2) A person who commits an offence under section 65.3 or 65.4 is liable on conviction,
>
> (a) in the case of an individual, other than an individual who is a service provider, to a fine of up to $50 000,

[155] Maclean Kay, ibid

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

(b) subject to paragraph (c), in the case of a service provider, including a partnership that or an individual who is a service provider, to a fine of up to $50 000, and

(c) in the case of a corporation, to a fine of up to $500 000

It is of interest that in more than 30 nations, the FOI law includes some kinds of penalties for "obstructing" the FOI process as more widely defined than in B.C., including Ireland, Mexico, Pakistan, India, Russia, Scotland, and the United Kingdom.

In Canada, Quebec's FOI statute contains the broadest definition of obstructionism. Federal information commissioner Suzanne Legault in 2015 well advised of the *Access to Information Act,* some measures that could well be adopted for the B.C. context:

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

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

Positively, the Quebec law extends beyond record alteration or destruction, to potentially cover a wider range of obstructionist practices. The Commissioner may institute penal proceedings for an offence under the law. (Yet there is a potential escape clause in the Quebec law: "An error or omission made in good faith does not constitute an offence within the meaning of this *Act*.")[157]

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

Penalties raise morally complex, difficult questions. For instance, This Committee could consider which offenses would be civil or criminal. Moreover, who should pay the fines is a matter of debate; in some nations, salary loss is prescribed for FOI violations - a far more effective measure than just fining a public agency, where the fine is essentially paid by taxpayers.

Yet the group Article 19 is of the view that, absent a deliberate intent to obstruct access to information, individuals should not be singled out for fines and other penalties, as this can lead to scapegoating within an institution - rather, the relevant public authority should bear responsibility as an entity.

The Government of Canada's discussion paper, *Strengthening the Access to Information Act*, 2006, notes: "Obviously, there must be a distinction between poor record keeping and intentional, bad (or even criminal) behaviour. Whatever sanction is applied, it must be commensurate to the misbehavior …. good information management practices must be learned, including rules or standards about when records should be created."

Toby Mendel of the CLD does not believe that criminal penalties are effective in deterring mischief, informing me in 2016 that: "Rather, it is hard to treat the common mischief that occurs as a criminal matter (or doing so seems over the top) and, furthermore, it is very hard to secure criminal convictions. I would suggest considering the Indian approach, which has administrative fines applied by the Commission, or something along those lines.

"Such sanctions are much easier and realistic to apply than criminal rules, and more appropriately tailored to the gravity of the matter. But leaving their application to internal disciplinary measures doesn't work, because the public bodies which apply those measures don't really support openness in the first place. So putting this in the hands of the Commission is a good solution (apart from some potential delicacy around the power of such a body to impose fines and the due process it would need to respect in doing so)."

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

In June 2012, the Newfoundland and Labrador government of Conservative premier Kathy Dunderdale shocked observers by inexplicably and boldly eviscerating its *Access to Information and Protection of Privacy Act*, in Bill 29, to keep cabinet and companies' records secret, block the information commissioner from viewing documents, raise FOI fees, and allow ministers on their own to bar any FOI request they called "frivolous, vexatious, made in bad faith, trivial, repetitious, systematic or amount to an abuse of process." The justice minister actually claimed the Bill "helps public bodies be more open and accountable" (rather as the B.C. government claimed with its Bill 22).

An uproar of protest ensued, with public rallies on the Legislature lawn in St. John's – an unprecedented public response in Canada to an FOI issue. A dramatic, marathon three day

opposition filibuster followed in the House, complete with naps on couches in caucus offices.369 The bill passed anyways.

Dunderdale stepped down in 2014, after a year of rock-bottom approval ratings and scathing public criticism - much of it around perceptions of secrecy. After the new premier Tom Marshall from *the same party* assumed office, he commendably reversed his predecessor's outlook, and appointed a panel to review the law. The independent commission was chaired by former Liberal premier and chief justice Clyde Wells, who prepared the report with retired journalist Doug Letto and former federal privacy commissioner Jennifer Stoddart.

The resulting report of nearly 500 pages gave 90 recommendations on how the province could improve the *Act*, and the commission even went so far as to write draft legislation of its own. Steve Kent, the minister responsible for the Office of Public Engagement, said the proposed changes would make this province's system among the best of the world, and most FOI experts agreed it was the best FOI law in Canada. He told the CBC the review was more than just an assessment of Bill 29. "We're not just tweaking," said Kent. "What's being proposed here is a brand-new piece of legislation."[158]

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

[Newfoundland *ATIPP Act*] Purpose

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

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

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

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

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

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

[Newfoundland *ATIPP Act*] From DEFINITIONS

(x) "public body" means

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

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

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

(iv) a local public body,

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

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

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

[Newfoundland *ATIPP Act*] Anonymity

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

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

[Newfoundland *ATIPP Act*] Transferring a request

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

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

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

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

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

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

[Newfoundland *ATIPP Act*] Extension of time limit

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

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

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

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

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

[Newfoundland *ATIPP Act*] Costs

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

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

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

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

[In the B.C. FOIPP Act, after Bill 22, the public body may charge for applying for, locating and retrieving the record, excepting only the first 3 free hours, while severing is free.]

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

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

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

[Newfoundland *ATIPP Act*] Legal advice

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

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

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

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

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

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(6) Section 25, the Public Interest Override

> *In our experience, a public interest override is crucial to the effective functioning of a freedom of information regime. It is simply not possible to envisage in advance all of the circumstances in which information should still be disclosed, even if this might harm a legitimate interest, and to address these through narrowly drafted exceptions, or exceptions to exceptions.* - Article 19[159]

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

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

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

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

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

In July 2015, the B.C. Information and Privacy Commissioner released a report [160]on complaints that the provincial government had failed to inform the public, per its duty under Section 25, on the risks leading up to the Mount Polley mine tailings pond dam breach that released effluent into three B.C. lakes.

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

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

While finding the government had no information about dam-related risk, Denham also made a finding that reinterprets Section 25(1)(b) to mean that, "urgent circumstances are no longer required to trigger proactive disclosure where there is a clear public interest in disclosure of that information."[161] I applaud this principle and urge it be enshrined in a revised B.C. *FOIPP Act*.[162]

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

Former NDP Attorney-General Colin Gablemann spoke of need for proactivity:

> We incorporated into the FOI act the strongest public interest override in Canada. We wanted to ensure that the head of a public body would, "without delay," disclose information that was "clearly in the public interest". I don't think this provision has ever been used, and certainly never by the head of a provincial ministry. That represents a huge failure of intent. Have there been no risks of significant harm to the environment, health or safety in B.C. in the last 15 years? How about "other information the disclosure of which is clearly in the public interest"?

Moreover the NDP wrote to FIPA in April 2017: "We believe the spirit of the public interest override should again be reflected both in the Act and the response from public bodies, and we will act to ensure this." We have yet to see this happen.

(7) Section 12 – Cabinet Records

Section 12 is a so-called "class exemptions," i.e., one lacking a harms test, contrary to global FOI trends. The Commonwealth Parliamentary Association's *Recommendations for Transparent Governance,* 2004, states: "(6.2) Exceptions should apply only where there is a risk of substantial harm to the protected interest, and where that harm is greater than the overall public interest in having access to the information."

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

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

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

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

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

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

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

Section 12 should be amended to clarify that "deliberations" only applies to the actual deliberations of Cabinet, not any other material. It should also establish that documents may only be withheld if they were actually discussed by cabinet, not if they were only prepared for that purpose but never were. i.e., no record can be said to reveal "deliberations" if it was never actually deliberated upon.[163]

(8) Response Times

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

[163] Such a new clause is regrettably necessary to stop a deleterious practice often observed in cabinet rooms in Commonwealth nations, whereby Cabinet members simply take documents into Cabinet and then out again and claim an exemption - behavior which is now a perfectly legal way to circumvent disclosure obligations in most Canadian jurisdictions. In Australia, applicants have had FOI requests refused because documents were "prepared for submission to Cabinet (whether or not it has been so submitted)."

> Time-sensitive records can lose all their value is their release is significantly delayed. Consider, for example, a government decision on whether to protect a particular green space or deport someone to his or her native country. Records explaining the context and details surrounding these decisions could have a vital impact on the public debate, but only if they are made public in a timely way. If release is withheld until after the person is deported or the green space has given way to a tower block, that information is clearly not much use any more, and citizens have been robbed of their ability to engage fully in public debate.[164]

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

One problem was noted by NDP MP Murray Rankin in 2006: "There also seems to be no penalty whatsoever for flouting deadlines -- and yet everyone knows that "information delayed" can often mean "information denied"."[165]

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

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

Under the B.C. *FOIPP Act*, an agency must respond to requests within 30 working days, a deadline which it can extend by itself for another 30 days, and in practice often longer. Data from the Commissioner's office shows average processing times have been well in excess of that, increasing to 57 days in 2019.

No FOI applicant without an uncommon degree of patience and endurance can prevail, and the legal odds are always stacked against him or her. For example, the applicant has just 30 working days to appeal a B.C. *FOIPP Act* refusal, and if that deadline is missed there is no second

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

[165] Murray Rankin, QC, Keynote address, B.C. Information Summit, Sept. 29, 2006

chance. By contrast government routinely breaks its own deadlines with impunity; there are no penalties for delays, as there needs to be - which stands at variance with other nations' FOI laws.

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

I cannot say exactly how well such laws are followed in practice, but the public and media in other states would not tolerate the delays of months or even years that polite Canadians have passively come to accept as inevitable. Such B.C. officials' complaints would be even less justifiable after calendar days was changed to working days in our *Act*, and one considers the far less advanced administrative systems in other nations.[166]

In Ottawa there was an important Federal Court of Appeal decision on FOI delays in March 2014. It overturned an effort in the lower Federal Court to quash the information commissioner's request for judicial review, upon an *Access to Information Act* applicant's complaint that the National Defence department had unjustly extended the response time limit by 1,110 days.[167] The Court offered guidance for future cases (and even perhaps for revised B.C. *FOIPP Act* wording), in stating that:

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

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

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[166] As Mr. Karanicolas of the CLD told your Committee in 2015: "The Indian bureaucracy functions certainly without the level of computerization and certainly without the level of technology and administrative support that the Canadian bureaucracy works with. If they can deliver information in 30 calendar days, certainly it's difficult to believe why it wouldn't be possible among public bodies here."

[167] Federal Court of Appeal decision in *Information Commissioner of Canada v Minister of National Defence* (2015 FCA 56) The court added: "This type of perfunctory treatment of the matter shows that DND acted as though it was accountable to no one but itself in asserting its extension." This often occurs in B.C. as well.

Jude Crasta of the Alma Mater Society told your Committee in 2015 that "public bodies wishing to delay for this reason tend to not ask, or give, essentially, a reason for their time extension, especially in our personal experience. They just take the time." The AMS advised these extensions in Section 10 (1)(b) be deleted, as do I.

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

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

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

TWO JURISDICTIONS – NIGHT AND DAY

The chairperson of this B.C. *FOIPP Act* review committee also serves as our provincial government's liaison with the State of Washington, a jurisdiction from which much can be learned on freedom of information issues.

In my work I have found no jurisdictions that manage FOI better than American states (where the oldest known public records law in North America comes from Wisconsin in 1849[168]) and from whom much can be learned. The starkest contrast in response times can be found by those who make information requests using both the B.C. and Washington state FOI laws.

The American public and media would not tolerate the service found in the B.C. FOI system. I have had records emailed to me by the American government, in full, within three days (and one time *overnight*), that would likely have taken months under our law and have been replete with deletions. Journalist Sean Holman reported the same results in his work, obtaining much fuller and faster replies from the Washington state FOI system than the B.C. one, regarding records of lobbyist Patrick Kinsella's activities.

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

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

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

By contrast, the B.C cabinet committee for climate action fielded submissions from more than 170 "interested parties" – all were strictly confidential; even a *list* of who addressed cabinet was not released. New Mexico, California and Washington State have posted vast amounts of material on climate change discussions online – all types of records that were withheld in B.C.[169]

On such grounds, in fact, Canadians at times use American FOI laws to find records on Canadian affairs that they cannot obtain here. For example, through the Washington State FOI law, I produced a story that began: "A catastrophic oil spill would set the Puget Sound cleanup effort back decades, and result in billions of dollars in harm to our economy and environment." So Washington State Ecology Department officials wrote about the proposed Transmountain oil tanker traffic through shared waters in memos to their governor Jay Inslee in 2013. They added that the Canadian federal oil response regime is "probably a couple of decades" behind the American one, and "we need to have a level playing field with the Port of Vancouver."[170]

I have heard visiting American journalists deride Canada's FOI laws as "pathetic" in comparison to their own, and the process of trying to obtain information from Canada on cross-border issues as "shockingly bureaucratic," and I was unable to contradict them.

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

In November 2006 the B.C. information and privacy commissioner created a superb, creative new "consent order" and "expedited inquiry" process to curtail delays, which works effectively today, and this process should be enshrined in the B.C. *FOIPP Act*. (In the new process, both applicant and agency voluntarily sign a binding "consent order," and if the latter breaches the

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

[170] U.S. worried about Canada's ability to respond to oil spills. By Stanley Tromp. *Globe and Mail*, Apr. 28, 2015

time deadline, that is a serious “deemed refusal.” I have found the process has quickened replies to my requests.)

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

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

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

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

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

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

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

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

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

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

In sum, what federal Information Commissioner John Grace wrote in 1997 about the "silent, festering scandal" of Canadian FOI delays is even more valid today: "There simply is no basis to the oft-heard cry that the time frames are unrealistically short or set without concern for shrinking departmental resources. . . many countries that are much poorer than Canada, and with far less efficient bureaucracies, manage to comply with far more stringent standards." For instance, consider Afghanistan, whose FOI law - ranked #1 in the world in the CLD-AIE ratings – sets a 10 day response time and three day extension limit.

(9) Section 14 - Legal Advice

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

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

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

If such outcomes were not the intent of parliament, then the B.C. *FOIPP Act* should be amended to render the solicitor-client privilege much more narrow and specific, to settle such disputes before they arise. (The exemption also overlaps with that for "policy advice," which can sometimes include legal advice, and this needs better demarcation.) The *Act* was created to serve the broader public interest, not just one sector's interest. I fully agree with the CLD's advice to your committee in 2015 that "The general recommendation that we make on this is to limit solicitor-client privilege to litigation privilege rather than *anything* that comes from a lawyer."

Moreover, the lack of any time limit, conceivably even for centuries, for legal advice in our FOIPP Act is simply indefensible, e.g., it could in principle be applied to a solicitor's advice written in 1871 regarding B.C.'s entry into Confederation. This concept was rebuked by former

federal Information Commissioner John Reid, on the *Access to Information Act*'s similar legal advice exemption (*ATIA* Sec. 23):

> It has been obvious over the past 22 years that the application and interpretation of section 23 by the government (read – Justice Department) is unsatisfactory. Most legal opinions, however old and stale, general or uncontroversial, are jealously kept secret. Tax dollars are used to produce these legal opinions and, unless an injury to the interests of the Crown can reasonably be expected to result from disclosure, legal opinions should be disclosed.[171]

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

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

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

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

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

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

> Members debated the rationale for keeping such documents permanently exempt from disclosure. It was also considered that solicitor-client privilege, in terms of legal advice to public bodies in

[171] John Reid, The Access to Information Act - Proposed Changes and Notes. Ottawa, 2005

> their policymaking role, was not intended to be protected to the same degree as solicitor-client privilege in law enforcement matters by the *FIPPA*. It was noted that solicitor-client privilege can be waived, and that if government is the client in cases of legal advice, government has the option of waiving its right to exemption under the *FIPPA*.

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

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

In the B.C. *FOIPP Act*, it should be important to distinguish between privilege vested in a private third party and crown privilege; public bodies need to respect the former quite carefully, and it is the latter that is largely subject to abuse; and a time limit for third party privilege is likely not advisable.

For instance, the legal affairs exemption is well split in the revised version of New Brunswick's FOI statute, which states: "22.1. The head of a public body shall refuse to disclose to an applicant information that is subject to a solicitor-client privilege of a third party." This mandatory term is separate from the law's discretionary Sec. 27 on solicitor-client privilege within government.

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

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

(10) Sections 17 and 21- Trade secrets

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

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

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

- In order F13-07 of 2013, the B.C. commissioner's adjudicator ordered the Provincial Capital Commission to release to me all losing bids to lease and develop the CPR Steamship Terminal Building (the site of the former Royal London Wax Museum) in Victoria's inner harbour, finding no evidence to support the PCC's pleas of Section 21(1) financial harm.[172]

- In order F14-36 of 2014 the B.C. commissioner's adjudicator ordered Vancouver city hall to release all losing bids on a parking meters contract to *Vancouver Courier* journalist Bob Mackin. The OIPC said city hall failed to show how disclosing the bidding information would cause any of the parties financial loss under Section 21, because the contract winner had already been chosen.[173]

In his landmark order Order 01-20, the B.C. Privacy Commissioner ruled that the UBC-Coca Cola contract should be released, despite Sec. 21, because it contained information not *supplied* in confidence, but only *negotiated* in confidence between UBC and the company: "The parties, in effect, jointly created the records." This worthy principle needs to be placed in the *Act*.

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

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

As John Reid well advised in 2002: "The law should tell firms choosing to bid for government contracts that the bid details, and details of the final contract, are public for the asking. There is

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

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

partial disclosure of winning bids, none at all of losing bids. Contract prices are released without details. That is not good enough."[174]

He added that *ATI Act* Sec. 20 - the equivalent of B.C. *FOIPP Act* Sec. 21 – "is one of the most used, abused and litigated exemptions under the *ATIA*. Many of the *Act*'s delay problems concern requests for business information. This Commissioner has seen thousands of government-held records relating to private businesses. Real secrets are rare. Sounding the alarm of competitive disadvantage has become as reflexive in some quarters as blinking. Concern for the public interest in the transparency of government's dealings with private businesses has been almost abandoned by government officials. New rules of the road are needed to govern the right to know more about government dealings with the private sector."

(11) Section 22 – Privacy

The privacy law changes in Bill 22 are beyond my scope, and have been astutely discussed by many others. I would only add that, apart from that Bill, Section 22 is generally well drafted, but there are a few features that could be added.

First, the section needs to state that the FOI applicant's identity must not be revealed within government without a strict need to know - that is, mainly to locate the records being sought - a practice that has egregiously occurred and which violates privacy rights in the *Act*. Newfoundland's FOI law was amended to avert this problem, as B.C. could.[175] Even if the current government claims to have ceased this practice today, a prohibition of it needs to be enshrined in law – not just in regulation or policy.[176]

Secondly, in 2007, B.C. municipal police departments actually began refusing to routinely release the salary and expense figures for their senior officers (which they had always released

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[174] *Response to the Report of the Access to Information Review Task Force*, by John Reid, Information Commissioner, 2002. (This is by far the most detailed and comprehensive pro-transparency list of *ATIA* reforms, hence valuable reading.)

[175] In 2015 a ministry official told your Committee on "a Recommendation 10 related to applicant anonymity," that: "Government chose to address this issue through policy and training, as the goal could be accomplished more directly and completely this way. There are times when the identity of a requestor needs to be known, such as when they're asking for their own information…. That has to be passed on to the people searching for their records. The nuances of those instances are difficult to address clearly in legislation." This is not correct, for Newfoundlanders and others have addressed this very well in their laws.

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

before), with absurd new "privacy" arguments. This occurred despite that the Act's Sec. 22 (4) reads:

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

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

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

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

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

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

(12) Section 3(7) - Conflicts of law

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

Passing secrecy provisions in other acts to override an FOI statute can give rise to a confusing patchwork of laws, for in such provisions, the withholding of the information might be mandatory or discretionary; with a harms tests, time limits, a public interest override and appeal routes – or, more often, without any of these features.[177]

The problem really is acutely important, for the B.C. *FOIPP Act*'s Section 3(7) – which was formerly Section 79 - prescribes that an agency must refuse to disclose any information requested under the *Act* that is restricted by many other statutes, as set out in a schedule to the *Act*.

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

As the OIPC told your Committee in 2015, at least 43 B.C. statutes have provisions that override or prevail over the B.C. *FOIPP Act* in whole or in part. (Some such overrides are found in Sec. 74 of the *Child, Family and Community Service Act*, and Sec. 40 of the *Human Rights Code*.) The *FOIPP Act* contains no mechanism to review, update or remove them. Yet Newfoundland has added to its access legislation a requirement that statutes that prevail over the FOI law should be listed in a schedule to that statute and routinely reviewed, and so should B.C.

Unchecked, the number of listed statutory overrides could grow still further, a practice that former federal Information Commissioner John Reid has well described as "secrecy creep," while his predecessor John Grace called Section 24 of the federal *ATI Act* - the equivalent to B.C.'s *FOIPP Act* Section 3(7) - "the nasty little secret of our access legislation." (Both advised that *ATIA* Section 24 be deleted, as do Justice Gomery, and I.)

Section 3(7) violates the stated goals of the B.C. *FOIPP Act*, which is to make government more accountable to the public and to provide a right of appeal. It is a mandatory and so-called "class" exemption: once the government decides that a record contains information of a kind contemplated in one of those other provisions, the agency has no choice but to refuse its release. However, very few of the other provisions by their own terms absolutely bar disclosure; they usually only "restrict" it in some way.

Indeed, most grant some measure of discretion to an official to determine whether to release information - usually to other government officials or to the person who provided it. As one legal

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

expert notes, "This varying degree of discretion fits awkwardly within a mandatory class exemption."[178]

Section 3(7) also violates the principle of independent review. The scope of the Information and Privacy Commissioner's review of government refusals to release records under this exemption is quite narrow. In investigating this refusal, all the Commissioner can do is to determine whether or not the disclosure is subject to some other statutory restriction. If it is, then even if the disclosure would likely cause no identifiable harm, it must be withheld nonetheless.[179] This prescription must be followed even if the other statute merely restricts, but does not categorically bar, disclosure.

Resolving this problem seems not a high priority in Canada because statesmen perceive that there will always be other far more urgent political priorities than the harmonization of principles in domestic statutes, to avert a few conflicts of law disputes that might never arise in practice. But Section 3(7) is entirely unnecessary because exemptions in the B.C. *FOIPP Act* already provide ample protection for legitimate interests.

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

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

The United Kingdom also allows the provisions of several other statutes to override its FOI law. Yet in one report, the UK's Department of Constitutional Affairs (in charge of implementing the law) identified 381 other pieces of legislation that limit the right of access under the FOI act, and committed to repealing or amending 97 of those laws and reviewing more. British Columbia

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[178] Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act, report: *Open and Shut: Enhancing the Right to Know and the Right to Privacy*. 1987

[179] One deplorable example: Vancouver was at one time the only B.C. municipality I know of that barred citizens from photocopying lists of the donors to civic election campaigns. My FOI request in 2004 for copies of these records was denied, so I was compelled to sit in the city clerk's office for hours to hand-write them all by pen. I appealed, but the Commissioner ruled that these rules of the *Vancouver Charter*'s Sec. 65 overrode rights in the B.C. FOIPP Act, as Sec. 3(7) specifically allowed. See Order 04-01

should do likewise with the B.C. *FOIPP Act*. Yet as FIPA sadly remarked in its 2005 recommendations:

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

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

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

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

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

India's FOI law contains a similar provision in Section 22. Within Canada, such a resolution was urged in Ottawa by MPs three decades ago (regarding *ATI Act* Section 24 – the equivalent of B.C. *FOIPP Act* Section 3(7)):

> The Committee is concerned about a "slippery slope" effect should the current approach of listed other statutory provisions in Schedule II be retained…. The impact of permitting wholesale additions to the list of other statutory exemptions contained in the *Access Act* is obvious: the spirit of the legislation could readily be defeated.
>
> The *Access Act* would not be a comprehensive statement of our rights to the disclosure of government records. Instead, it would be amorphous. One of the benefits to be derived from listing all exemptions in the *Access Act* is that, in effect, the complete *Act* is brought under one roof. No longer would other legislation need to be consulted in order to determine one's rights in this vital area. The Committee recommends that the *Access Act* be amended to repeal section 24/Schedule II.[180]

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

Recommendation: First option: Repeal B.C. *FOIPP Act* Section 3(7) and its related schedule. If that is not accepted, there is a secondary option: Extend coverage to categories of records exempted by "notwithstanding clauses" in other statutes. At the very least, follow the Newfoundland example, which has added to its access legislation a requirement that statutes that prevail over the FOI law should be listed in a schedule to that statute and routinely reviewed with it.

(13) Section 75 – Fees

Moving beyond the application fee now, it is widely believed by FOI applicants that governments routinely impose excessive fee estimates for access to records to dissuade requesters. (The new FOI application fee is discussed in Chapter 1 on *Bill 22*.)

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

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

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

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

On another point, the Federal Court says the government can no longer charge people fees for the search and processing of *electronic* government documents covered under FOI legislation. In his ruling of March 31, 2015, Justice Sean Harrington said the wording of the *Access to Information Act* and its regulations are "vague" and that practices under the act "have practically stood still" since the days when computers were rare in the workplace. Electronic records are far more easily located via search engines and other means than are paper records. ATIP officials in Ottawa have told me they would indeed stop charging such fees, based on the ruling.

Previously, I had to abandon some requests due to high fees, but no more. This principle should be incorporated into a reformed B.C. *FOIPP Act.*

(14) Education and Promotion

The empowerment of the people by means of the passage of the B.C. *FOIPP Act* in 1992 can only be achieved if the public is aware of its rights and knows just how to exercise them in practice. [181] Yet, as federal information commissioner John Grace wryly reported of the *ATI Act* in his annual report of 1994:

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

For some journalists who have been reading access laws for decades and have made hundreds of FOI requests, it is easy to forget how difficult the process can be for one just beginning in the "game" (for such it is) and who has been taught nothing of this democratic right that should be considered as fundamental as voting.

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

In critiquing the draft FOI bill of Mozambique, Article 19 noted that: "In our experience, a recalcitrant civil service can undermine even the most progressive legislation. Promotional activities are, therefore, an essential component of a freedom of information regime."[182] The need is evident; the British Columbia Freedom of Information and Privacy Association (FIPA) -

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[181] As noted too by the Commonwealth Parliamentary Association, in *Recommendations for Transparent Governance*, 2004: "(11.2) Parliamentarians have an important role to play in this process by making sure that their constituents are aware of their rights. Use should also be made of regular educational systems, including universities and schools, to promote civic understanding about the right to access information."

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

the only Canadian organization working full time on FOI advocacy – regularly receives calls from members of the public asking how to exercise their information rights.

In 128 national FOI laws, 51 have some legislated mandate to promote the law or educate the public, most strongly in India. Several nations thought it important enough to mandate these activities in statutes, and this is advisable for an amended B.C. *FOIPP Act*. India's transparency law imposes duties to monitor and promote the act. Moreover, in Ecuador's FOI law:

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

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

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

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

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

As well, one might task the ministry of education to include modules on FOI in school curricula, as part of citizenship training. This has been done, for example, in countries such as Nicaragua, Honduras and Ecuador. In Mexico children are taught in high school how to file FOI requests. This idea brings me back full circle to how I began my FOI journey 29 years ago, when seeking the earthquake seismic report at Langara College: at a Mexican high school, if a similar seismic report was commissioned yet withheld, students there would have been educated on how to obtain it – but not so in B.C., yet.

The Freedom of Information Process Forum

Over my past 25 years of filing FOI requests for news stories and being so often frustrated by obstacles, I have come to believe that a more cooperative approach should be tried. So I propose the creation of a B.C. "Freedom of Information Process Forum," to candidly and respectfully discuss systemic FOI problems, and pragmatically attempt to resolve these.

This would be a council of FOI applicants (such as journalists, lawyers, FOI advocates, academics) and senior government officials (such as access coordinators, deputy ministers, and chief information officers), which would meet semi-formally once a year to begin and then perhaps more often, by teleconferencing if convenient. It could be organized by a university department (e.g. sociology, political science), journalism school, or association of FOI professionals such as CAPA, and it might be chaired by a neutral third party such as a professor, retired judge or ombudsperson.

I envision a figurative round table, signifying equality, and discussion topics could include: just how FOI "harms" are calculated and discretionary exemptions are applied, how to narrow requests, staged releases, how to balance competing rights and needs, why media requests are flagged and delayed, record formats, if some requests should be prioritized, and how to clear impasses and backlogs.

Some disputes are based not necessarily on ill-will, but on misunderstandings that could be cleared up; and perhaps one could locate a bit of common ground, and then build upon it. The parties might never agree on some points, but it is surely worth trying, and to listen and learn about another's point-of-view, for a more realistic and comprehensive outlook.

In time, the Forum's mandate might be broadened beyond FOI law to discuss government transparency generally, such as proactive publication, improved public relations service to the media, archival declassification, open meetings, etc. Such a Forum could be a model for any city, province or nation. It would itself be covered by FOI law, of course, because it performs "a public function." The United States has such an entity: the *FOIA Advisory Committee*, chaired by OGIS, at https://www.archives.gov/ogis/foia-advisory-committee

Appendices

For *Turning Back the Clock*, Stanley Tromp's report on the *B.C. Freedom of Information and Protection of Privacy Act, 2022*

Appendix 1 – The usage of the B.C. *FOIPP Act* by average citizens, with 30 examples

Appendix 2 – Explanatory notes to the *B.C. FOI News Story Index*

Appendix 3 – Collection of 65 fine stories from the *B.C. FOI News Story Index*

Appendix 4 - The growing misuse of Section 13 (policy advice), with examples

Appendix 5 – B.C. New Democratic Party responses to FIPA electoral questionnaires on freedom of information issues, 2009 and 2017. With quotations from NDP MLAs and Liberal premiers on FOI law, 2007-2021

Appendix 6 – The voice of the people. Citizens' complaints to the Premier on *Bill 22*

Appendix 7 - Student societies and financial accountability

Appendix 8 - Miscellaneous FOI "creative avoidance" methods

Appendix 9 - What price accountability? The real cost of FOI

Appendix 10 – "Oral government" and 2010 Olympic Games

Appendix 12 - The dangerous diversion of faux transparency

Appendix 13 – Lessons from the UBC-Coca Cola contract dispute

Complete list of 135 recommendations

A note on the author

APPENDIX 1

Citizens' Usage of the B.C. *FOIPP Act*

¶ Beyond the FOI usage by opposition parties or the news media – who serve the public interest in their own way – we need to focus now on the average B.C. citizens, who can least afford the request application fees permitted in Bill 22 (passed in November) and would be most harmed, the innocent parties caught in the political crossfire.

The government assures us that no application fees will be charged for personal requests, just for non-personal "general" ones; one problem we have is that the NDP implies that because most of the public do not file general requests, the public interest would not be harmed by possible prohibitive fees. This assumption is simply wrong.

Premier John Horgan claimed that "there will be no fee for individuals looking for information." Vaughn Palmer responded: "Not so. The only exemption announced to date is for individuals requesting information about themselves. Individuals seeking non-personal information — from government ministries, health regions, universities, school districts, crown corporations — would be subject to an application fee." (It is now set at $10.)

B.C. information and privacy commissioner Michael McEvoy told the *Vancouver Sun* about the fee: "It poses an obstacle to access and accountability, and not just for media," he said. "It could be a parent group, for example, that finds itself making access to information requests to multiple health authorities and to the Ministry of Health and other ministries. You could see how that number could add up awfully quickly and be a deterrent to people making legitimate requests."

CBC Alberta journalist Charles Rusnell wrote that his province's FOI application fee has always posed a financial barrier in Alberta. "This is particularly true for independent researchers affiliated with environmental groups and other non-profits, mall and even large media outlets and private citizens most of all."[183]

Ken Rubin, Canada's most expert FOI applicant and researcher for news media, noted: "From my experience, higher initial fees do act as a barrier: it turns people off who would apply (like citizen groups, people seeking to discover government effects on their health, income, environment, consumer products, etc.). Back in 1982-83, the feds began with a $5 application fee but draft regulations that I found said it would be $10. The publicity on this changed the application fee back to $5. I have often wondered if the fee was $10 (or up to the possible legal limit of $25 – still a possibility), what would have been the effect on usage."

David Cuillier, PhD, president of the U.S. National Freedom of Information Coalition, said on Bill 22 that such a fee puts many citizens at a disadvantage in interacting with their government. "Even worse, it differentially hurts the poor, widening the information gap in our society…. The

[183] Charles Rusnell, David Cuillier, Ken Rubin, correspondence with the author, Oct. 2021

public records request system is a way for citizens to interact with their government, and simply should be considered a cost of doing business. So why start making it harder for citizens to know what their government is up to on this front?"

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

In 2019 I produced an Excel database of 2,000 B.C. news stories produced by FOI requests since 1993, to demonstrate the public value of the access law to skeptics. See: See the Index at - https://canadafoi.ca/bcstoryindex.xlsx There are 70 stories in Category 6 concerning records obtained by citizens. Because these stories are based only on records that the citizens chose to share with the media, there are likely many other examples that we never hear about.

Most importantly, some of these citizens (who may be too poor to pay fees) filed general requests for their whole community's benefit, above and beyond their own personal interests. The public had never been truly consulted about such planned fees in Bill 22. One might inquire of the Premier and cabinet members: is there any information in the stories below - if the FOI requests that revealed it had been blocked by application fees - that your constituents would be better off not knowing about?

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30 samples of the fine usages of "general information" B.C. FOI requests by average citizens, aiding a larger community purpose

(Portions highlighting the citizens' applications I have placed in italics)

[1]

School's seismic safety rattles parents. **By Jeff Rud,** ***Victoria Times Colonist,*** **April 8, 2003**

Nobody knows for sure just how 109-year-old South Park elementary would fare if Greater Victoria experienced a major earthquake. But two engineering reports 12 years apart raising concerns about the safety of the popular James Bay school were enough for Alexander Galitzine to pull his two daughters from the school. The 2002 report results were *obtained by the South Park parent advisory council safety committee through the Freedom of Information Act*. It showed indications of a collapse hazard in even a moderate quake "with the probable complete loss of South Park elementary school." The Galitzines are one of four South Park families who had their children leave the school.

[2]

Removal of hospital beds opposed by own experts. **By Don Harrison, *The Province* (Vancouver), Jan. 18, 2004**

The Fraser Health Authority removed all but a handful of acute-care beds from Delta Hospital despite being warned by its own experts about such a move. FHA documents show the two medical committees it set up to look into the controversial downgrading of Delta Hospital to a sub-acute facility advised last February that it would either be difficult or impossible to find room as planned for Delta patients at already-crowded Richmond and Surrey hospitals. The waits for beds could potentially put acutely ill patients at risk. This revelation comes after *the people of Delta filed a FOI request* to examine their health authority's plans. The 14 months' worth of documents are as thick as a phone book, but according to Delta's mayor, fail to answer the big questions.

[3]

Losing track; Schools not taking ownership when struggling students leave traditional system early. **By Janet Steffenhagen, *Vancouver Sun*. Apr. 5, 2010**

A woman who was duped by a now-defunct company on contract with the College of the Rockies to recruit and help train nursing students has won a $25,000 judgment in small claims court after a two-year battle with the public institution. The college, located in southeast B.C., has also settled out of court with two other students who said they were cheated by the company, PTI Online, between 2002 and 2007. The college cut ties with the company in October 2007 after discovering it had falsified documents for students seeking entry to the college's access to practical nursing program. *Unable to afford a lawyer, students used FOI to gather evidence and took their case to "the poor people's court,"* said a friend.

[4]

Woman launches class action suit after eardrum surgery. **By Pamela Fayerman, *Vancouver Sun*, Apr. 25, 2006**

A Vancouver woman who was shocked to learn she may have received infected donor tissue during reconstructive eardrum surgery in 1994 has launched what she hopes will be a class-action lawsuit against St. Paul's Hospital, the B.C. Ear Bank and a number of other defendants. *Her lawyer David Klein, who is asking the court to certify the case as a class action, said 70 pages of documents he obtained from the provincial government through FOI processes*, showed that when Health Canada conducted a review of the facility in late 2002, there were numerous health and safety concerns about the way materials like bones, membranes, and cartilage were being collected, stored and distributed.

[5]

***Lyme disease recognized*. By Barb Brouwer, *Salmon Arm Observer,* Aug. 6, 2013**

Sheri and Rory Mahood know well the hell that can follow a tick bite. Both are suffering the debilitating effects of Lyme disease from tick bites they received on their own Sunnybrae property in the fall of 2009. *The couple has formed the Lyme Disease Association of B.C. Through a FOI request, the Mahoods got a copy of a 2010 report*, Chronic Lyme Disease in British Columbia – a Review of Strategic and Policy Issues , commissioned by the Provincial Health Services Authority and clearly marked, "Not for distribution." Prepared by Brian T. Schmidt, retired senior vice-president of the provincial health authority, the report laid out the nature of the disease and offered several recommendations.

[6]

***New windows in B.C. Housing apartments. Change not directly related to suicide of tenant three years ago.* By Dan Hilborn, *Burnaby Now,* July 22, 2006**

Three years after Harry Kierans leaped to his death out the windows of his 14th-floor suite in the Hall Towers at Kingsway and Edmonds, B.C. Housing is halfway through a $4.6-million program of installing safer, smaller and more energy-efficient windows in the two highrise apartment buildings. *After filing a series of freedom of information requests to obtain their brother's government records, Harry's sisters received a stack of documents* measuring more than 22-cm thick including several memos that indicate Harry had made several requests to move out of the Hall Tower in the months leading up to his suicide.

[7]

***Daycare inspection reports don't mention losing kids.* By Staff, *CBC BC*, Jan. 10, 2014**

A Vancouver woman says she was shocked beyond belief to learn that daycare staff failed to notice when her two-year-old daughter wandered off and ended up alone outside in a parking lot. Rachel Garrick says young Henrietta had not been gone long when she wandered away from the Hastings Park Childcare Centre last November, but that fact is hardly comforting. When she could only find glowing licence reports and no mention of similar incidents, *she sent Vancouver Coastal Health, the licensing agency, a request under the B.C. FOI Act.* "I received that [response] last week and it was very upsetting to see in August, just a few months before Henrietta went missing, they lost track of another child."

[8]

***Abbotsford residents urge change in high-crash 'Sumas Prairie Speedway.'* By Dustin Godfrey, *Mission City Record,* Dec. 1, 2018**

A crash at the intersection of Dixon and Campbell roads left Camille Timmermans and her husband Nathan with long-lasting injuries, including a concussion and muscle issues. Joyce Verwoerd, who lives across the street from the Timmermans, adds grimly that an area resident only recently suffered that very fate. *Verwoerd recently filed a freedom of information request with the Abbotsford Police Department for the number of crashes and fatalities on the area's roads. The numbers are staggering*: 233 crashes in that time and seven deaths. That's two crashes per month and nearly one death per year.

[9]

***No discussion on school sale*. Letter by Linda Travers, Victoria resident, *Victoria Times Colonist,* Apr. 22, 2007**

The Greater Victoria School District's decisions to close schools and sell taxpayers' property without a clear, transparent process are unconscionable. For months, I have been trying to get meaningful information about the January sale of Fairburn Elementary to a private developer. Starting with rumours last fall I eventually learned that a real estate company was directed in November 2006 to sell Fairburn without notification to taxpayers and nearby residents. *My Freedom of Information request* revealed there was no board meeting to change Fairburn's status from a three-year lease to a decision to sell — in direct contradiction to a May 13, 2003, district press release confirming that "schools slated for closure will not be sold." Parents and others from Lampson, Cloverdale, Richmond and other schools are doing their part by providing trustees with excellent information.

[10]

***CSRD failed residents*. Letter by Dale and Karen Van Male, *Campbell River Courier – Islander,* May 2, 2007**

Re. your article "Dump trucks in school zone angers parents". The residents of the area are angry also. This has been an ongoing operation for four years with the last two years being the worst. Anyone living on Crawford or McLelan Road knows the magnitude of this operation…. One of the biggest blows to the residents was recently when *a copy of the Development Permit for the property in question was obtained, through the Freedom of Information Act*, and it became immediately obvious that the property owner was not living up to many of the terms and conditions as stated in the Development Permit and the Regional District was not enforcing it.

[11]

***Surface lease review finally released to public*. By Friedrich Hardy, *Alaska Highway News* (Fort St. John), June 8, 2007**

Last week, northeast landowners and interest groups received a review of oil and gas surface leases contracted by the provincial government in 2005, but it's left them to wonder why it came two years late. A number of Peace residents were involved in the compilation of data through

meetings and submissions, and at the time public policy consultant firm Perrin, Thorau and Associates said the report would be made public. But it wasn't until *resident Rick Koechl filed a FOI request on behalf of concerned landowners* that the final copy of the report "Availability of Information About Surface Access Leases" made its way into the region. The 43-page document reveals four recommendations that work towards providing landowners with sufficient information to negotiate surface lease agreements with oil and gas companies.

[12]

'Nuisance' gains privacy victory; School board will have to provide information about pedophile teacher. **By Janet Steffenhagen, *Vancouver Sun,* March 17, 2008**

School officials describe him as a nuisance, but the provincial privacy office has ruled that an Abbotsford parent who has doggedly asked questions about the handling of a pedophile teacher deserves answers. The decision is a victory for Greg Cross, who has been trying to get information from the Abbotsford board of education regarding Serge Lebedoff since 2001, when he reported disturbing behaviour by the teacher-on-call and was told by a school principal that an investigation was underway. Cross continued to ask questions. That prompted the board to appeal to the Information Commissioner for permission to ignore his requests, saying they were frivolous, vexatious, annoying and costly. But in a recent ruling, the office refused, saying Cross has a legitimate interest in the matter and the board must respond.

[13]

***Residents call for pedestrian walkway*. By Devon MacKenzie, *Peninsula News Review* (Sidney), Oct. 5, 2012**

A group of Central Saanich residents are banding together to call for a pedestrian walkway to be put in along a section of West Saanich Road. "We want this path primarily for safety and accessibility," resident Barb Whittington said. "According to a freedom of information request we got from the municipality, when this stretch of road was monitored from the fall of 2011 to the early spring of 2012, 100 per cent of the vehicles traveling down it were speeding, even after the speed limit was changed from 50 to 40 kilometers an hour."

[14]

No easy answers: FOI requests 'overwhelm' City of White Rock; Residents question city's responses. **By Melissa Smalley, *Peace Arch News* (White Rock), March 31, 2016**

White Rock residents say they are getting little response from the city on FOI requests, some dating back more than a year and are questioning why the process of accessing information is difficult. *Ross Buchanan is one of several residents to file a handful of FOI requests with the city*. Buchanan's requests have covered a number of issues in the city over the past two years, including correspondence about the then-proposed addition of chloramine to the water supply,

documentation of the city's research into joining the Greater Vancouver Water District and an untampered expense file for Mayor Wayne Baldwin for an 18-month period.

[15]

***Suicide prompts call for changes; Coroner*. By Cindy Harnett, *Victoria Times-Colonist,* May 4, 2013**

A coroner's report is calling for the files of all students with a diagnosed mental illness to be flagged, after a Victoria student with an anxiety disorder committed suicide after being kicked out of her school's gifted program. The report is a sober portrait of how the school system failed Freya Milne – an artistic, sensitive 16-year-old with "exceptional abilities and needs." An email *obtained by the family under FOI* shows the school's former co-ordinator of the gifted education program saw no compelling reason to give Freya "special treatment" because "she doesn't want to do an essay."

[16]

***Motocross track illegal*. By Ray Chipeniuk, letter to editor, *Interior News* (Smithers), May 23, 2012**

About a year ago, I came to the Interior News office to complain to the editor of that era about the abundant coverage given to the Smithers Motocross Association (SMXA). The main grounds for my complaint were that motocross is an illegal use of the land base where the SMXA operates and the noise from illegal motocross events is a nuisance for residents up to three kilometres away. For verification of the statements I make in this letter about land use, zoning, and even the term "illegal," *I encourage you to obtain the relevant documents from the RDBN. I did, through Freedom of Information, and I am not a reporter.*

[17]

***DNV developments flagged over traffic concerns; MLA cautions putting brakes on housing is no traffic fix.* By Brent Richter, *North Shore News,* Dec. 7, 2018**

The Ministry of Transportation and Infrastructure has flagged the District of North Vancouver, raising concern about the pace of development. The sentiments were spelled out in a series of letters from the ministry to district staff sent during the rezoning processes for a 150-unit townhouse project in Lions Gate and for the 411-unit Emery Village redevelopment in Lynn Valley. Kelly Bond, who with her fellow Emery Village renters is set to be demovicted in April, came by the letters via a Freedom of Information request she filed while informing herself about the development process.

[18]

Unintended obfuscation? **By Paul Henderson, *Chilliwack Times,* Dec. 7, 2010**

Currently some residents in Yarrow have their collective knickers in knots because of a quarry operator's proposal to build a gravel conveyor belt system down the north face of Vedder Mountain to some properties on Vedder Mountain Road. Yarrow resident Victor Froese has been on the forefront of the battle to stop this particular project, which could basically turn a large piece of land into a gravel pit in his otherwise bucolic neighbourhood. *Froese and his neighbour Walter Raupach have been determined, and have gone so far as to make FOI requests to find out where the project is at.* At the newspaper, we are used to being led down the garden path either with distraction, misinformation or simply with language, so the persistence of Froese and Raupach is admirable.

[19]

***Our school trustees eating well*.** **By Cathy Wolfe, letter to editor, *Courtenay Comox Valley Record*, Nov. 4, 2008**

Through a Freedom of Information request, I have discovered how much the SD71 school board spent on catering from January 2007 until June 2008. During this 18-month period, the board spent about $146,500 of taxpayers' dollars to feed themselves, management and other SD71 employees at various meetings within the Comox Valley. This amount does not include expenses for the travel of trustees and district staff outside the district. I wonder how many lunch programs for needy students or how many learning assistance teachers or computers this money could have paid for instead, and how this huge expenditure benefited students at all.

[20]

***'It's all about trust'; Concerned residents pore over 6,000 pages about OSB plant*.** **By Matt Lamers, *Alaska Highway News* (Fort St. John), Oct. 17, 2013**

Greg Hammond knows the problems Peace Valley Oriented Strand Board has had in honouring its environmental commitments better than anyone. He owns land directly south of the particleboard plant, and says his land has been flooded twice "that we know about" with contaminated water, causing damage to the property. "The land's not the same," he said. *Due to the fruits of a long delayed FOI request - 6,190 pages of documents - a group now has the information to help explain why the land may have changed*, and how Peace Valley OSB repeatedly ran into major problems with British Columbia's environmental regulations while the land was changing. One ministry letter told of how Peace Valley OSB's dryer stack failed to comply with the province's regulations for formaldehyde and air flow rate.

[21]

***Canada Line operator ordered to reveal its deal with TransLink*. By Kelly Sinoski, *Vancouver Sun*, April 8, 2009**

The operators of the Canada Line have been ordered to reveal all the details of their agreement with TransLink, despite claims by Canada Line Rapid Transit Inc. that it would lead to an increased risk of terrorism and cause financial harm. Celia Francis, senior adjudicator for the Information Commissioner, said Canada Line Rapid Transit and InTransitBC did not provide sufficient evidence to "establish a reasonable expectation of harm flowing from disclosure." She ordered all information of the concession agreement be made available to lawyer Cameron Ward, who filed the FOI request, within the next 30 days. *Ward represents former Cambie merchant Susan Heyes, who successfully sued TransLink, InTransitBC and Canada Line Rapid Transit for $600,000 in damages after losing business* as a result of tunnel construction along Cambie Street.

[22]

***Schools group questions information from district.* By Staff, *Harbour City Star* (Nanaimo), Dec. 27, 2013.**

Members of the *Save Cedar Schools coalition* have questions about information they received from the Nanaimo-Ladysmith school district. Spokesman Steve Rae said the coalition is sifting through more than *6,000 pages of correspondence and material related to schools in their area that they requested from the district in a FOI request.* "We've spent $2,000 and more than four months of our time on trying to get this information and all we received was an incomplete record of what we wanted," Rae said. "We've been in contact with the Ombudsman's office and are asking that an investigation be held into this issue." The district contracted a consultant, at a cost of $10,000, to help comply with three FOI requests regarding the district's plans for schools in Cedar.

[23]

***WCB doctors too old to practice*. By Barbara McLintock, *The Province* (Vancouver), Apr. 10, 1997**

The fate of some injured workers in B.C. is in the hands of retired doctors who aren't even allowed to practise any more, charges NDP MLA Rick Kasper who cited in the legislature the case of one of his constituents who found that two of the three doctors on his Workers Compensation Board "medical review panel" were no longer on the active list kept by the College of Physicians and Surgeons. Instead, they were "life members" — a category reserved for retired doctors who are specifically banned from "practising medicine for gain," Kasper said. But *the injured worker involved, Clayten Adkens, from Sooke, told The Province that when he used FOI to research his own case,* he found one of the doctors had been paid about $1,300 for his case alone. "I wanted to know what the qualifications were of the doctors on my case," said

Adkens, a welder with lung damage. “But when I looked at the (college’s) list, I couldn’t find two of the names there at all.”

[24]

***Terry Jacks’ longest season*. By Stephen Hume, *Vancouver Sun,* Dec. 2, 2000**

The story began five years ago when a call from a shift worker at Howe Sound Pulp and Paper in Port Mellon *tipped former singer Terry Jacks that the mill was not in compliance with its emission permits for sulphur dioxide and nitrogen oxide.* Jacks says he didn’t take the tip at face value. Instead he filed freedom of information requests with the provincial environment ministry for data comparing emissions from pulp mill stacks with the levels set under the pollution permit granted by Victoria. The bureaucrats led him on a merry chase, he says. But he persisted and he finally got the statistics he sought.

[25]

***Safe, quality daycare was all she wanted,* by Deborah Pearce, *Victoria Times Colonist,* March 23, 1997**

The Capital Regional District released details to the Times Colonist – through the initial FOI work of concerned mother Brenda Day – of problems involving day-care operator, Sunny Times Day Care, exposing a sorry history of complaints from parents about the treatment of their children while at the still-operating facility. Columnist Deborah Pearce said that only days after her story appeared, “parents started coming out of the woodwork with complaints against the woman who ran the place.” In the end, the manager voluntarily surrendered her day care licence, and promised to close her facility. *Pearce said later “in my opinion Sunny Times would still be operating without FOI.”*

[26]

***Peeved pop says pupils political pawns,* by Gordon Clark, *The Province* (Vancouver), Feb 5. 1997**

The NDP was accused of putting politics ahead of children in its handling of new school funding. *Dr. Murray McFadden, a Langley parent-activist, said cabinet ignored an objective list prepared by the education ministry ranking 64 school projects in order of priority.* Only three of the 11 new schools projects announced Monday -- all in NDP ridings -- were on the list. "I would say there is child exploitation there," he said. "Because the needs of the kids of all the province should come before any partisan political needs of any party." *He obtained the list through FOI,* and wondered why Ron Brent elementary, curiously in Education Minister Paul Ramsey's town, was able to jump over 60 other schools waiting for funding. Vancouver school board co chairwoman Sandy McCormick said she was upset that Magee, in a Liberal riding -- the school at the top of the ministry list -- was ignored. She said the school is badly overcrowded, has asbestos- hazard problems and had to evacuate most of its top floor after recent flooding.

[27]

***Letter: Parksville's mayor has some explaining to do*, by Carl Anshelm, *Harbour City Star* (Nanaimo), Sept. 4, 2002**

Despite two requests, in writing, the Mayor has declined to inform the taxpayers of the financial status of her multimillion dollar 'vision and dream' – the Civic and Technology Centre. Failing response from the Mayor, the writer, under provisions of the Freedom of Information Act, followed up by a formal complaint to the FOI commissioner, the following details were released: 1. The amount of money borrowed to date as authorized by referendum is $4,550,000. 2. The interest paid to date on borrowed funds – $374,745. 3. $1,050,000 of the amount borrowed and $59,745 of the interest is being repaid from lease revenues received by the city from the Vancouver Island Regional Library.

[28]

***Mom mad at school board: No thanks for lobbying, she's called gay activist*, by Sheryl Yaeger, *The Province* (Vancouver), May 25, 1997**

Surrey parent Jackie Ward is miffed that, after bringing in more than $70,000 for a new school, her only recognition was to be called a homosexual activist. Robert Pickering (the board's chairman) has been vocal in his opposition to teachers receiving education about recognizing and assisting homosexual students. Ward, who is one of three members of Heterosexuals Exposing Paranoia, said the board is being run by personal agendas. She noted that while Pickering says the school board is trying to get more money from the province, a freedom-of- information request showed that he has written one letter in six months, and it wasn't about funding.

[29]

***Health authority intervenes at yet another China-owned senior home; Official highlights concerns about insufficient staffing, lack of cleanliness*, by Joanne Lee-Young, *Vancouver Sun,* Dec. 13, 2019**

Sandra Hawkes is watching as health authorities on Vancouver Island have intervened at another senior care home owned by a Beijing company and is wondering why the Fraser Health Authority isn't taking similar steps. In 2017, Ottawa approved a $1-billion-plus deal for Anbang Insurance Group to buy Retirement Concepts and its 20 senior care homes, including Waverly. It was controversial from the start. Critics argued patient care could be harmed under a foreign company that revealed little about who actually owned it, which is a requirement under federal investment rules. *Hawkes has spent months requesting more specific details about inspections through FOI requests.* This has yielded inspection reports for Waverly in 2017-19 showing licensing officers making repeated requests for "corrective action" by certain dates.

[30]

***B.C. school size rules ineffective, critics say*, by Zak Vescera, *Vancouver Sun*, July 22, 2019**

Trustees, teachers and parents say the province's school-design rules are out of step with student needs and modern curriculum…. The standards mean some of those rebuilds, like the one scheduled for Eric Hamber Secondary, will be significantly smaller than their predecessors. Vik Khanna, a tech entrepreneur who has a son attending Hamber, says he's concerned the new school will be more than 30 per cent smaller even though it is earmarked to accommodate the same number of students. The Vancouver school board has appealed to the ministry for more funding for the Hamber project, which is already set to cost $79.3 million. *Khanna says responses to FOI requests he filed indicated adding the space could cost as much as $20 million more.*

Appendix 2

The *B.C. FOI News Story Index* - Introduction

See the Index at - https://canadafoi.ca/bcstoryindex.xlsx

Produced as a reference for journalism students, this Excel database contains a summary of every significant news article I could find that was produced from records obtained through requests under the B.C. *Freedom of Information and Protection of Privacy Act* since the law took effect on October 1, 1993, until the end of 2020.

The search was extensive, through mainstream newspapers, radio and` TV – as well as small rural newspapers, student, alternative and online media. More than 2,000 news stories were found, and placed in 24 categories. The *Index* is best viewed on a large screen, and the topics are word searchable, by Ctrl-F. Other features:

• Alongside several stories I have placed a **{*}** symbol, to draw attention to what I believe is an especially interesting, timeless or historically important FOI example (and time-pressed readers could skip ahead to these results). A few have even led to investigations, regulatory changes, and relief or justice for affected persons.

• Many of the articles are not based upon FOI requests filed by journalists, *per se*, but from those filed by interest groups (most often environmental), or opposition parties, or the participants in events, who then in turn shared those records with the news media.

• The main focus of this database is the BC FOI law. Yet one can also click on the **red tab** at the bottom to see fascinating stories about this province produced via the Canadian federal *Access to*

Information Act (1982) - mainly on records from the RCMP, Health Canada, and Environment Canada. Then, within that second red-bannered worksheet, one can scroll to its bottom, below the **orange bar**, to find articles produced via foreign FOI laws, mainly American. (One can click on the **blue tab** to return to the B.C. stories.)

• For FOI appellants and media lawyers: When contesting FOI obstructionism at inquiry before the information commission or courts, one can search this database for the types of records that have been released under FOI before, and therefore ideally should be again. This can also be done via the sectional index of OIPC rulings at - https://www.oipc.bc.ca/rulings/sectional-index/

• Taking the world view, such an FOI story database could be replicated in any province or state, indeed any country, and I would encourage this for the benefit of the public and journalism students (for it could also serve a source for story ideas). A non-profit group could hire a researcher, journalism student or retired reporter for this task, and perhaps update it yearly.

A fourfold purpose for the *BC FOI News Story Index*

(1) The Public Interest

I believe the value of FOI needs to be demonstrated rather than just asserted. If the public asks, "Why should we care if we have a good FOI law?", a kind of answer can be found here. Every British Columbian who browses this database for an hour will find it time well spent, I guarantee. To dispel the idea that FOI is mainly utilized by the big city press, I searched all B.C. local newspapers from the *Agassiz-Harrison Observer* to the *Williams Lake Tribune* to find dozens of local stories from every part of this province (and all the media have a common cause in better FOI laws).

The vast range of FOI topics is quite astonishing, covering the whole spectrum of society, from the cabinet office to Vancouver's Downtown Eastside, from farms to coal mines, from nursing homes to logging roads. Most powerful are the sections on the shocking mistreatment of children, seniors and animals. The old adage of journalism's mission being "to afflict the comfortable and comfort the afflicted" has been well realized here, with news that can bring some degree of justice to the powerless, and voice to the voiceless.

For many readers, the most interesting and moving summaries may be found in Category 6 – Personal Requests (perhaps the best place to start reading the *Index*). These 65 stories are based on FOI requests that were filed not by journalists but by individuals or their family members often in some form of distress. Working to improve their lives, they obtained documents that helped some to clear their names of false allegations, or aided adoptees to find their true parents, or enabled others to obtain redress for childhood abuse, or workplace injuries, botched surgeries, hepatitis C infections, schoolyard bullying, land appropriations and rental

evictions. It shows that obtaining records is not solely within the purview of experts, and their usage best demonstrates the professed goal of the FOI law – to empower the average citizen.

The first and lengthiest category concerns your money. In articles that may prompt reader groans and/or chuckles, FOI revealed how the public treasury was sapped as your tax dollars went to a $572,000 severance for a former city manager for 19 months service; or $9 million in severance for fired political appointees after the 2001 election (one gaining $177,475 for seven months work); or a PR spin-doctor charging $75,000 in moving expenses to relocate from Victoria to Vancouver; or two university deans gaining $500,000 interest-free housing loans each; and so on and on.

Overall, these stories on issues as diverse as health, safety, financial waste, public security, and environmental risks share two common features: all reveal issues critical to the public interest (*i.e.,* not merely topics "the public might find interesting," as some officials say), and all were made possible only through FOI requests. They belie the most pernicious, self-serving myth of all – "What the people don't know won't hurt them."

Here we can see politicians contradicted by policy experts, warnings not heeded, the hypocrisy of preaching one course in public and doing the opposite in private, draft reports watered down for their final public versions, and more (particularly for those adept at reading between the lines). In stark contrast to the bland, vague reassurances of government public relations, we encounter the sharp bite of reality as we read in graphic detail inspectors' reports from the trenches.

The articles require a second look, for when they appear in daily media they may be forgotten within days, but many should not be, because we could be living continuously with the unresolved or recurring problems that they have raised. Moreover, not every FOI story necessarily reveals a scandal, but can still be valuable in educating the public on the scope of a little-known issue, and on how government operates. My fondest hope is that the public may finally realize that not everything good can be had for free online, and here see the value of FOI journalism, enough to financially support its production, and so to ensure its survival.

This catalogue is also a necessary and powerful corrective to a ruling party's zealous loyalists and the bureaucracy's professional obstructionists. These often try to trivialize and discredit the FOI law by fixating on what they call the "frivolous and vexatious" usage of it (e.g., "Those malicious and time-wasting gadflies swamp us with hundreds of systematic requests – at the taxpayers' major expense - for every lunch and taxi expense chit, receipts for office carpet replacements, etc.").

Such requests might indeed occur, but at the same time such critics always remain *silent* upon the many creditable revelations - of human abuse, wasteful spending, environmental damage, the personal cases cited in Category 6, and other grievous public harms – which were only made possible through FOI. The latter was surely the goal of premier Mike Harcourt who passed the law, and whom told the Jack Webster journalism awards dinner in 1993 (as I well recall), "We passed an FOI law so you folks could do more stories."

Moreover, while critics complain of the cost of administering the FOI law, it is really a miniscule fraction of the B.C. budget. In fact, the FOI system often saves public funds, because public outrage over misspent money – revealed via media FOI requests – has induced government to trim the waste and tighten controls.

The most common theme that emerges from the stories is *the hidden misuse of power*. Its exposure by FOI is usually (but not always) followed by justice, restitution, and improvements. On government misdeeds, it has been well said, "sunlight is the best disinfectant," a relief to the public from the dark night of ignorance, and one of the few ways to end some forms of grotesque wrongdoing that can only thrive in secrecy. Whenever officials claim they want to withhold records because of fear the public might "misunderstand" them, it is more often the case they fear the public will understand them all too well.

Yet with Canada's ineffectual FOI laws, we can produce far fewer FOI news stories than the American press does. In fact I often use the FOI law of Washington State, and the contrast in responses with B.C. is like night and day. The loss of hundreds of such untold and untellable news articles in the public interest that might have been possible amounts to a world of lost opportunities. This *Index* may bring an ironic, unintended consequence, whereby officials may say: "Look - this database demonstrates the law is working very well. Therefore no law reform is needed." No. The key point, which I cannot overstate, is this: If our FOI laws were raised to global standards, this story list would – and should - have been twice as long.

Overall, these stories can serve as an antidote against despondency or cynicism regarding the eroded B.C. FOI system, for they show how journalists can still overcome the barriers of bureaucratic and political resistance to produce valuable results. But now imagine losing them. There are many such articles from the 1990s golden age of B.C. FOI (relatively speaking) that one simply cannot see any more today because officials have so undermined the FOI law and exploited its gaping loopholes. In response, many journalists (i.e., those that remain) have simply given up on the FOI process - a most regrettable error I believe. Our task should be to revive the spirit of the 1990s in which such fine work was possible. Why should we - or the public - accept anything less?

(2) To encourage needed FOI law reform

This second purpose stems directly from the first. It is well known that B.C. and Canadian FOI laws have fallen far behind the rest of the world (as detailed in my book on global FOI, *Fallen Behind*). Urgently needed reforms have stayed frozen in a circuitous time warp for decades, while a longtime B.C. legislative columnist has well described the B.C. government's transparency record as "the shame of the province." These stories demonstrate the value of keeping the FOI system alive, particularly after the passage of the NDP's notorious Bill 22 in November 2021.

(3) An incentive and story idea generator for journalists

Beyond an archive, this catalogue (which can be updated continually) was also intended to be used as an active tool for both journalism students and working reporters.

In their spare time, they can browse through the subjects, in Column B, for story ideas, and the database is topic word searchable by Ctrl-F. Even with the state's new FOI obstructionism, many records that were obtained before can often be retrieved again; this is at least worth trying. Reporters from other provinces may find it interesting also, for a certain type of record obtained by FOI from one crown corporation, health authority or city hall can likely be obtained from the same type of entity anywhere else.

Sometimes to enhance the story, the media post the original records on their websites, and the *Vancouver Sun* laudably constructed searchable databases for the public on government salaries, and nursing home and daycare inspections.

Even in these challenging times, the news media still work as an indispensable bridge between government and the public; the vast majority of Canadians will never file an FOI request, and so, by default, the records that the media requests will generally provide what the public sees. Although the press in Canada generally file only between five to ten percent of FOI requests, the benefit to the public interest is felt far beyond these statistics.

Compared to regular media (transcribing council meetings or recycling press releases, with the agenda set by others), FOI news is proactive, breaking new ground, working against the grain. The general topic investigative reporter is the wild card of democracy, surprising readers and responding to secretive governments in the spirit of the Colorado *Aspen Daily News* motto: "If you don't want it published, don't let it happen."

Some FOI stories remind one of a lightening flash in the night, waking the public from its sleep, which is followed by a short pause, then a thunderclap (equivalent to the next day's reaction after the story to the misdeeds revealed). To bypass public relations spin and "pack journalism," such articles are welcomed by a public starved for substance - stark and needed factual correctives to a Trumpian, fact-free, "post-truth" age, where taxpayer-funded PR staff outnumber news reporters by 5-to-1 (an ever expanding ratio, lamentably), and the media are awash in oceans of social media, ads, entertainment and trivia.

(4) The historical record

The *Index* can be of interest for local historians, sociologists and political scientists also. Scrolling through it, some may have almost the sense of reading a parallel history, one perhaps more "real," running concurrently to the official version the public was meant to see. (On occasion one might also wonder here if "those who do not remember the past are condemned to repeat it.")

In this digital age, as time accelerates with ever shortening public attention spans and competition for our attention, it is all the more necessary to pause for an hour, and take stock of all the B.C. media have achieved with FOI over the past quarter century. Memories grow faded and distorted with time, but written records remain fresh and accurate. (Some of the earliest articles were not posted online, and even most of those that were have long ago been deleted from the internet, and are certainly not retrievable by Google.)

Last month's events are overridden in the river of time, what is out of sight is generally out of mind, and yesterday's articles are forgotten as "old news." Yet many should not be because we could be living continuously with the unresolved or repeated problems that they have raised (e.g., a decade before the Peter German report on money laundering at B.C. casinos, the CBC revealed the problem in an FOI story of May 21, 2008). Even dated or resolved issues can still provide an interesting record of social history.

Finally, another goal is to preserve and appreciate the writers here – enterprising sleuths and nobody's fools, shining needed spotlights into the darkest corners, working without fear or favour, never mistaking quantity of information for quality, nor swallowing the official line. (Barbara Yaffe of the *Vancouver Sun* has the honour of being first, one month after the law took effect, producing an FOI-based story on November 6, 1993 on lavish spending by B.C.'s agent-general in London.)

Some fine stories - which readers may have forgotten or missed upon their first publication - have received journalism awards, while others should have. Browsing this index makes us feel all the more acutely the retirement of such prolific FOI champions as Stewart Bell, Larry Pynn, Kim Pemberton, Ann Rees, Chad Skelton, Janet Steffenhagen and others. Yet we can take much hope from the superb FOI articles being produced by the new generation of journalists such as Sam Cooper, Zac Vescera, Travis Lupick, Tyler Olsen and Bethany Lindsay.

When seen in such a database, the stories are re-contextualized; quality FOI articles that frequently appeared in the 1990s and were taken for granted now assume a new stature in these barren news media times, one that will likely only grow in the years to come. Journalists who write "the first rough draft of history" can be needlessly modest at times, and their historical influence may be overlooked.

("Another problem is that historians, disdaining journalists and their work, often ignore them. . . . the old feeling, never abandoned in the newsroom or university, [is] that journalists are somehow inferior creatures, involved in practices akin to, say, poultry or mortuary science, not in a high and honourable calling." - *Muckraking,* edited by Judith and William Serrin, 2002)

Professional newsgathering is *not* a sunset industry, even (especially rather) in a so-called "post-truth era." While these times are extremely challenging, obviously, it can help us to glance backward to draw inspiration from our pioneers. Some such articles here can galvanize us today, and are quite easily updated or replicated. It is vital for the public interest to pass on the FOI journalism torch to new generations of investigative reporters, of whom there will surely be.

The B.C. media's service to the openness cause was noted by the province's first Information and Privacy Commissioner David Flaherty (even despite FOI-based news stories

sharply critical of his travel spending), a privacy expert whose rulings, candidly speaking, were mostly deleterious to transparency. His words below are even more important today in this age of newsroom reductions than two decades ago. In his final annual report of 1998/99, in *Ave Atque Vale*: Hail and Farewell, he wrote:

> I wish to close on a note of high praise for the media in this country, in at least partial response to the recurrent attacks on them by politicians in particular. I am not thinking here of the issue of trying to balance competing interests of accountability and privacy in the dozens of decisions that I have made in response to media requests for access to information. Nor am I selfishly reflecting my strong sense that the media would have had to be my ultimate defenders, as surrogates for the public, if the politicians and government of the province had chosen to turn against the *Act* by, for example, abolishing it. There have been times when I did not regard this as an idle threat.
>
> At the end of the day, my privileged vantage point of the past six years has fully persuaded me that a free press is absolutely fundamental to the preservation and advancement of an open and democratic society in British Columbia and Canada as a whole. Becoming fully persuaded of what may strike some as a truism has been an added benefit and lesson from my experience in public office. It has been worth it.

Most impressive stories have been done in the first three decades of FOI in B.C., and overall they have surely helped make this province a better place to live. But if we accept our decrepit Canadian transparency laws and subverted processes, will we see far fewer stories such as these? Or will we ensure improvements so as to make it possible that the best is yet to come? Although it may appear a bleak dystopian landscape for Canadian FOI journalism today, it is essential to view this situation as neither necessary nor inevitable. Most FOI misfortune happens mainly because we permit it to happen, and the choice is ours.

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B.C. FOI NEWS STORY INDEX - CATEGORIES

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Appendix 3

65 fine news stories published with records obtained under

the B.C. *Freedom of Information and Protection of Privacy Act*

From 2,000 articles at the *B.C FOI News Story Index* - https://canadafoi.ca/bcstoryindex.xlsx

Collected and summarized by Stanley L. Tromp, 2022

[1]

***Internal government documents reveal B.C.'s 9-1-1 system was unprepared for heat wave, as NDP set to weaken information-access laws*. By Wendy Cox and James Keller, *The Globe and Mail,* Oct. 27, 2021**

The B.C. Opposition Liberals released documents obtained under the FOI act to show that the province's E-Comm system, the agency that manages 911 calls, was woefully understaffed. In early June, three weeks before a deadly heat wave, a data analyst for the agency warned that calls for an ambulance had been going up and the response time by the ambulance service had been declining. The analyst wrote that the BC Ambulance Service "is compromising public safety overall by negatively impacting 911 answerability." Between June 20 to July 29, historic heat records were shattered and the BC Coroners Service and the province reported 569 "heat-related deaths." As calls flooded in, 911 operators had a duty to stay on the telephone with the person seeking help until either fire or ambulance paramedics could respond. But staff in those services were themselves backlogged, waiting for patients to be seen in emergency rooms. As a result, some operators were on calls for hours with increasingly desperate people and were unable to pick up other calls coming in.

[2]

***Hundreds of thousands of chickens died during June heat dome: reports*. By Denise Ryan, *Vancouver Sun,* Sept. 27, 2021**

It wasn't just humans that suffered during the deadly heat dome that punished B.C. in June. At least 651,000 animals died on farms as a result of the heat wave, the vast majority of them chicken and other poultry, according to records obtained by animal justice advocate Camille

Labchuk through a freedom of information request. Chickens are particularly vulnerable to extreme heat because they can't sweat to cool down. During a heat wave, the birds can pant, ruffle their feathers or hold their wings out to try to cool themselves, but require additional help such as cooling pads, tunnel ventilation and fans. Documents obtained by Labchuk, executive director of Animal Justice, show that the B.C. Chicken Marketing Board recorded 416,146 deaths during the heat dome June 24-30; the B.C. Egg Marketing Board noted 145,000 deaths; the B.C. Turkey Marketing Board had 61,000; and the B.C. Broiler Hatching Egg Commission reported a loss of 29,210 animals.

[3]

***Preventing Low Supplies of PPE in B.C*. By Jon Woodward, and Bob Mackin, *CTV Television, and The Breaker,* July 18, 2020**

In 2014, Ebola ravaged parts of Africa and cases even showed up in the U.S. In response, B.C.'s health authorities donated essential masks and other personal protective equipment, $1.6 million worth. Trouble is, it wasn't replaced. So when the coronavirus arrived in B.C. this year, there wasn't nearly enough supply. Internal documents obtained through FOI show that wasn't the only factor that decimated BC's PPE stockpiles between 2013 and 2019. Around 20% expired and around 15% were taken out for everyday use. At the end of it all, BC had lost about two-thirds of its PPE, with officials warning in January, "should a widespread pandemic occur in B.C., the current level of pandemic supplies will likely not meet B.C.'s requirements, which may lead to a public safety risk," a risk that materialized.

[4]

***Rapists, pimps allowed to keep jobs working with children*. By Stewart Bell, *Vancouver Sun,* Oct. 23, 1997**

The *Sun* reported that pimps, rapists and other convicts had been cleared to work with children by B.C.'s criminal records review panel. The $1-million B.C. government screening program for people working with children deemed people with records for serious sexual offences and/or violent crimes to be “no risk.” The 217 declared "no-risk" included those with criminal records for sexual assault, sexual interference, living off the avails of child prostitution, indecent acts, assault, kidnapping and drug trafficking. The story was based on data that Bell obtained by FOI from the Ministry of the Attorney General. The next day, NDP Attorney General Ujjal Dosanjh ordered an investigation.

[5]

***B.C. College of Teachers keeps some bad records spotless; Incidents of a sexual nature, violence, wiped from histories*. By Janet Steffenhagen, *Vancouver Sun,* July 5, 2011**

Scores of educators who were investigated and disciplined by their employers for misconduct - including inappropriate relationships with students, violence, threats and theft - remain members in good standing with the B.C. College of Teachers. Documents obtained via FOI by The *Sun* show that the college, which is responsible for regulating the profession in the public interest,

handled many cases of proven misconduct in a way that left disciplinary records clean. Not only is the public unaware of these transgressions, but so too are boards of education and their hiring authorities, the college admitted. Dozens of cases were dismissed by the college's preliminary investigation subcommittee without action or settled informally, including some that involved sexual interference and intimate relationships with minors; slapping, shoving and punching students; consuming alcohol during class; threatening and stalking colleagues; and accessing child pornography on a school computer.

[6]

Children in ministry care at risk as system in crisis, audit reveals: Girls placed in homes with "sexual deviants" are one example of a program near collapse. **By Jeff Lee, *Vancouver Sun*, Sept. 17, 1999**

An internal audit of children in provincial government care found girls placed in homes housing "sexually deviant males," young children sharing homes with teens with behavioural problems, and unlicensed group homes that offered inadequate food. The auditors' report found serious deficiencies in virtually every area of the province's children-in-care program, including an extraordinary turnover of foster parents and an inability to find enough qualified, trained replacements. In some cases unlicensed group homes were run by unskilled staff and employees had criminal backgrounds, despite the fact criminal record checks are mandatory.

[7]

B.C.'s child labour laws make Canada look bad; Why should kids work at 12? **By Catherine Evans and Adrienne Montani, editorial, *Vancouver Sun*, July 11, 2016.**

In 2004, when the B.C. government lowered the work start age to 12, our province became an outlier among developed states around the world. Nowhere else are there so few restrictions on the type of work children can do at such a young age. WorkSafeBC does not publish reports on how many children under 15 are injured on the job. We know, however, from interviews with children and FOI requests to WorkSafeBC that children under 15 are working in B.C. and some of them are getting hurt. Having even one child injured at work badly enough to be reported to WorkSafeBC before that child has even completed their compulsory schooling is not the message that Canada and Canadians want to send to the rest of the world.

[8]

Warning: Not for kids: Despite the risks, babies and toddlers are being prescribed anti-psychotic drugs that are not proven safe for young patients. **By Ann Rees, *The Province* (Vancouver), Dec. 20, 2000**

Hundreds of youngsters are being prescribed anti-psychotic medications which are not proven to be safe for young patients. In many cases the mental disorders they are suffering are so serious that doctors believe benefits from the drugs outweigh the risks. The drugs have never been proven safe for young children. Doctors across Canada were shocked to learn the youngest

patient on an anti-psychotic medication in B.C. last year was a baby boy under a year old who was prescribed a drug called haloperidol. Yet in B.C., haloperidol was prescribed to 136 patients under age 20 last year -- and 25 of them were 10 or younger, according to data obtained through Freedom of Information from the provincial PharmaNet prescription drug database.

[9]

***Woodlands residents were sterilized: Internal documents also outline cases of assault, abuse*.** **By Kim Pemberton, *Vancouver Sun,* March 4, 2002.**

At least four mentally disabled residents of Woodlands Institution were sterilized, according to internal documents obtained by *The Vancouver Sun*. The documents, which took one year to obtain through FOI, also confirm earlier Sun reports that some mentally disabled residents were physically assaulted, verbally abused and inhumanely treated while living at the provincial home for the mentally disabled in New Westminster. *The Sun* also found documents on abuse cases not previously reported, including the case of a resident who was frequently shackled to his desk over an eight-month period to prevent him from running away from school.

[10]

The Shock Treatment - Electroconvulsive therapy remains a popular but controversial treatment. **By Danielle Egan, *The Tyee*, Aug. 24, 2018**

In B.C. forced psychiatric detainment has doubled over the past decade, and ECT rates have spiked 36 per cent since 2011. This controversial treatment can even be forced upon non-consenting citizens, according to the BC Mental Health Act, a policy currently being challenged in the BC Supreme Court, by the Council of Canadians with Disabilities, which initially filed the suit with two plaintiffs, including a 66-year-old former nurse who was involuntarily detained and forced to undergo ECT hundreds of times. The Council had no data on the use of involuntary ECT use in B.C., so I recently applied for that data, via an FOI request. That data revealed that 280 citizens were forced to have ECT last year, up from 254 in 2007, the earliest year of the available data. Last year, 39 of these people were over the age of 75.

[11]

Why aren't inspection records public? **By Chad Skelton, *Vancouver Sun*, June 21, 2008**

Earlier in 2008, *The Sun* filed a series of FOI requests to Fraser Health and Vancouver Coastal Health, asking for a large volume of inspection data, including reportable incidents. *The Sun* has now made that data available on its website through a series of searchable online databases at www.vancouversun.com/care/. The databases, which can be searched by a facility's name, allow users to see a wide variety of inspection data for more than 3,000 licensed care facilities across the region -- not only daycares, but long-term care homes, drug rehab centres and group homes for the disabled. The databases show the current risk rating (high, moderate or low) for every licensed facility in the region. And they include a list of every serious incident reported by each facility -- such as abuse, neglect and medication errors -- a total of 35,000 incidents in all.

[12]

Chokings, sex attacks and suicide, but no details. **By Sam Cooper, *The Province* (Vancouver), Oct. 19, 2011**

A three month-investigation by *The Province* using FOI law has brought to light some alarming statistics about conditions in B.C. care homes. From 2008 to the present, in Interior Health residential facilities, there have been 12 "patient safety event causing death" incidents, 25 cases of "sexual incident toward patient," plus 692 "physical toward patient" incidents. In Vancouver Coastal licensed care homes, there were 26 attempted suicides, 18 chokings, 44 disease outbreaks and 42 medication errors. In Fraser Health licensed facilities, there were 70 unexpected deaths, 120 disease outbreaks, 15 cases of neglect and seven poisonings. These statistics are certainly alarming when viewed out of context, but because of information roadblocks - including a complete failure to release information by Vancouver Island Health - The Province is unable to tell readers exactly what they mean.

[13]

Policy that hurts elderly driven by Liberals, NDP charges: Regional health officials only following policy, MacPhail says**. By Craig McInnis, *Vancouver Sun*, July 27, 2002**

A new provincial policy that splits up elderly couples when one partner has to go into a nursing home is being driven by the government, not the regional health authorities, B.C. New Democratic Party leader Joy MacPhail said. She made the comment after releasing documents, obtained under the Freedom of Information Act, that detailed the new policy, which was part of the major overhaul of the health-care system announced this spring. MacPhail said the documents show Liberal government policy is responsible for the wrenching stories of elderly couples who have been separated since the changes took effect.

[14]

SkyTrain's Mounting Death Toll. Experts urge platform barriers already saving lives in other cities. **By Bob Mackin, *The Tyee,* Nov. 18, 2008**

British Columbia Coroners Service statistics obtained through FOI reveal that at least 54 people have died on SkyTrain tracks and platforms since 1985. Ten deaths were accidental, and the rest were suicides. The SkyTrain president said there is no plan to retrofit any Expo Line or Millennium Line platforms with barriers to stop people from falling or jumping on tracks. Past Olympic cities like Beijing and Torino have such barriers on their new rapid transit lines, as do Hong Kong, Las Vegas, London, Paris and Singapore.

[15]

Briefing note: taller wood-frames have "significant" fire safety concerns**. By Sean Holman, *Public Eye Online,* April 1, 2009**

A briefing note prepared for the B.C. Housing and Social Development Minister advised there would be “significant" fire safety concerns with five and six storey wood-frame buildings. But despite that note, obtained by Public Eye via FOI, the government moved ahead with its plan to permit the construction of those controversial buildings. Premier Gordon Campbell first mentioned the possibility of taller wood-frames at the Council of Forest Industries annual convention on April 16, 2008, telling attendees, “Wood can be used up to four storeys. Let's push that ceiling." But the note warned “combustible buildings higher than three or four storeys are considered to present a significant fire load," and that increasing their height “will likely meet firm resistance from building and fire officials."

[16]

***106 chairlift 'incidents' in 2008*. By Larry Pynn, *Vancouver Sun,* Feb. 21, 2009**

The eyes of the world turned to the Whistler ski resort when a gondola tower collapsed, leaving dozens of skiers and snowboarders stranded or injured and raising the spectre of a similar disaster during the 2010 Olympics. However, FOI documents show that scores of accidents at B.C. ski resorts go unpublicized and that visitors are far more likely to be injured while loading, unloading, or just falling off a lift. The B.C. Safety Authority recorded 106 "reportable incidents" at ski hills in 2008, including an unlucky 13 persons who plunged as far as nine to 12 metres from lifts, some suffering serious injuries in the process. Grouse Mountain recorded the most falls from lifts at three, followed by two each at Mount Seymour, Blackcomb, Whistler, and Kimberly Mountain.

[17]

***Violations 101*. By Stanley Tromp, *Vancouver Courier,* June 24, 2011**

An audit by the Ministry of Finance (obtained via FOI) highlighted many safety violations, fire hazards, and “general neglect over a long period of time” - at Vancouver Community College. KD Engineering, VCC’s former building management company for 31 years, had been hired without tender, and had been paid about $1 million a year with no written contract.
A lack of inspections of the King Edward diesel shop exhaust system "contributed to potential carbon monoxide poisoning." The fire pumps at each campus were not tested monthly to ensure they were working. The emergency back-up electrical supply for the fire pumps, was not operable. "No effective oversight of this contractor's performance, leading to significant non-compliance with life-safety laws," the audit concludes. In sum, the health and safety of 25,000 students and children in the KEC daycare may have been placed at risk for years.

[18]

***B.C. dairy farm inspections reveal animal welfare breaches; Overcrowding, tails accidentally torn off, dehorning without pain medication among the findings at one in four B.C. dairy farms*. By Larry Pynn, *Vancouver Sun,* Sept. 18, 2016**

More than one in four B. C. dairy farms failed to comply with a provincial Code of Practice related to animal welfare during an 18-month period, inspection documents obtained through

FOI show. Issues revealed during routine inspections by the B. C. Milk Marketing Board showed overcrowding, lame or soiled cattle, tails accidentally torn off by machinery, branding and dehorning of calves without pain medication, and cows lying on concrete. Postmedia News obtained the inspection reports after the release of disturbing undercover video shot at a major Chilliwack dairy operation in 2014. "It shocked a lot of us," said Tom Hoogendoorn, vice-chair of the B. C. Milk Marketing Board. "Hardened farmers were crying when they saw that." The B.C. SPCA described it as showing "employees at Chilliwack Cattle Sales using chains, canes, rakes, their booted feet and their fists to viciously whip, punch, kick and beat the dairy cows, including downed and trapped cows who could not escape the abuse."

[19]

Provincial documents shed light on the darker side of horse racing. **By Larry Pynn, *Vancouver Sun*, Dec. 27, 2011**

Twenty horses died in as many months at Hastings Racecourse in Vancouver due mainly to bone fractures, according to provincial documents released through FOI. Thirteen horses were euthanized after leg, shoulder or pelvis fractures, the documents show. Other deaths related to medical problems such as pulmonary edema and hemorrhage, perforated intestinal ulcers, foot infections and brain disease. The documents detail necropsy results from the provincial Animal Health Centre in Abbotsford on horses between Jan. 1, 2010, and Sept. 13, 2011. Peter Fricker of the Vancouver Humane Society urged the public to think twice before supporting any event - horse racing or otherwise - that subjects animals to undue risk or stress.

[20]

***Biologist mauled for grizzly critique: Environment Ministry employee suspended two weeks for negative report on provincial policies*. By Malcom Curtis, *Victoria Times-Colonist,* April 13, 2000.**

An Environment Ministry biologist claims B.C.'s grizzly bear population is dropping due to over-hunting and poor government management. But for his candor he was suspended for two weeks after circulating a report that criticizes provincial policies. Dionys de Leeuw, in a report distributed to other government scientists, said the government has catered to a small group of hunters by increasing the "allowable kill" of bears to up to 1,300 annually in the early 1990s from 300 a year in the early 1970s. "Clearly grizzly bears, as individuals and as a population have suffered the consequences of this overkill," the Terrace-based biologist wrote. The report was obtained by the Sierra Club of B.C. under FOI.

[21]

Freeze on dialysis money 'will mean some die.' **By Barbara McLintock, *The Province* (Vancouver), June 14, 2002**

Dozens of British Columbians who suffer from kidney disease will die unnecessarily if the government insists on its funding freeze for dialysis, according to government documents. "If no

growth monies are available, then DEATH, in patients who would otherwise live, would be the impact," writes the B.C. Renal Agency in its submission to the Provincial Health Authority. The documents were obtained by the Hospital Employees Union under FOI. The agency says it's impossible for it to freeze the budget because of the rapid increase in the number of patients whose lives can be saved only through the use of dialysis. HEU secretary-business manager Chris Allnutt said the government should have released the report for public discussion.

[22]

***Food exceeds bacterial limits*. By Larry Pynn. *Vancouver Sun*, Aug. 23, 2003**

Almost 80 per cent of raw-food samples and 30 per cent of cooked- food samples analyzed by the B.C. Centre for Disease Control last year exceeded bacterial health guidelines. Information supplied to *The Vancouver Sun* after a FOI request reveals that 78.8 per cent of 33 samples of "raw ready-to-eat" foods tested by the disease-control lab -- vegetables, sprouts, salads, and sushi -- failed to meet federal health guidelines for at least one of four bacteria types. Of 555 samples of "cooked ready-to-eat" foods tested, 30.6 per cent failed one or more bacteria types. The random tests in food establishments, including restaurants and delis, covered a wide range of foods, but mainly meats, poultry, dairy products, salads, sandwiches, baked goods, Chinese and ethnic foods.

[23]

***Liberals were warned HST would hurt economy; Documents reveal top Victoria bureaucrats discussed new tax as early as March 2009.* By Jonathan Fowlie, *Vancouver Sun,* Sept. 2, 2010**

The B.C. Liberal government pushed ahead with the harmonized sales tax despite warnings from high-level officials that it could lead to at least five years of increased unemployment, lower wages and depressed productivity. "While the long-term economic gain [of the HST] is relatively clear, harmonization will cause a short-term loss in GDP and unemployment," says a briefing note prepared by the top official in B.C.'s tax policy branch for Finance Minister Colin Hansen. The revelation came in documents obtained under the Freedom of Information Act.

[24]

***Liberals' ears burning over 'fire sale' of land*. By Michael Smyth, *The Province* (Vancouver), April 16, 2015**

In the Lower Mainland's red hot real-estate market, it's not uncommon for a seller to get the asking price on a property - and sometimes more. That's why the NDP Opposition wants to know why the Liberal government sold several parcels of Crown land in Coquitlam for 33 per cent under their appraised value. Freedom-of-information documents show the land had been independently appraised at $128 million. But the government sold it for just $85 million. That's $43 million less than the appraised value. And look who the buyer was: Wesbild Holdings Ltd. The company and its director, developer Hassan Khosrowshahi, are generous donors to the Liberal party.

[25]

***Interest, small payments up Tourism debt*. By Rob Shaw, *Victoria Times Colonist,* Oct. 9, 2013**

Five years after starting to pay off its share of the Vancouver Convention Centre, Tourism Vancouver is $19 million deeper in debt than when it started, new documents show. The tourism agency began in 2008 to pay $89 million it owed the province for its share of the $883.2-million Vancouver Convention and Exhibition Centre expansion project on the city's downtown waterfront. But the repayment amounts were so low they were outpaced by the government's interest rate, and so the tourism agency has slid deeper into debt, according to an FOI request. The agency's total debt ballooned to approximately $108.4 million in July 2013, the government wrote in an Oct. 4 response letter obtained by the *Times Colonist*.

[26]

***Delay of Skeena sale costly for taxpayers*. By Steve Mertl, *Canadian Press,* April 11, 2002**

The B.C. government could have sold ailing forest company Skeena Cellulose Inc. back to the private sector in 1999 for more than 16 times what it eventually got for it, but rejected the deal because there were strings attached. And because it took another three years to unload the troubled company, B.C. taxpayers appear to have coughed up an extra $100 million to prop up the company, documents obtained by The Canadian Press via FOI indicate. The government finally sold Skeena in a deal that wraps up for $6 million.

[27]

***Final bill for fast ferries may reach $400 million*. By Craig McInnis, *Vancouver Sun*, Jan. 23, 1999**

The cost of B.C.'s new fast ferries could exceed $400 million by the time all the bills are in, according to figures released by the new president of the provincial ferry corporation, by FOI. Philip Halkett revealed that B.C. Ferries has already exceeded by $5 million the $230-million spending cap set by the provincial Treasury Board for the entire project…. The first board of B.C.'s fast-ferry project harboured profound doubts about the deal, virtually from the day it was set up. But the minutes from BC Ferries board meetings (via FOI) show that the board was let go by the government only a few months after being put in place. And after that, the tough questions stopped for more than 18 months. (In the end, it took $450 million to build three ships, but they were sold off for $19 million.)

[28]

***Public land bought with $210.9M taxpayer loan; Under terms of 2008 mortgage for Little Mountain interest doesn't accrue until 2026*. By Dan Fumano, *The Province* (Vancouver), Sept. 1, 2021**

Thirteen years after the B.C. government sold the Little Mountain social housing property to a private developer, new revelations about the controversial deal prompted more public outrage. The full sales agreement for the six-hectare Vancouver site was made public for the first time, revealing that in 2008, the B.C. Liberal government gave the property's buyer, Holborn Properties, a $210.9-million mortgage but it will not begin accruing interest until 2026. "Where'd they get that money? The got it from us, the people of British Columbia. B.C. Housing provided the mortgage ... 18 years, no interest payments," said David Chudnovsky, the retired NDP MLA who obtained the sales contract through a 3½-year FOI process. Holborn, a Vancouver-based development firm owned by one of Malaysia's wealthiest families, opposed Chudnovsky's access attempts for years, but abandoned that effort last week. Holborn initially pledged to build 234 units of social housing, but only 53 of the promised units have been built so far.

[29]

Whale gamblers also bet on B.C. real estate; 'High-risk' VIPs may have used winnings to invest in properties, documents suggest. **By Sam Cooper, *Vancouver Sun,* Sept. 30, 2017**

Paul King Jin, the alleged suspect at the centre of a major RCMP probe into money laundering and underground banking, is connected in big B.C. real estate loans to "high-risk" VIP gamblers from China, a Postmedia investigation shows. The RCMP's investigation, dubbed E-Pirate, alleges that Jin and his associates used an illegal cash exchange business in Richmond to lend suspected drug dealer cash to high-roller gamblers who, with troubling ease, used massive wads of small bills to buy chips in B.C. casinos. These ultrawealthy Chinese "whale" gamblers who were recruited in Macau casinos, could pay back these loans in China, thus ending up with cash in Canada while avoiding China's tight capital-export controls. BCLC documents, obtained by Postmedia through FOI, allege that 36 VIP gamblers, mostly from China, were linked to massive cash drops from Jin's network.

[30]

***Cash, cars and computers: How B.C. confiscates millions without showing evidence of crime*.** **By Bethany Lindsay, *CBC BC*, June 24, 2019**

Data obtained through a FOI request shows the province made 913 administrative forfeiture claims last year, amounting to $3.36 million in cash, 288 vehicles, 501 cellphones, 56 computers and a slew of other items including electronics, jewelry and a Wayne Gretzky rookie card. These administrative claims account for a whopping 80 per cent of B.C.'s civil forfeiture files, according to the Civil Forfeiture Office. That statistic was shocking, but not surprising to Micheal Vonn, policy director of the B.C. Civil Liberties Association. "It is simply an unjustifiable system," she told CBC. "You wouldn't be in support of citizens who have no moral culpability [being] swept into a program to provide cash to the government on the basis of a system in which it doesn't make any sense for them even to attempt to defend themselves," Vonn said.

[31]

10-year analysis shows convictions in less than three percent of sexual assaults reported to Vancouver police. **By Staff, *Global News,* Aug. 16, 2016**

Only a small fraction of sexual assaults that occur in Vancouver are ever reported to police. And of those that are, only a similarly small percentage are ever resolved with a conviction. That's the depressing picture made crystal clear in a story by Global News. From 2005 to 2015, there were 5,231 sexual assaults reported to the Vancouver Police Department, according to documents obtained by the news network via a freedom-of-information request. Over the same 10-year period, police brought charges forward in 1,022 cases of sexual assault. There were only 156 eventual convictions, or 2.98 percent of cases taken to police.

[32]

***Clark met with Chinese developers while housing prices skyrocketed*. By Sam Cooper, *Vancouver Sun*, Nov. 14, 2017**

In 2015, as home prices skyrocketed in Vancouver, then-premier Christy Clark and then-trade minister Teresa Wat held intimate meetings with Hong Kong developers and donors who had billions invested in Vancouver property. They wanted to know if Clark's government would intervene in the market to reduce prices, documents obtained by Postmedia News show. The internal Ministry of Trade documents, released through a FOI request, for the first time reveal some of the courting strategies employed by Clark and Wat for trade meetings with real estate tycoons and corporations in China and Hong Kong. The 477 pages of notes highlight a "master narrative" about the significant place of foreign investment in Vancouver real estate, which differs from the government's public stance in 2015.

[33]

***Justice, lies and videotape*. By Leonard Cunningham and Jason Lee, *Vancouver Courier*, Feb. 2, 2003**

Documents obtained through FOI reveal that from 1992 to 1996, the city paid out more than $310,000 in claims resulting from alleged excessive force during arrest and false arrest. From 1997 to 2001, that figure jumped to more than $510,000. For lawyer John Richardson, a member of PIVOT legal society, the Stanley Park beatings are "just the tip of the iceberg." This past October, PIVOT, an organization of lawyers and activists, released a scathing report on VPD police practices. Over a nine-month period, it collected affidavits from more than 50 individuals from the Downtown Eastside alleging police use of torture, unreasonable use of force and unlawful detention.

[34]

***BC Rail sale was tainted, documents suggest*. By Scott Simpson, Lori Culbert and Jim Beatty, *Vancouver Sun*, March 3, 2004**

The British Columbia government was accused last November by Canadian Pacific Railway of leaking confidential competitive information to a rival railway during a fierce bidding war for

ownership of BC Rail, *The Sun* has learned. A letter obtained from Premier Gordon Campbell's office through FOI shows CPR officials feared the government's handling of the BC Rail sale was "extremely prejudiced" and would lead to higher prices for shippers in the BC Rail service area. That document, which suggests the $1-billion sale of BC Rail may be tainted by influence-peddling, fraud and corruption, is a five-page summary of the police investigation into breach-of-trust allegations and seven searches on Dec. 28 at the B.C. legislature and the offices of people with ties to the provincial or federal Liberals.

[35]

***New rules would end most police chases*. By Rob Shaw, *Victoria Times Colonist*, April 8, 2007**

New, more restrictive rules for police pursuits in Victoria could reduce the number of high-speed chases by up to 90 per cent, the *Times Colonist* has learned. Only nine per cent of chases in Victoria in the past six years – about seven of 82 cases - were started for what could be defined as "serious" criminal offences. Those included breaking and entering, robbery, armed carjacking, erratic driving that forced an officer to fire his gun at the driver, two hit and runs, and a suicidal driver. The data from 2001 to 2005 were obtained by this paper under FOI. The Victoria Police Department's new guidelines, restricting chases to the most serious offences, are expected to be unveiled later this month. Chief Paul Battershill said he's aware that by changing the rules, Victoria will eliminate the vast majority of its chases.

[36]

***Governments short-change crime victims. Ministry retroactively deposits accrued interest back to account.* By Rebecca Aldous, *Victoria News*, March 29, 2009**

More than $7 million in provincial funds targeted for victims of crimes was diverted from its intended use, according to FOI documents obtained by Black Press. E-mails between the Ministry of Public Safety and Solicitor General and the Ministry of Finance show that interest from the Victims of Crime Act special account, which funds victim services programs and promotes equal access to victim services throughout B.C., was added to general revenue. The account's interest and any other income must remain within it, according to the act. "(The provincial government) has been taking money from victims," NDP public safety critic Mike Farnworth said.

[37]

***Videos show fare scofflaws being shocked by Tasers.* By Darah Hansen. *Vancouver Sun*, *CBC,* March 6, 2010**

Surveillance video documenting nine out of 10 incidents where a Taser was deployed against "non-compliant" transit passengers was made public by the region's transit police authority, a year after an FOI request was filed by CBC/Radio Canada. The footage was taken between 2007 and 2008. Captured by both Taser-mounted video cameras and station surveillance cameras, the

black-and-white images are grainy and, in some cases, too blurry to make out what is happening. Transit police had earlier released written details of the incidents, including four cases where passengers were hit with the electro-shock device while being investigated for possible fare evasion.

[38]

***B.C. minister fears money laundering involves billions of dollars, cites reports*. By Staff, *Vancouver Sun,* Jan. 18, 2019**

Documents that say money laundering in British Columbia now reaches into the billions of dollars are startling to the province's attorney general who says the figures have finally drawn the attention of the federal government. David Eby said he's shocked and frustrated because the higher dollar estimates appear to have been known by Ottawa and the RCMP, but weren't provided to the B.C. government. Confidential provincial government documents dated April 2017 and released through Freedom of Information requests show the government was tracking suspicious currency transactions at B.C. casinos, especially in $20 bills, for years.

[39]

***Province accused of diluting jail report; Union points to deleted portions of draft document on violence behind bars*. By Kim Bolan, *Vancouver Sun*, Dec. 2, 2015**

The union representing B.C.'s corrections officers wants to know what the government is hiding in a heavily censored report on prison violence in the province. The B.C. Government and Service Employees Union has appealed to the B.C. Information Commissioner after getting a copy of a report by Liberal MLA Laurie Throness with large sections blanked out. The document is a first draft of Throness' report on escalating violence in B.C. jails. His final report was made public in December 2014. The BCGEU says it was initially told there was no draft version, but got the document on Nov. 20 after an FOI request. The draft contains some strong language about violence in nine B.C. provincial jails that is missing from the final version.

[40]

***Rogue mail: B.C. companies rake in big profits selling lotto tickets in the States*. By Ann Rees, Wendy McLellan, *The Province* (Vancouver), June 25, 1995**

Law-enforcement agencies on both sides of the international border are investigating B.C.-based lottery-marketing companies suspected of ripping off elderly Americans. The companies net more than $120 million US a year by sending foreign lottery-ticket promotions through the U.S. mail. U.S. officials say that's illegal under their laws and have asked B.C. to help stop the practice. So far, B.C. has failed to shut the companies down. Briefing notes to the B.C. attorney-general's ministry, obtained through FOI, show it was made aware of substantial illegal activity two years ago. At a 1993 meeting in Seattle, U.S. officials told the Canadians they had seized 50 tons of illegal mail to that point. The Americans raised the possibility that Canadian officials

could face U.S. charges if they continued to allow B.C. lottery tickets to be resold into the U.S. B.C. banned the resale of B.C. Lotto tickets a month later.

[41]

***Children left in cars at casinos*. By Chad Skelton, *Vancouver Sun*, July 11, 2006**

More than 40 people have been banned from B.C. casinos over the past three years for leaving their children alone in the car while they go inside, according to B.C. Lottery Corp. internal records obtained by *The Sun*. Coquitlam RCMP has responded to several such incidents at that city's casino and a spokeswoman said officers have found children as young as three left alone in cars. While most children are found during the day, BCLC said a few have been discovered as late as 3 a.m. at some of the province's 24-hour casinos - left there by both parents and grandparents. In response to a FOI request, BCLC provided The Sun with a list of recent barrings at its casinos.

[42]

***Suspected money laundering at B.C. casinos under-reported, CBC probe reveals*. By Curt Petrovich, *CBC News*, May 21, 2008**

CBC News learned the B.C. Lottery Corp. underreported suspected money laundering at the province's casinos for years. Documents show casino workers routinely observe dozens of suspicious financial transactions each year, but only a fraction are reported to the federal agency that tracks money laundering. Players can feed thousands of dollars in $20 bills into slot machines and cash out after playing only once or twice, walking away with a casino cheque for the remaining amount. By law, BCLC must file reports of all incidents of suspected money laundering with the Financial Transactions and Reports Analysis Centre of Canada, or FINTRAC, the federal agency that tracks the crime. The federal agency has asked the province to investigate.

[43]

***Illegal gaming unit closed in 2009 due to BCLC 'funding pressure'; IIGET believed organized crime might influence regulated casinos*. By Sam Cooper, *Vancouver Sun*, Oct. 24, 2017**

B.C.'s illegal gambling task force was shut down in 2009 due to urgent "funding pressure" on the B.C. Lottery Corp., according to a confidential B.C. government memo. The March 2016 memo for the finance minister is the first known document indicating the illegal gambling task force was disbanded by B.C. officials for financial reasons. It also suggests, in the aftermath of the unit's closure, organized crime has been able to increase its dangerous reach into both legal and illegal casinos, for the purposes of money laundering. These outcomes mirror the concerns IIGET warned of in its 2009 threat report for the B.C. officials that governed it. That report, obtained by Postmedia News by FOI, cryptically noted: "A conflict of interest or perception of corruption undermines the integrity of gaming in B.C. and so this is a very important part of the report."

[44]

B.C. gaming investigators repeatedly warned bosses of 'horrendous' money laundering. **By Eric Rankin, *CBC BC*, Jan. 11, 2019**

When former RCMP deputy commissioner Peter German brought down his Dirty Money report, he guessed the amount of suspicious cash laundered through B.C. casinos "exceeded $100 million" over approximately seven years. Now, secret internal reports obtained by CBC News through FOI show the dollar figure is at least seven times higher: more than $700 million between 2010 and 2017. And the co-author of the confidential reports - who was one of the province's top gaming investigators - believes the actual figure is $1 billion. "I crunched the numbers and added them all up," said Joe Schalk, former senior director of investigations with the province's Gaming Policy Enforcement Branch. Shortly after warning of a "massive escalation" of suspected dirty money flowing virtually unimpeded into B.C. casinos, Schalk and his boss were fired in 2014. Schalk says “at times we were even told we should not be talking about money laundering.”

[45]

B.C. to probe lotto corp.: Report of retailers winning sparks ombudsman's inquiry. **By Chad Skelton, *Vancouver Sun*, Dec. 19, 2006**

B.C.'s ombudsman has launched an investigation into the B.C. Lottery Corp. after revelations by *The Vancouver Sun* that lottery retailers win prizes at several times the rate of the general public. On Dec. 13 *The Sun* reported that over the past six years, those who sell lottery tickets have won 4.4 per cent of all lottery prizes over $10,000 -- a rate anywhere from three to six times their share of the population. The figures, obtained through a Freedom of Information request, raised fears that retailers may be stealing customers' winning tickets.

[46]

'Damn near extinction': Population of B.C. steelhead on verge of collapse**. Glena Luymes, *Vancouver Sun*, Oct. 18, 2021**

A decades-long slide in Interior steelhead populations could escalate this year with only 58 fish expected to spawn in the Thompson watershed. Ottawa has declined to pursue an emergency listing of the Interior steelhead as endangered under the Species at Risk Act, citing the adverse impact of widespread fishery closures on First Nations, recreational and commercial fisheries. Instead, Ottawa said it would collaborate with B.C. on a steelhead recovery plan. But while the research was peer-reviewed by the Canadian Science Advisory Secretariat, it was never released publicly. In producing a Scientific Advisory Report to inform government decision-making, Fisheries and Oceans altered key points in order to support "status quo commercial salmon harvesting," according to provincial government officials, whose comments were found in 1,600 pages of documents obtained by the B.C. Wildlife Federation through FOI requests.

[47]

B.C. funding caribou extinction through fossil fuel subsidies and tax breaks: study. **By Matt Simmons, *Canadian Press*, Oct. 1, 2021**

The connection between caribou and money goes deeper than the iconic creature's depiction on Canada's 25-cent coin; the B.C. government is funding the extinction of endangered caribou through fossil fuel subsidies, according to a University of British Columbia study published. "B.C. has committed a lot of money, a lot of resources and talks a lot about the priority of caribou habitat restoration, but on the other hand is actively subsidizing an industry that is encouraging caribou declines in the very area that B.C. wants to protect," Adriana Di Silvestro, one of the lead authors of the study, told The Narwhal. The study collated data from records obtained from publicly available sources or through FOI requests. There are more than 3,000 active oil and gas wells in federally designated critical caribou habitat and more than half of those are operated by companies that received credits and subsidies in the past three years, said the study.

[48]

***Court-ordered fines going unpaid in B.C., report says*. By Larry Pynn, *Vancouver Sun*, July 20, 2012**

About 40 per cent of court-ordered environmental fines in B.C. are going unpaid, West Coast Environmental Law revealed. The organization used FOI to obtain a copy of Closing the Gap, an Ministry of Environment report of 2010 on the payment of environmental fines. It shows that the average payment rate for fines on violation tickets between 2003 and 2008 was 80 per cent, compared with an average payment rate of 59 per cent for fines imposed through court convictions. Lower value court fines tend to be paid, but higher fines, most often given to corporations, are unpaid - 83 violators collectively owed $700,000 in outstanding court fines. About 70 per cent of fines handed out specifically under the Environmental Management Act and its predecessor, the Waste Management Act, went unpaid, according to WCEL.

[49]

Imported eggs spell danger for local fish. **By Greg Middleton, *The Province* (Vancouver), May 18, 1997**

Opponents of fish farming fear that B.C. is risking its wild salmon by continuing to allow the import of Atlantic salmon eggs that may be diseased. The provincial and federal governments have known about the risk for years, says David Narver, the former director of the provincial fisheries branch. Narver, who warned the federal fisheries department of the risks of imported eggs in a 1993 letter, said in the letter that the risk remains no matter how vigilant the fisheries department is. Fisheries consultant David Ellis, who helps natives develop fisheries, got a copy of the letter under FOI. Anti-fish-farming lobbyists such as Alexandra Morton believe diseases brought in with Atlantic salmon eggs are already killing wild salmon.

[50]

***Oil, climate change threaten food supply: B.C. report*. By Randy Shore, *Vancouver Sun*, April 2, 2007**

Climate change and rising oil prices are a threat to B.C.'s ability to feed itself in the future, scientists and planners say. B.C. farmers produce only 48 per cent of the meat, dairy, fruit and vegetables that we consume, according to a report prepared by the B.C. Ministry of Agriculture. The report, titled B.C.'s Food Self-Reliance, says that the area of farmland with access to irrigation in B.C. would have to increase by nearly 50 per cent by 2025 to provide a healthy diet for all British Columbians. Maintaining our current level of food self-reliance in 2025 would require a 30-per-cent increase in agricultural production, it says.

[51]

***Victoria let fish farms off the hook for hundreds of thousands of dollars.* By Jeff Lee, *Vancouver Sun*, Feb. 5, 2004**

The provincial government refunded more than $425,000 in fines and forgave hundreds of thousands of dollars in unpaid penalties assessed against salmon farmers for illegally expanding their operations. The decision was made in 2001, just six months after the Liberals swept into power, according to documents obtained through FOI by the Sierra Legal Defence Fund. Sierra says the refunds, including more than $175,000 to Stolt Sea Farms, one of the largest salmon farming companies in B.C., was done without ministerial or cabinet approval or Treasury Board scrutiny. The decision was a reversal of a long-standing policy of British Columbia Assets and Land Corp. to charge two times the rent against people who trespass on Crown land.

[52]

***B.C.'s directive to scientists under fire. Teams writing recovery strategies for endangered species told not to identify critical habitat, groups learn,* By Mark Hume, *Globe and Mail,* Dec. 6, 2007**

Two environmental groups are calling for a federal investigation after obtaining documents that show the B.C. government is telling science teams that are writing recovery strategies for endangered species not to identify critical habitat. "This shows how politics trumps science," Gwen Barlee, a director of the Western Canada Wilderness Committee, said. She added the B.C. government doesn't want to identify critical habitat because once it does, it will have to take steps to protect land, possibly curtailing logging or other development. Barlee's office and Ecojustice made FOI requests to obtain draft B.C. guidelines that indicate how recovery plans for endangered species should be structured.

[53]

***No, thank you; Fish farms turn tail on tissue sample reporting*. By Serena Black, *Prince George Citizen,* Aug. 11, 2010**

B.C.'s salmon farm industry has decided not to participate in reporting tissue samples to the provincial government for fish health and sea lice monitoring audits. "Instead of creating and enforcing strict regulations, the government allowed numerous rules to be voluntary measures so salmon farms didn't have to report anything if they didn't want to," said David Lane, executive director at T. Buck Suzuki. Lane also said the association's refusal to provide data has convenient timing. In 2003, Lane took the ministry to court over an FOI request regarding the release of disease and sea lice infestation data. The ministry lost what turned into a six year battle, and Lane was given the information for 2002-03.

[54]

Mount Polley Disaster Brought Quick Government PR Response, Documents Show. Three-year-old FOI request reveals early belief laws broken and co-ordination with mine owner. **By Jeremy Nuttall, *The Tyee*. June 14, 2017**

In the hours after the 2014 Mount Polley mine disaster, authorities were already concerned laws had been broken and the premier's office was worried fallout from the tailing pond breach would "get in the way" of other planned mines, documents provided to The Tyee reveal. Almost three years after the disaster, and weeks away from a deadline to lay charges under B.C.'s environment act, no charges have been laid and no fines levied. The government's initial reaction to the dam's collapse is revealed in hundreds of pages of emails and other communications obtained through a FOI request and provided to The Tyee by Jessica Ross, an independent researcher.

[55]

***B.C. releases documents revealing hunting culture among conservation officers*. By Larry Pynn, *Vancouver Sun*, Jan. 29, 2018**

After repeatedly denying the existence of such documents, the B.C. government has finally complied with a FOI request revealing a strong hunting culture within the conservation officer service. The person who successfully navigated the bureaucracy where others couldn't and who refused to take no for an answer is Bryce Casavant, the former conservation officer who gained international attention and support when he refused a superior's order to kill two young bear cubs on Vancouver Island in 2015. The documents reveal that 75 of 106 mainly uniform and patrol officers have hunting records and that 48 specifically purchased hunting licences last year. Four officers unsuccessfully applied for limited-entry grizzly bear hunts, which have since been banned by the NDP government except for First Nations for food, social and ceremonial purposes.

[56]

***School fees rejected by top court*. By Staff, *Prince George Citizen*, Oct. 3, 2006**

British Columbia schools can no longer charge parents extra fees for things like music instrument rentals, home economics class materials and shop-class supplies, a B.C. Supreme Court has ruled. The ruling means school boards and the B.C. Ministry of Education will have to

fully fund those activities, John Young, the Victoria school trustee who launched the court challenge, said. Young used school fee schedules from 15 B.C. school districts as evidence in court. With information obtained via FOI, he noted schools are charging hundreds of dollars to students. One school in suburban Victoria is charging students $1,100 to participate in an athletic program. Young said he met a woman who said she was paying $700 to keep her three high-school-aged children in school.

[57]

Audit uncovers cheats at hairdressing schools: Ex-convicts found out that enrolling in a stylists' course meant a quick buck. **By Chad Skelton, *Vancouver Sun*, July 21, 2000**

Faked attendance records. Tuition fees collected for students no longer attending classes. A system so lax that word circulated among penitentiary convicts that student loans were an easy way for released prisoners to scam money. Those were some of the findings of investigators with the ministry of advanced education, training and technology who launched audits into 70 career colleges in the province during the past three years. The Vancouver Sun obtained details of the audits through freedom of information legislation.

[58]

***School newspapers win access to contracts with Coca-Cola: Details of deals must be released to public, privacy commissioner rules*. By Sarah Galashan, *Vancouver Sun*, May 29, 2001**

Exclusive deals signed between Coca-Cola and two post-secondary institutions in Vancouver are public documents, according to the B.C. information and privacy commissioner. The decision marks a milestone in a five year legal battle between student journalists and administrators at the University of British Columbia and Capilano College where only Coca-Cola products can be sold. In exchange for the exclusive rights to sell and advertise to a campus market, the beverage company paid both schools an undisclosed amount. Andrew Epstein, the lawyer who represented the two student newspapers, The Ubyssey and The Capilano Courier, during the long arguments under the FOI Act, calls the decision precedent setting. "So far as I know this was the first of its kind in Canada," he said.

[59]

***UBC course enrolments manipulated*. By Sarah Schmidt, *Vancouver Sun*, Jan. 31, 2004**

Senior administrators at the University of British Columbia embarked on a deliberate campaign to manipulate course enrolments to improve the school's standing in the influential Maclean's university ranking, internal documents show. And they did so despite repeated warnings from professors that the moves had either no effect on the learning environment or could actually hurt

students. The correspondence, obtained under FOI, details an eight-month effort to limit enrolment in courses for the purpose of improving UBC's fifth-place finish in 2002's university ranking. It included suggestions to deceive students about room capacity and deny them the opportunity to major in a discipline. The effort also raised concerns about preventing students from graduating on time.

[60]

Contract binds Vancouver to play by IOC rules or not play at all. **By Daphne Bramham, *Vancouver Sun*, Aug, 7, 2009**

It's easy to understand why the International Olympic Committee would want any disputes with host cities decided by its own "court," so that it is beyond the grasp of courts in countries whose judicial systems are dodgy. But why on earth did Vancouver's mayor Larry Campbell sign the host city contract governed by Swiss law? Signing off Vancouver's right to access Canadian courts in the event of a dispute with the IOC is just one of the troubling pieces of the contract signed in 2003 and obtained by the B.C. Civil Liberties Association under B.C.'s FOI law. The contract's preamble declares that the IOC is "the supreme authority of and leads the Olympic movement." There is no mention in the contract of human rights or the Canadian Charter of Rights and Freedoms.

[61]

***Fire prevention key amid climate-change dangers: internal gov't document*.** **By Lindsay Bethany and Larry Pynn, *Vancouver Sun*, Dec. 5, 2014**

As the planet heats up and the risk of "mega fires" rises, B.C. will no longer be able to lean on its world-class wildfire-fighting teams to keep people and property safe, according to a draft provincial document, obtained through FOI. The Forests Ministry paper, called Climate Change Adaption Action Plan for Wildfire Management 2014-2024, suggests fire prevention should become the top priority of the province. It says the average temperature in B.C. is predicted to rise by four degrees by 2080. That warming trend, combined with the higher rate of wildfire spread in forests affected by the mountain pine beetle, means that "mega fires" will be increasingly common.

[62]

Energy hikes hit poor the hardest; 'Energy poverty' means people can't afford to upgrade their homes. **By Scott Simpson, *Vancouver Sun*, June 25, 2008**

Rising energy costs are hitting a quarter-million low income families three times as hard as other British Columbians, according to a report done for the B.C. government. It calculates that about 18 per cent of B.C. residents are living in "energy poverty," forcing them to spend about 17 per cent of total after-tax income on heat, light and fuel. Those better-off spend about five per cent on energy. The report was obtained by the B.C. Old Age Pensioners' Organization via FOI, and

has been posted on the website of the B.C. Utilities Commission as part of a hearing on proposed BC Hydro rate increases.

[63]

***Budget Rent a Car 'may have' engaged in deceptive acts: consumer watchdog*. By Staff, *CBC BC*, March 2, 2016**

A CBC Go Public investigation into Budget Rent a Car has resulted in a Consumer Protection B.C. probe which found the rental agency charged customers for damage to vehicles which occurred either before or after their rentals. As a result, the company has promised not to charge customers for damage they don't sign off on at the end of a rental unless the car is dropped off after business hours or the consumer doesn't wait for the completion of the inspection. The CBC has obtained a supplemental report on the Consumer Protection probe through FOI. It reveals that Budget B.C. made a number of changes to its policies and procedures after the CBC story.

[64]

***Berry pickers worse off, says union report*. By Staff, *Surrey North Delta Leader*, Sept. 29, 2004**

Conditions for farmworkers have worsened because the provincial government has cut back inspections and lowered standards, says a report prepared by the B.C. Federation of Labour. However, a senior government manager disputes the findings. The study says information obtained under FOI requests reveals inspectors have found children as young as 12 years old working in the fields, that some berry pickers are shorted on hourly wages, that some farmers are using inaccurate scales to weigh berry pickers' buckets, and many other abuses. It condemns a B.C. government decision to reduce inspections during peak picking times "in response to concerns by farmers and labour contractors about disruptions to the harvest," according to a 2002 memo from the agriculture and labour ministers.

[65]

***Forests ministry knew of conditions in squalid camps; workers not yet paid*. By Aaron Orlando, *Revelstoke Times Review*, July 21, 2011**

A group of tree planters have not yet been paid a full year after they were found living in squalid conditions in a forestry camp near Golden, B.C., despite the fact that they've won labour decisions ordering they be paid. B.C. Public Interest Advocacy Centre lawyer Ros Salvador found internal government communications through an FOI request. The emails were exchanged in 2010 between ministry of forests managers, B.C. Timber Sales staff and health authority officials. An environmental health officer with Vancouver Coastal Health and an RCMP officer investigated the camp and found the uncomfortable, cold and hungry workers sleeping in a "boxcar on wheels" without proper ventilation. They used a single outhouse, had no showers and were cleaning themselves using cups of water. The RCMP officer felt the condition of the camp

warranted follow-up with his supervisors for possible criminal charges. Similar conditions at the Golden camp sparked outrage across the country.

Appendix 4

The growing misuse of Section 13, policy advice

Each year, public servants in B.C. send hundreds of subject-expert "briefing notes" to ministers on a vast array of topics, a very important resource for the public interest. But these are becoming more difficult for the public and press to obtain. Sample 1 shows a briefing note to the Minister of Advanced Education on *UBC Research Ethics* that was released in full to me under FOI in 2004, with not one line blanked out.

Contrast that to Sample 2, a briefing note to the same minister, entitled *Scan of Private Degree Granting in British Columbia,* released in 2012 under FOI. Most of this record is blanked out under Sec. 13, even background facts Under current practices, if the first briefing note of 2004 was FOI-requested today, most of it likely would have also been blanked out under Sec. 13, as the second sample was.

ADVICE TO MINISTER

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

KEY FACTS REGARDING THE ISSUE:

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

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

ADVICE AND RECOMMENDED RESPONSE:

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

On the Clinical Research Ethics Board issue:

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

On the multi-centre FACCT trial:

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

STRATEGIC LINKAGES:

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

Communications Contact:	Kathryn Macdonald	356-6948
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	Connie Johnston	356-7865
File Created:		
File Updated:		
File Location:		

Minister's Office	Program Area	Deputy	Comm. Dir

Drug companies pay doctors big bucks for volunteers

Margaret Munroe

Tuesday, February 24, 2004

[Factual and policy advice briefing note to the same Ministry of 2012. – S.T]

Scan of Private Degree Granting in British Columbia **DRAFT**

Background

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

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

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

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

System Challenges

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

s.13

s.13

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

s.13

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

1

Student Enrolment s.13

Appendix 5

B.C. NDP Statements on Freedom of Information, 2006-2021

[1]

(From news story: *Dix, Farnworth pledge reforms to Freedom of Information Act; candidates commit to reducing fees, releasing more records and creating an open data portal on the Internet*. By Chad Skelton, *Vancouver Sun*, **Feb. 15, 2011)**

B.C. NDP leadership candidates Adrian Dix and Mike Farnworth both promise to make major changes to the province's Freedom of Information laws if elected premier, including reducing fees and narrowing the grounds on which government can withhold records. Dix and Farnworth both agreed the FOI law is in urgent need of reform. "Currently, the legislation remains too vague and open-ended, allowing the government to exploit this lack of clarity to avoid public disclosure whenever possible," Farnworth wrote.

Under the current law, government can withhold records considered "policy advice or recommendations," an exemption that has been applied to large volumes of records. Dix wrote the section should be amended to make it clear certain records should always be released, whether policy advice or not, such as scientific analyses and investigation reports.

Horgan wrote that he supported some changes to the Act, such as making university spinoff companies subject to FOI requests. But he was less enthusiastic about reforming the Act's policy-advice exemption, saying it had "stood the test of time."

[2]

Hansard, April 1, 2008

NDP MLA Adrian Dix (the current Heath Minister):

There's also a difference between an opposition party that introduced freedom-of-information and privacy laws in British Columbia and got them passed through the Legislature, and a government that on 16 occasions…. Sixteen changes they've made to make freedom-of-information requests more time-consuming and more difficult. That's a difference.

You know what? I say this to the government: You never think this when you're in government, but sometimes political parties are in government, and sometimes they're in opposition. It is dangerous for a government to act towards a fundamental law of our province, freedom of information, as if they're going to govern for a thousand years.

As the member for Columbia River–Revelstoke eloquently said: "This is beyond partisanship." One day we'll be over there, and they'll be making FOI requests. We should

respond to those FOI requests, and we should respect the spirit of a law that says you should have access to that information.

Instead, what we have is a government that routinely uses the FOI Act and Section 13 in particular of that act to deny the public of British Columbia - MLAs, the media, citizens - the right to information they'd otherwise get.

[3]

Hansard, April 1, 2008

NDP MLA Mike Farnworth (the current Solicitor General):

That is a government obsessed by secrecy. That is a government afraid of the advice that it's been given. That is a government afraid to let the public know what is going on. The only positive thing in that is that I know my eyes are not getting any weaker. What it says is that this is a government that is far too secretive.

Whiteouts. In fact, I would not be surprised if the whiteout line in the budget has significantly increased since this government took power. I say that with some justification, because when you look at this government's record on freedom of information, you see a startling fact, and that is that they have made more than 16 changes to FOI to make it more time-consuming and more difficult.

More expensive for ordinary citizens, more expensive for small business, more expensive for non-governmental organizations, more expensive for the media, more expensive all around. Is it because there are financial considerations? Well, the act did make for what would be considered normal. No. "Excessive" is the word that people have used. "Almost usurious" are other words that have been used to describe the way in which this government has used financial costs to restrict the ability to access freedom of information.

Clearly, the actions of this government since they have taken office completely defeat the intent of freedom-of-information legislation. It's supposed to be sunshine legislation, to let the light of public scrutiny shine in. We know that they certainly appreciated it when they were in opposition. They loved it every day they were in opposition. But, by God, they sure couldn't wait to draw the curtains shut when they became government, and that's a shame.

[4]

Hansard, May 5, 2014

NDP MLA George Heyman (the current Environment Minister):

In this time when British Columbians and people across Canada are becoming more cynical about politics, more alienated from government, I think one of the tools we have at our disposal to reverse that unfortunate trend, to give people back some sense that we in this chamber and people in government are acting on their behalf, is to respect their right to information. . . .

I could go on, and the litany goes on, but the answer to this issue is to strengthen the act on the recommendations of the Information and Privacy Commissioner, which she has made on numerous occasions, both to allow greater access to information and to ensure documents are kept. We on this side of the House would, in fact, do that.

[5]

Hansard, May 16, 2016

NDP MLA Doug Routley:

The freedom-of-information law, introduced by the NDP government in 1992 and adopted unanimously by this House, is meant to be a regulatory backstop to a culture of transparency. Instead, we have seen a steady and deliberate undermining of freedom of information and, consequentially, democratic integrity.

The information of government belongs to the people of B.C. The information of what our government has done, how it was done and who decided is essential to a functioning, effective democracy. We have to see it to judge it. The FOI laws of the province have been weakened many times by government's amendments, and the provisions stretched to favour secrecy over openness.

As the transparency of government is blurred and blindfolded, the backstop of FOI law becomes the point of conflict. To repair the damage done to faith in government's integrity, we need to significantly toughen and expand FOI law. But more than that, we require the shift in culture that begins and ends in the Premier's office.

(Hansard, March 22, 2010)

When I try to describe to people which ministry I'm critic of, I often say, "Well, I'm critic of the ministry of secrecy, surveillance and propaganda," because the FOI Act has essentially become the secrecy act of government.

[6]

Hansard, May 26, 2008

NDP leader Carole James:

We've seen freedom-of-information laws ignored and disdained by this Premier. We see new bureaucracies created with no oversight, little public accountability.

[7]

Hansard, April 1, 2008

NDP MLA Norman Macdonald:

The billions of dollars that are spent of the people's money, the billions of dollars that government spends of your money…. How that money is spent is going to be fully scrutinized. The policies that the government has the abilities to put in place, that restrict our lives, that put boundaries around what we can do, are thoroughly, thoroughly challenged. . . . .

But we as the public, we as the opposition, need to know all that we can to do our job properly, and freedom-of-information legislation is an important part of that. If it errs, it needs to err to the side of openness.

[8]

Hansard, March 8, 2007

NDP MLA Guy Gentner:

Freedom of information helps to ensure that a government is operating with the informed consent of its citizens. That's what it's all about. Power is information, and without that information we are powerless.

Freedom of information exists for the purpose of making public institutions transparent and accountable to the public. When all else fails it is a citizen's best hope to pierce the veil of obstruction that so often hides the work of government and to find out what is really going on. I don't understand the reluctance of this government to open its arms and say to its populace: "We are willing to allow you to see what is really going on."

NDP MLA Maurine Karagianis:

I find it quite laughable, because if I didn't laugh, I would probably want to cry for the inability of this government to follow through on the promise of openness and accountability

Again, as part of government's endeavours to constrain the flow of information and to prevent people from clearly seeing and understanding the thread of activities that have taken place, it has become more and more difficult to even get information under the Freedom of Information and Protection of Privacy Act. Often documents have arrived back in my hands so severely severed as to actually be a waste of paper.

[9]

(From news story: *Key files hidden or destroyed, NDP says; B.C. government accused of flouting information law.* By Lindsay Kines, *Victoria Times-Colonist*, April 30, 2015)

The NDP accused the Liberals Wednesday of flouting B.C.'s FOI law by withholding or destroying important government records. For the second straight week, the Opposition produced

documents that show one senior official denying the existence of records only to have another person release them.

NDP Leader John Horgan, whose party highlighted three similar cases last week, said the documents paint a disturbing picture of increasing government secrecy. "I think all British Columbians should be concerned when their government hides things from them," he said. "The whole point of having access to information is so we can all make reasonable judgments about the effectiveness or ineffectiveness of our political leadership."

[10]

Then-MP Murray Rankin - current B.C. NDP MLA and Minister for Indigenous Relations – writing on the *Access to Information Act*, the federal equivalent of B.C.'s *FOIPP Act.* From his preface to the book *Fallen Behind,* by Stanley Tromp, 1st edition, 2008:

Perhaps sadly, this book places Canada in the global context and demonstrates just how far behind other countries Canadians are in providing a meaningful right of access to their government's public records. Reading this book will no doubt make you angry: why do Canadians tolerate this state of affairs?

For legislation like the *ATIA*, which the courts have affirmed is quasi-constitutional in nature, its continuing vitality now hinges upon meaningful reform efforts. It is now time to squarely face the perennial issue of commitment: is there a political will and a bureaucratic willingness to live up to the quasi-constitutional rights now enshrined in the *ATIA*? Is there a similar will to amend the law now, as is urgently required, to make it responsive to some of the serious and pressing issues canvassed in this book? . . . . Without a meaningful right to information, our democracy atrophies.

[11]

Murray Rankin, QC, currently B.C. NDP MLA and Minister of Indigenous Relations. Keynote address, B.C. FIPA Information Summit, Sept. 29, 2006

Can we not find bipartisan support to restore our freedom of information?

Most important of all, it has so far failed to implement the very thoughtful recommendations of the special all-party committee of the Legislature chaired by Mr. Blair Lekstrom. It has been over two years since the committee issued its unanimous recommendations. The silence from the government so far is deafening.

At the beginning of this new century, the right to information is now being regarded as the prerequisite for the exercise of other rights to democracy. . . . If [B.C. FOI] is as important as human rights, which the Court also found to be a quasi-constitutional right, how can we allow it to be treated that way?

[12]

Hansard, Oct. 17, 2011

NDP MLA Doug Routley (on *FOIPP Act* section 12, cabinet records):

There's a standing joke in government and in research circles that anything the government doesn't want to share with the public simply gets loaded onto a trolley and wheeled through the offices of the cabinet and thereby becomes a recommendation to cabinet and exempt. That's one area of the act that wasn't addressed in this amendment act that could have gone a long way to improving the openness of our democracy.

I am concerned - and others are - that section 12 is being used increasingly as an excuse for blanket withholding of information of government. As with section 13 that I'll talk about in a minute, this is now not only being used for specific cabinet documents but even for any information that might have gone into the creation of those documents.

On *FOIPP Act* Section 13 – the Policy Advice exemption

[13]

[Former NDP Attorney General Colin Gableman - who introduced the B.C. *FOIPP Act* in 1992 - in a speech to the 2007 BC Information Summit]

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

[14]

Murray Rankin, QC, currently B.C. Minister of Indigenous Relations. Keynote address, B.C. FIPA Information Summit, Sept. 29, 2006

I'm particularly concerned about the B.C. Court of Appeal's decision in the *College of Physicians and Surgeons* case (also known as the "Dr. Doe" case), where the policy advice or recommendations exemption in the *Act* was, in my view, extended remarkably and too far.

I do hope that the government agrees that this is a regressive development and, consistent with its recent re-affirmation of a commitment to open government, will amend the section to overcome the Court of Appeal's overbroad reading of Section 13(1). It is now up to the government to ask the Legislature to change the *Act* and restore the original intent of the legislation and I hope the Opposition will be watching - I know all of us will - to ensure the government does not listen to its officials and try to duck this one.

[15]

Hansard, April 1, 2008

NDP MLA Mike Farnworth (the current Solicitor General):

Anyway, the Privacy Commissioner has called for an amendment to section 13 dealing with advice: "As it stands, the advice or recommendations exception I think unacceptably curtails the public right to know." He had a deep concern: "In this case, Bill 25, the predecessor of this bill, fails to address a serious imbalance that now exists between the public's right to know and government confidentiality. Not to amend section 13 would seriously undermine public accountability by allowing public bodies to possibly withhold broad swaths of information.

They just don't get it. An all-party committee went out and came back with recommendations. Those recommendations were thoughtful. They were bipartisan. They had the support of the public . . . . So what happens? It's ignored. . . . Minister, this is your last session. You said you're not running again. Take this opportunity. Seize this opportunity to put your stamp on one of the most important, fundamental pieces of legislation before us in this chamber.

[16]

Hansard, April 1, 2008

NDP MLA Katherine Conroy:

Most notably, the policy advice section, Section 13. I think it's the dreaded Section 13, as anybody who has requested a Freedom of Information Act would call it. It does not have the amendments that have been requested. This government has been caught abusing this section in order to hide politically damaging information. It has been proven again and again that the ministries are utilizing section 13 to not be open and accountable, to not provide information to people when they ask for it.

I think that we know that the government record on freedom of information has been, in fact, quite dismal. The act has been amended six times since 2001. It has led to less accountability each time, and 16 changes that have been made to the Freedom of Information Act have made the requests much more time-consuming and much more difficult.

Hansard, May 29, 2008

[K. Conroy presented a bill titled *Freedom of Information and Protection of Privacy Act Amendment Act, 2008*]

It gives me great pleasure today to be introducing a piece of legislation that amends the *Freedom of Information and Protection of Privacy Act* in order to restore public access to information. Amendments to section 13 narrow policy advice exceptions, preventing information from being withheld when it is not directly related to policy or when the relevant government

decision has already been made, and restoring the purpose of this section to its original intent. *[The Bill did not pass.]*

[17]

NDP reply to election campaign questionnaire by the B.C. Freedom of Information and Privacy Association (FIPA), 2009

Q.3. Increasing use is being made of several "exceptions" in the FOIPP Act. In particular, section 12 (cabinet confidences) and section 13 (policy advice) are now used to block the release of factual or background information. What will your government do to limit or narrow the current exceptions or limit their use?

Reply: The Campbell government has improperly used multiple exemptions in order to restrict the public's access to government information. In particular, the B.C. Liberal government has expanded the meaning of "advice" in section 13 "Policy Advice", and their use of this section has lead to a widespread call for reform: the freedom-of-information commissioner, the B.C. Freedom of Information and Privacy Association, the Campaign for Open Government and an all-party committee chaired by a government member have all recommended that the section be fixed, but the Campbell government has refused to act.

Our private members bill returns the policy advice exemption to its original intent, preventing information from being withheld when it is not directly related to policy or when the relevant government decision has already been made.

[18]

NDP reply to election campaign questionnaire by the B.C. Freedom of Information and Privacy Association (FIPA), April 27, 2017 (https://fipa.bc.ca/wp-content/uploads/2018/01/BC-NDP-Response.pdf)

Q.3. Certain sections of FIPPA that exempt records from release, specifically cabinet confidences (s.12) and policy advice (s.13) have long been criticized as overly broad and in need of change. What specific changes, if any, would you make to those sections?

Reply: Anyone who has ever submitted a Freedom of Information request to the Christy Clark B.C. Liberals knows that more often than not, what they get back (if it's not a "No Records" response") is reams and reams of blank or heavily severed pages. The B.C. Liberals have used multiple exemptions in order to restrict the public's access to government information, and two key ones are Section 12 and 13.

The B.C. Liberals' use of section 13 to deny even factual information has led to widespread call for reform, including by the Information Commissioner, and we support the Commissioner's advice, reflected in the May 2016 report of the *Special Committee to Review the Freedom of Information Act*, that the meaning of this section should be restored to its original, pre-B.C. Liberal, intent.

We also support the position of the Information Commissioner regarding Section 12: the Commissioner has clearly stated that "the importance for our system of government of generally protecting the confidentiality of Cabinet proceedings and deliberations is beyond question" (https://www.oipc.bc.ca/special-reports/1274) but that this should not be applied as a blanket mandatory exemption, as the B.C. Liberals have done, but rather that "the government can maintain an appropriate and necessary level of confidentiality using a discretionary exception" exercised by Cabinet (https://www.oipc.bc.ca/special-reports/1935m)

On FOI-exempt subsidiary companies

[19]

Hansard, May 20, 2008

[NDP MLA Katherine Conroy presented a bill titled *Freedom of Information and Protection of Privacy Act Amendment Act, 2008*]

It gives me great pleasure today to be introducing a piece of legislation that amends the *Freedom of Information and Protection of Privacy Act* in order to restore public access to information. The amendments increase the scope of the act to include information from quasi-public bodies in order to preserve public access to information concerning bodies that are performing governmental functions.

As well, this act increases the transparency of government with regards to information available to the public. By expanding the scope of the Freedom of Information Act, enhancing the public interest paramount principle and limiting exemptions under section 13, as recommended by the Information and Privacy Commissioner, it restores a high standard for public access to information. Coupled with improvements in the time and cost involved, this act improves government accountability, transparency and openness. *[The Bill did not pass.]*

[20]

Hansard, May 18, 2016

NDP MLA Doug Routley:

The next question I would like to ask is related to the subsidiary corporations of public bodies. It's been a recommendation for some time from committees that subsidiary corporations - land development corporations subsidiary to universities, for example, and business corporations of school districts - essentially any subsidiary corporation controlled by government…. There are several different definitions of what that might be. A 50 percent plus one ownership stake in that corporation or the appointment of directors of the corporation by the government could qualify the corporation to come under the scope of FIPPA.

It’s been a recommendation from a couple of commissioners, a couple of reports now. A previous minister from Prince George had agreed, when she was Education Minister, that that was an appropriate step and a gap in the legislation. Has the minister considered it? Will he be moving to bring subsidiaries under the scope?

Hon. Mike de Jong [Liberal minister for FOI policy]:

Short answer is yes. It is something that we are examining, that I am seized of . . . . So the idea, the notion of extending the umbrella more broadly, is something that I see wisdom in.

[21]

Hansard, March 7, 2007

NDP MLA Harry Lali:

When we talk about that, there are a number of bodies that come into play that are actually covered. B.C. Ferries, for instance, is one of them. The role of Maximus, the MSP premiums, is in there. Accenture, which is Hydro records and billings. And then you can also look at the Northern Development Initiative Trust, the Southern Interior Development Initiative Trust and the Vancouver Island development initiative trust. There are a number of bodies that are now put at arm's length. VANOC is another one, and a whole lot of P3s also come under the purview of this.

It's the taxpayers' money that these quasi-governmental, quasi-independent bodies spend. If there is only one taxpayer in this province, it's their money that is being spent. Yet there is absolutely no accountability. . . . they're spending literally billions and billions of dollars. Actually, there was an estimate that was done. It was $27 billion worth of projects that are being done as a result of all of this, and people don't have access to their own information.

So I'd like to ask the minister: how can she say that they are living up to the Premier's statement of being the most open, accountable and democratic government when clearly they are not? What is she willing to do to make sure that people can get access to their information from these quasi-independent, quasi-government bodies that I've mentioned?

[22]

Hansard, July 21, 2015

Meeting of the Special Committee to review the B.C. *FOIPP Act.*

NDP MLA and committee member David Eby (the current Attorney General):

We were provided a document that had a list of recommendations put forward by the 2010 committee and where we were at in terms of the implementation as a province. Recommendation No. 4 was: “Expand the definition of ‘public body’ in schedule 1 to include any corporation that is created or owned by a public body, including an educational body.”

Now, I understand the history of this is that in 2005 Minister Shirley Bond issued a press release saying that school boards that owned entities would be subject to FOI. We got an update last week, this week. . . . saying that this was under consideration, that there were consultations that had been done, and there were implications that may have "unintended consequences."

I'm having trouble understanding how in 2005 the government could say that they were going to do this, and in 2015 we still don't have this in place.

(Committee Meeting, Nov. 18, 2015)

[NDP MLA David Eby speaking to the Government's Chief Information Officer]

Eby: In follow-up on this wholly-owned-subsidiary issue, I'm surprised that you're seeking advice from this committee about how to implement this. I note in the Privacy Commissioner's submission, she notes: "In June 2014 and October 2011, I wrote to the relevant ministers to ask that an amendment be drafted to FIPPA to ensure that these entities were all public bodies that were covered by FIPPA."

Since October 2011, or perhaps since June 2014, you haven't been able to figure out a way to get wholly-owned subsidiaries under the Freedom of Information Act, any way to draft legislation to bring them underneath? If you haven't, if that's the case, have you advised the commissioner of your difficulty around this and asked for suggestions about how to implement her recommendation?

It seems to me that this has been going on for a long time. This committee has heard from six or seven witnesses that this is a serious issue. We're going to hear from the commissioner, it seems, on it as well. I find it surprising that there are no records on this request.

B. Hughes: *I'm not sure I understand your last comment that there are no records.*

Eby: How can it be that since October 2011 this has been an issue - a huge issue for the public - in front of this committee for multiple years, yet this ministry has no idea about how to implement that recommendation and is, in fact, seeking recommendations from elected officials about how to do that?

[23]

NDP reply to election campaign questionnaire by the B.C. Freedom of Information and Privacy Association (FIPA), 2009

Q.2. Extending the FOI act to all public and quasi-public bodies - A number of multi-billion dollar entities are not covered by the FOIPP Act, including BC Ferries and VANOC. Will you extend the scope of the Act by covering the public and "quasi-public" bodies not currently covered?

Reply: We support expanding the scope of the *Act* to include information from quasi-public bodies in order to preserve public access to information concerning bodies that are performing governmental functions.

[24]

Q.4. In 2017, the Special Legislative Committee reviewing FIPPA repeated the recommendation from the 2010 Committee that subsidiaries created by educational public bodies like colleges and universities should be made subject to the Act. Will your government make this change and if not, why?

Reply: We support the *Act* being expanded to capture subsidiaries created by public bodies and will consult with affected organizations.

- NDP reply to FIPA, election campaign questionnaire, April 27, 2017

On "oral government" and duty to document

[25]

[From news story: Records for 2010 Olympic Games go missing. By Stanley Tromp. *The Georgia Straight*, April 17, 2008. *Background: Minutes of the meetings of the B.C. 2010 Olympic and Paralympic Winter Games Secretariat - a branch of the B.C. Economic Development Ministry - the entity that politically oversees the Games, were recorded for a time. It ceased doing so after being irked by the media's FOI requests for them; the Liberal minister for the Olympics publicly defended the move. Then-MLA Harry Bains is the current minister of labour*.]

The loss of FOI access to the minutes is "reprehensible", the B.C. NDP Olympic Games critic, MLA Harry Bains, told the *Straight*. "It's like pulling teeth. This secrecy is absolutely unacceptable. This is billions of taxpayers' money. It's also paramount to the success of an organization to keep minutes so that we can review the past history of decision-making, and improve it in the future."

[26]

[From news story: *Victoria's secrets have long been kept creatively; Freedom of Information law sidestepped by premiers for 23 years*. By Rob Shaw. *Vancouver Sun*, Oct. **29, 2015]**

Private email accounts, secret code names, mass deletion of emails, the suspicious absence of key records and an oral culture of not writing things down - these sound like ways staff and members of Premier Christy Clark's government are skirting the FOI Act.

From the moment the FOI law passed in the legislature, NDP and Liberal premiers have found ways to get around it. "I can remember public servants saying, 'Well, let's not write this down,' " said Colin Gabelmann, the NDP attorney general who created the act. It's all disheartening to Gabelmann, the father of the FOI act who has watched it be weakened and undermined for years.

"I didn't anticipate it," he said in an interview. "It's like burning books. It's destroying evidence. It's destroying history. I never ever anticipated it would come to this."

In 2000, then-premier Dosanjh was forced to admit 18 cabinet ministers were using private email accounts with secret code name aliases (Dosanjh, a self-admitted technology Luddite, had the email alias "Loriann" after the assistant who set up his computer). Critics said they were sidestepping FOI.

NDP Leader John Horgan, who worked as a staffer in the '90s-era NDP governments, said he doesn't remember finding ways to exploit the FOI act. A future NDP government wouldn't mistreat FOI, he said.

[27]

Hansard, March 7, 2013

NDP MLA Maurine Karagianis:

You'd think when the Premier has claimed credit for shipbuilding where none actually occurred, at least there would've been some shred of paper somewhere in her office to document it. The reality is that since this Premier was sworn in, the increase in "no records" responses from her office has increased by 45 percent. The lack of records only serves to make British Columbians more suspicious about what their government is doing and why it is so secretive in hiding information through the back channels.

[28]

Hansard, Feb 16, 2017:

NDP MLA Doug Routley:

I move the introduction of the Public Records Accountability Act. I am pleased to introduce a records accountability act. This is the third time I have brought forward a bill to improve British Columbia’s access to information. This all is against the backdrop of continued scandals regarding information management in this province — this against the backdrop of repeated condemning reports from successive Information and Privacy Commissioners. This bill acts on many recommendations made by the Information and Privacy Commissioner as well as several select standing committees to review the *Freedom of Information and Protection of Privacy Act*.

This bill does three key things. First, it creates a positive duty to document, which will require that the government maintain full and accurate records pertaining to any action that the

government makes, which includes business done with contracted companies. Recent years' triple-delete scandal and a plethora of "no records" responses to freedom-of-information requests require that the people of B.C. have more confidence in the management of the records of government.

Second, this bill requires that this information be maintained in an accessible form so that all may reference this information and ensures that no government document is destroyed without authorization.

Finally, this bill creates the duty to investigate instances of unauthorized destruction of government information and compels public bodies to release records as to how they process freedom-of-information requests. It also removes legal immunity from officials who fail to disclose documents. *[The Bill did not pass.]*

[29]

Hansard, March 2, 2015

NDP MLA Doug Routley:

The government has a record of relying on an oral culture, increasingly relying on government and governance without documentation.

We have seen that so many times in this province, where the government has failed to produce information, has produced incorrect information, has produced misleading information that has led directly to tragedy in people's lives and a farce of good governance. Creation - in other words, the duty to document - is a failed aspect of Bill 5. . . . What good is a Freedom of Information Act absent the information? It's empty. It's meaningless. Frankly, I would argue that it is contemptuous of taxpayers.

(Hansard, March 14, 2017)

Since the *Act* was passed in 1994, and up to 2015, there have been 50 amendments to the act. Of those 50 amendments to the act, zero were expanding openness. Zero expanded access for British Columbians. . . .

As I said, I was pretty excited when I saw that there was going to be legislation that said: "Duty to document." I was talking to people about it, and they said: "No, there is no duty to document." This is typical of this government. This is, yet again, an attempt to try to do something just before an election. To be able to say one thing when in fact they're doing the opposite — doing absolutely nothing.

[30]

NDP reply to election campaign questionnaire by the B.C. Freedom of Information and Privacy Association (FIPA), 2009

Q.5. B.C. is the only province in Canada which does not have an Archives Act to ensure that important government records are preserved. And currently, government documents are not being properly placed in the provincial archives. What will you do to correct these inadequacies?

Reply: An NDP government will consider Archive acts and best practices across Canada for dealing with government records in order to determine a made-in-BC policy.

Q.6. What will your government do to incorporate the principles of public access into the creation, preservation and destruction of records, including:

= a positive duty to create and maintain records of key government decisions, orders, actions, deliberations and transactions; and
= penalties for improperly tampering with or destroying records to avoid disclosure?

Reply: An NDP government will consider best practices both across Canada and internationally regarding the duty to create and maintain records in order to determine a made-in-B.C. policy.

[30]

NDP reply to election campaign questionnaire by the B.C. Freedom of Information and Privacy Association (FIPA), April 27, 2017 (https://fipa.bc.ca/wp-content/uploads/2018/01/BC-NDP-Response.pdf)

Q. 2. Both FIPA and the Information and Privacy Commissioner have recommended the creation of a 'duty to document' in the Freedom of Information and Protection of Privacy Act. The Special Legislative Committee reviewing FIPPA agreed with this recommendation. FIPA has called for the creation of penalties under FIPPA to discourage interference with information rights, as have the Commissioner and the Special Committee.

Will your government act on the Commissioner's recommendations to put a "duty to document" in the Freedom of Information and Protection of Privacy Act?

Reply: Yes. The B.C. NDP has introduced legislation multiple times, including the *Public Records Accountability Act, 2017*, to strengthen Freedom of Information legislation and create a positive duty to document government actions for greater accountability to the public. The B.C. Liberals have not only repeatedly refused to legislate the duty to document, including in their recent pre-election PR exercise of Bill 6, but Christy Clark and the B.C. Liberals were found to have flouted and even broken FOI laws to avoid accountability using practices including the willful destruction of emails and documents that the Information Commissioner called a threat to the integrity of access to information in British Columbia.

And the rot started right at the top: the Commissioner discovered that the Christy Clark staffer in charge of FOI coordination in the Premier's office was using Post-it notes to avoid proper record

keeping, and her deputy chief of staff for operations had not retained a single email over two years working for Clark.

On B.C. FOIPP Act section 25, the Public Interest Override

[31]

NDP reply to election campaign questionnaire by the B.C. Freedom of Information and Privacy Association (FIPA), 2009

Q. 7. Will you reinforce section 25 of the FOIPP act, "Public Interest Paramount" to take a more expansive approach to evaluating when disclosure of records is in the public interest and a fee waiver is merited?

Reply: We introduced a private member's bill which strengthens Section 25, the public interest override clause. Our bill broadens the categories of information where public interest must be seen as paramount, and provides for a fee waiver in cases where disclosure of information is deemed in the public interest.

[32]

NDP reply to election campaign questionnaire by the B.C. Freedom of Information and Privacy Association (FIPA), April 27, 2017 (https://fipa.bc.ca/wp-content/uploads/2018/01/BC-NDP-Response.pdf)

Q.5. Section 25 of FIPPA states that if government records are deemed to be in the public interest, they must be disclosed, even if no request has been made. FIPA, the Commissioner [and the Special Committee] have called for legislative change to this section to bring it into line with how the Commissioner interprets this requirement.

A. Do you agree that Section 25 needs to be rewritten to reflect this?
B. What other steps would you take to bring public bodies into line with their statutory duty to disclose under this section?

Reply: The public interest override section is a key provision for Freedom of Information legislation. After the Mount Polley disaster, the Information Commissioner released a report showing that the Christy Clark government had information indicating the existence of a potential safety risk but did not disclose this to area residents. The Commissioner identified the term "urgent circumstances" in section 25 as the reason for government withholding this information and concluded that urgent circumstances should not be required to trigger disclosure where there is a clear public interest to do so. We believe the spirit of the public interest override should again be reflected both in the Act and the response from public bodies, and we will act to ensure this.

Several Other FOI Issues

[33]

NDP reply to election campaign questionnaire by the B.C. Freedom of Information and Privacy Association (FIPA), 2009

Q.1. Improving the government's response to Freedom of Information requests

B.C.'s Information and Privacy Commissioner has repeatedly called for improvement in the serious and chronic problem of delay in government responses to freedom of information requests. If your party forms the next provincial government:
(1a) What will you do to create a change in government culture and performance regarding freedom of information requests?

Reply: We are committed to restoring a high standard for public access to information and as government will require faster turn-around on Freedom-of-Information requests.

(1b) What specific amendments or reforms would you make to the Freedom of Information and Protection of Privacy Act and its administration?

Reply: We introduced a private member's bill containing several specific reforms to improve the government's response to FOI requests, including shortening response times, returning the definition of "day" to its ordinary meaning, and addressing the excessive fees that have been levied by the BC Liberal government in order to make information more readily available to the public.

(1c) In his February 2009 report, the Information and Privacy Commissioner identified the main causes of FOI delays as systemic – underfunding, cumbersome sign-off procedures and inter-ministry consultation processes, and a need for better records management practices across government. What will you do to reduce these problems?

Reply: We are committed to cutting red tape and requiring faster turn-around on Freedom-of-Information requests supported by realistic funding for the Freedom of Information and Protection of Privacy office.

Q.4. Governments in BC and elsewhere have developed a process of 'amber lighting' or providing special attention for FOI requests from the media, political parties or civil society groups. These requests often take much longer to process than requests which are not singled out for special attention. What specific measures will you implement to ensure that requests are not singled out for additional delays and obstruction?

Reply: We will not continue the Campbell government policy of targeting "troublesome requestors" and amber-lighting specific categories of requests.

Q.8. Will you extend the time period for appeals to the Information and Privacy Commissioner from the current 30 to 90 days?

Reply: An NDP government will consult with the Freedom of Information and Privacy Commissioner over methods to improve the appeal process, including the issue of appropriate time periods.

Addendum – Statements on Freedom of Information by Liberal Premiers

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

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

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

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

Open government is the hallmark of a free and democratic society. Access to government information helps us as the official opposition and others hold the government to account, and accountability enhances democracy.

Secrecy feeds distrust and dishonesty. Openness builds trust and integrity. The fundamental principle must be this: government information belongs to the people, not to government.

This means, among other things, that all citizens must have timely, effective and affordable access to the documents which governments make and keep. Governments should facilitate access, not obstruct it.

- *Liberal opposition party leader Gordon Campbell, letter to the B.C. Freedom of Information and Privacy Association (FIPA), July 22, 1998*

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

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

Appendix 6

The Voice of the People

Citizens' complaints to the Premier on Bill 22

In early March 2022, in response to my freedom-of-information requests, I received nearly 400 pages of records of complaints to the Premier and the Citizens Services ministry about Bill 22, the *Freedom of Information and Protection of Privacy Amendment Act, 2021,* mainly on fees.[184]

There are also many pages of complaints about privacy protection losses in *Bill 22*, a worthy topic for another report. Some writers describe themselves as former NDP supporters who pledged to vote against the party in the next election. All the authors' names and identifying features were properly withheld under Section 22 for privacy reasons.

All the writers were then sent replies via the same generic form letter signed by Citizens Services Minister Lisa Beare. It reads in part: "Our proposed changes will help B.C. keep pace with new technology, ensure timely access to information, strengthen privacy protections, and improve services for people in B.C . . . . As a government, we are committed to open and transparent access to information. Thank you for your interest." There is no record here of any responses by the Premier. Excerpts from several of the texts appear below.

From emails addressed to B.C. Premier John Horgan

Oct. 25, 2021

Dear Premier Horgan. What has happened to you, I wonder. Don't hide your government's decision-making processes, expose them to the light! Secrecy does not work as a governing policy, so remember your values, Premier. Your legacy should be that you strengthened our democracy, not weakened it.

Oct. 27, 2021

We understand it is a pain for the ruling party to have to explain their actions from the past, but this is what democracy is all about. . . . This will not be forgotten in a couple of weeks, which seems to be what government hopes for. This change to FOI will haunt you in the next election.

[184] One can read the records at the B.C. open government website - https://www2.gov.bc.ca/gov/search?id=4BAD1D13C68243D1960FECBBF7B8B091&q=FOI The files are: CITZ-2021-15446 (94 pages); OOP-2021-15447 (327 pages); OOP-2021-15451 (38 pages).

When the NDP are back in opposition, which will happen eventually, you will be kicking yourself.

Oct. 20, 2021

Please reconsider your amendment to fees for accessing Freedom of Information from the government, particularly for those who are of low income, disabled, and single parents. By implanting a standard fee across the board, you are deliberately discriminating against the poor and disadvantaged persons in British Columbia.

The new amendment that makes it impossible for the Privacy Commissioner to waive fees in certain situations is really concerning. . . . Do I need to start a petition to prove this point? Please advise.

Oct. 25, 2021

John, you are not correct when you say, "Who cares?" I care very much. I have relied on B.C. journalists using FOIPPA requests to dig into casino money laundering, foreign ownership of housing, the Office of the Speaker clerk misspending, and pandemic information. It is not acceptable to me to put a financial barrier in place for any journalists to do their jobs.

Oct. 25, 2021

Some of the changes, around disclosure of privacy breaches for example, appear to be useful; but others, such as those which allow storage of personal information outside Canada, and the rather controversial addition of a fee, may not serve British Columbians well.

I ask that you withdraw this legislation, and revisit it once the committee has reported back to the legislature. Anything else looks like hubris, and that does not become you.

Oct. 26, 2021

Charging a fee for information that we should all have unhindered access to sends a strong message that you and your government have something to hide. It is baffling that you expect us to buy into this hogwash.

This definitely an issue for any re-election consideration. It certainly makes me look at your government in a different light. Very seldom do I take the time to speak out. . . but this proposed change is beyond disappointing.

Nov. 2, 2021

I'm very disappointed that it took such a short time for the NDP to introduce a B.C. Liberal type FOI access restriction. Even though I'm not an NDP member, until now I have always voted for the NDP provincially. It would appear that a minority government is best for the province.

Oct. 20, 2021

During the recent provincial election campaign, I don't recall the NDP incumbent's brochure advising voters that, if re-elected, the NDP would provide open and transparent government by

introducing a $25 fee for FOI requests. I urge you strongly to reconsider this imposition on good government.

Oct. 20, 2021

Dear John. After years of preaching the sanctity of freedom of information whenever the topic came up, your government is now going to start charging anyone who tries to exercise that right. This is indeed an unprecedent level of hypocrisy from your government, and a new low in the level of government trust by the voters. Please rescind this change.

Nov 10, 2021

Hey, we all supported a few draconian impositions on our freedoms during COVID. It was fair game but you are overstepping now. This is a bit eerie, if you know what I mean. Suppressing the public's ability to hold government to account and obtain information is frightening.

Oct. 30, 2021

So arrogant, so soon. . . . Without freedom of information, there is no accountability. Where do we live, China? Hungary? Pesky journalists, pesky opposition, pesky public. The premier knows what's best. Here's looking forward to the next election. Can't come soon enough.

Oct. 19, 2021

I'm writing to express my concern and dismay regarding the new fee for the above that is set to be passed in the legislature. It is unnecessary, flies in the face of a democratic government, and provides no benefit to the public. At best this is a money grab, at worst it is initiating a gag order so that the public cannot even send in a request to access information (without paying for it) that rightfully belongs to them.

I'm appalled that the Government has chosen to act in a manner of secrecy and protectionism. This new piece of legislation needs to be abolished.

Oct. 26, 2021

We just heard about the new change the NDP is proposing in Bill 22 for charging for freedom of information. This is discouraging news for democracy. It makes B.C. politics look shady and corrupt. I'm sure that if the NDP was in opposition they would try very hard to block this bill. The fee will discourage some from paying, but not all, but that's not the point.

The point is lack of free resources for average people and media requesting information in the government files. Our little voice is nothing to you, but we ask that the NDP not pass this bill.

Oct. 24, 2021

I am writing as a concerned citizen, but also as a member of the NDP in good standing. I am writing to vigorously object to the changes being considered (actually "rammed through by the premier's office") according to the *Vancouver Sun*. . . . The no-cost structure of FOI was set up by the NDP government of the 1990s specifically as a way to ensure a robust democracy.

This is not the behavior the grassroots expects from an NDP government – imposing user fees like what Christy Clark used to do. Let's nip this in the bud now, and allow the public, the media, and the opposition to do their job of holding the government to account. Otherwise, the other question is - what else is in the pipeline to take away our public access rights?

Oct. 22, 2021

I am writing to object to, and express significant outrage about the regressive changes being pushed through against our B.C. freedom of information laws. First, I write this letter as a lifelong New Democrat, where I have given a lifetime of service to the cause of human rights and uplifting the status of the average working person.

My people are those that work minimum wage, disabled people on monthly support, racialized people working several jobs. This is the BC NDP party that I believe exists – one that fights for ordinary citizens; so why is the party going against its own principles to thwart our FOI rights?

Second, the initial FOI legislation was put in place by a B.C NDP government that wanted to increase transparency and in doing so, make our laws the most accessible in Canada. Why is this mandate being changed now?

Nov. 1, 2021

I appreciate that criticism is hard to take when people have been farming FOI requests to back up that criticism. It is what the Act is for. . . . This proposed fee has all the moral feel of Christy Clark's triple deleted emails. This fee eliminates any moral high ground the NDP might have got from that. It will only make your supporters distrust you. I am otherwise pleased with the performance of the NDP since they took power, especially on their handling of COVID 19.

Nov. 7, 2021

Please withdraw this Bill and recognize the role of the all-party special committee and allow it to complete its work. For democracy to resist the rise of right-wing anti-democratic movements, people need to believe their government supports an open and transparent attitude towards decision making.

Oct. 20, 2021

While I have been supportive of most of your agenda, it seems that a year in power has already gone to your head. Charging $25 for FOI requests is undemocratic and exactly the type of thing that you would have opposed during 16 years in opposition. Unless you want to end up back in opposition, please stop proposing changes like this.

Oct. 21, 2021

I am deeply concerned with the above review. This seems to be leading down a dark path. Charging for FOI requests is an absolute no go. Isn't it the government's job to be transparent and accessible? I shake my head at this and wonder what needs to be hidden.

Oct. 19, 2021

Please do not start charging citizens fees for requesting access to our records. It really comes across as a petty way to get funds. Why are you taking away tolls on bridges, giving ICBC rebates and making transit free for kids, but now proposing to charge people to make FOI requests? From where I stand, it doesn't really make any sense.

Oct. 27, 2021

Why is this government NOT listening to the B.C. Privacy Commissioner for amendments to B.C. privacy legislation? Yes, the privacy legislation needs to be updated but not to benefit governments and business, and make it more difficult and costly for the public to submit FOI requests.

Nov 25, 2021

This legislation will stifle access to information, a concern expressed by the Information and Privacy Commissioner. The worst government is the one you elect because you think they share your values and then they betray your trust.

Nov. 26 2021

It is really a horrible thing you have done to become less transparent when more is actually needed! It is dishonourable that you passed this bill while parts of B.C. are in very difficult circumstances. It is certainly not a democratic decision, since most in B.C. are against your actions.

Nov. 7, 2021

I'm starting to doubt whether you are putting people first, and question whether I can trust you and your mandate letters. I'm asking you to withdraw this Bill. Please help me regain trust in public bodies by becoming more transparent.

Oct. 22, 2021

I supported you in the last two elections but my support is not guaranteed. The government when in a minority situation governed sensibly. Clearly, the need to have the support of Andrew Weaver kept the excesses somewhat in check, resulting in good middle of the road policies.

The arrogance already being displayed over the proposed Freedom of Information bill is unseemly and hypocritical. There should be no charge for these requests. Its this type of behavior that upsets people and gets them thinking about supporting the Liberals.

Oct. 20, 2021

I am very concerned about the new legislation that allows my personal data to be stored outside of Canada and potentially exposed to foreign laws which enable access to my data, which I have not authorized. In particular, laws in countries like the USA, China and Russia would not protect me from prying eyes. Please do more to protect my information.

Oct. 19, 2021

For too long the default mode in the civil service has been a paternalistic "we will tell you what you need to know." The people's data should be free and easy to access, not buried behind layers of bureaucracy designed to keep secrets hidden. If the problem is FOI requests are expensive (which I doubt), the answer is to make data available by default.

The government should have to justify its secrecy, not the people asked to justify their need for records. Of the many things B.C.'s government spend money on, servicing FOI requests is one I have zero concerns about (contrasted with, say, the billions of dollars for the Site C Dam!).

Oct. 22, 2021

I understand that the fees can range from $5 to $50. While there are few issues for large companies, I am concerned about fettering individual access as well as access from political parties. This can seriously impair the democratic process.

This feels like a Conservative move, not one I am accustomed to seeing from the NDP. Keep it in and I "campaign" for someone else.

Oct. 25, 2021

The stated purpose of you Bill 22 is to reduce the number of FOI requests! Obviously it is the people who have the least amount of money who will be most impacted. So they will have no access to the records of their own government?

Why not instead staff the department that is handling FOI requests? Why not improve its efficiency? Why not listen to the recommendations of the committees that have been studying the handling of FOI requests? . . . . I had expected better from you.

Oct. 20, 2021

I heard on the radio this morning with dismay this new legislation regarding the $25 FOI fee. This is outrageous! Faith in our democracy is at an all time low as well as trust in government, and you think this is a good idea?

I was a longtime Liberal supporter but have switched sides for the past two elections. I feel you've doing an excellent job (thus far) and encourage you to reconsider this plan.

Oct. 21, 2021

There are legitimate changes needed to the legislation regarding use and storage of personal information, particularly in its use for healthcare and especially clinical research, etc., where we have seen major impediments to progress.

But the attempts to package such changes with policy designed to reduce your government's accountability are truly discouraging. To be honest, it does really seem to be shaping into a pattern these days.

Oct. 22, 2021

This whole fee for freedom of information requests is ridiculous, and again Mr. Horgan says "Who cares?" I care. I have helped low-income parents access information about institutions and bureaucracies. . . . FOI is one of the few ways a citizen of the province can get information and the government can be transparent.

Oct. 22, 2021

We've already paid for the information. We've paid for you and your ministers and their researchers and consultants, and we've paid for the storage and retrieval and FOIPPA specialists that handle the information. Don't tell us we have to pay twice for the same information. Stop the fees for FOI requests.

Oct. 20, 2021

I have never contacted anyone in government before but this is one that I could just NOT ignore. Your recent announcement of charging for processing FOI requests is one of the biggest hits against the democratic process in B.C. Are you turning into a Trump-like politician? . . . . This only makes it look like you're hiding things from us and unwilling to justify your decisions.

This is a huge hit against our rights as citizens of this province! And no, "other provinces do it" just not cut it. I am talking with all my friends about this, and although we may not agree on all things, we are in total agreement with this.

Oct. 27, 2021

Sorry, I just don't buy this spin. If it is costly, the solution is to be more efficient and have more open data. It'd be nice for once to have a government that was less concerned with comms-strategizing and focus-grouping every single decision, and just doing what is right and wanted by the people it purports to represent.

Oct, 22, 2021

I am writing to express my displeasure with the proposed changes to the FOI legislation, including the thinly veiled proposal to begin charging a fee for information requests. As a longtime NDP supporter, I find the increasing arrogance of your office and government distressing enough that I do not plan to support your party in the future.

I know that electronic systems can be put in place to provide access to all information. That is what your government should be doing – making all information available and then restrict access based on well defined privacy criteria. Government is not a business and should not be run as a business.

Oct. 27, 2021

I don't often agree with the B.C. Liberal party, but they are right to oppose the changes. Your government appears to want to be less transparent and hide your mistakes. The 911 heat wave situation is a perfect example of this.

Please remove the fees on access to information requests. A government that truly represents the people wouldn't stand for such a self-serving policy.

Oct. 23, 2021

Please count me squarely against the amendments you government is proposing to FOI legislation. Please remember that government is to serve the people, not frustrate their ability to oversee government work. Typically I am quite supportive of NDP policies. I am not happy about your direction on FOI – and particularly the requiring of payment from information seekers.

Oct. 24, 2021

I am appalled at the NDP's implementation of a $25 fee for routine applications under the province's FOI legislation. It is an odious and unnecessary deterrent to people making access requests.

Do not attempt to justify this fee by accusing the Opposition of abusing access to information by bombarding the government with "too many requests." Citizens want accountability and transparency. Yet once a party is elected, these principles are trampled upon.

Nov. 1, 2021

I have voted NDP in every provincial election. I'm pretty sure you are going to lose votes, and perhaps your governing positions in the next election, if you stick to this plan. I know I'm not alone in my distaste for these proposed cuts to the viability of the FOI. I've received several replies basically all saying something similar, like this one: "I've had it with the NDP."

It was actually your party that first brought in this Act in 1993. Weakening it significantly like you are think about doing would be a cruel irony.

Oct.19, 2021

Good morning John. Forgive me for being rash, but are you trying to crush democracy in British Columbia?! Do you now see any ethical issues with charging citizens money in order to find out the truth and hold the government and public service accountable? I don't know what your intentions are regarding this bill, but this looks bad. Not only does it look bad, it is bad.

I can't help but notice your party's hypocrisy given how many FOI requests the NDP put in while the Liberals were in office. Backpay all of those and then you can talk to me about $25 to use my right to access public information. Good day sir!

Oct. 21, 2021 *[The only message of support]*

Recently your Government made an announcement that people who request background information through Freedom of Information will be charged $25, which I think is a small price to pay for demanding a lot of staff time to respond to these requests.

I think it would be prudent to have the Ministry explain why the $25 is reasonable, and also that the Government receives repeated requests from a few people who from my experience are

trying to tie up Government operators, and based on your record nothing untoward is found. Keep up the good work John. Your friend.

From emails addressed to Citizens Services Minister Lisa Beare

Oct. 21, 2021

Dear Minister Beare. Freedom of information is critical for transparency and accountability, and in my opinion fees act as a barriers to access. Again, in my opinion, there are already sufficient provisions for when fees are appropriate. . . . Additionally, I believe that any information that must be provided by statute should be exempt from fees.

Nov. 10, 2021

I have been a B.C. NDP supporter all my adult life. . . . Proud that is until now. Bill 22 is, on balance, retrograde legislation. It should be withdrawn and re-written. Some of Bill 22's provisions are welcome but overall the bill is not a worthy effort.

I know how challenging the Act can be for government. . . . Fees for access are misguided. They will penalize the wrong people. To ordinary citizens looking for government (i.e., our) information, they will be just one more reason not to bother. At first blush, that may seem like a benefit, but is "trust us to govern well" really your motto? What about when it's the other guys' turn again?

Oct. 27, 2021

None of what you are saying meets the goals of a party that purports to reflect what the values of working people should be, and I am very surprised that the people advising you and the party are engendering an era that eliminates one of the best FOI laws in Canada. I was extremely disappointed that this bill was referred to committee stage before first reading.

The "fee for access" put simply is a weak justification. . . . this is a political game because it shows the government has something to hide – including COVID 19 data, the Massey Tunnel briefing documents, Site C documents, St. Pauls's documents, and what else? Never have I felt such a sense of shame for a government I have so proudly supported.

Oct. 28, 2021

Thank you for your reply. You have not addressed my central point, however. You have an all-party committee which has been charged with submitting a report that would seem to be relevant to the work that you have been undertaking to update B.C.'s freedom of information legislation.

Why not wait for the report prior to introducing new legislation? Why do we have parliamentary committees anyway?

From emails to NDP MLAs

Oct. 21, 2021

I am starting to doubt whether you are putting people first and question whether I can trust you and your mandate letters. Don't you think you are on the wrong side of this one?

I am asking you and you colleagues to consider these actions: Recommend the NDP withdraw this Bill. Recognize the role of the all-party special committee and allow it to complete its work, including an open consultation process. Commit, on the record, to introduce comprehensive amendments to FIPPA that reflect the recommendations of past and current special committees.

Nov. 26, 2021

What has happened to the NDP? What happened to transparency builds trust? Your party is unrecognizable. I watched as party members cheered the move to push through this bill with debate, denying British Columbians the right to information. Unbelievable. - Your constituent (for now).

Oct. 25, 2021

It's unbelievable that now that the NDP (my party!) has a majority, it seeks to introduce a $25 fee for FOI requests. Wow, really? The "party of the people" wants to reduce FOI requests.

This bills bespeaks a political party that does not want to have its work, policies, decisions examined by society in general, but the opposition, by citizens. I'm appalled and ashamed to see the NDP propose this legislation. A party who wins a majority is well advised to remain humble with trust bestowed.

Oct. 30, 2021

Please don't make me regret voting for you by failing to speak up strongly and vote against the $25 freedom of information fee. This fee may seem small to you and Premier Horgan, but it is the weekly food budget for many people. In a time of increased costs for everything, including the basics of food and shelter, this Bill is a cold and calculating way to keep us uninformed and mute. I expected better.

Appendix 7

Student societies and financial accountability

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

Several student societies, acting like a law unto themselves, manage student money much like in a Wild West - a problem lying under the radar for decades - and they urgently require more accountability. Many excellent points were made by Langara students Owen Munro and James Smith in their presentation to your Committee on November 18, 2015 (see below).

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

"This power is bestowed upon people who do not have the qualifications or meaningful experience to manage major sums of public money without being accountable to a certain standard of high quality," as Munro and Smith noted, adding of the elected members, with their rapid turnover, "These are young people with little to no experience in politics, finance, law or leadership."

(We should also take note that some wrongdoing occurs not so often from elected younger student councillors as from the fulltime, long-term staffers – often much older, shrewd, unionized, and very well reimbursed with sometimes-hidden benefits. Some believe Victoria should set a cap on their remuneration.)

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

Most graduates of the Langara Journalism Program (which I completed in 1993) can recall longstanding conflict with the fabled Langara Students Union. It has been widely reported that fights over lack of financial transparency for students' money has led to student journalists banished from some societies' premises, yelling matches, threats of lawsuits and violence, and even assaults. All this needs to end.

One member of this Committee member on Nov. 18, 2015, in regards to extending the *FOIPP Act* to the LSU, raised the caution that "hard cases make bad law." That may be so if the LSU was unique, but the problems are systemic, extending across the province. See the sidebar below for news of financial wrongdoing in the student societies of Kwantlen Polytechnic University, Douglas College, the University of Victoria, and the College of New Caledonia.

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

At one B.C. students' society in the 1990s when $20,000 vanished, the police fraud branch investigated, and said "the students' accounting systems were so bad that you couldn't even tell where money had been stolen" (e.g., they were routinely forging signatures on cheques); some staff had been paid many thousands of dollars in accrued overtime with no time sheets. The little information that was, with much difficulty, revealed here is likely just the tip of the iceberg.

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

Since they are not governmental bodies, these societies are not covered by FOI laws. But all B.C. student societies are registered societies, governed by the B.C. *Societies Act*. That *Act*, which governs non-profit organizations like the LSU, and 26,000 other societies in B.C. The government admitted the *Act* was outdated and so it underwent a review in 2012.

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

For example, each year the LSU collects hundreds of dollars in mandatory fees from every student for an income of more than $2 million per year. Long renowned for its arrogant opacity, in 2012 the LSU pushed its secrecy beyond endurance when it passed changes to its constitution that could allow the LSU to bar students from attending student society board meetings, prevent in-camera meetings from being taken, and stop students from making copies of society records, even with a ballpoint pens.

In response, the *Societies Act* was amended it 2015, and it now states in Section 27, that for members seeking records, "the society must provide the person with a copy of that record." Yet the problem is there is no strong mechanism in the *Society Act* for a member to *enforce* this inspection right if the society refuses to comply. The final resort to enforce the *Act* is for students to appeal to court, which most cannot afford to do. What is the best course?

Possible options

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

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

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

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

Student societies are an exceptional case, [185] for these reasons:

• A post-secondary education is regarded as indispensable for most forms of success today, and student unions are different from other societies, in that there is no option about membership. "For us, that makes a student union a de facto part of the post-secondary institution," i.e., a public body, noted Munro and Smith.

• Student unions' funding is taken mainly from the students themselves. Yet in turn much of those students' money comes from government through student loans and grants, that is, taxpayer's money, and so the general public has an interest in the society's spending as well. This is *not* "inside baseball."

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

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

It should be the college or university administration's current DMIP, a trained professional, one objective and detached from the student society. The society itself cannot be entrusted with this responsibility, which would be a conflict-of-interest, even if it did improbably have the technical competence for it. (The DMIP's salary and resources could be enhanced to fulfill this added new task.) This is not an encroachment upon the society's cherished "political independence," despite its vocal protests; the parent institution's DMIP would not create or enforce student society policies, just the *FOIPP Act*. If the societies have nothing to hide, then they have nothing to fear.[186]

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

[186] It should be noted that whenever any call is raised for more external financial accountability, the student society routinely and shrilly bewails any such call as a veiled attempt from the provincial government to squelch its political activism (even its farcical delusions of influence on foreign affairs, fantasies best indulged on one's own time and expense). Thus the society tries

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

Of course, those opposed to FOI coverage would have many counterarguments, such as: It is unfair to single out student societies, for other societies might have as bad or worse problems as yet unknown; labour unions also collect mandatory fees, and that is no reason to FOI-cover them; such senior external oversight would be an intrusion on the society's autonomy, and could be used as a means of political control, and more.[187] Yet I believe the benefits of FOI coverage would far outweigh these objections, overall.

In sum, it seems incomprehensible why senior governments have abandoned students for decades as millions of their dollars have been extracted from their pockets against their will, gone to unqualified managers, spent in secret, and then untold amounts of it stolen or wasted with impunity. This must not continue.

Some advocates believe that, while extending *FOIPP Act* coverage to these entities might not be the perfect solution in every regard, it is still the best (or rather least negative) of the available options, and on balance far better than the current status quo. The *Societies Act* was amended, yes, and that was a good start. But that is not the end of this story, and some still perceive shortcoming with it. We need to re-examine this problem, regularly and rigorously.

(Noteworthy points in the revised B.C. *Societies Act*, and LSU Bylaws)

Societies Act

Current to Nov. 24, 2021

https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/15018_01#division_d1e1781

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to rally all students around it for supposed protection from Victoria and other hostile outside forces, often "fascist." A staffer at one scandal-ridden student society that was facing a possible shutdown by the college in the 1990s said the cancellation is "absolutely linked to [the society's] political activity," he said. "What other reason would there be?" This is a wholly spurious plea that should be resolutely ignored as a red herring. Transparency for students regarding their own money is our only purpose.

[187] As well, others may plead against *FOIPP Act* coverage with, "The *Society Act* could be made more effective by amendments." (I would call this prospect doubtful; it was last amended in 2015, after consultations, with needed accountability measures still missing.) Perhaps routine publication of certain records for institutes of higher education could be mandated in other statutes such as the *B.C. College and Institute Act* and the *University Act*.

36 (1) The financial statements of a society required under section 35 must include a note providing the information required by the regulations in respect of

(a) the remuneration, if any, paid by the society to the directors in the period in relation to which the financial statements are prepared, and

(b) the remuneration paid by the society in that period,

> (i) unless subparagraph (ii) applies, to the employees of the society, and to persons under a contract for services with the society, whose remuneration was at least the amount specified in the regulations, or
>
> (ii) if there are more than 10 persons described in subparagraph (i) whose remuneration was at least the amount specified in the regulations, to the 10 most highly remunerated persons.

(2) A note in the financial statements referred to in subsection (1) need not identify directors, employees or other persons referred to in that subsection by name.

[S. Tromp: The subsection (2) is utter nonsense. There are no legitimate privacy rights to such remuneration. Each year the B.C. government publishes salaries and expenses of named persons in the Public Accounts online, and so it should be here. Sections 195 and 196 below also require more consideration.]

195 Section 28 *[copies of financial statements]* does not apply in relation to a member-funded society.

196 Section 36 *[reporting on remuneration of directors, employees and contractors]* does not apply in relation to a member-funded society.

Langara Student Union (LSU) bylaws, as of 2021

https://www.langarasu.ca/about-us/governance/langara-students-union-association-bylaws/

13.2 Inspection by Members

13.2.1 Unless Council determines otherwise, subject only to Section 24(2)(a) of the *Societies Act*, no Member is entitled to inspect or obtain a copy of any of the records of the LSU described in Section 20(2) of the *Societies Act*.

13.3 Copies of Records

13.3.1 All records of LSU (including any copies made thereof) shall not be reproduced without the express written consent of the President or Vice President Finance & Administration.

[S. Tromp: The sections above should be examined for conformity with the letter of the Societies Act, and their spirit only further demonstrates the value of placing student societies under the B.C. Freedom of Information and Protection of Privacy Act.]

B.C. student societies and the need for more financial transparency

These news stories only detail problems that somehow became public, and likely indicate the tip of the iceberg. As student societies benefit from a large and involuntary public subsidy, they should be open to scrutiny by the mainstream media and other outside examiners via the FOIPP Act (more so than the student media might or might not irregularly provide, through their privileged access as society's member via the Society Act). – S.T.

Student association in hot water; University board wants power to intervene to control how money is spent. By Jennifer Saltman, *The Province*, Vancouver, Sept. 19, 2011

Kwantlen Polytechnic University is asking the province to change legislation so universities can intervene in student association business to protect the millions of dollars in student fees they collect. The Kwantlen Student Association has a history of financial problems and is involved in three active lawsuits - two of which were filed in August. Recent allegations about how money is being spent, how the student association is operating and ties between the current executive and a former board member who is accused of mismanaging funds has the university concerned.

Former UVic manager wanted for stealing: Student society noticed money missing last year. By Lee King, *National Post*, Oct. 31, 2002

Saanich police have issued an arrest warrant for a former University of Victoria Student Society manager wanted for stealing funds. Vivek Sharma, 28, had been employed with the society as business operations manager from 2000 to 2001. The charges against Mr. Sharma include fraud, theft and causing a person to use a forged document.

CNC to release money to student association: Organization hoping to get back on track after earlier allegations of misuse of funds. *Prince George Citizen*, Nov. 29, 2001

Eight months after it froze funds to its student association over issues of audit reporting, the College of New Caledonia is preparing to release the money, an official said. Until this month, when new elected representatives took office, the association had been inactive after an internal dispute came to a head in March. Penny Fahlman, the college's director of finance and bursar, said part of the internal conflict involved allegations of misuse of funds. As well, the association had received poor audit reports for the previous three years, due to inadequate documentation.

College holds back student union fees. By Blais Simone, *Coquitlam Now*, Nov. 4, 2006

Douglas College is holding more than $1.5 million in student fees back from its student union - money collected since May 2005 - amid allegations of improper financial practices and mismanagement by the student union.

Regional Roundup: New Westminster. *Vancouver Sun,* Apr. 27, 1998

Charges have been laid against a Douglas College student society member suspected of improperly cashing 10 cheques worth over $6,000.

Student union cash crunch looms: Langara threatens to stop collecting LSU fees. By Lynn Moore, *Vancouver Sun*, Feb. 4, 1992

Unless Langara's troubled student union cleans up its act - and soon - it will lose its major source of funds. Citing financial and personnel problems, administrators at the Vancouver Community College campus have decided that effective Aug. 26, they will no longer collect student fees for the association. The fees account for about two-thirds of the association's annual revenue of about $310,000 and cancellation of the fee-collecting agreement could kill - or at least weaken - the Langara Student Union.

Several key points made by Langara students on *FOIPP Act* amendments

Meeting of the Legislative Special Committee to review the FOIPP Act, Nov. 18, 2015.

https://www.leg.bc.ca/content/HansardCommittee/40th4th/foi/20151118am-FIPPAReview-Victoria-n7.htm

O. Munro: My name is Owen Munro, and I'm with my colleague James Smith. We are journalism students at Langara College, and we are here today to present an argument about why student governments and student unions should be covered under the British Columbia *Freedom of Information and Protection of Privacy Act*.

We believe that student unions should fall under the same jurisdiction as public institutions, and we intend to show that the current system is both outdated and exploitative. It doesn't hold accountable student unions who collectively are in possession of millions of dollars across the country, and these student unions can sometimes overstep their roles within the B.C. *Society Act* to their own benefit.

FOI records are an essential tool for students and student journalists to hold university and college student unions to a high degree of accountability. Students are in a position where, despite having many available resources, they are placed at a disadvantage. Student unions are treated as a society in the B.C. *Society Act* and aren't transparent in their actions.

For students wanting to know more about their unions, from salaries to in-camera meetings to minutes, the most successful way of doing so is through the B.C. *Society Act*. Each student union is a registered society, but they are not recognized as governmental bodies, as some other functions would be, despite having many similarities to those governmental bodies.

They hold committee meetings and elections. They have control over student fees, which are mandatory. They use their own accounting systems, and they sign contracts with service providers, such as food and drink providers. They make decisions that really just affect student opinions and options as a whole, from clubs, activities, food and drink options and events. They are not unlike the structure we experience from any other governmental bodies.

We have very little influence on the interests of student unions that have become increasingly secretive and favourable towards their own benefits. In 2012, the Langara Students Union successfully eliminated their own members from attending in-camera meetings, a symbolic representation of their secretive operations toward the very people that fund them.

While we have the ability to request and to access information from our public institutions, the fact of the matter is that student governments are much more secretive, despite running essential services with fees that are mandatory of every student attending that public institution. Ironically, the fundamental service that a student union or government is mandated to provide is advocacy on behalf of the students.

There are many documented abuses of power by student unions and governments dating back to the inception of FOI laws in British Columbia. Section 19 of the *B.C. College and Institute Act* states that institutions must collect fees on behalf of student unions. This power is bestowed upon people who do not have the qualifications or meaningful experience to manage major sums of public money without being accountable to a certain standard of high quality.

There needs to be a level of transparency that ensures that our students' public money isn't being spent in unscrupulous ways and that we can trust our student governments are representing the best interests of students and not just their own agendas.

We would like to have something other to lean on than an exploitable B.C. *Society Act*. The society branch doesn't hold any power in regards to enforcement of the regulations to student unions. They can only remind student unions that the Society Act is in effect, but their power to do more so doesn't go beyond that.

For students to do anything beyond this, we must use section 85 of the B.C. *Society Act* and can request a superior court to remedy irregularities of student unions. This argument is underscored by the student unions' view, especially at Langara, that they cannot be challenged by students because they are aware of the time and the cost that it takes to find some form of justice for most students.

I can imagine the difference we would make if we were able to spot reckless and inefficient spending in our own student unions, not just at Langara, but other public institutions. That would be something that not just students but the general public needs to know. [….]

My colleague James Smith will now speak in-depth on specific occurrences that have happened at Langara and other public institutions in British Columbia in recent times. There have been many situations where the secrecy of our own unions have been in contravention of the B.C. Society Act and the principles which they claim to stand behind.

We have stood idly by for far too long without trying to make a profound impact on the systematic secrecy and unaccountability of the actions of student unions. There is vital information and data that is being withheld that urgently needs to be addressed for a transparent system that holds student unions responsible for their own individual actions.

J. Smith: It's our position that student societies should be subject to the *Freedom of Information and Protection of Privacy Act*, as student societies are de facto part of the post-secondary institutions with which they're associated. B.C. post-secondary students collectively pay their unions millions of dollars every semester, yet there is little to no oversight to ensure that the money is spent responsibly or that the elected bodies adhere to their own bylaws or the statutes of the B.C. *Society Act*.

The union fees collected by the university, college or institution are mandatory, as is membership with the existing student society. It's mandatory and automatic. Anyone seeking a post-secondary education must, by default, join their institution's student society, making these societies as much a part of the school as anything else, such as classes or the school's administration.

A post-secondary institution, of course, has no say over how these student societies run, and rightly so. However, if a student - i.e., a union member - takes issue with how the union is being run, thinks the union is in violation of a bylaw, there's little recourse for them.

As members of a student society, we are guaranteed access under the *Society Act* to financial records, auditor reports, meeting minutes, etc. However, if we don't get access, or if the records are incomplete or unnecessarily censored, there's nothing we can do without hiring a lawyer, which we obviously can't afford to do.

While I can't speak directly to the situation at other post-secondary institutions, I can tell you that Langara Students Union, which controls the fees that are mandatorily collected by the college on their behalf, operates entirely behind closed doors and seems to do everything in its power to keep it that way.

I know that journalist and Langara alumnus Stanley Tromp mentioned the LSU briefly in his presentation before this committee on November 9. As student journalists, it is our duty to keep the public informed about the issues that affect them — in this case, how millions of dollars of their money is being spent by a group of inexperienced people with little to no oversight.

Every year, the LSU council designates a new elected member to act as their immediate liaison. That person is our sole point of contact. All other elected members and paid staff are barred from talking to us under any circumstances, citing LSU policies that aren't available on their website

or anywhere else and that they won't show us a written copy of. The media liaison, regardless of who it is, is often hard to reach and, as often as not, leaves us without comment before deadline.

Efforts to get the information we want ourselves are equally frustrating. The LSU bylaws require all members, not just those in the media, to give 48 hours notice to inspect any and all documents to which we're legally entitled. The bylaws do not specify any specific officer or adviser or staff member or councillor who must be present to release these documents. [….]

Adding to the culture of secrecy at the LSU, all meetings are conducted behind closed doors. The public and membership are not allowed to attend these meetings, as per article 5.14, called "Closed council meetings," of the LSU bylaws. In addition, an unknown number of meetings are conducted in camera and off the books, making it impossible to fully know what the union is doing or how decisions about the spending of students' money are being made. [….]

The extreme level of secrecy at the LSU allows them to operate however they want and do whatever they want with few to no checks and balances. The lack of oversight for the LSU and other student societies in our province has led to many instances of malfeasance over the years, from election irregularities to mismanaged funds and, in at least one recent extreme case, alleged embezzlement.

Between 2005 and 2011 the Kwantlen Student Association was embroiled in a series of scandals connected to their one-time director of finance and chairperson of the board, Aaron Takhar, and the Reduce All Fees slate of candidates, including mismanaged and missing funds, election improprieties and more lawsuits than I can count. [….]

Of course, issues involving student societies are not always, or even often, because of malicious intent by its elected members. These are young people with little to no experience in politics, finance, law or leadership. Many, if not most, of them are often in it for a bump to their resumés. For example, a student at Langara who wants to transfer to UBC has to have extracurricular activities, like student government, on his or her resumé in order to get accepted. He or she may have no interest in it otherwise. [….]

It is our position that if student societies were subject to *FOIPP Act*, they could better be held accountable to their public membership, which mandatorily pays its fees through public institutions. *FOIPPA* requests can be costly, but they're far cheaper than court cases and more readily available for the public to use — especially students. [….]

[NDP MLA] David Eby: I'm very concerned about the information you presented about what's happening at Langara, as an advocate for open government and transparency at all levels. [….]

So if I could just get you to comment on how unique the situation is at Langara - whether the change made by this committee would put undue bureaucratic obligations on to a number of small committees with, admittedly, large amounts of money at the university level but limited resources to fulfil freedom-of-information requests and whether we do that for the entire province to respond to a single situation at Langara.

O. Munro: If I can take this one. This isn't necessarily a situation that is unique to Langara. This is a situation where many other student unions — whether it be Kwantlen, UBC, Douglas College…. This is happening all over, not just Langara. So if we could have some sort of FOIable system where we can at least see the minutes that these meetings have produced, even if it wasn't an in-camera meeting, and have some sort of accountability that way….

J. Smith: Using the example of the Kwantlen Student Association and that whole situation, the executive board members and that were a group of friends and relatives of Takhar. Even when the meeting minutes and that kind of thing are publicly available, as they are with some student associations…. They do put their minutes and financial records and that online and openly available in their offices. That doesn't necessarily let us know how a group of students, like in the KSA example - which, admittedly, is an extreme example - would coordinate their efforts outside of the meetings.

FOI access to things like e-mail records and that would help uncover things like that kind of alleged corruption and collusion in order to maybe stop the problem before it gets out of hand. [….]

[NDP MLA] Kathy Corrigan: What I'm wrestling with is what we define as government. I think that FOI legislation is meant to cover government and government bodies. What I'm trying to figure out is: is a student union a government body? Maybe it can be extended to bodies that are funded by government bodies or to programs that are done for the purposes of providing public services.

I'm wrestling a bit with that concept of whether or not a student union is a government-related body. I'm wondering if you've got any comments on that.

J. Smith: I believe that the student unions are different from other societies, such as trade unions, in that there's no option about membership. In your career, you can choose to join a union workplace or a non-union workplace. Depending on your career, that choice can be very limited, but it is there. If you want a post-secondary education, which you have to have these days, you have to join these unions. You're not really given a choice in the matter. As I said, it's mandatory, and it's automatic.

For us, that makes a student union a de facto part of the post-secondary institution, even though the post-secondary institution doesn't have any say over how not just the LSU but the student societies run. In that way, I think it's different. It's kind of a unique situation compared to other societies covered by the *Society Act* or the FOI people. [….]

Also, the money the LSU manages is coming from students. A good chunk of that money is coming from the government through student loans and student grants as well. And the LSU…. Sorry, I keep saying the LSU, and I mean to be more general. The student unions advocate for students and have, often, a seat on the college or university board, which puts them essentially as an elected member on the governing body of a public body. Again, that lends itself to my argument that they are a de facto part of that public body.

Appendix 8

Miscellaneous FOI "creative avoidance" methods

Unfortunately, beyond "oral government," there are yet other pernicious practices employed to undermine the FOI process. Perhaps an amendment to the B.C. *FOIPP Act* or a new *Archives Act* should explicitly prohibit many of these, with penalties for violations. Mere policies or regulations to bar them are insufficient, because such rules can too easily be dropped at any time by a future administration.

Some officials sadly evidence a fertile imagination for "creative avoidance" as one commissioner called FOI resistance. Besides recalling my own FOI experiences, such cat-and-mouse games have been widely reported from various nations, and from sources such as information commissioners' reports, public inquiries, books and news articles. Practices can include:

• Changing the title of a record sought by an FOI applicant, sometimes after a request for it is received, then wrongly telling the applicant "we have no records responsive to your request."[188] The law should make it make it absolutely clear it is only the subject matter that counts, not the record's title per se. (Thankfully some FOI laws prohibit the destruction of a record after a request for it has been received, even if the record had already been scheduled for destruction.)

• Post-it sticky notes. Such notes affixed to documents can contain the most important information on a topic. Yet when an FOI request comes in, some officials have removed the sticky notes, photocopied the denuded original, mailed that copy to the applicant, and then later reattached the notes to the originals – all in the false assumption that such notes are not covered by FOI laws.[189] Officials can also write penciled notes that can be easily erased.

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[188] This was noted in the Somalia Airborne inquiry report of the 1990s, whereby documents called "Response to Queries" (RTQ) were simply renamed by officials as "Media Response Lines" (MRL), with the officials then denying to the media *ATIA* applicant that the sought RTQ records existed.

[189] Denham's report noted an FOI coordinator in the premier's office used disposable Post-it notes to avoid generating records. Yet in the B.C. FOI regulations, any marginal note made upon a document transforms that record into "a new record," and a separate photocopy is made of it for FOI applicants: "Marginal notes and comments or "post-it" notes attached to records are part of the record, not separate transitory records. If the record is requested, such attached notes are reviewed for release together with the rest of the record." Ideally, such FOI regulations would be placed in law.

• Storing records offsite - or at a site owned by a private company partnering with government - and so claiming they are not in the state's "custody" and cannot be accessed. (See the Quebec FOI's law solution.[190])

• Sending illegible photocopies, which can delay the FOI replies for months as the applicant appeals, or applies over again for legible copies of the same records.

• Incorrectly claiming that documents are not available in a readable format, or are in too fragile a condition to be accessed.

• Providing only a positive summary of the records instead of the original records sought, offering other information as a compromise, or burying the applicant with positive but not really relevant records.
[191]

• Mingling exempt and non-exempt records together, then claiming an exemption for them all; for example, incorrectly placing records into files of cabinet or international relations documents Mislabeling records, which is a major problem in federal *ATIA* requests for cabinet records.

• Stonewalling, i.e., incorrectly claiming that records do not exist when they do; or not searching properly and then claiming documents cannot be found

• Inflated fee estimates. This was detailed during the 1997 inquiry on the Canadian military scandal in Somalia, along with established cases of improper document alteration.

• Mislabeling records as "preliminary" or "investigatory," and so forth; or arguing that the records need not be released under the FOI law because they will be published within 60 days – and then not publishing them, or delaying replies until after the applicant's deadline to appeal to the commissioner has run out.

• B.C. *FOIPP Act* Sec. 6 prescribes that an agency must produce a record for an applicant if "the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer," and "creating the record would not unreasonably interfere with the operations of the public body." But some agencies could overstate the difficulty of doing this, and so refuse to create records, or heighten fees.

• Interpreting the wording of an applicant's request too narrowly, or even altering it and then replying to the agency's re-worded version; delaying the release for months with clarifications and re-clarifications until an issue is stale, or until after an election.[192]

• Still other methods were detailed by former Australian FOI official Don Coulson. These included "pumping applicants for extra information to find out why they want documents, before

[190] Quebec's FOI law notes this issue: "1. This Act applies to documents kept by a public body in the exercise of its duties, whether it keeps them itself or through the agency of a third party."

[192] In 2007 Alberta's privacy commissioner ruled the government for political purposes withheld information about the government's use of aircraft until after the 2004 provincial election.

briefing ministers and advisers; delaying the release by saying an application has been overlooked, the department is overloaded with requests and is under staffed; hiding behind the excuse that requests are too voluminous or time-consuming to process, often without helping applicants to narrow down exactly what they want; others did not notify applicants of their rights of appeal."[193][194]

Appendix 9

What price accountability? The real cost of FOI

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

Vaughn Palmer noted this fact back in 1992, before the FOI law was passed, while reporting that the government had advanced hundreds of millions of dollars in loans to private businesses, with all the terms secret, even the loan size. In lieu of FOI law, the media had to rely on leaks, which exposed cases of massive waste in the loan program. Today records on such cases could be publicized through FOI requests.[195]

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

> That kind of disclosure might have helped to derail other boondoggles - and there are plenty of examples. The recent review of government finances determined that some $300 million worth of government loans have gone bad in recent years. Part of the price tag for not having freedom of information.[196]

Journalist Russ Francis of *Monday Magazine* made the same point: "How many more fast ferry projects and Skeena Celluloses will never even be proposed for fear their terms will be revealed

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[194] Chris Tinkler, *The FOI's bag of dirty tricks*. Sunday Herald Sun (Australia), November 10, 2002

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

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

under FOI?" Conversely, knowing the FOI system is ineffective can enable politicians and bureaucrats to spend in ways that they realize the public would consider intolerable if it knew.

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

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

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

In 2007 Ian Paisley, the First Minister of Ireland, indicated he would like to limit FOI enquiries aimed at the Executive. "On occasions," he argued "the requests are of a wide-ranging and detailed nature that requires many hours of research, and are sent in by lazy journalists, who will not do any work, but who think that we should pay them and give them the information that they want." [197]

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

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

As regard to claims of the media being driven solely by profit, the notion that information obtained through FOI requests sells more newspapers is quite amusing. If only it were so!

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

When the *Canberra Times* of Australia sought information on various programs through FOI, the government proposed hefty charges, justifying these by claiming the paper would gain a commercial benefit. The editor replied:

> I would dearly like to see the research to back up that claim. Sadly, to my knowledge, there is no evidence that newspapers publishing serious articles for the public benefit gain anything in circulation or advertising revenues. If anything, such revenues are more likely to be threatened. Circulation is more likely to be boosted by the most superficial superstar reporting tripe.[198]

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

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

I have at least seven responses to this complaint:

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

(2) Media FOI requests were intended to serve the public by providing it with vital information, and the higher fees then being planned would most impair not chains but smaller community, student, and alternative media who could least afford to pay them.[199]

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

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

(5) Private corporations have at times been heavier users of the FOI law than media, yet government never publicly complains of the former applicant category, likely because such businesses' FOI usage creates no political embarrassments, and this despite the fact its usage is

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

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

driven solely for private profit (often seeking records on their competitors' bids, contracts, etc.), unlike the media's, which at least in principle is co-mingled with the broader public interest.

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

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

In sum, as Canadian Newspaper Association president Anne Kothawala put it: "Freedom of information is not about 'selling newspapers,' as some cynics allege. It's about real people, with real stories, and about real consequences on our lives. It's central to our way of life and the structure of rights and freedoms that underwrites it."[200]

Appendix 10

Oral government and the vanishing public record

In 2007 two key source of information about the finances and management of the 2010 Vancouver Olympic Games were abruptly cut off. Minutes of the meetings of the B.C. 2010 Olympic and Paralympic Winter Games Secretariat (a branch of the B.C. Economic Development Ministry), the entity that politically oversees the Games, were once recorded, then no more. Samples of those minutes appear on pages 7 - 8.

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

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

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

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

A sample of VANOC minutes (a rarely seen bird indeed) appears on pages 9 -10. Consider the amount of detail we have lost.

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

MEETING NOTES

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

Agenda

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

Meeting Notes

1. Beijing Update

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

2. Update on Education

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

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

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

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

3. **Adopt the Agenda:**

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

4. **Approval of the Minutes:**

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

5. **Review of Action Items Summary**

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

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

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

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

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

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

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

6. **Communications Announcements & Issues**

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

DRAFT
VANOC
MINUTES OF THE MEETING OF THE FINANCE COMMITTEE
Location: Room 200 - 2nd Floor - VANOC Boardroom
3585 Graveley Street
Vancouver BC

Monday, March 12, 2007
3:00 PM – 5:35 PM

Committee Members Present:

Ken Dobell, co-Chair	Peter Brown	Jim Godfrey
Chief Gibby Jacob	Patrick Jarvis*	Michael Phelps*
Judy Rogers		

Regrets:
Annette Antoniak

Guests:
Jeff Mooney, VANOC, Director
Jaqueline Evans-Atkinson, Director of Finance, BC Olympic and Paralympic Games Secretariat
Jeff Garrad, BC Olympic and Paralympic Winter Games Secretariat
Paul Henderson, Olympic Operations Office, City of Vancouver
Rob Toller, 2010 Olympic and Paralympic Games Federal Secretariat

Staff:

John Furlong	Dorothy Byrne	Ken Bagshaw
Ward Chapin	Dave Cobb	Dan Doyle
John Eastman	David Guscott	Ron Holton
John McLaughlin	Rex McLennan	
Cathy Priestner Allinger	Donna Wilson (4:30pm)	Terry Wright
Todd Kobus	Shirley Shankar (recorder)	

**Participated by teleconference.*

These Minutes reflect the order of the Agenda.

Mr. Dobell called the meeting to order at 3:00pm.

1. **ADMINISTRATION**
   a) Approval of Agenda
   The agenda was approved as circulated.

   b) Approval of the Minutes of Finance Committee Meeting of February 5, 2007
   MOVED AND SECONDED THAT the minutes of the Finance Committee meeting held February 5, 2007 be approved as circulated.

CARRIED

2. VENUE DEVELOPMENT

a) Venue Development EVP Report (including allocation of contingency), Procurement Plan and Budget Summary

Management presented an overall venue development budget update, including status of program, schedule, risk register, contingency status and highlights of various projects including:

- Whistler Creekside Alpine Venue
- Whistler Sliding Center
- Whistler Nordic Competition Venue
- Cypress Mountain
- UBC Winter Sports Centre
- Richmond Oval
- Hastings Park
- Hillcrest Curling Venue
- Trout Lake and Killarney training venues
- Vancouver Olympic & Paralympic Village

It was noted that a detailed project analysis of the Whistler Athletes' Centre is ongoing and would be presented to the Committee at its next meeting. It was also noted that the Hastings Park forecasted completion budget showed a surplus of s.21 from the previous forecasted budget.

The Committee was asked to approve a recommendation to the Board for approval of venue-specific budget transfers from contingency to cover current forecasts of costs at completion. After discussion by the Committee, the following resolution was **MOVED AND SECONDED:**

BE IT RESOLVED THAT the Finance Committee recommend to the Board that a total of s.21 be approved for transfer from the venue development central contingency account to the budget account for individual venues in the amounts shown below:

Venue	Contingency Transfer	New Authorization
Whistler Sliding Centre		
Whistler Alpine Venue		
Cypress		
UBC Ice Hockey		
Richmond Oval		
Training Venues		
Whistler Nordic Centre		
TOTAL	s.21	s.21

s.21

AND THAT a total of s.21 is approved for transfer from the Hastings Park budget account to the venue development central contingency account, resulting in a net draw from the central contingency account of s.21

Secrecy and the 2010 Olympics

***The Asian Pacific Post*. Editorial**
April 22 2008

On Feb 11, 2008, the eve of the two year countdown to the 2010 Olympics, Premier Gordon Campbell took to the stage and proclaimed proudly to the people of BC; “these are your games”
.

What he did not say was that you, the people of BC have no right to know how your money will be spent on the games. Wrapping another cloak of secrecy around the games, the B.C. Olympic Winter Games secretariat, which manages public funds for the event, has stopped recording minutes of its meetings.

At the same time the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games aka VANOC, has stopped supplying the minutes of its meetings to the government secretariat. There is only one reason for this. Both VANOC and the secretariat do not want nosy reporters and members of the opposition from getting access to these minutes using the FOI process.

The minutes, blanked out in many sections and often delayed, were one of the few places the public was able to gauge and assess what was being planned for your money. The Canadian Taxpayers Federation believes the secretariat stopped keeping minutes to prevent access through Freedom of Information saying when “people find a way of getting information, those channels are shut down."

NDP Olympic Games critic, MLA Harry Bains said the secrecy surrounding the use of $2.5 billion of taxpayers’ money is unacceptable. The secretariat said keeping the minutes were “not an effective management tool" whatever that means. The move it says is "consistent with cross-government practices and legislation." Translated, VANOC officials and the BC Government want you to believe their spin doctors.

The *Asian Pacific Post* and the *South Asian Post* are big supporters of the 2010 Olympic Games in Vancouver. We have always believed that the games will entrench Vancouver and its panoramic diversity on the global stage reaffirming its position as one of the best places to live on the planet.

However, the increasing secrecy surrounding the 2010 games is creating a credibility gap between VANOC and its supporters, let alone its detractors. Now with the minutes gone, the media and the public has to rely on oral governance of VANOC. That means if anything or anyone screws up, we will have to rely on hearsay on who authorized what and when.

There will be no raw records, except perhaps for carefully doctored final versions, to review the decision making processes involving $2.5 billion of taxpayer’s money. The zeal for secrecy by VANOC is in defiance of the spirit of the Freedom of Information laws which was created to ensure transparency of governance.

If Premier Campbell is serious about accountability and this being the people’s games, his government should order the secretariat and VANOC to keep meticulous records and minutes of all that transpires with the taxpayer’s money. VANOC should not deprive the taxpayer of the transparency required for democracy to work.

Appendix 11

The dangerous diversion of faux transparency

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

Recent B.C. premiers have been enthusiastic advocates of the new era of digital government, such as with the posting of datasets of information online, as well as the use of social media like Twitter and Facebook. Yet the unexamined consequences to our FOI law must be understood.

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

Of this latter event, Vincent Gogolek of the B.C. Freedom of Information and Privacy Association (FIPA) told CBC: "Everyone thinks it's so cool that the minister tweets, and talks about 'crowdsourcing' and other techie buzz, but it's like the government's saying: 'Look at the shiny new gee-gaws that we have here, and ignore the smell coming from the access to information system.'"

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

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

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

should be indicator enough to any politically aware person that this digital route signifies almost no concession of real power.[201]

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

One fatal delusion is that format alone somehow creates "value added" content. But common sense tells us that a B.C. cabinet report on a public disease risk that is 95 per cent blanked out due to a defective FOI law (such as with Section 13), and then all those blank pages are instantly posted to the B.C. Open Government website, or all the blogs and twitter feeds in the world, does not make readers a bit more informed as they gaze at their whited-out screens; such is a case of "garbage in, garbage out."[202]

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

Furthermore, how many homeless persons can afford iPhones and laptops? Regarding this reality, although enhanced democracy was the professed goal, one may see a growing class split between the techo-rich and the so-called "techno peasants" - which ironically leads not to more socio-political equality, but less. [203]

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

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

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

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

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

Appendix 12

Lessons from the UBC-Coca Cola contract dispute

In regards to B.C. *FOIPP Act* Sections 17 and 21, which were misapplied in the case below, free access to public-private partnership contracts is essential to the public interest. I became familiar with this topic, after waging a five-year legal battle to view the 1995 UBC-Coca Cola exclusive marketing contract while I was a student and working at the *Ubyssey* student newspaper. It was my first FOI legal dispute and a formative influence for my later cases.

Much was at stake because it was the first such exclusive public-private marketing deal with a public body in Canada, and I filed the first FOI request to view one; in such a partnership between the two sectors, the question arose - whose culture would prevail, that of corporate secrecy or public transparency?

UBC refused, I appealed to the OIPC, and voluminous arguments were made (while UBC assured us that "the contract itself is securely locked in a Chubb safe"). Then a disaster ensued. B.C. Information and Privacy Commissioner David Flaherty in Order 126 ordered the contact to remain sealed, accepting the university's and companies' Sec. 17 and 21 claims of financial and economic harms.

The *Ubyssey* appealed that order in judicial review in B.C. Supreme Court. We were widely expected to lose the case (and even I was not hopeful), for the power and funding was weighted so heavily on the other side. Yet we won after the newspaper's lawyers demonstrated in court that at American universities, unlike those in Canada, such contracts are freely publicized even without FOI requests, and with no demonstrable harms incurring. The judge also stated the first commissioner should have, but did not, consider my pleas on Section 25, the public interest override.

Mr. Flaherty's term expired and he was succeeded by David Loukidelis in 1999, and a new inquiry was held. In his influential Order 01-20 of 2001, the new commissioner wrote the

contract should be released because it contained information not *supplied* in confidence, but only *negotiated* in confidence between UBC and the company: "The parties, in effect, jointly created the records." (I believe the *Act* should be reformed to place this principle into Sec. 21(1)(b).) He also insisted on specific evidence for potential harms – of which none was produced - whereas his predecessor had just accepted bald assertions of harm from the company. Thus the landmark initial OIPC ruling was followed by a landmark reversal. Henceforth, no public body could withhold such contracts from the public. (UBC also repealed its much-criticized Policy 116, which gave its corporate partners too much influence in the FOI process.)

The matter then took a darker turn in three unexpected ways. In his submission to the first OIPC inquiry, UBC president David Strangway[204] promised that "almost all" of the contract's profits ($8.5 million over 10 years) would be spent on improving disabled access at UBC, and that my publicizing the contract by FOI might scuttle the contract and so imperil their funds – perhaps to induce guilt in the applicant (and at times almost succeeding) so as to dampen his efforts. Yet, five years later, I investigated and reported that UBC had spent *less than 10 percent* of the total contract profits on disabled access; and amongst the incidental beneficiaries, 21 percent - more than $1 million - had instead gone to the contract negotiating firm Spectrum Marketing (led by a former Coca-Cola vice president) – news that unsettled many readers.

There is an important principle in FOI work: negative old governmental habits die hard, and no single victory can be taken for granted: Two years after the Coca Cola contract was liberated from its Chubb safe, the ever intransigent UBC simply refused to accept that precedent, and so denied my later FOI requests to see its similar exclusive supply contracts with a bank, an airline, an internet provider, and Spectrum Marketing; hence I had to appeal in an inquiry *again*, whereupon the OIPC ordered those contracts opened also (in Orders 03-02, and 03-03, and 03-04). Such obstructionism on contracts is hopefully *passe* by now.

Then came fallout in Victoria. In 2006 the B.C. government tried to pass Bill 30 that would have exempted designated contracts and projects with private sector partners from FOI requirements *for 50 years* (a prospect unimaginable anywhere else in the world's FOI laws).[205] Concerted opposition scuttled the bill. That proposal was not surprising, for public bodies such as UBC were obviously much displeased at the OIPC orders, and in 2004 the B.C. bureaucracy

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[204] The same President Strangway, who - reminiscent of several premiers - wrote in the *Vancouver Sun* (Dec. 5, 1985): "Above all, I want the university community and the public to feel that UBC is a place with no secrets and that information about it and its activities is open and accessible. . . If we apply that yardstick to the academic life of the university, why should it not apply equally to its administrative and business life?"

[205] The woeful *Bill 30* – which had no such statutory precedent in Canada – would have amended the B.C. *FOIPP Act*'s Section 21, so that the government must (not may) refuse to release information, for 50 years, that is "jointly developed for the purposes of the project," and that is "shared or jointly developed explicitly in confidence," and could harm "the negotiating position of the third party," along with other sorts of supposed harms. As *Vancouver Sun* noted, "This Bill is intended to erect a legislative framework around the Liberal experiments in having private companies assume contractual responsibility for providing government services," that is, the so-called P3s. Many nations post such records online.

complained to a legislative FOI review that the commissioner's rulings which had opened up public-private business contracts had "undermined fair and open procurement processes that will result in the best deal for the province." The commissioner's aide refuted this claim and objected: "This serious allegation is a calculated appeal to politics, and we note that no particulars or evidence have been provided to support this sweeping claim."

At educational institutions, not all lessons are to be found in the classroom. In this onerous five-year UBC endeavour (a dispute that likely cost all sides a combined total of over $100,000 in legal fees), students learned to fight for their basic legal rights, including their rights to information. At the time, I was told our court appeal was belittled in senior UBC executive circles as "mischievous and doomed to fail." In the end, it was neither. The lesson was that on such points of principle - never give up.

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135 recommendations for reforms to the

British Columbia *Freedom of Information and Protection of Privacy Act*

and related transparency measures

Compiled and prepared by Stanley L. Tromp

My purpose here is to provide government transparency advocates with a resource base of 135 recommended reforms to the B.C. *FOIPP Act* of 1992. They can select from, modify, or add to these items as they choose, to create their own lists of preferred amendments, and these can also be adapted by other provinces.

I have tried to be as comprehensive as possible, to detail every needed amendment to the B.C. *FOIPP Act* that I could conceive of (pared down from my original 200 items), and have considered the widest range of sources collected over three decades. There are several explanatory notes to explain and bolster the recommendations. Those marked with an * are what I regard as the 15 most pressing items. Overall, I hope to have found some sort of balance here between (1) the ideal, and (2) the politically achievable.

The Canadian sources are noted at the end of this file. The reader may find it helpful to print out or have open on a screen the most recent version of the B.C. *FOIPP Act* text (available at https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96165_00_multi) as a reference. – *S.T.*

***Recommendation #1**

Repeal the most negative features passed in Bill 22, the *Freedom of Information and Protection of Privacy Amendment Act (2021),* which are:

> ~ Sec. 3(3), that Part 2 of the *Act* does not apply to a record that does not relate to the business of the public body; • a record of metadata that (i) is generated by an electronic system, and (ii) describes an individual's interaction with the electronic system; • an electronic record that has been lawfully deleted by an employee of a public body and can no longer be accessed by the employee.
>
> ~ Sec. 33.1 A public body may disclose personal information outside of Canada only if the disclosure is in accordance with the regulations, if any, made by the minister responsible for this *Act*.
>
> ~ Sec. 27. That Sec. 43 allows the public body – upon the Commissioner's approval – to disregard a request if (c)(i) it is excessively broad, or (ii) is repetitious or systematic.
>
> ~ Sec. 75 (1), that the head of a public body may require an applicant who makes a request to pay (a) a prescribed application fee.

The B.C. *FOIPP Act* must also make it unmistakable clear the Premier's office is covered by the *Act* (which Bill 22 might have placed in doubt to some).

Section 12 - Cabinet records

Recommendation #2

Delete clause "or prepared for submission" from B.C. *FOIPP Act* Sec. 12(1). Sec. 12 should establish that documents may only be withheld if they were actually discussed by cabinet, not if they were only prepared for that purpose but never were. i.e., no record can be said to reveal "deliberations" if it was never actually deliberated upon. Sec. 12 should also be amended to clarify that "deliberations" only applies to the actual deliberations of Cabinet, not any other material.

(Such a new clause is regrettably necessary to stop a deleterious practice often observed in cabinet rooms in Commonwealth nations, whereby Cabinet members simply take documents into Cabinet and then out again and claim an exemption - behavior which is now a perfectly legal way to circumvent disclosure obligations in most Canadian jurisdictions. In Australia, applicants have had FOI requests refused because documents were "prepared for submission to Cabinet (whether or not it has been so submitted).")

***Recommendation #3**

Add a harms test to Sec. 12, replicating the terms found in Scotland's FOI law, Sec. 30:

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

Two terms could be added from the FOI statute of Ghana, which prescribes in Sec. 6.(1)(c) that cabinet records are exempt that:

> [i] prejudice the effective formulation or development of government policy;
>
> [ii] frustrate the success of a policy by the premature disclosure of that policy;

At the bare minimum, the B.C. *FOIPP Act* should reflect the terms used in the FOI statute of the United Kingdom, on policy advice and cabinet confidences, Sections 35 and 36.

Recommendation #4

Sec. 12 should not apply to a document that contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of Cabinet. This would be somewhat more open than the terms now set in Sec. 12(2)(c).

(In the Newfoundland FOI law, such factual material can apparently be freed in any circumstances, for in Section 27. (1), "'cabinet record" means [….] (d) a discussion paper, policy analysis, proposal, advice or briefing material prepared for Cabinet, excluding the sections of these records that are factual or background material." In the FOI statute of the United Kingdom, in Sec. 35, once a cabinet decision has been made, "any statistical information used to provide an informed background to the taking of the decision" is not exempt.)

Recommendation #5

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

(B.C. Supreme Court ruling 2011 BCSC 112 stated: "In my view, the conclusion of the OIPC delegate, that headings that merely identify the subject of discussion without revealing the 'substance of deliberations' do not fall within the s. 12(1) exception, was a reasonable decision.")

Recommendation #6

Clearly mandate the principle of severability to Cabinet records. Implement recommendation 4-5 of the *ATI Act Review Task Force* report of the federal Treasury Board Secretariat, 2002: "That a prescribed format be developed for Cabinet documents that would allow for easy severance of background explanations and analyses from information revealing Cabinet deliberations such as options for consideration and recommendations."

Recommendation #7

The time period during which Cabinet confidences cannot be disclosed via Sec. 12 should be reduced from 15 years to 10 years, as in Nova Scotia's FOI law.

Recommendation #8

Proactively publish Cabinet minutes 15 years after their creation, and on the government internet, eventually moving to 10 years after their creation.

Recommendation #9

Add a provision to the B.C. *FOIPP Act* Sec. 12 to state that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public within five years after the decisions have been taken and the matter is complete. Ideally these would be released proactively, not requiring B.C. *FOIPP Act* requests. Section 8(1)(i) of India's *Right to Information Act 2005* provides a good example of such a clause.

Recommendation #10

In B.C. *FOIPP Act* Sec. 12, implement the advice of federal Commissioner John Reid in his 2002 report, to amend the *ATI Act* to clearly state that summaries of decisions are not considered Cabinet confidences once they are severed from other information which may reveal the substances of deliberations of Cabinet or one of its committees. The Act should also remove all potential uncertainties in the wording around cabinet documents, making it clear that they are defined solely by their substance, not by their titles.

(He noted: "Such summaries - e.g., Treasury Board circulars implementing decisions relating a new policy or budget reduction - should be routinely available to the public. All governments summarize Cabinet decisions in order to communicate these to the public or allow government institutions to implement the directions of Cabinet. Not all such summaries are made available to the public in press releases or other similar public documents.")

Recommendation #11

Establish that Cabinet may choose to publish or grant access to information that is otherwise exempt under Sec. 12.

Recommendation #12

As FIPA advised in 2004, amend the B.C. *FOIPP Act* so that Sec. 12(3), which applies to local public bodies, has parallel provisions to Sec. 12 (2)(c) which applies to Cabinet confidences. The lack of similar qualifying language in Sec. 12(4) allows local public bodies to withhold background materials or analysis in conditions not allowed to Cabinet, and this omission should be corrected.

Section 13 - Policy Advice

***Recommendation #13**

Amend Sec. 13 with the wording of Article 19's *Model Freedom of Information Law*, 2001:

> 32. (1) A body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to:
>
> > (a) cause serious prejudice to the effective formulation or development of government policy;
> >
> > (b) seriously frustrate the success of a policy, by premature disclosure of that policy;
> >
> > (c) significantly undermine the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; or
> >
> > (d) significantly undermine the effectiveness of a testing or auditing procedure used by a public body.
>
> (2) Sub-section (1) does not apply to facts, analyses of facts, technical data or statistical information.

At a bare minimum, consider the harms test for policy advice records in Sec. 35 of the FOI law of the UK, Canada's parliamentary model, and South Africa (Sec. 44).

Recommendation #14

That Sec. 13 be amended to add a definition of "advice." It should also be clarified as to the type of sensitive decision-making information it covers and include a listing of those type of documents it specifically does not cover.

As well, clarify that "advice" and "recommendations" are similar terms often used interchangeably that set out suggested actions for acceptance or rejection during a deliberative process, not sweeping separate concepts.

Recommendation #15

That Sec. 13 be amended in order to restrict its application to advice and recommendations exchanged among public servants, ministerial staff and Ministers – that is, only information which recommends an actual decision or course of action by a public body, minister or government.

The federal MPs *Open and Shut* report of 1987 well advised that the *ATI Act*'s policy advice exemption "only apply to policy advice and minutes at the political level of decision-making, not factual information used in the routine decision-making process."

Recommendation #16

Clearly mandate the principle of severability to all policy advice records. (This should be stated at the start of the exemptions portion of the *Act*, for all exemptions, but might need to be reiterated here.) A prescribed format should be developed for Sec. 13 documents that would allow for easy severance of exempt from releasable non-exempt material.

***Recommendation #17**

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

If the record concerns a policy advice matter that has been completed but not made public, the B.C. government may only withhold the record for two years.

If the record concerns a policy advice matter that has neither been completed nor made public, the B.C. government may only withhold the record for five years - on the model of Nova Scotia's FOI law, Sec. 14.

> (In 2015 the federal Information Commissioner advised "reducing the time limit of the exemption for advice and recommendations to five years or once a decision has been made, whichever comes first.")
>
> *Also see Appendix A, below, regarding the Dutch FOI protection for policy analysts*.

Sec. 14 – Legal Affairs

The B.C. *FOIPP Act's* Sec. 14 reads in full: "The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege."

Recommendation 18

Solicitor-client privilege, in terms of advice given to public bodies by officials who also just happen to be lawyers, acting in their policymaking and statute-designing roles, was not intended to be protected to the same degree as solicitor-client privilege in litigation or law enforcement

matters. This must be made clear in an amended B.C. *FOIPP Act,* that the former matters are not "legal advice," and should instead be dealt with instead in Sec. 13, the policy advice exemption.

The specificity in Quebec's FOI law is helpful in interpretations: "31. A public body may refuse to disclose a legal opinion concerning the application of the law to a particular case, or the constitutionality or validity of legislative or regulatory provisions, or a preliminary or final draft of a bill or regulations." This is valid only if this opinion does not constitute policy advice, as per B.C. *FOIPP Act* Sec. 13.

(Overall, for the B.C. *FOIPP Act* Sec. 14 legal affairs exemption, the main issue is the wide scope rather than the absence of harm; if the scope is narrow, then harm can largely be presumed, although a time limit and public interest override are also important. This exemption should be mainly restricted to legal or administrative proceedings, and designed to ensure a fair trial.)

***Recommendation #19**

Amend Sec. 14 to state that the exemption cannot be applied to records under legal privilege 30 years after they were created, per the model of the UK FOI law's Sec. 43. Better yet, the American *FOIA* sets a 25 year limit for such records.

(On time limits, federal Information Commissioner John Reid well wrote: "It has been obvious over the past 22 years that the application and interpretation of [the legal affairs *ATI Act* exemption] by the government (read – Justice Department) is unsatisfactory. Most legal opinions, however old and stale, general or uncontroversial, are jealously kept secret. Tax dollars are used to produce these legal opinions and, unless an injury to the interests of the Crown can reasonably be expected to result from disclosure, legal opinions should be disclosed.")

***Recommendation #20**

Add a harms test to Sec. 14, to state the exemption can only be applied to withhold records prepared or obtained by the agency's legal advisors if their release could reveal or impair procedural strategies in judicial or administrative processes, or any type of information protected by professional confidentiality that a lawyer must keep to serve his/her client. Sec. 14 should be limited to a litigation privilege or matters which would be privileged from production in legal proceedings.

(Politicians sometimes summon a lawyer to merely sit in on a closed door meeting to listen, and then term his or her presence "legal advice." Lawyers also fight to keep secret their taxpayer-funded legal billing figures, claiming solicitor-client privilege on this point, even after all appeals are finished, and the B.C. *FOIPP Act* should prohibit this.)

Recommendation #21

In its brief to the Senate on Ottawa's *Bill C-58*, the Quebec journalists' federation noted a special problem in the *ATI Act*, which should be blocked in a reformed B.C. *FOIPP Act*:

"Our members' experience in Quebec is instructive; government bodies have a tendency to add the names of lawyers or notaries to distribution lists on documents, so they are able to refuse to disclose the documents, citing solicitor-client privilege. The Commission d'accès à l'information, which makes review decisions in Quebec, has stated that in order to assert solicitor-client privilege, there had to be a relationship with a client; the mere fact of including the name of a lawyer or notary in a distribution list does not create that relationship. Solicitor-client privilege is not a catch-all concept for camouflaging documents."

Recommendation #22

Add a clause to the B.C. *FOIPP Act* Sec. 14 that information is privileged from production in legal proceedings, unless the person entitled to the privilege has waived it.

Section 16 - intergovernmental relations

Recommendation #23

Amend Sec. 16 - "Disclosure harmful to or negotiations" - to state that information may be withheld "where there is an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information, and where disclosure would cause serious harm based on reasonable expectations of secrecy."

Recommendation #24

Amend Sec. 16 to state that, if the Canadian public body wishes to apply this exemption, it must first consult with the other government to ask if it would object to disclosure of the records, as likely to cause "serious harm based on reasonable expectations of secrecy," not just unilaterally claim that it would do so without inquiring.

Recommendation #25

Amend the B.C. *FOIPP Act* to read: "16. (4) The head of a government institution shall disclose any record requested under this Act that contains information described in subsection (1) if the government, organization or institution from which the information was obtained (a) consents to the disclosure; or (b) makes the information public."

Sec. 25 - The Public Interest Override

Recommendation #26

Clearly establish in the B.C. *FOIPP Act* Sec. 25 that there shall be no consideration of temporal urgency in applying a public interest override.

(The B.C. Information and Privacy Commissioner considered this question in a report of 2015. After the environmental disaster at the Mount Polley mine tailings pond dam, she received complaints that the provincial government had failed to proactively release data on the risks, before the event, per *FOIPP Act* Sec. 25, public interest override. She advised "that Section 25(1)(b) be re-interpreted to no longer require an element of temporal urgency for the disclosure of information that is clearly in the public interest.")

Recommendation #27

B.C. *FOIPP Act* Sec. 25 (1) commendably mandates the immediate release of records: "(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."

Yet other features in several national FOI laws could be considered for addition to the Sec. 25 override (while emphasizing such a list is not exhaustive):

- a contravention of, or a failure to comply with a law or regulation
- an imminent and serious threat to the prevention of disorder or crime or the protection of the rights or freedoms of others
- (a) a miscarriage of justice; or (b) significant abuse of authority or neglect in the performance of official duty; injustice to an individual; (c) danger to the health or safety of an individual or of the public; or (d) unauthorised use of public funds
- ignoring regulations, unauthorized use of public resources, misuse of power, and other related maladministration issues.
- consumer protection (and this factor should be added to the B.C. *FOIPP Act*'s override in Sec. 21 on third party business secrets)
- it concerns urgent cases threatening public security and health, as well as natural disasters (including officially forecasted ones) and their aftermaths
- it presents the overall economic situation of the nation

Recommendation #28

Consider adding to the B.C. *FOIPP Act* these terms in Mexico's FOI law: "14. Information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake."

Recommendation #29

Place in the B.C. *FOIPP Act* these principles in Article 19's *Model Freedom of Information Law*, 2001:

> Notwithstanding any provision in this Part, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.

Article 19 also asserts that the bar should not be set high to apply the override: "Disclosure should not need to be vital in the public interest; rather, the public interest in disclosure should just outweigh the interest in secrecy."

Recommendation #30

The override in the Australian FOI law below is rather limited, yet some provisions below help shore up whatever is there. While it seems regrettable that such (perhaps) self-evident points are necessary to assert, this may stem from political realism and experience. These might be considered for the B.C. *FOIPP Act* Sec. 25:

> Irrelevant factors – 11A (4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
>
> (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
>
> (b) access to the document could result in any person misinterpreting or misunderstanding the document;
>
> (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
>
> (d) access to the document could result in confusion or unnecessary debate.

Recommendation #31

Encourage the Commissioner to devote a chapter of his annual report to note serious cases of failure where the government and agencies had an obligation to proactively disclose information in the public interest per B.C. *FOIPP Act* Sec. 25 (whether or not an FOI request for access was made), but did not. Seek and consider input on further measures to guarantee the Sec. 25 duty of proactive publication.

Section 3 (7) – the B.C. *FOIPP Act* and other statutes

B.C. *FOIPP Act* Sec. 3(7) [formerly Sec. 79] reads: "If a provision of this *Act* is inconsistent or in conflict with a provision of another *Act,* this *Act* prevails unless the other *Act* expressly provides that it, or a provision of it, applies despite this *Act.*"

Recommendation #32

Whereas the B.C. *FOIPP Act*'s existing exemptions afford adequate protection for all legitimate secrets, delete the *Act*'s Sec. 3(7), and so render this *Act* supreme on disclosure questions.

Recommendation #33

If that is not accepted, there is a secondary option (which FIPA advised in 2005): Extend coverage to categories of records exempted by "notwithstanding clauses" in other statutes.

Recommendation #34

If the courses on Sec. 3(7) above are not accepted, then at the very least mandate that an all-party committee study the necessity of each paramountcy clause in other Acts that override the B.C. *FOIPP Act,* with a view to repealing or amending those clauses.

Recommendation #35

If B.C. *FOIPP Act* Sec. 3(7) is retained, prescribe in the law at a minimum that the B.C. Information and Privacy Commissioner must be consulted when new overrides are to be added, to note where the information would not be protected by a general exemption that already exists in the B.C. *FOIPP Act*. Consider granting the Commissioner the power to veto such an addition.

Recommendation #36

Even if Victoria does not wish to delete B.C. *FOIPP Act* Sec. 3(7), it can be noted that even Ottawa recognizes such a section's problematic nature, in the Justice Department of Canada's *A Comprehensive Framework for Access to Information Reform: A Discussion Paper*, 2005. At the barest minimum, this advice therein should be implemented:

"In relation to the second issue, that of future additions to [*ATI Act* Sec. 24's schedule], the Government believes that criteria should also be adopted. These could include: whether the Government institution has a demonstrable and justifiable need to provide an iron clad guarantee that the information will not be disclosed. The Government shares the opinion of the Task Force that the standard to be met for Section 24 [the equivalent of B.C. *FOIPP Act* Sec. 3(7)] protection should be very high. In addition to meeting the criteria, therefore, the government institution seeking to add a confidentiality provision to Schedule II should be required to justify why the information in question cannot be adequately protected by the other exemptions in the *Act*."

Recommendation #37

Consider the advisability of Antigua and Barbuda's FOI law, Sec. 6(3): "Nothing in this *Act* limits or otherwise restricts the disclosure of information pursuant to any other law, policy or practice."

Recommendation #38

Amend the B.C. *FOIPP Act* to allow other forms of Sec. 23 notice - public notice or advertisement - whenever substituted notice is likely to be effective, practical and less costly than direct notice.

(So advised in the 1987 MPs *Open and Shut* report and Commissioner John Reid's 2002 report. The latter explained that in the *ATI Act*, institutions must give direct notice to and consult with third parties before records may be released. This adds very long delays; and often there are so many of these third parties - in one case he noted *126,000* of them – that direct notice is simply impractical, and so departments take the path of least resistance and simply refuse to disclose the records.)

***Recommendation #39**

The B.C. *FOIPP Act* reads: "21 (1) The head of a public body must refuse to disclose to an applicant information [….] (b) "that is supplied, implicitly or explicitly, in confidence." Add the clause: "Information negotiated in confidence is not exempt from disclosure."

(In his landmark order Order 01-20, the B.C. Information and Privacy Commissioner ruled that the UBC-Coca Cola contract should be released, despite Sec. 21, because it contained information not *supplied* in confidence, but only *negotiated* in confidence between UBC and the company: "The parties, in effect, jointly created the records." This worthy principle needs to be placed in the *Act*.)

Recommendation #40

Add these terms to the B.C. *FOIPP Act*, from Justice Gomery's report *Restoring Accountability*, 2006:

Definitions: '"trade secret" means any information, including a formula, pattern, compilation, program, device, product, method, technique or process (a) that is used, or may be used, in business for any commercial advantage; (b) that derives independent economic value, whether actual or potential, from not being generally known to the public or to other persons who can claim economic value from its disclosure or use; (c) that is the subject of reasonable efforts to prevent it from becoming generally known to the public; and (d) the disclosure of which would result in harm or improper benefit to the economic interests of a person or entity.'"

Scope of Coverage

[**Background:** Sec. 46 (d)(iv) of Bill 22 states the minister may add subsidiaries or other entities to FOI coverage, if he/she "determines that it would be in the public interest." We may note this is, at least, some kind of response from Victoria to persistent public objections on the subsidiary problem, hitherto ignored. But there is, of course, a world of difference in law between "may" and "must." In actual fact, if coverage is ever applied to the $500 million InBC Investment Corp. - where it is most needed - this move would be surprising but always welcome. This wholly discretionary new section was likely designed to create the illusion of solving the subsidiary

problem without actually doing so, and thus push it all off the public's agenda. If that is the case, then the section's net effect is to be worse than useless – and hence the measures below.]

Recommendation #41

Extend the coverage of the B.C. *FOIPP Act* to all offices and branches of the Legislature.

***Recommendation #42**

The entities below would be designated a "public body" in B.C. *FOIPP Act* Schedule 2

(a) any institution that is controlled by a public body, at any ownership level, or

(b) performs a statutory function, or

(c) is vested with public powers; or has a majority of its board members appointed by a public body, or

(d) is 50 percent or more publicly owned via its shares[206] (including InBC Investment Corp.)

The entities below would not be designated a "public body" in Schedule 2, *per se,* but their records would be accessible by the FOI law only to the extent of their public functions, if:

(e) they perform a public function – after this term is considered and carefully defined

(f) where public funding in effect covers 50% of regular operational costs, whatever the formal nature of the flow of funds (e.g., if the operational costs are funded by grants or other)

(For purposes of this *Act*, a private body includes any body, excluding a public body, that: – (a) carries on any trade, business or profession, but only in that capacity; or (b) has legal personality.)

Recommendation #43

There are more details below to flesh out the criteria above, which need to be placed in the B.C. *FOIPP Act*:

- institutions having the power to establish regulations or standards in an area of B.C. jurisdiction

[206] Regarding (d), it is absolutely crucial that such entities be at least 50 percent publicly owned, and not "fully owned," for if the latter course was the law, the government could just sell off 5 percent of the entity and still own the remaining 95 percent, as a dexterous way to escape FOI coverage. In fact, it might best be set to a degree less than 50 percentage, since in some cases 20 percentage ownership could mean control. e.g., the South African FOI law assumes control with 20 percent ownership although that can be defeated if control is not in fact present. Obviously one controls with 50 percent but often control is present at much lower levels.

- institutions responsible for carrying out an important public policy on behalf of the government; or it performs functions or provides services pursuant to federal statute or regulation

- statutory boards, tribunals, agencies and commissions

- nationalized industries

- non-departmental bodies or quangos (a British term for quasi non-governmental organizations)

- consulting firms, research institutes and universities under contract with government, but only to the extent of their public duties; or the B.C. *FOIPP Act* should deem that all contracts entered into by scheduled institutions contain a clause retaining control over all records generated pursuant to service contracts.

- government institutions, including Special Operating Agencies, and all present and future public foundations

- any entity that provides under contract with a public authority any service whose provision is a function of that authority

- agencies whose capital stock forms part of the domain of the State

- if public institutions are exclusively financed out of a Consolidated Revenue Fund, they should be covered. Agencies that are not financed exclusively in this way, but can raise funds through public borrowing should be included, with the major determinant being their degree of government control

- an entity covered entity should be covered if owned totally or partially or controlled or financed, directly or indirectly, by public funds, but only to the extent of that financing

- An entity should be covered if it carries out a statutory or important public function or a statutory or public service, but only to the extent of that statutory or public function or that statutory or public service.

Recommendation #44

Student societies and student governments of post-secondary public educational entities should be covered by the B.C. *FOIPP Act. (*See Appendix 8 of Tromp's report *A Right Under Siege* for an in-depth explanation*.)*

Recommendation #45

The B.C. *FOIPP Act* should be amended to cover any entity in which a majority of its governing board members are appointed by government or a minister - or if not so appointed, in the discharge of their duties are public officers or servants of the Crown - it or its parent is directed or managed by one or more persons appointed pursuant to statute.

Recommendation #46

Consider the proposal of Article 19, that private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health. Inter-governmental organizations should also be subject to FOI regimes based on the principles enunciated above.

Recommendation #47

The B.C. *FOIPP Act* states in Sec. 3(1): "This Act applies to all records in the custody or under the control of a public body." Clearly and explicitly define these legal terms in the statute., i.e., what exactly is record "custody" and "control."

Recommendation #48

Render it unlawful in the B.C. *FOIPP Act* to store records offsite - or at a site owned by a private company partnering with government – so as to claim these are not in the state's "custody" and cannot be accessed.

Emulate Quebec's FOI law on this issue: "1.1. This Act applies to documents kept by a public body in the exercise of its duties, whether it keeps them itself or through the agency of a third party."

Recommendation #49

The B.C. *FOIPP Act* should set that all contracts entered into by scheduled institutions contain a clause retaining control over all records generated pursuant to service contracts. Implement this proposal from the federal Treasury Board Secretariat, in *Access to Information: Making it Work for Canadians. ATIA Review Task Force* report, 2002:

> 3-3. That 'the government's Policy on Alternative Service Delivery be amended to ensure that arrangements for contracting out the delivery of government programs or services provide that: records relevant to the delivery of the program or service that are either transferred to the contractor, or created, obtained or maintained by the contractor, are considered to be under the control of the contracting institution; and the *Act* applies to all records considered to be under the control of the contracting institution, and the contractor must make such records available to the institution upon request.

Recommendation #50

The question arises on who should have the authority to determine what entities must be covered according to the criteria, and how. The B.C. Information and Privacy Commissioner should have this authority; and amendments to the B.C. *FOIPP Act* should create the right for any person to make a complaint to the Commissioner if the government fails to add any particular government institution or institutions to FOI coverage, similar to the proposal in the federal Commissioner's *Blueprint for Reform*, 2001:

> The mechanism which is recommended is this: Cabinet should be placed under a mandatory obligation to add qualified institutions to Schedule I of the *[ATI] Act.* Any person (including legal person) should have the right to complain to the Information Commissioner, with a right of subsequent review to the Federal Court, about the presence or absence of an institution on the *Act*'s Schedule I. As at present, the Commissioner should have authority to recommend addition to or removal from the Schedule and the Federal Court, after a *de novo* review, should have authority to order that an institution be added to or removed from the Schedule.

***Recommendation #51**

Amend the Act so that government and public agencies must post all P3 partnership and large supply and service contracts on their websites within one week of their finalization - except for small portions where genuine commercial confidentiality or other legitimate interests may be protected, and only per B.C. *FOIPP Act* exemptions, which may be appealed to the OIPC. At the very least, they should be released routinely (when appropriately redacted) upon request, without an FOI application required.

Recommendation #52

Consider adding South Africa's FOI legal provision (which is also set in that nation's Constitution) that allows individuals and government bodies to access records held by private bodies when the record is "necessary for the exercise or protection" of people's rights.

Recommendation #53

The B.C. *FOIPP Act* should be amended to provide that an agency, board or commission may not be removed from compliance with the *Act* by virtue of changing its name but continuing to perform the same functions.

Recommendation #54

Amend the B.C. *FOIPP Act* so that the B.C. government may not enter into a "shared jurisdiction" arrangement or contract, or create a new institution with national, provincial, municipal or other governmental co-partners, unless the records of that arrangement, etc., are available under a freedom-of-information law of at least one of the partners.

(By far the most intransigent problem is that dozens of Canadian entities have a "shared jurisdiction" amongst federal, provincial and other governments; since it is claimed that these

bodies do not fit the within scope of any one partner's FOI laws, they fall between the cracks and are covered by none. A good example of such an FOI-exempt entity is the First Nations Health Authority, a B.C.- federal partnership.)

Recommendation #55

Create a special schedule of which named entities qualify as an "aboriginal government," while criteria for this should be added also.

Duty to document, and record retention

[**Background:** The disastrous trend towards "oral government" – whereby government officials do not create or preserve records of their decisions or policy development because they do not wish such records to be ever made public through the FOI process – is growing each year. The *Information Management Act* passed by NDP in 2019 does not create a true "duty to document" government actions and decisions, despite the government's voluble claims; it mere gives the Chief Information Officer the *discretion* to bring in "directives and guidelines" on the creation of adequate records.

When in opposition, the NDP's private member's *Bill M-207* of 2016 stated: "Every public body and service provider *must* create and maintain full and accurate records of government information." (Italics mine.) The party, when running for election in 2017, in response to a questionnaire to FIPA, promised "to create a positive duty to document government actions for greater accountability to the public." Yet this was never done. This inaction counters the advice of the B.C. Information and Privacy Commissioner, past Legislative Special FOIPP Committee reviews, and many others.]

***Recommendation #56**

The Government should adopt legislation *mandating* public servants to fully document governmental functions, policies, procedures, decisions, recommendations, essential transactions, advice, and deliberations. Make it an offence to fail to do so or to destroy documentation recording decisions, or the advice and deliberations leading up to decisions. It includes records of any matter that is contracted out by a public office to an independent contractor.

This requirement would ideally be placed in a new comprehensive B.C. *Information Management Act* (rather than the failed *Act* passed in 2019 with its discretionary rules, a law which should be repealed as the new statute replaces it). The new B.C. *Information Management Act* should apply to every entity covered by the B.C. *FOIPP Act.*

Details would be worked out in policy at a ministry, even program, level. Government should consider adopting a risk-based approach, with the nature and significance of decisions, actions and transactions being used to determine which records have to be documented and in what manner. There should be a (non-exhaustive) list of examples of records to be generated. The

Information and Privacy Commissioner must be granted authority over this new *Act*, with the powers to ensure compliance with it.

Recommendation #57

The body responsible for archives would develop, in coordination with the Information and Privacy Commissioner, a records management system which will be binding on all public authorities. Such codes should be developed in consultation with public bodies and then laid before the Legislature.

Recommendation #58

Implement these terms in a new B.C. *Information Management Act* taken from Article 19's *Principles of Freedom of Information Legislation*, 1999, endorsed by the United Nations:

> Destruction of records - To protect the integrity and availability of records, the law should provide that obstruction of access to, or the willful destruction of, records is a criminal offence. The law should also establish minimum standards regarding the maintenance and preservation of records by public bodies. Such bodies should be required to allocate sufficient resources and attention to ensuring that public record-keeping is adequate. In addition, to prevent any attempt to doctor or otherwise alter records, the obligation to disclose should apply to records themselves and not just the information they contain.

Recommendation #59

In Canada and most nations, records are primarily catalogued for the government's convenience, not for the public's scrutiny. The only provincial FOI law that prescribes record management to assist applicants is that of Quebec, in Sec. 16, and this should be considered for a reformed B.C. *FOIPP Act:*

> 16. A public body must classify its documents in such a manner as to allow their retrieval. It must set up and keep up to date a list setting forth the order of classification of the documents. The list must be sufficiently precise to facilitate the exercise of the right of access.

(This factor is present in the FOI laws of many nations also, such as with India's law: "4. Every public authority shall – (a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act." The African Union's *Model Access Law* of 2013 prescribes that officials must "arrange all information in its possession systematically and in a manner that facilitates prompt and easy identification" and "keep all information in its possession in good condition and in a manner that preserves the safety and integrity of its contents.")

***Recommendation #60**

- Include a provision in the B.C. *FOIPP Act* that all emails and communications sent from the personal email addresses and from the work email addresses of employees, directors,

officers, and contractors, and which relate directly or indirectly to workplace matters, are subject to the access law.

- Ban public officials using private email accounts, personal cell phones and tablets for carrying out government business. The B.C. *FOIPP Act* should be amended to include electronically stored information (e.g. voice-mail, E-mail, computer conferencing etc.) explicitly in the definition of recorded information, and to give requesters the right to request a record in a particular format if it exists in various formats.

- Legislation should advise access officials to keep up-to-date on the latest information and communication technologies, so as to watch for and thwart any back-channel evasions of FOI obligations.

(The federal Commissioner released a policy statement which expressly includes any form of instant messaging under the definition of records. This applies to phone-based messaging services like SMS and BBM, online messaging services like Facebook, as well as dedicated messaging apps like WhatsApp. Yet in this digital age, FOI law and policy always struggle to keep up with lightning-paced technological changes.)

Recommendation #61

A common tool of FOI avoidance is for Canadian officials and politicians to use post-it sticky notes to avoid a paper trail - an intolerable breach of the public interest.

Amend the B.C. *FOIPP Act* to add this wording of British Columbia's FOI regulations, which state that any marginal note made upon a document transforms that record into "a new record," and a separate copy is made of it for FOI applicants: "Marginal notes and comments or 'post-it' notes attached to records are part of the record, not separate transitory records. If the record is requested, such attached notes are reviewed for release together with the rest of the record."

Recommendation #62

In some jurisdictions, records may not be destroyed after an FOI request for them has been received, even if they had already been scheduled for destruction. For instance, in Washington state's FOI law, "If a requested record is scheduled shortly for destruction, and the agency receives a public records request for it, the record cannot be destroyed until the request is resolved. Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule." This measure is advisable for the B.C. *FOIPP Act*.

Recommendation #63

The FOI statute of Ecuador commendably goes one step better, wherein "information cannot be classified following a request." This measure is advisable for the B.C. *FOIPP Act*.

Recommendation #64

Federal information commissioner John Grace issued a sharp rebuke to the oral government concept, noting its origins: "The misguided effort to avoid scrutiny by not making records is driven by ignorance of the law's broad exemptive provisions."

This last point is crucial, and the solution to such ignorance is to begin an education program for all officials and public servants about how the B.C. *FOIPP Act* exemptions work, exactly what information can be legally withheld, and why the FOI law need not be so feared.

The Information and Privacy Commissioner's Powers

Recommendation #65

Under the federal *Access to Information Act* Sec. 31, applicants have within 60 days of receiving an unsatisfactory response from the public body, to appeal to the Information Commissioner about delays, exemptions, or any other issue. This 60 day limit should also set in the B.C. *FOIPP Act,* instead of its current 30 days. (The *ATI Act*'s limit was shortened in 2006 from a right to appeal within one year. Six months to appeal would be a fair compromise between the two, and this limit might be set in the B.C. *FOIPP Act.)*

The deadline to file an appeal of a FOIPP ruling to Judicial Review should also be doubled to 60 days (as the JR process can be complex and onerous to a layperson).

Recommendation #66

Amend the B.C. *FOIPP Act* so that upon the conclusion of an investigation, the Commissioner's office will have the power to recommend to the Attorney General's office that it lay charges and fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal. (These amounts will be determined in further amendments or regulations.)

Recommendation #67

Amend the B.C. *FOIPP Act* to grant the Information and Privacy Commissioner the power to require public bodies to submit statistical and other information related to their processing of requests, in a form and manner that the Commissioner considers appropriate.

(The federal Commissioner well noted in 2021: "In Scotland, statistics are gathered every three months through a computer system rather than compiled once a year in an annual report; this allows them to promptly assess trends and institutions' performance. This method of data collection also makes it possible to take action quickly and as needed, something that is not possible in our current access regime." This is advisable for B.C.)

Recommendation #68

The B.C. Information and Privacy Commissioner should be given powers in the B.C. *FOIPP Act* to require systemic changes in government departments to improve compliance (as in the United Kingdom).

Response times

[**Background**: The most common initial FOI response time in other nations' FOI laws is two weeks – *half* the 30 day period allowed for the initial response in the B.C. *FOIPP Act*. Of 128 nations, 92 set an initial response time ranging from three to 21 days. For the extension limit, 58 nations set from three to 21 days, whereas 29 countries set 30 days. Some FOI laws also have penalties for delays, which the B.C. *FOIPP Act* needs.]

***Recommendation #69**

For the B.C. *FOIPP Act*, set a 20 day initial response limit for records – the standard in the FOI laws of Quebec, New Zealand, the United Kingdom and the United States. Also replicate the 10 day FOI extension limit in Quebec's statute.

Recommendation #70

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

***Recommendation #71**

The B.C. *FOIPP Act* should be amended to prohibit the use of any discretionary exemption if the department is in a deemed refusal situation due to delays. In this situation, it would be required to gain the approval of the Commissioner before withholding isnformation under mandatory exemptions (the standard in Mexico).

(At a minimum, Commissioner John Reid's 2002 report well advised that the *ATI Act* be amended to preclude reliance upon the policy advice and legal privilege exemptions [i.e., the B.C. *FOIPP Act*'s Sec. 13 and 14] in late responses. "It would have every bit as much force, without risking highly damaging disclosure, if it were restricted to loss of the ability to invoke [these two] sections in late responses. These two sections are discretionary and protect the internal, advice-giving process. A sanction so limited would pinch where the pinch is needed.")

Recommendation #72

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

Recommendation #73

Under no circumstances may a third party notification excuse the public authority from complying with the time periods established in the B.C. *FOIPP Act*.

Recommendation #74

For the B.C. *FOIPP Act*, implement this recommendation from *Observations and Recommendations* by federal Commissioner Carolyn Maynard, 2021: "The *[ATI] Act* should provide a clearer process for institutions that decide to have a consultation and set out a maximum length of time for consultations required in order to respond to access requests."

(This is necessary because, as Commissioner Maynard noted, as long as a consultation is under way, institutions generally will not respond to an access request, even though there is nothing to stop them from doing so under the *Act*. The OIC's investigations show that institutions rarely decide to disclose information without having a consultation when the information concerns other institutions. As a result, requesters are frequently denied timely access to requested records, in whole or in part.)

Recommendation #75

Amend the B.C. *FOIPP Act* so that where a request for information relates to information which reasonably appears to be necessary to safeguard the life or liberty of a person, or for public health emergencies, a response must be provided within 48 hours. (This term appears in many nations' FOI laws, and in Afghanistan and Nepal such information must be provided within 24 hours.)

Recommendation #76

Whereas the worst delay bottleneck is often at the "sign off authority" levels and processes, these must be streamlined and simplified. Hence amend of the B.C. *FOIPP Act* to vest such authority at the lowest reasonable level, normally with the information officer if there is one.

On the extension of time limits, restrict the delegation of granting time extensions to a senior official, perhaps at Assistant Deputy Minister level, with the hopes of increasing the accountability for institutions' FOI performance.

Recommendation #77

Amend the B.C. *FOIPP Act* to state that information releases may never be delayed due to public relations concerns or consultations, such as pre-release "issues management" or "spin control" plans.

(Public relations staff need not be prohibited from being informed about B.C. *FOIPP Act* requests - in reality this could likely not be stopped anyways - but only if this process does not cause delays, or breach the applicant's privacy.)

Recommendation #78

Amend the B.C. *FOIPP Act* to state that records will be granted to applicants in staged releases if they request it. That is, if any portion of the information requested can be considered by the information officer within the time period specified, it must be reviewed and a response provided to the requester.

(The federal Treasury Board Secretariat in its *ATIA Review Task Force* report of 2002 advised that "Access to Information Coordinators be encouraged to offer to release information to requesters as soon as it is processed, without waiting for the deadline, or for all of the records to be processed." This right should be set in law, beyond encouragement.)

Recommendation #79

Repeal B.C. *FOIPP Act* Sec. 20, which allows the head of a government institution to refuse to disclose records to a requestor if the head predicts the material will be published by government within 60 days after the request is made.

(Sec. 20 can be misused as a game to buy extra time. An institution may delay a request for records on the basis of this section and, when just before that 60 day period expires, simple change its mind about publication and newly apply exemptions to the record. In 2015 the federal Information Commissioner advised the equivalent section of the *ATI Act* [its Sec. 26] be repealed.)

Recommendation #80

Yet if government does not which to repeal Sec. 20, there is a secondary option: Amend it to change the period from 60 days to 30 days after the request is received, and stipulate that if the record is not published within those 30 days, it must be released forthwith in its entirely with no portions being exempted.

Recommendation #81

Implement these measures advised by Information Commissioner Suzanne Legault (in *Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act*, 2015):

> 3.5 - The Information Commissioner recommends that, in cases where a consulted party fails to respond to a consultation request, the consulting institution must respond to the request within the time limits in the Act.
>
> 3.6 - The Information Commissioner recommends that a third party is deemed to consent to disclosing its information when it fails to respond within appropriate timelines to a notice that an institution intends to disclose its information.

Recommendation #82

For the B.C. *FOIPP Act,* consider the limits set in Newfoundland's revised FOI law: "23. (1) The head of a public body may, not later than 15 business days after receiving a request, apply to the

commissioner to extend the time for responding to the request." The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to here.

("That is a reasonable compromise between the need for some flexibility and the problem of abuse of extensions by public bodies," said the CLD's Toby Mendel on Newfoundland's law, "although I prefer the absolute limits found in many laws, i.e., 30 days plus another 30 and that's it.")

Recommendation #83

Amend the B.C. *FOIPP Act* to change the current 20 day request transfer limit to 5 days (as per the revised Newfoundland FOI law), or a maximum 10 days (as it was in the original B.C. *FOIPP Act)*. The head of the other institution must then reply within the remaining days up to the overall maximum of 30 days.

Recommendation #84

Amend the B.C. *FOIPP Act* to allow for rolling or continuing requests.

(Two provinces admit rolling requests. In Alberta's law: "9(1) The applicant may indicate in a request that the request, if granted, continues to have effect for a specified period of up to 2 years." The same right exists in Ontario's FOI law, Section 24(3).)

***Recommendation #85**

In November 2006 the B.C. information and privacy commissioner created a fine new "expedited inquiry" and "consent order" process to curtail delays, which works effectively today, and some equivalent of this should be prescribed in the B.C. *FOIPP Act*.

Recommendation #86

The B.C. *FOIPP Act* should be amended to require institutions to publicly report each year the percentage of access requests received which were in "deemed refusal" at the time of the response and to provide an explanation of the reasons for any substandard performance.

Recommendation #87

Persistent and excessive failures to respond to B.C. *FOIPP Act* requests within the time limits would be reflected in the reduced remuneration and bonuses of the head of the public body responsible for B.C. *FOIPP Act* compliance (such as deputy ministers).

Proactive Publication and Routine Release

Recommendation #88

The United Kingdom's FOI law, Section 19, imposes a duty on every public authority to adopt and maintain a "publication scheme," which must be kept current and approved by the Information Commissioner, and this rule should be established in British Columbia as well.

In its report on *Bill C-58*, the Senate recommended an amendment to *ATI Act* Sec. 91(1.1): "The [federal] Information Commissioner shall review annually the operation of Part 2, proactive disclosure, and include comments and recommendations in relation to that review in her annual reports." This feature is advisable for the B.C. *FOIPP Act* as well.

Recommendation #89

In the B.C. *FOIPP Act*, Sec. 3(5)(a), "Part 2 does not apply to the following: (a) a record that is available for purchase by the public" - should be amended to read "(a) material available for purchase by the public if such material is available at a reasonable price and in a format that is reasonably accessible, as deemed by the Information Commissioner upon a complaint."

Recommendation #90

Proactive disclosure in the B.C. *FOIPP Act* or another law should mandate the publication of:

- both winning and losing contract bids, so the public can consider for itself the value of the award decisions
- all contracts, licences, permits, authorizations and public-private partnerships granted by the public body or relevant private body

Recommendation #91

The government should include within mandatory publication schemes a requirement that institutions proactively publish information about all grants, loans or contributions given by government, including the status of repayment and compliance with the terms of the agreement.

Recommendation #92

The proactive publication of public opinion polls and research might be mandated, but at the least, the B.C. *FOIPP Act* should be amended to state that that no *FOIPP* exemptions will be applied to results of public opinion research, and that complete listings of polls, and public opinion results, must be provided upon informal request by the public.

Recommendation #93

Amend the B.C. *FOIPP Act* to voice the principle set in the FOI *Code* of Wales (which is subject to the United Kingdom's FOI law) that states: "We will continuously seek opportunities to publish information unless it is exempt under this *Code*. We will publish the facts and factual analyses behind policy proposals and ministerial decisions, unless they are exempt under this *Code*."

(This positive spirit might be contrasted to that of Canada, where some officials file lawsuits to block FOI requests that could reveal facts and analyses related to policy advice.)

Recommendation #94

The B.C. *FOIPP Act* should include a proactive disclosure requirement for environmental enforcement information.

Recommendation #95

Mandate that government statistics and datasets – if all personal identifiers have been removed - cannot be withheld under any B.C. *FOIPP Act* exemption.

Recommendation #96

Amend the B.C. *FOIPP Act* to add a much longer list of records that must be routinely released or proactively published, on the examples of Article 19's *Model Freedom of Information Law* (2001), and those of many other nations and commentators.

> See *Appendix B*, below, for some samples of records requiring proactive publication in the FOI laws of other nations.

Penalties

[**Preface**: One of the few good features of Bill 22 is the addition of Part 5.1, Offenses, most notably in Sec. 65.3: "A person who willfully conceals, destroys or alters any record to avoid complying with a request for access to the record commits an offence." Yet still more can be done, for the Centre for Law and Democracy notes that the *breadth* of subjects for sanctions is more important than the penalties' severity, *per se.*]

Recommendation #97

Implement the advice of the Information and Privacy Commissioner in his letter of Oct. 20, 2021 to the Minister of Citizens Services on the new Part 5.1:

"This is a step in the right direction, but it does not go far enough. The inappropriate destruction of records should be penalized anytime, not only when there is an access to records request in play. This should include oversight over destruction of records other than in accordance with approved disposal schedules, as is the case under Alberta's *FOIPP Act*."

Recommendation #98

Afghanistan's FOI statute (CLD-rated #1 in the world) is quite well rounded, and parts of it may be advisable for the B.C. *FOIPP Act*:

> Article 35. (1) The followings are recognized as violation of this law:
>
> 1 - Providing such information to the applicant that does not conform to the contents of information request form.
>
> 2 - Refusal of information to the applicant without justified reasons.
>
> 5 - Not providing requested information within the allocated timeframe.
>
> 7 - Lack of reporting by the Public Information Officer to the Commission within the specified timeframe.

Recommendation #99

On delays, for an amended B.C. *FOIPP Act*, we should consider the superb FOI law of India, whereby in Article 20(1), if the Information Commission decides that an FOI officer "has not furnished information within the time specified," it shall impose a fine for each day until the information is furnished, up to a maximum amount. (Many other nations' FOI laws have this same feature.)

Recommendation #100

This principle should be adapted in the B.C. *FOIPP Act*: "Article 19 supports criminal penalties for those who obstruct access, but only where such penalties respect the basic criminal rule requiring mental, as well as physical responsibility (*mens reas*). We therefore recommend that this article be amended to provide for liability only where the obstruction was willful or otherwise done with the intention of obstructing access."

Recommendation #102

India's FOI law penalizes those have knowingly given out incorrect, out-of-date, incomplete or misleading information, and this may be advisable for the B.C. *FOIPP Act.*

Recommendation #103

Implement this principle of Transparency International, in *Tips for the Design of Access to Information Laws*, 2006:

"Sanctions should penalize the institutions that have failed to respond to requests for information, along with the heads of these agencies, to avoid the possibility of individual, lower rank civil servants being penalized. The burden of responsibility should rest with those with the power to make change."

Recommendation #104

In Mexico's fine FOI law, officials can be penalized for "fraudulently classifying information that does not fulfill the characteristics indicated by this Law." The FOI law of Ukraine also imposes penalties for "ungrounded categorization of information as restricted access [classified] data."

(Such a principle would be welcome in the B.C. *FOIPP Act*, e.g., if an official deliberately misclassifies cabinet records to exclude them from the *Act*'s scope.)

Recommendation #105

The *B.C. FOIPP ACT* should make it clear that "creative avoidance" practices such as these and others are prohibited:

- Stonewalling, i.e., incorrectly claiming that records do not exist when they do; or not searching properly and then claiming documents cannot be found

- Changing the title of a record sought by an FOI applicant, sometimes after a request for it is received, then wrongly telling the applicant "we have no records responsive to your request." (This has occurred in Canada.) The law should make it make it absolutely clear it is only the record's subject matter that counts, not the record's title *per se*.

- Interpreting the wording of an applicant's request too narrowly, or even altering it, and then replying to the agency's re-worded version

Recommendation #106

In regards to duty to document, draft milder penalties for not creating records, and for not maintaining records properly.

[See *Appendix C* below on the wide scope of penalties in Mexico's FOI law.]

Exemptions, harms tests, time limits – general reforms

[**Background**. Several B.C. *FOIPP Act* exemptions lack explicitly-stated harms tests and so are known as "class exemptions," a situation that falls seriously short of world FOI standards. The *B.C. FOIPP Act*'s purpose clause states that one goal is "specifying limited exceptions to the right of access," but when exemptions lack a harms test, this limitations purpose is sometimes defeated. As the human rights organization Article 19 has noted, FOI statutory exemptions should be narrowly drawn, should be based on the content rather than the type or name of the record, and should be time-limited.]

Recommendation #107

Amend the B.C. *FOIPP Act* to state: "The right to refuse information only lasts for the period in which the risk of harm from disclosure remains live, or for the number of years set for each exemption, whichever occurs first."

(This may be ideal phrasing for FOI exemptions, as it ensures the best of both worlds. With the first option, the topic sensitivity might expire long before a set time limit and so the records should be opened. Yet even if they should, if a recalcitrant agency denies this and stubbornly resists in court for years, then the second option of the fixed time limit would remain, as it does now, as a default catch-all net. Also consider the terms of the Czech FOI law: "The right to refuse information only lasts for the period, in which the reason for refusal lasts. In justified cases the subject will verify if a reason for refusal still lasts.")

Recommendation #108

The B.C. *FOIPP Act* should be amended to prescribe that exemptions cannot be generally applied to withhold information that has already been published - subject to a very few special harms exceptions.

(This is advised because there are examples of agencies invoking discretionary FOI exemptions to withhold information published in old newspaper clippings, and data already posted on a company's website. Yet common sense indicates that if harms could have resulted from such information release, these damages most likely would have occurred during its first, "informal" publication, as it was "road-tested"; if they did not, then fears of such harms resulting from a second, formal release via FOI are almost certainly groundless.)

Recommendation #109

Place in the B.C. *FOIPP Act* these terms from Article 19's *Principles of Freedom of Information Legislation*, 1999, endorsed by the United Nations:

> Principle 4. Exceptions should be clearly and narrowly drawn and subject to strict "harm" and "public interest" tests. A refusal to disclose information is not justified unless the public authority can show that the information meets a strict three-part test.
>
> (1) the information must relate to a legitimate aim listed in the law;
>
> (2) disclosure must threaten to cause substantial harm to that aim; and
>
> (3) the harm to the aim must be greater than the public interest in having the information

Recommendation #110

Add to above terms this clause from Mexico's FOI law, Article 104, III: "The limitation is consistent with the principle of proportionality and is the least restrictive means available to avoid harm."

Recommendation #111

Add a general provision at the beginning of the exemptions part of the B.C. *FOIPP Act* to oblige heads of institutions to use their discretion in favour of access and openness, not refusal.

Also consider adapting the stronger default right to records present in Finland's FOI law as compared to the B.C. *FOIPP Act*: "1.1 Official documents shall be in the public domain, unless specifically otherwise provided in this *Act* or another *Act*."

Recommendation #112

Implement this worthy proposal from the federal Treasury Board Secretariat's *ATIA Act Review Task Force* report, 2002:

"4-1. The Task Force recommends that guidelines be issued on how to apply discretionary exemptions by: exercising discretion as far as possible to facilitate and promote the disclosure of information; weighing carefully the public interest in disclosure against the interest in withholding information, including consideration of any probable harm from disclosure, and the fact that information generally becomes less sensitive over time; and having good, cogent reasons for withholding information when claiming a discretionary exemption."

Recommendation #113

The B.C. *FOIPP Act* should make clear that officials may not mingle exempt and non-exempt records together, then claim an exemption for them all (for example, wrongly placing records into files of cabinet documents).

Recommendation #114

Establish an expert independent panel of academics, historians, journalists, librarians, and representatives of the B.C. Archives, the OIPC, etc., to advise and report upon [1] the de-classification of historical records, and [2] the ideal time limits for each B.C. *FOIPP Act* exemption. These could be two separate panels.

(Several nations' FOI laws simply allow for all material prior to a certain historical point to be released, and this could be considered for the B.C. *FOIPP Act*. Some nations also release certain older records proactively at a set time without FOI requests; for instance, Britain sends cabinet records to the National Archives for public viewing under "the 30 year rule," an ongoing tradition that predated the passage of its FOI law.)

Recommendation #115

Consider the proposal in *A Call for Openness*, the report of the MPs' Committee on Access to Information (2001) for the B.C. *FOIPP Act* - **"**We recommend that the *Access to Information Act* be amended to include a 'passage of time' provision requiring institutions to routinely release records under their control 30 years after their creation. This provision would override all exemptions from release contained in the *Act.*"

Other Topics

Recommendation #116

The whistleblower protection Sec. 30.3 of the B.C. *FOIPP Act,* and the B.C.'s *Public Interest Disclosure Act (PIDA)* of 2018, contain many helpful features.

Yet add this statement within the B.C. *FOIPP Act*: "Protection from civil and criminal liability: Any person who grants or discloses information in good-faith reliance on provisions of the B.C. *FOIPP Act* shall be protected from any and all civil and criminal liabilities, even if it is later determined that the information was in fact exempted. Similar protection shall be accorded all

persons that receive information pursuant to this *Act.*" Consider expanding the protection to "anything done in good faith in the performance of the *Act*."

Privately survey all B.C. FOIPP staffers to inquire what they believe would be the best whistleblower protection measures, then implement what the majority advise.

(See B.C. FIPA report *Best Practices in Whistleblower Legislation,* by Carroll Anne Boydell*, 2018, at* https://fipa.bc.ca/best-practices-in-whistleblower-legislation-an-analysis-of-federal-and-provincial-legislation-relevant-to-disclosures-of-wrongdoing-in-british-columbia/)

Recommendation #117

Amend Sec. 22 to state that bonuses of named officials and employees of all entities covered by the B.C. *FOIPP Act* are not the private information of individuals, and encourage the government to post them online, as it does for salaries and expenses.

Amend the *Act* to state that all salaries and expenses of officials and employees of all entities covered by the B.C. *FOIPP Act* must be available for routine release, without an FOI request, and encourage all such entities to publish such figures online annually, as the B.C. government does for ministries for salaries over a certain limit.

Recommendation #118

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

(This latter practice has occurred, prior to an OIPC order of Dec. 2011 which forbade it. See https://thetyee.ca/Blogs/TheHook/2011/12/08/Govt_Cant_Hide_Ministers_Records/ The OIPC also ruled on June 19, 2015 that topic headings do not qualify for Sec. 12.)

Recommendation #119

Delete B.C. *FOIPP Act* Sec. 22.1. Disclosure of information relation to abortion services (a section unique in the FOI world). Such informational harms are already prevented by other exemptions.

***Recommendation #120**

The Federal Court stated that Ottawa can no longer charge fees for the search and processing of electronic government documents covered under the *ATI Act*, per the 2015 ruling of Justice Sean Harrington. This principle should be set in law in the B.C. *FOIPP Act.*

Recommendation #121

Extend the free time "spent locating and retrieving a record" in B.C. *FOIPP Act* Sec. 75(1)(b)(i) from the current 3 hours up to 5 hours (which is the standard in the federal *ATI Act*).

Recommendation #122

Amend the *Act* to establish that an applicant who makes a formal access request has the right to anonymity throughout the entire process, as in the Newfoundland FOI law. Add a privacy protection clause in the B.C. *FOIPP Act* to state that an applicant's identity must not be revealed within government without a strict need to know (for example, to locate the records the applicant seeks that include his or her name, or with one's consent).

Recommendation #123

Implement in the B.C. *FOIPP Act* the advice of federal Information Commissioner John Reid's 2002 report, that the *ATI Act* should be amended to give a requester the right to request information in a particular format; that departments should be allowed to deny the request on reasonable grounds, but any refusal should be subject to review by the Information Commissioner.

His proposal to create *ATI Act* regulations on these matters is also advisable for the B.C. *FOIPP Act*:

"Act and regulations do not, however, mention the conversion of data from one format into another. If requesters are asked to pay for these conversions (which can often be done simply and automatically), will subsequent requesters have to pay again? Or will a department, having accomplished the conversion once, be required to maintain the data in the converted format for future requests? Would documents printed on demand from an electronic record be held in anticipation of a future request? No regulations are in place to govern on-line or remote access to electronic information."

Recommendation #124

Amend the B.C. *FOIPP Act* to permit a government institution to group all requests received from a requester (within 30 days of receipt of the initial request) on the same subject matter. When grouping has been employed, it is appropriate that the requester be so informed in the extension notice.

Recommendation #125

For B.C.'s directors/managers of information and privacy (DMIPs), implement the advice of the 1987 MPs' Justice Committee *Open and Shut* report - which stated that the time was long past due to professionalize their role - to [1] classify them as part of departmental senior management group, [2] make them a part of departmental executive committees, [3] give them direct reporting relationships with deputy heads of departments, [4] develop a uniform set of job descriptions and set of expectations for them, [5] ensure that they have completed standard, formal training in their discipline and [6] surround them with a leadership culture which does not penalize them for making the access law effective within their institutions.

Recommendation #126

Add a clause to the B.C. *FOIPP Act* to state that B.C. officials may never assert "crown copyright" regarding records released in response to B.C. *FOIPP Act* requests. Follow the lead of the American *Copyright Act,* which states that no government records can be copyrighted.

(For years, B.C. ministries would attach notices inside packages of documents mailed to FOI applicants, warning that: "These records are protected by copyright under the federal *Copyright Act*, pursuant to which unauthorized reproduction of works is forbidden." In 2008, Stanley Tromp complained to B.C.'s Privacy Commissioner, who reviewed the issue. In a letter to Tromp of June 1, 2009, he stated: "Government has decided to cease including copyright notices in access to information disclosures." While this voluntary move is welcome, there is no guarantee the problem could not arise again someday, hence it needs to be prohibited by law.)

Recommendation #127

Implement a policy directive for the department that administers the B.C. *FOIPP Act* system to educate and promote the access process to the general public. This might also be done by the B.C. information and privacy commissioner's office, which has a right to "inform the public about this Act" in Sec. 41(1)(c) of the *Act;* if so, government must provide adequate funds for this work, and it would be a dedicated, stand-alone part of the Commissioner's budget.

Recommendation #128

The legal system for B.C. *FOIPP Act* cases needs to be made more fair and equitable for all. The *Act* should include a bar on costs being awarded against a requestor if a third party appeals a decision to B.C. court and the requestor wishes to appear as a party in the court proceeding.

We should also seek wider grounds to bar court costs in B.C. *FOIPP Act* cases from being levied against a citizen applicant or lay litigant, considering the large imbalance of power and resources. If such costs are assessed against an applicant, he or she could be financially ruined, which is why some applicants dare not engage in FOI litigation. It is especially unwarranted if important legal or Constitutional FOI issues are in dispute.

Recommendation #129

The relevant statute should state that the usage of in-camera affidavits in B.C. *FOIPP Act* court cases should be curtailed to the bare minimum necessary and justifiable.

(Inequity arises when FOI applicants, who are sometimes lay litigants, voice all their arguments in the open, where these can be parsed and shredded by expert Crown lawyers, at unlimited public expense; by contrast, the agency too frequently presents its arguments and much evidence with in-camera affidavits, which the applicant cannot view or challenge, and hence must prepare reply submissions to these in the dark.)

Recommendation #130

One feature of American FOI litigation worth contemplating for our B.C. *FOIPP Act* is the "Vaughn Index." This is a document prepared by agencies that are opposing disclosure under the U.S. *FOIA*. It must describe each document or portion that has been withheld and provide a detailed justification of the agency's grounds for non-disclosure. This is intended to help "create balance between the parties," said one U.S. court.

Recommendation #131

Add a clause to the B.C. *FOIPP Act* to state that access to government information is to be regarded in the province as "a human right."

(There is a growing body of authoritative statements by international human rights bodies and courts to the effect that FOI is a fundamental human right. Such right of access is entrenched in human rights law through decisions of the Inter-American Court of Human Rights and the European Court of Human Rights, as well as the UN Human Rights Committee's 2011 *General Comment on Article 19 of the International Covenant on Civil and Political Rights*, to which Canada is a party.)

Recommendation #132

Consider an amended broader purpose clause for the B.C. *FOIPP Act*.

(The stated principles in the purpose clause are extremely important, for these can provide guidance to commissioners or judges in writing their rulings. Other factors could be added to the B.C. *FOIPP Act's* existing Sec. 2; in other nations, these include: accessing information necessary to investigate crimes against humanity, human rights violations, crimes of economic damage to the state, environmental harms, and reducing corruption and inefficiency. The purpose clauses in the FOI laws of Alberta and Nova Scotia have good features.)

Recommendation #133

That the B.C. Premier ask the Prime Minister and other premiers to begin discussions on amending the Canadian Constitution to include the public's right to obtain government information - which is a provision that 42 other nations have in their Constitutions or Bill of Rights, and one that was urged by B.C.'s first information and privacy commissioner David Flaherty.

Recommendation #134

Immediately work in full partnership with First Nations and their representative organizations to develop and enact mutually agreed-upon changes to policy and legislation regarding access to information, in full compliance with Article 19 of the UN Declaration of the Rights of Indigenous Peoples.

(Complete and timely access to federally controlled information is essential to First Nations' pursuit and resolution of their historical grievances against the Crown, including historical breaches of the Crown's legal obligations under statutes or treaties. Full access to

information is also necessary for Indigenous peoples to protect and advance their Title, Rights, and Treaty Rights, and in matters related to governance and cultural interests.)

Recommendation #135

Create a "British Columbia Freedom of Information Forum." This would candidly and respectfully discuss systemic FOI practices and problems, and pragmatically attempt to resolve these.

This would be a council of B.C. *FOIPP Act* applicants (such as journalists, lawyers, FOI advocates, academics) and senior government officials (such as DMIPs, deputy ministers, chief information officers, and members of the OIPC), which would meet semi-formally once a year to begin and then perhaps more often, by teleconferencing if need be. Its low key work would differ from a (sometimes politicized) Legislative law review each six years, and focus far more on FOI practice than law reform *per se*.

This Forum could be organized by a university department (e.g. sociology, political science), law school, journalism school, or association of FOI professionals, and it might be chaired by a neutral third party such as a professor, retired judge or ombudsperson. The United States has such an entity: the *FOIA Advisory Committee*, chaired by OGIS - https://www.archives.gov/ogis/foia-advisory-committee Its records would be public via FOI, of course, because it performs "a public function."

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Appendix A – The Dutch FOI protection for policy analysts

For the B.C. *FOIPP Act* Sec. 13, consider the Dutch legal protection for policy analysts. In the Canadian public service, civil servants "who even cast the slightest doubt on the wisdom of the government's policy are severely reprimanded," wrote one author. The Netherland's FOI law takes account of this concern, with a unique provision:

> 11. 1. Where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information shall be disclosed concerning personal opinions on policy contained therein.
>
> 11. 2. Information on personal opinions on policy may be disclosed, in the interests of effective, democratic governance, in a form which cannot be traced back to any individual. If those who expressed the opinions in question or who supported them agree, information may be disclosed in a form which may be traced back to individuals.
>
> 11. 3. Information concerning the personal opinions on policy contained in the recommendations of a civil service or mixed advisory committee may be disclosed if the administrative authority directly concerned informed the committee members of its intention to do so before they commenced their activities.

The initial Dutch exception is phrased in extremely broad terms, and is also mandatory. But its clawbacks (or exceptions to the exception) are indeed interesting as an option, hence worth considering, perhaps with a caveat about the breadth of the initial exception in this area. In the Netherlands under these terms, much useful policy information could still be released, which is better than no release at all. If included in the B.C. *FOIPP Act*, this could relieve some fears of provincial government analysts distressed at being identified, with the feared effect on their careers.

Appendix B – Several proactive publication rules of other nations

Pro-active publication and routine release are amongst the FOI issues on which the world has left Canada farthest behind.

Most other nations from Albania to Zimbabwe prescribe such information release in sections of their FOI statutes, and many of these are exhaustive, sometimes running to over 400 words each; the longest is that of Kyrgyzstan with 1,800 words. As well, proactive publication can also be mandated in statutes other than the FOI law. Below are just a few.

• All statutes and internal regulations must be published (Columbia and other nations)

• Courts and other bodies are required to publish the full texts of decisions, and the Congress is required to publish weekly on its web site all texts of "projects of laws" (Ecuador)

• Public bodies must publish information on a government activity's influence on the environment (Armenia)

• In Serbia, the National Council is required to publish the data of sessions, minutes, copies of acts and information on the attendance and voting records of MPs.

• The state must publish contracts including a list of those who have failed to fulfill previous contracts, budgets, results of audits, procurements, credits, and travel allowances of officials (Ecuador); and information relating to public tenders (Croatia)

• In Estonia, national and local governments must post online: statistics on crime and economics; information relating to health or safety; budgets and draft budgets; information on the state of the environment; and draft acts, regulations and plans including explanatory memorandum. They are also required to ensure that the information is not "outdated, inaccurate or misleading" (The Estonian FOI law cites 32 types of public records to be published in Section 28)

• In Brazil, government must publish on the internet a list of the information which has been declassified in the last 12 months, and a list of information classified in each level of secrecy

• In Palestine's draft FOI bill, Art. 8 requires public and private "industrial institutions" to publish six-monthly reports providing information on the location, nature and associated hazards of toxic materials used by them, the volume of materials released into the environment as a result of manufacturing processes and waste disposal methods and mechanisms they use.

Appendix C - FOI Penalties: the wide scope of Mexico's law

[The freedom of information law of Mexico - RTI-ranked #2 in the world by the CLD-AIE - is an outstanding model to follow, in many ways. Although it is not clear from below what the exact penalties would be, the scope of the subjects is the widest I have seen in an FOI statute so far]

Article 206. The Federal Act and those of the States will set forth as penalty causes for breach of its obligations under the terms of this Act, at least the following:

I. The lack of response to requests for information within the time specified in the applicable regulations;

II. Acting with negligence, willful misconduct or bad faith in the substantiation of requests regarding access to information or by not disseminating information concerning the transparency obligations under this Act;

III. Not meeting the deadlines under this Act;

IV. Using, removing, disclosing, hiding, altering, mutilating, destroying or rendering useless, totally or partially, without legitimate cause, according to a relevant authority, the information in the custody of the regulated entities and their Public Servants or to which they have access or knowledge by reason of their employment, office or commission;

V. Delivering incomprehensible, incomplete information, in an inaccessible format or a mode of shipment or delivery different from the one requested by the user in his request for access to information, responding without proper grounds as established by this Act;

VI. Not updating the information corresponding to the transparency obligations within the terms set forth in this Act;

VII. Intentionally or negligently declaring the lack of information when the regulated entity should generate it, derived from the exercise of its powers, duties or functions;

VIII. Declaring the lack of information when it wholly or partly exists in its archives;

IX. Not documenting with intent or negligence, the exercise of its powers, duties, functions or acts of authority in accordance with applicable regulations;

X. Performing acts to intimidate those seeking information or inhibit the exercise of the right;

XI. Intentionally denying information not classified as secret or confidential;

XII. Classifying as confidential, intentionally or negligently, the information without it meeting the characteristics indicated in this Act. The penalty shall apply when there is a prior ruling by the Guarantor Agency, which is final;

XIII. Not declassifying information as secret when the reasons that gave rise thereto no longer exist or have expired, when the Guarantor Agency determines that there is a cause of public concern that persists or no extension is requested by the Transparency Committee; XIV. Not meeting the requirements laid down in this Act, issued by the Guarantor Agencies, or

XV. Not complying with the resolutions issued by the Guarantor Agencies in the exercise of their functions. The Federal Act and those of the States shall establish the criteria to qualify the penalties, according to the seriousness of the offense and, where appropriate, the economic conditions of the offender and recidivism. Likewise, they shall include the type of penalties, procedures and terms for implementation. The penalties of an economic character may not be paid with public funds.

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A Note on the Author

Stanley L. Tromp is a graduate of the University of British Columbia Political Science department (B.A., 1997), where he completed the course in international law at the UBC Law Faculty, and won the 1996 essay prize on the Responsible Use of Freedom from St. Mark's College at UBC. He graduated from the Langara College journalism program (Vancouver, 1993), and was awarded the best Langara journalism student prize from the B.C. Yukon Community Newspaper Association (BCYNA). He served in the Canadian Forces reserves (39th Brigade) from 2002 to 2008.

He has been nominated for a Webster Award (2015), a Canadian Association of Journalists award (1997), a B.C. Newspaper Foundation award (1999), and won a Canadian Community Newspaper Association prize in 2013.

While a reporter for the UBC student newspaper the *Ubyssey,* his freedom of information act request for the UBC-Coca Cola marketing contract in 1995 prompted a five-year legal dispute, a successful B.C. Supreme Court appeal, and an influential ruling for disclosure by the B.C. Information and Privacy Commissioner. His appeals have also been the subject of 22 other rulings by the B.C. Commissioner.

For news articles, he has made hundreds of FOI requests, including to foreign countries and American states, and has been called "one of the more diligent and creative practitioners of access-to-information reporting" by a B.C. legislative columnist. His news stories have been published in the *Globe and Mail*, the *Vancouver Sun*, the *Georgia Straight*, *Vancouver Magazine*, the *Vancouver Courier*, *The Province* (Vancouver), the *Financial Post*, *The Canadian Press, The Courthouse News*, and many other publications; plus editorials on FOI topics.

He has also produced many non-FOI stories – notably one in 2008 from research in the British Archives. This revealed that in 1948, the British governor of Newfoundland in secret memos had urged the British naval chief to send a warship with 200 armed sailors to stand by near St. John's out of sight, to quell any potential riots by people opposed to the Confederation vote result. (Link)

He has spoken often to House of Commons and Senate committees in Ottawa considering *ATI Act* amendments, and has made four presentations to British Columbia legislative reviews of the provincial *FOIPP Act*, plus the Alberta FOIPP review. He was one of the founders of the group B.C. Journalists for Freedom of Information (BCJC) in 1998.

In 2007-08, as an aid to FOI scholars and advocates, he spent a year compiling the first *World FOI Chart*, an Excel spreadsheet comparing all the world's FOI laws, with NGO commentaries, posted at his website. The Chart was the foundation of his book *Fallen Behind: Canada's Access to Information Act in the World Context*, a book one lawyer called "by far the most comprehensive comparative analysis to date of Canadian and international access to information laws." It was fully revised and updated in 2020.

He spent the two years of the COVID-19 shutdown in research, to compile a database of all 6,500 news articles produced through the federal *Access to Information Act* since its passage in 1983, plus 2,000 news stories resulting from the British Columbia FOI law, and writing 100 word summaries of each. The result was published by its sponsor BC FIPA in August 2021. This *ATIA News Story Index* and *B.C. FOI News Index* were created to demonstrate the value of FOI laws to public, and thus help built support for needed law reforms, plus providing a morale boost and story ideas for reporters and journalism students.

That month also saw the posting of his *Time for Change: A List of 206 Recommendations for Access to Information Act Reform*, the most comprehensive catalogue of needed amendments to the *ATI Act,* produced for the Centre for Free Expression at Ryerson University. His FOI website – www.canadafoi.ca – has been consulted by the general public, journalists, university professors, courthouse and parliamentary librarians, politicians, senior bureaucrats and Crown lawyers from many nations.