The Hallmarks of Fairness

Improving Alberta's Freedom of Information and Protection of Privacy Act

A submission to
the Alberta Legislative Standing Committee on
Health review of the Freedom of Information
and Protection of Privacy Act

June 2010

BC Freedom of Information and Privacy Association

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The opinions expressed here are those of the author and do not necessarily reflect the views of the Alberta Law Foundation or FIPA

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Alberta LAW FOUNDATION

BC Freedom of Information and Privacy Association

103 - 1093 West Broadway, Vancouver, BC V6H 1E2
Ph: 604-739-9788 • Fax: 604-739-9148
Email: fipa@vcn.bc.ca • Web: www.fipa.bc.ca

The Hallmarks of Fairness

Improving Alberta's *Freedom of Information and Protection Of Privacy Act*

With recommendations for amendments

A submission to the
Alberta Legislative Standing Committee on Health review of the
Freedom of Information and Protection of Privacy Act

By Stanley Tromp

Author of *Fallen Behind: Canada's Access to Information Act in the World Context*, and the *World FOI Chart*

A report presented by the BC Freedom of Information and Privacy Association (FIPA)

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June 2010

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Executive Summary

I am gratified to work with the B.C. Freedom of Information and Privacy Association to comment on needed reforms to the Alberta *Freedom of Information and Protection of Privacy Act,* for FIPA has been actively supporting the access and privacy movement in Alberta since 1993.

The Alberta law was modeled upon the British Columbia *FOIP Act*, but several important differences are present, which I will point out. My purpose is to fulfill the terms noted in this Committee's advertisement for public input, that it sought suggestions to "modernize the *Act*" and to "harmonize the *Act* with other access and privacy legislation." My key recommendations include:

- Amend the Alberta *Act* to clarify that records created by or in the custody of a service-provider under contract to a public body are under the control of the public body on whose behalf the contractor provides services. As well, prescribe that all entities that perform public functions be covered by the *Act*.

- Delete Sec. 6 (4), and include ministers' briefing books under the *Act*'s scope again.

- Amend the *Act* to mandate that when a department's response falls into deemed refusal, it loses the right to collect fees (including any search, preparation, and photocopying charges).

- Change Sec. 22 from a mandatory exemption to a discretionary one, whereby deliberative records may be released if cabinet consents.

- Eliminate the $25 application free to file a *FOIP Act* request.

- The Alberta government should not proceed with any data sharing initiatives until a meaningful public consultation process has occurred, and the outcome of that process is an enforceable code of practice for data sharing programs.

- A positive duty to oblige officials to create and maintain records necessary to document their actions and decisions should be incorporated into the *FOIP Act* or other legislation.

- A harms test should be added to the *FOIP Act* exemptions for cabinet records, official advice, and legal advice.

- Amend Sec. 13(2) of the *Act* to require that public bodies provide electronic copies of records to applicants, where the records can reasonably be reproduced in electronic form.

In regards to information access and privacy protection, the government of Alberta made a strong start with the passage of its statute in 1994, but more can be done. By raising the Alberta *FOIP Act* up to the best world standards, legislators can also greatly enhance their democracy, and create a lasting legacy for their constituents.

Introduction

"The *Act* has had a significant impact on Albertans. It safeguards their privacy, at least with respect to government. It has made the workings of government more visible to the people. It has made the government better, because you make better decisions when you are more accountable. I would hazard a guess that it is changing the way government deals with people generally because openness and accountability are the hallmarks of fairness."

> *- Robert Clark, first Information and Privacy Commissioner of Alberta, submission to legislative FOIP Act review, 1998*

The passage of a freedom of information and protection of privacy law marks the start of a new relationship between citizens and their government, and its great importance is often not fully understood.

Although Canada has not yet done so, at least 40 other nations today explicitly grant the public a right to obtain government information in their constitutions or bill of rights. Since the mid-1990s there has been a profound shift in the way in which freedom of information is understood. At first it was viewed primarily as a governance reform, but now, in stark contrast, FOI is globally seen as a fundamental human right.

The public wealth of taxpayer-funded government information must be freely shared so that citizens are informed on public matters, are able to engage in public debate, and able to assess the performance of their governments. The alternative – a populace that is ill-informed, or even worse, misinformed about its government - poses a great danger to our democracy. The people will be unable to participate effectively as citizens, unable to hold their government to account, and may stop trusting elected officials. The right to protect one's private life from government and corporate intrusions is no less important.

Alberta in the Canadian and World Context

I was pleased to read in this Committee's advertisement for public input that it sought suggestions to "modernize the *Act*" and to "harmonize the *Act* with other access and privacy legislation," for that is my primary field of study.

Most of the discussions regarding *FOIP Act* reform are by now familiar. So I wish to consider another perspective on the issue, one not explored yet: we could continuously reframe and re-conceptualize the Alberta *Act* in the light of rapidly-changing international and historical contexts.

In the past decade our knowledge and experience of this topic have multiplied, and we can now draw more accurate conclusions. To this end, I created a *World FOI Chart* in 2008 to aid FOI scholars and posted it to my website www3.telus.net/index100/foi

This chart cross-references by topic key documents on freedom of information law, i.e., texts of 73 national FOI laws, 29 draft FOI bills, 12 Canadian provincial and territorial

FOI laws, and the commentaries of 14 global and 17 Canadian political organizations. (It is also the basis of my report *Fallen Behind: Canada's Access to Information Act in the World Context*, and for a global index of FOI rulings, both posted there.)

This report compares sections of the Albertan FOI and privacy law with those of other provinces and nations; I could have written far more extensively on this matter (and may do so in future), but if so, the resulting report would have been too lengthy for this Committee. Fortunately, for readers wanting to pursue the topic further, on my Excel *Chart*, upon scrolling down to Row 16, one can compare Alberta's *FOIPP Act,* section by section, to all the other laws.

The whole ground has shifted, for a decade ago we did not have clear global FOIP standards that each FOIP law could be measured besides, but now we do. Even in a world growing ever more integrated and interdependent, I would still never suggest that the domestic FOIP laws of every province should be harmonized. Yet Alberta could raise its own *FOIP Act* up to the very best standards of Commonwealth nations, and then look beyond the Commonwealth to consider the rest of the world.

Exemplary sections of the Alberta *FOIP Act* would be helpful for adoption in other jurisdictions' FOIP laws, and why not visa versa? Indeed, it is a pleasure to note that the Alberta *FOIP Act* has some rare or unique features that could serve as a model to other provinces, and it is surely far advanced over the antiquated 1982 federal *Access to Information Act* (as detailed in my book *Fallen Behind).*

We need not spurn helpful concepts for Alberta *FOIP Act* amendments solely because they originated in non-Commonwealth nations. I believe the adjustment difficulties, and the "harms" that would supposedly result from their broader provisions, are often overestimated. Moreover, features from others' FOIP statutes need not be transplanted verbatim to Alberta but many could, with the exercise of political imagination, be adopted and modified to suit the provincial context.

Even the United Kingdom, the Canadian parliamentary model, has well outpaced us on many critical points (although frankly it still lags behind us on a few others). Some Canadian officials, to deter FOI reform, still invoke the great tradition of Westminster-style confidentiality. Yet the UK *Freedom of Information Act* has several positive features absent from the Alberta *FOIP Act*, such a harms test for policy advice, a 20 day response deadline, and a 30 year time limit for legal advice records.

On FOIP reforms, Canadian parliamentarians need not leap into the future but merely step into the present. The best examples for Canada to generally follow for inspiration are, I believe, the access laws of India and South Africa - in most but not all their respects.

There is a familiar objection: critics call it absurdly naïve to presume such superior FOIP provisions will be enforced or affect any reality on the ground. The statutes might be just "paper tigers," they say, being laws completely ignored or ineffective in actual practice.

That is, in fact, often sadly true. Should these facts discourage us? Yes, and no. Although fully aware of such objections, I would reply that statutes are comparatively more important and enduring than actual governmental practices of the day. There are

many good FOIP laws that do not result in good practice, but one very rarely sees good FOIP practice without a good FOIP law first in place as a foundation for it.

Although Alberta was a latecomer to the passage of a provincial *FOIP Act* (followed only by Prince Edward Island), it compensated for the tardiness by learning from other provinces' experiences, and then by passing one of the best statutes.

To begin, in April 1993, a Discussion Guide on a *FOIP Act* bill was prepared by the Department of Justice. Fifteen regional public forums were held to receive input from Albertans across the province. Two public comments were noteworthy:

> "…..it is essential for citizens to be informed of the processes of government in order to effectively exercise their options as citizens in a free and democratic country." - *Sherie Angevine, Private Citizen*
>
> "…..the burden must be upon the Government to establish appropriate grounds upon which to refuse disclosure. Those grounds should be limited and narrow." - *Norman Conrad, Riel Policy Institute*

The all party panel of MLAs, chaired by the Hon. Ty Lund, concluded: "If this report is implemented in the legislation, it will be the strongest Bill in Canada and uniquely Albertan."

Then the *Freedom of Information and Protection of Privacy Act (FOIP Act)* was given Royal Assent in 1994 and came into force on October 1, 1995 for Provincial Government Ministries. It was extended to cover school jurisdictions and health care bodies in fall 1998. It was then extended to cover post-secondary educational institutions and local government bodies in 1999. FOIP amendment Acts were passed in 1999, 2003 and 2006.

(The Alberta *Health Information Act* and regulations came into force on April 25, 2001. Health care bodies that are subject to the *FOIP Act* continue to follow the *FOIP Act* for non-health information, but now follow the *Health Information Act* for health information. As well, Alberta's *Personal Information Protection Act,* PIPA, for the private sector came into force in January 2004.)

FIPA in Alberta

I realize that submissions to an Alberta *FOIP Act* review appearing from outside the province are exceedingly rare, and some Albertans may wonder why we are advancing this report. In fact, BC FIPA has a long record of concern for Alberta that continues today, and the B.C. *FOIP Act* was the main inspiration for Alberta statute.

The BC Freedom of Information and Privacy Association is a non-partisan, non-profit society that was founded in 1991 to promote and defend access and privacy rights in Canada. (www.fipa.bc.ca) Our goal is to empower citizens by increasing their access to information and their control over their own personal information.

We serve a wide variety of individuals and organizations through programs of public education, public assistance, research, and law reform. BC FIPA is a centre for legal and policy research, and we are frequently consulted by governments. We have produced over 40 studies and reports on FOI, privacy and other information issues.

In the early 1990s, as the Alberta law was being proposed, BC FIPA executive director Darrell Evans was invited to the province by the Alberta Civil Liberties Association to speak at public events and panels, proposing needed FOIP measures and educating the public, and he has returned since then to speak in fall 2009.[1]

I have consulted the widest range of sources I could find, the most important being the reports of the 1993 discussion group, the 1999 and 2002 legislative reviews, and the Commissioner's annual reports.[2]

I will focus on the statute's text, and although the B.C. *FOIP Act* was virtually replicated in Alberta, I am careful not to presume that errant FOIP practices elsewhere in Canada also necessarily appear in Alberta. In fact, there are many grievous problems in FOIP law and practice that plague B.C. and Ottawa – which I detail in my other reports - that Albertans can be grateful do not occur in their province.

My objective here is to highlight areas of particular concern with the Alberta *Act* and its interpretation, based on FIPA's experience in B.C. and the experiences of people who contact the office for assistance. I will also touch on administrative issues which have a large impact on how well management of FOI and privacy functions.

There are two types of matters I deal with, (1) urgent problems, ones that are unique to Alberta, and (2) less urgent general topics, in the sense of reaching for an ideal law, recommendations that would be helpful at any time or place. As you may know, the B.C. legislature also undertook a *FOIP Act* review this year, and reported in May. I will consider the applicability of its advice to Alberta throughout this report; I hope its good recommendations will be adopted here, and its several very negative ones spurned.

The value of a strong *FOIP Act* is better demonstrated than just asserted, so for your interest I have compiled summaries of news stories on issues as diverse as health, safety, government waste, public security, and environmental risks – stories made possible by the Alberta *FOIP Act,* posted at www3.telus.net/index100/albertafoistories

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[1] It may be also noteworthy that FIPA's first president David Loukidelis wrote the report *Information Rights for British Columbia* (1991) with 73 recommendations, which was highly influential in the enactment of B.C.'s *FOIP Act*, and in turn, Alberta's *FOIP Act*. (Mr. Loukidelis then served as B.C.'s Information and Privacy Commissioner from 1999 until May 2010, when he left to become B.C.'s deputy Attorney General.)

[2] Sources for all FOIP statutes and commentaries cited here, with their internet links can be found at pages 357–381 of my book *Fallen Behind*, at http://www3.telus.net/index100/foi

Moving Forward

It was well observed by a prominent Albertan, the current prime minister, that "Information is the lifeblood of a democracy. Without adequate access to key information about government policies and programs, citizens and parliamentarians cannot make informed decisions, and incompetent or corrupt governance can be hidden under a cloak of secrecy." (Cited in the *Globe and Mail*, Nov. 2, 2007)

Alberta Information and Privacy Commissioner Frank Work echoed the same points in a 2005 speech: "The right of access to information is precious. No government should ever oppose it or impede it on the basis that it is too expensive, too time consuming or only the 'trouble-makers' use it. Accountable governments are better governments."

Finally it is also noteworthy that on his very first day in office - January 21, 2009 - U.S. President Barack Obama issued an Executive Order to all government agencies to reverse the default secrecy position of his predecessor. A similar public order from the premier to the Alberta public service would be most welcome. As the President wrote:

> 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.

In regards to information access and privacy protection, the government of Alberta made a strong start with the passage of its statute in 1994. One can still do more. By raising the Alberta *FOIP Act* up to the best world standards, legislators can also greatly enhance their democracy, and create a lasting legacy for their constituents.

- Stanley Tromp, Vancouver, B.C., June 2010

Alberta *Freedom of Information and Protection of Privacy Act*

(Note: The *Act*'s Sections 1, 3 and 4 are all interrelated and concern the scope of coverage, and so will all be dealt with together in one chapter, after Section 2; thereafter, I will return to discussing the sections in their statutory order.)

Section 2 - Purposes of this Act

A purpose section in a freedom of information law is very important; more than just political rhetoric, the stated principles can provide guidance to commissioners or judges in making their rulings. In the global context, the purpose section in Alberta's *FOIP Act* is comparatively limited, and confined mainly to process.

Within Canada, the best purpose section is found within Nova Scotia's FOIP statute (1977), the first to be passed in this country:

> 2. The purpose of this Act is [….] (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to (i) facilitate informed public participation in policy formulation, (ii) ensure fairness in government decision-making, (iii) permit the airing and reconciliation of divergent views.

Other nations go much further than Alberta - there are very strong purpose statements in the FOI laws of New Zealand, Finland, Japan. The submission of Paul Fraser, B.C.'s acting information and privacy commissioner, to the 2010 B.C. legislative FOIP review committee, made another valid point:

"The concept that an infringement of the right to privacy must be reasonable and justifiable is found in s. 2 of the B.C. *Personal Information Protection Act* (PIPA) which sets out the purposes of that *Act* as follows:

> The purpose of this *Act* is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of individuals to protect their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

"However, no such provision exists in *FIPPA*. In our submissions to the 2004 Special Committee we recommended *FIPPA* be amended to require public bodies to consider the wider privacy impacts created by a proposal, and if those impacts could not be minimized to an acceptable level, the proposal should be abandoned. This recommendation followed a 2001 proposal by Senator Sheila Finestone, P.C. to create a legislative *Privacy Rights Charter*."[3]

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[3] *Privacy Rights Charter (Bill S-21)*, Senate of Canada, 1st Session, 37th Parliament, http://www.parl.gc.ca/37/1/parlbus/chambus/senat

Recommendation #1

Amend Sec. 2 to state that the Alberta *FOIP Act*'s purposes include increasing public participation in policy making, scrutinizing government operations, and reducing wrongdoing and inefficiency; and add phrases modeled upon the purpose clauses in the FOI law of Nova Scotia.

Recommendation #2

Amend Sec. 2 to require that for an infringement of the right to privacy to be lawful, it must be "proportional to the public interest that is achieved."

Scope of Coverage – General Comments

Over the past two decades, the trends of government restructuring invoke serious doubts as to the viability of the FOI and privacy system. One problem is that there is a growing trend in Canada towards contracting out public functions to "private" entities that are not covered by FOIP laws – some are in effect shell companies wholly owned by government, some not. I emphasize that I do not oppose privatization, *per se*, only the loss of public transparency and privacy protection that often accompanies it, but should not.

These entities are often called "quasi-governmental" or "quasi-public" bodies. They include multi-governmental partnerships, government-industry consortia, foundations, trade associations, non-profit corporations and advisory groups.

This situation was of concern even a decade ago to the 1999 Alberta FOIP legislative review committee, which noted that guidelines describing the implications of the *FOIP Act* to contract managers have been published and such records are covered by the provisions of the *Act* relating to custody and control. "However, the Committee unanimously agreed that this should be made more explicit," and it advised:

> 12. That contracts between a public body and another body to perform some statutory functions, or functions under an enactment, should include access and privacy requirements related to the *Act,* to the extent of the statutory functions being performed.

Any reduction in the Act's coverage of institutions that are funded by taxpayers, carry out public policy as determined by Legislatures, or deliver public services on behalf of government, is a reduction of transparency, accountability and democracy. This complex problem, what FIPA calls "information laundering," also costs taxpayers money by allowing more opportunity for sloppiness or even malfeasance.

Essentially, my position is that any public body, any corporate subsidiary of a public body, and any organization that is controlled by a public body and/or receives its funding primarily from public sources and for delivering a public service should be automatically covered by the Alberta *FOIP Act* when they are created. Private entities that are not

owned by government but still perform public functions need not be designated as "public bodies" themselves, *per se*, but their records of their work on those functions need to be accessible by the FOIP process.[4]

Some Canadian governments have granted some of their wholly-owned companies exclusions from FOIP laws, claiming that they required "special protection" from their commercial competitors. Such claims are illogical and spurious because the Alberta *FOIP Act* already contains generous protections (such as Sec. 16 and 25) to prevent such harmful information releases.

The basic statutory solution in many nations - and which the Alberta *FOIP Act* would ideally follow - is not for the statute only to list named entities in regulations or schedules to the *Act*, but rather to include precise and broader criteria of what *kind* of entities are covered.

Both options - definitions and listings - might be implemented; and it could then be noted in a reformed Alberta *FOIP Act* that covered bodies are those "including but not limited to" those listed in schedules. Hence, when an entity claims not to be covered by the *Act*, an appellate body such as the information commission or a court could study the criteria and rule whether it should indeed apply or not in each case.

The problem is spread over Sections 1 to 4, but Section 2 is the best place to begin the discussion:

> 2. The purposes of this Act are (a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act, […]

One case in B.C. well illustrates the point: Three "private" companies were created by the University of British Columbia, and through FOI requests, I sought the annual report and meeting minutes for UBC Properties Investment Ltd., UBC Research Enterprises Inc. and UBC Investment Management Trust. UBC refused, I appealed, and in April 2009, the B.C. Information and Privacy Commissioner's adjudicator handed down Order F09-06 on my FOI request for records of those entities.[5]

He ruled that, although the entities themselves might not necessarily be defined as "public bodies" in the *Act*, their records should be accessible by FOI requests anyways, because the B.C. law states that "This Act applies to all records in the custody or under

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[4] The 1999 Alberta legislative review advised in Recommendation 11 that that the criteria for inclusion should be expanded to include bodies whose primary purpose is to perform functions under an enactment. The 2002 Alberta legislative discussion paper made a distinction between entity inclusion by a "*structural* approach" (i.e., based on government control by funding or appointments), or a "*functional* approach" (i.e., where the entity assumes regulatory functions), and it asked the public what the FOIP criteria should be.

[5] http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/156693/2009/orderf09_06.pdf (now under reconsideration by the BC OIPC)

the control of a public body." As an indisputably public body, UBC has "control" over those records of its entities.

He pointed out that the three organizations were incorporated by UBC, 100 percent owned by UBC, must report to UBC administration and/or the Board of Governors, and most if not all of their directors are UBC employees or BoG members; all that constitutes "control." (Because the adjudicator had settled the issue of control, he remained silent on the question of "custody.")

A recent B.C. Supreme Court decision on FOI and Simon Fraser University's companies – a ruling now under appeal - has made this problem into an emergency. If this harmful ruling stands, it will allow every educational body in the province to hide records by creating a shell company. This would it will be a disaster for transparency in B.C., and, potentially for Alberta as well - hence the urgency to improve the *FOIP Act* to avert this.

Sec. 1 - Definitions

The Alberta *FOIP Act* coverage is quite wide, ranging from the cabinet office to the *Head-Smashed-In Buffalo Jump Interpretive Centre Advisory Committee.* The Minister of Service Alberta is responsible for maintaining a directory of public bodies, of which there are currently over 1,200, and which is available on the Government of Alberta's *FOIP Act* website.[6] In the *Act*'s Definitions, Section 1, the most important subsection in regards to FOIP coverage is (p):

(p) "public body" means

(i) a department, branch or office of the Government of Alberta,

(ii) an agency, board, commission, corporation, office or other body designated as a public body in the regulations,

(iii) the Executive Council Office,

(iv) the office of a member of the Executive Council,

(v) the Legislative Assembly Office,

(vi) the office of the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner or the Information and Privacy Commissioner, or

(vii) a local public body,

but does not include

[6] http://foip.alberta.ca/pbdirectory/index.cfm

(viii) the office of the Speaker of the Legislative Assembly and the office of a Member of the Legislative Assembly, or

(ix) the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta;

These four terms are also relevant to the question of coverage - 1(d) "educational body"; 1(g) "health care body"; 1(i) "local government body"; and 1(j) "local public body."

In Sec. 1 (p)(ii), we see the public body must be designated in the Regulations. The relevant Regulation, noted below, sets the criteria for coverage:

> **ALBERTA REGULATION 186/2008** (Consolidated up to 146/2009) [This Regulation expires on June 30, 2015.][7]
>
> Criteria to be used for designating public bodies
>
> 2 The Lieutenant Governor in Council may designate an agency, board, commission, corporation, office or other body as a public body and add the name of that body to the list in Schedule 1
>
> (a) where the Government of Alberta
>
> (i) appoints a majority of the members of that body or of the governing board of that body,
>
> (ii) provides the majority of that body's continuing funding, or
>
> (iii) holds a controlling interest in the share capital of that body, or
>
> (b) where that body performs an activity or duty that is required by an enactment and the Minister responsible for the enactment recommends that the Lieutenant Governor in Council make the designation.

I believe these criteria (i) to (iii) have been adequate, but (1) their application should be mandatory as the public body is created, not applied later at a minister's discretion and leisure, and (2) this criteria is so important to the public interest that it should be placed in the statute, not just a regulation. (The old claim of various "harms" resulting from such entity coverage can be rejected, again, because the *Act* already contains generous exemptions to prevent such harmful releases.)

[7] There is further explanation in the Regulations: "Interpretation. 1(2) For the purposes of section 1(p)(ii) of the Act, an agency, board, commission, corporation, office or other body listed in Schedule 1 is considered to be a public body." Then: "Schedule 1. All boards, committees and councils established under section 7 of the *Government Organization Act*, whether or not they are included in the list of agencies, boards, commissions, corporations, offices or other bodies designated below as public bodies. Any subsidiary of a public body designated below."

The 1999 Alberta review committee endorsed at least the possibility of placing the criteria in the statute: "Recommendation 9. That the criteria for the inclusion of agencies, boards and commissions under the *Act* should be established in a new section of the *FOIP Act* or in the FOIP Regulation, rather than in policy as is presently being done." When the *Act* was amended in 2001, the criteria were moved from policy into regulation;[8] on this road to reducing discretion on coverage, it now seems logical to move these entities as the final step into the statute.

The government stated in its 2002 submission: "The intention of adding the criteria to the FOIP Regulation is to promote transparency, not to change the way in which these criteria are currently being applied." If this governmental intent is still present, it could be demonstrated by adding statutory criteria - the best transparency promotion of all.

One of the benefits is that is there are far more democratic checks and balances in the process of amending a statute (e.g., one designed to water down FOIP coverage criteria) than in the process of merely changing a regulation: legislative debates and votes, contrary amendments proposed, media coverage, and so forth.

I suggest that in Regulation 2(a), the wording should extend beyond "the Government of Alberta," to add "educational body, health care body, local government body, and local public body" – for their subsidiaries should not be excluded from coverage either.

Alberta should be warned of a problem noted in B.C., where the Liberal government, urging schools to be more "entrepreneurial," made changes to the *School Act* in 2002 to enable cash-strapped school boards to create business entities that could generate extra funds for the districts. Then after a public outcry that a wholly-owned company (which was not covered by the B.C. *FOIP Act*) of a school district had lost money in failed overseas investments, the B.C government legislated in 2007 that all companies controlled by the school districts must be subject to the FOIP law also.

In his submission to the 2010 B.C. legislative review, the B.C. Commissioner noted a loophole, whereby "public body" and "local government body" as defined in the B.C. *FOIP Act* had coverage of their companies mandated, but "educational body" did not, a gap that helped Simon Fraser University to claim its companies were excluded from the *Act*'s coverage. He advised in his Recommendation #11: "(a) Amend *FIPPA* so that paragraph (n) of the definition of local government body is moved into the definition of public body in Schedule 1."

In response, the B.C. legislative committee advised: "Recommendation 4. 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." I agree.

[8] It also raised the possible complicating factor of the passage of the *PIPA* law: "If the scope of the *FOIP Act* is expanded, it is possible that some organizations might find themselves captured by both public sector and private sector privacy legislation."

Recommendation #3

a] Place the criteria for designating a public body as noted in Regulation 2 directly into the FOIP statute instead.

b] In Regulation 2(a), the wording should extend beyond "the Government of Alberta," to add "educational body, health care body, local government body, and local public body" – for their subsidiaries should not be excluded from coverage either.

c] Amend the wording of Regulation 2, "The Lieutenant Governor in Council may designate. . ." to read "must designate."

d] Delete from Regulation 2(b) the phrase: "and the Minister responsible for the enactment recommends that the Lieutenant Governor in Council make the designation."

Recommendation #4

Amend the Act to conform to Recommendation #77 of the 1999 Alberta legislative FOIP review: That the *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.

Delegated Administrative Organizations (DAO)

As the 2002 Alberta legislative FOIP committee described it: "Delegated administrative organizations (DAOs) are independent organizations to which the government has delegated the delivery of specified services in accordance with government policy. DAOs are not controlled by the government and do not normally have an active role in developing governmental policy." Their coverage is not mandated under the Alberta *FOIP Act.*

The 2002 committee appeared satisfied that "when a DAO handles a statutory function" on behalf of a public body, the head would maintain responsibility and control. Records under the "custody or control" of a public body can be accessible under the *Act* under Sec. 2, and so this would presumably include some records held by several DAOs. "When the Government body has control as described above, then the records are subject to the *Act."* But this situation is far too erratic and ambiguous, likely leading to arguments over the meaning of "custody or control," and more.

The 1999 committee said that certain DAOs had been created specifically for the purpose of performing a statutory function, while in other cases the performance of a statutory function under a contract was a relatively minor part of the work of an existing organization. "In such cases, the entire operations of an organization should not be brought under the *Act*. It was felt that where statutory functions were the *primary*

purpose of the organization, the organization should be covered." The Committee agreed and advised:

> Recommendation 11. That the criteria for inclusion of agencies, boards and commissions, etc. noted in section 1(1)(p)(ii) of the *Act* should be expanded to include bodies whose primary purpose is to perform statutory functions or functions under an enactment."

By this measure, those entities whose *secondary* purpose is to perform a statutory function - no matter how crucial to the public interest that function is - would elude coverage. This is unsupportable. I would counter that such an entity can still be covered by the *FOIP Act*, but only to the extent of its public duties, not its private ones.

On DAOs, the 2002 Committee advised: "Recommendation 2. That the FOIP legislation be amended to permit, but not require, the designation of delegated administrative organizations (DAOs) as public bodies, and that the criteria for the designation of DAOs as public bodies be developed in policy."

This is entirely inadequate. The *FOIP Act* coverage of DAO records – only insofar as their public duties are concerned - should be mandated, and done so in the *Act*, not regulations. (In the regulation, cabinet may, not must, add a public body, in 2.(b), "where that body performs an activity or duty that is required by an enactment.")

Recommendation #5

Amend the *FOIP Act* (not regulations) to explicitly mandate the coverage of delegated administrative organizations (DAO), only insofar as records of their public duties are concerned.

The 1999 B.C. legislative FOIP review committee advised in Recommendation #17 that "any Officers of the Legislature created in future be automatically added to the law's Definition section and relevant schedule." The same could apply for Alberta.

Recommendation #6

Amend the *Act* so that any Officers of the Legislature created in future be automatically added to the law's Definition section and relevant schedule.

The 1999 Alberta legislative FOIP review committee advised removing two electrical utilities controlled by a local authority - EPCOR and ENMAX – from the scope of the Act, because they had complained of potential competitive harms.

"This issue was most frequently identified concerning deregulation of the electric power industry. Consideration was given to allowing the utilities to be included but to make exceptions for certain business records, however, the Committee thought this would be very complex." The Committee advised:

"Recommendation 8**.** That an amendment should be made to section 1(1)(i)(xvi) of the *Act* to provide for the local authority utility companies, EPCOR and ENMAX specifically, to be excluded from the *FOIP Act."* The *Act* was then amended to accomplish this. As I noted earlier, the Alberta *FOIP Act* already contains generous protections (such as Sec. 16 and 25) to prevent such harmful information releases, so such exclusions are needless.

Recommendation #7

Amend the *Act* Sec. 1(i)(xii) to remove the exclusion of "EPCOR Utilities Inc. or ENMAX Corporation or any of their respective subsidiaries" from the *Act*'s scope, and so to include these in the scope again

British Columbia has the only FOIP law in Canada that covers self-governing professions,[9] and this question has been much discussed in Alberta.

The 1993 Alberta legislative review actually went further, advising: "Self-governing professions, not-for-profit groups and charities receiving public monies should be considered for inclusion during the proposed 3 year review of the legislation." In 1998, Alberta's Commissioner Robert Clark advised government to "consider" adding the professions.

The 1999 legislative review noted it was generally agreed that professions that were subject to legislation ought to be accountable in some way to the public on matters of access and privacy, but parties differed on how this should best be done. Both the 1999 and 2002 committees advised against the professions' inclusions in the *Act*, but proposed other new forms of self-regulation for access and privacy. Alberta Commissioner Frank Work advised to the 2002 legislative review that:

> Recommendation #3 – That, given the functions performed by the self-governing professional and occupational organizations, these organizations should be made accountable to the public, preferably by including these organizations as public bodies under the *FOIP Act* or, at the very least, by ensuring that these organizations abide by the fair information practices similar to those outlined in the Canadian Standards Association's Model Code for the Protection of Personal Information. In particular, it is recommended that these organizations establish a review process whereby their actions in regard to access and privacy are reviewed by an impartial body.

[9] In the B.C. law's Definitions, "local public body" includes "(d) a governing body of a profession or occupation, if the governing body is designated in, or added by regulation to, Schedule 3." In Alberta, the 2002 review noted that "Alberta currently has 51 self-governing professional organizations, four of which are currently subject to the [Alberta *FOIP*] *Act,* because the Government appoints a majority of those members."

The latter CSA course would be welcome, yet I still advise the former legislative option, as being far more effective, transparent and effectively enforceable.

Recommendation #8

That the Alberta *Act* be amended to include the records of self-governing professions, as in British Columbia.

In 2002, the Alberta FOIP legislative review advised: "Recommendation 3. That the Government of Alberta, when renegotiating its contract for municipal policing services with the RCMP, consider whether it is appropriate to include the RCMP within the scope of the Alberta *FOIP Act*."

There are of course several jurisdictional issues to sort out, for the situation is not equivalent to the Ontario and Quebec provincial police forces falling under the FOIP laws of those provinces. The 2002 report noted that "the *FOIP Act* appears to apply to the RCMP under section 1(i)(x)(B) of the *Act*, because police services, as defined in the *Police Act*, includes provincial police services provided by the RCMP under a federal and provincial agreement." Yet the RCMP is a federal agency, subject to the federal *Privacy Act*, and the federal *Access to Information Act*.[10]

I strongly endorse this measure (and I hope other provinces do likewise), if it can be done, the main reason being that the 1982 federal *Access to Information Act* is well known as one of the world's most woefully antiquated and ineffectual FOI laws (as I detailed in my book *Fallen Behind*), and the most intransigent to reform. Albertans would be far better served by their provincial *FOIP Act,* which grants its Commissioner the power to order record release, unlike the *ATIA*.

Recommendation #9

That the Government of Alberta, when negotiating its contracts for municipal policing services with the RCMP, include a clause bringing the RCMP within the scope of the Alberta *FOIP Act* to extent it provides municipal policing services within the province.

In April 1993, a Discussion Guide on a *FOIP Act* bill was prepared by the Department of Justice. Fifteen regional public forums were held to receive input from Albertans across the province. Based on the public feedback, the legislative panel advised: "Personal Information - Expand the definition of 'personal information' to include sexual orientation,

[10] The report further explained: 'When the RCMP is acting under contract to a province or a municipality as a local police service, it deals with local policing issues. An individual in Edmonton, Calgary or Lethbridge with an access to information or privacy issue with the police service can use the Alberta FOIP legislation because the police services in those cities are subject to the *FOIP Act*. An individual in a municipality where the RCMP is the local police service uses the federal access and privacy legislation."

political beliefs or associations, marital status, family status, national or ethnic origin, and criminal records, where a pardon has been issued."

In the current Alberta *FOIP Act*, only the term "sexual orientation" is missing from the list above, placing gays at a lesser position than pardoned former criminals. This situation is inconsistent with human rights law and policy in the rest of Canada in the year 2010. "Sexual orientation" appears in the FOIP laws of British Columbia, Saskatchewan, Manitoba, Ontario, Nova Scotia, Newfoundland, the Yukon and the Northwest Territories.

The term is also included in the *Alberta Human Rights Act,* and its Sec.1(1*)* states that *"*every law of Alberta is inoperative" to the extent it contradicts this human rights law. Its preamble begins, "Whereas it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: [. . . .] sexual orientation." As a basic human right, all Alberta citizens merit equal privacy protection.

Recommendation #10

Amend the Definitions Sec 1(n)(iii), after "the individual's age, sex, marital status or family status," to add "sexual orientation."

Sec. 3 - Scope of this Act

It seems self-evident that government contactors' records on providing services to the public should be open to the same public. What is most notable is that in the United States, even then-president George Bush, a staunch private sector advocate, passed amendments to the *FOI Act* in December 2007 to ensure that information records held by private government contractors can no longer be kept off-limits to *FOIA* requestors.

The same action was advised by the 2004 B.C. legislative FOIP review. In the 2010 B.C. review, the Commissioner's office, for example, claimed that this amendment is urgently required in order to clear up any confusion on the part of contractors and public bodies regarding who has custody or control of requested records. Other proponents of speedy implementation included advocacy groups, labour unions, librarians and taxpayers' advocates. The B.C. committee concluded: "We share their concerns about the delay and urge government to take action."[11]

Regarding which privacy protection provisions should apply in such contracting-out cases - i.e., those of the *FOIP Act* or of *PIPA* - the statute that you deem to have the strongest privacy protections had best be chosen.

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[11] Regarding the partnership contract itself, it is dismaying that FIPA and many other have been compelled to appeal for years against the vast over-application of FOIP exemptions applied to service contracts the B.C. government forged with IBM, Maximus, EDS and other companies.

Recommendation #11

Amend the Alberta *FOIP Act* to clarify that records created by or in the custody of a service-provider under contract to a public body are under the control of the public body on whose behalf the contractor provides services.

Recommendation #12

Amend Sec. 3 of the *Act* to state that the law's coverage extends to any institution that is established by the Legislature or by any public agency - that is publicly funded; publicly controlled; wholly owned; performs a public function and/or is vested with public powers; or has a majority of its board members appointed by it. This includes public foundations and all crown corporations and all their subsidiaries.

Sec. 4 - Records to which this Act applies

The Alberta Treasury Branch was established in 1938 by the Government of Alberta to extend basic financial services to Albertans, and it became a provincial crown corporation in 1997. In 2002, it launched its new corporate identity, ATB Financial. It is the largest Alberta-based financial institution, with assets of $26.5 billion, and some 5,000 employees providing services to more than 670,000 Albertans in 242 communities.

Section 4(1)(r) of the *Act* excludes a record in the custody or under the control of a treasury branch, such the ATB. The exclusion does not apply to a record that relates to a non-arms length transaction between the Government of Alberta and another party. The Commissioner has consistently ruled that ATB is not subject to Part 2 of the *FOIP Act*.

The 2002 legislative committee noted ATB's concerns about possible commercial harms, and so advised in Recommendation 49, "That the exclusion of treasury branch records under section 4(1)(r) of the *FOIP Act* remain unchanged." Yet as I noted earlier, the Alberta *FOIP Act* already contains generous protections (such as Sec. 16 and 25) to prevent such harmful information releases, so this ATB exclusion is unnecessary.

Canadian provinces

Some provinces contain much broader definitions of what is a "public body" for FOIP purposes in their statutes (beyond the regulations) than is found in the Alberta *FOIP Act*, although they also list many of their entities by name in schedules as well.

Sometimes funding is one factor for inclusion. In New Brunswick's FOI law, a public body means "any body or office, not being part of the public service, the operation of which is effected through money appropriated for the purpose and paid out of the Consolidated Fund, as set out in the regulations."

Control over appointments can also be a factor. In Nova Scotia's FOI law (not regulations), a public body includes:

> a Government department or a board, commission, foundation, agency, tribunal, association or other body of persons, whether incorporated or unincorporated, all the members of which or all the members of the board of management or board of directors of which (A) are appointed by order of the Governor in Council, or (B) if not so appointed, in the discharge of their duties are public officers or servants of the Crown.

Manitoba's law has similar provisions. Both factors are present in Quebec's FOI law -

> Government agencies include agencies not contemplated in sections 5 to 7 to which the Government or a minister appoints the majority of the members, to which, by law, the personnel are appointed in accordance with the Public Service Act (chapter F-3.1.1), or whose capital stock forms part of the domain of the State.

Automatic coverage of all present and future governmental foundations (and others such as university foundations) is needed for the Alberta *FOIP Act*, and a model can be found in Yukon's FOI law, wherein a public body is defined as "each board, commission, foundation, corporation, or other similar agency established or incorporated as an agent of the Government of the Yukon."

• Article 19, *Principles of Freedom of Information Legislation,* by Toby Mendel, 1999, endorsed by the United Nations:

"For purposes of disclosure of information, the definition of 'public body' should focus on the type of service provided rather than on formal designations. To this end, it should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines).

"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. . . "

Other nations

Other nations have the same kinds of entity criteria found in Alberta's Regulation 2, but they are mandatory and contained in the statute's text – as opposed to discretionary and set in a regulation as in Alberta.

Other statutes and practices serve as living examples to be studied for the answer to a fair and essential question: did their broader coverage of entities actually cause the myriad "harms" that opponents of FOI reform in Canada so direly warn of? The opponents could also be reminded that coverage of an entity does not mean that all of its records can then be revealed; many FOI statutory exemptions can still apply, *e.g.,* to

prevent harms to commercial interests, privacy, law enforcement. (The United Kingdom has been studying these entity coverage questions.[12])

Canada has fallen behind its Commonwealth partners on entity coverage. Even one of the most traditionalist FOI statutes, that of Australia (1982), includes a fuller description of entities to be covered than does the Alberta *FOIP Act,* in which explicit mention of "a public purpose" is absent. In the Australian act's interpretation:

> ***prescribed authority*** means: (a) a body corporate, or an unincorporated body, established for a public purpose by, or in accordance with the provisions of, an enactment or an Order-in-Council, other than: (i) an incorporated company or association; or (ii) a body that, under subsection (2), is not to be taken to be a prescribed authority for the purposes of this Act […]

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

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

• The draft FOI bill of Sierra Leone helps illustrate an important distinction that can easily be misunderstood: truly "private" entities need not worry that *all* of their records would be opened to public scrutiny, for only *some* might be. In this bill, for instance, Clause 6 prescribes that a "public body" is defined as, amongst other things, "(e) carrying out a statutory or public function, provided that the bodies indicated in sub-section (1)(e) are public bodies only to the extent of their statutory or public functions."

The organization Article 19 points out that pursuant to this definition, a private security firm 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.

This means that anyone can submit an information request that is related to its public activity without having to show that the information is needed to enforce a right, as is the case in relation to information requests submitted to an "ordinary" private body. The latter is defined in Clause 6 as any body that "(a) carries on any trade, business or profession, but only in that capacity; or (b) has legal personality."

"This is a broad definition that ensures that access can be gained to information held by a corporate body or any business undertaking whenever this is necessary to enforce a right. This may be used, for example, to obtain access to information from factory concerning dangerous substances it emits into a river from which drinking water is taken."[13]

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[12] UK Ministry of Justice, *Freedom of Information Act 2000: Designation of additional public authorities*. Consultation Paper CP 27 Published on 25 October 2007. The consultation paper can be downloaded from http://www.justice.gov.uk/publications/ cp2707.htm

[13] *Sierra Leone's draft Access to Information Bill Statement of Support,* by Article 19, London, 2005

Section 5 - Relationship to other Acts

FOIP 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.

This conclusion of the 1993 Alberta legislative FOIP review is still advisable today: "A single Act should incorporate access and protection of privacy problems. All statutory provisions relating to access and protection of privacy should, wherever practicable, be consolidated in that single Act."

This point was echoed in Commissioner Frank Work's *Annual Report* of 2008-09: "I am concerned about the extent to which the government has been introducing Bills which create provisions which are "paramount" to access and privacy laws. This is not new and there has not been a tidal wave of these, but, over time, the cumulative effect of paramountcy provisions is troubling. We oppose paramountcy provisions for several reasons."[14] The Alberta *FOIP Act* reads:

> 5 If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless
>
> (a) another Act, or
>
> (b) a regulation under this Act
>
> expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

Passing secrecy provisions in other acts to override an FOIP 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. Here, Sec. 5 prescribes that an agency must refuse to disclose any information requested under the *FOIP Act* that is restricted by other statutes.[15]

If the number of listed statutes would grow, former federal Information Commissioner John Reid has well described it as "secrecy creep," while his predecessor John Grace called Sec. 24 of the federal *ATIA* - the equivalent to Alberta's *FOIP Act* Sec. 5 - "the nasty little secret of our access legislation." (Both advised *ATIA* Sec. 24 be repealed.)

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[14] In his 2006-07 report, the Commissioner noted he had decided a trilogy of cases setting out a new approach to legislation that prevails over the *FOIP Act:* Orders F200 5-007, H2003-002, and F2005-029

[15] For examples, as noted within the *Alberta FOIP Regulations, 16 and 17*, some provisions that prevail despite the *FOIP Act* include: the *Alcohol and Drug Abuse Act*, section 9; the *Maintenance Enforcement Act*, section 15(1); and the *Wills Act*, section 52.

This situation is unnecessary, as Commissioner Frank Work wrote in his *Annual Report* of 2007-08: "The general provisions of the *[FOIP] Act* have proven to be very adaptable to new situations. "Carving" specific bits of information out of the Act is not only contrary to the intent of the law but makes application of the law unduly complicated. I oppose these unless it can be shown that the *Act* is clearly inadequate."

Sec. 5 violates the stated goals of the Alberta *FOIP 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 the information. As one expert notes, "This varying degree of discretion fits awkwardly within a mandatory class exemption."[16]

Sec. 5 also violates the principle of independent review. 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. This prescription must be followed even if the other statute merely restricts, but does not categorically bar, disclosure.

The United Kingdom also allows the provisions of several other statutes to override its FOIP law. Yet in one recent 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 FOIP act, and it has committed to repealing or amending 97 of those laws and reviewing a further 201. Alberta should do the same.

The FOIP laws of South Africa and India override all other statutes on access questions, but if Albertans believe this option is too extreme for now, the following is advised.

Recommendation #13

That an all-party committee study the necessity of each paramountcy clause in other *Acts* that override the Alberta *FOIP Act*, with a view to repealing or amending those clauses, and consider the necessity of retaining Sec. 5. Study advice from the same review process that occurred in the United Kingdom.

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

Sec. 6 - Information rights

In 2006, the Alberta *FOIP Act* was amended to state that:

> 6(4) The right of access does not extend
>
> (a) to a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry, or
>
> (b) to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly

(The exclusion expires five years after the date the minister was appointed.)[17]

This change was a disastrous error, and contrary to the intent of the *Act*, which is to render government more accountable. After reading every provincial and national FOIP statute in the world, I was unable to find a single other one that explicitly excluded ministerial briefing books in full.

For years in B.C., the media have received briefing books through our FOIP law, although sections were deleted due to the existing exemptions – e.g., cabinet records, policy advice, privacy and more. The Alberta government can do the same, to prevent release on such legitimate grounds of harm, so Sec. 6(4) is entirely unnecessary. Under the original Alberta *Act*, such ministerial records had been available for a decade, with no real evidence of harms resulting from their release.

Recommendation #14

Delete Sec. 6 (4), and include ministers' briefing books under the *Act*'s scope again.

Unfortunately, the Alberta *FOIP Act* was also amended to state:

> 6(7) The right of access to a record does not extend to a record relating to an audit by the Chief Internal Auditor of Alberta that is in the custody of the Chief Internal Auditor of Alberta or any person under the administration of the Chief Internal Auditor of Alberta, irrespective of whether the record was created by or for or supplied to the Chief Internal Auditor of Alberta.

[17] As noted in the government's *FOIP Bulletin* of June 2006, appealing a Sec. 6(4) refusal is futile: "If a public body chooses to provide access to a record to which one of these exclusions applies, the public body should clearly indicate when responding to the request that the record is being provided outside the FOIP Act. The applicant has no right to request a review by the Commissioner if a public body provides access to records outside the FOIP process."

(8) Subsection (7) does not apply to a record described in that subsection

(a) if 15 years or more has elapsed since the audit to which the record relates was completed, or

(b) if the audit to which the record relates was discontinued or if no progress has been made on the audit for 15 years or more.

The government had not demonstrated any real harm that ever resulted from FOIP requests for such audits. I believe this section 6(7) should be deleted; harms can be prevented by the application of other existing exemptions to the audits. e.g., law enforcement, privacy, work history, advice to cabinet, advice from officials, harm to government third party financial interests, etc. At the very least, a five year time limit is more reasonable than a 15 year one.

Recommendation #15

Delete *FOIP Act* section 6(7), and include all audits within the *Act*'s scope, for harmful information releases can be prevented by applying other existing FOIP exemptions.

If this section is not deleted, at least reduce its 15 year time limit to 5 years.

Sec. 10 - Duty to assist applicants

In Order F2007-029, on reviewing the Edmonton Police Commission's response to an access request, the Alberta OIPC determined that the Commission had failed to meet its duty to assist to assist the applicant, by failing to inform the applicant of all responsive records in its custody or under its control, and the provisions of the *FOIP Act* on which it had relied to withhold information. The ruling noted that a public body should supply evidence on the following points to establish that it conducted an adequate search for responsive records, points that could be embodied in the law itself:

1. The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request

2. The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.

3. The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.

4. Who did the search

5. Why the Public Body believes no more responsive records exist than what has been found or produced

Recommendation #16

In response to the problems noted in OIPC Order F2007-029, add a new sub-section to Sec. 10 – or a new regulation pursuant to Sec. 10 - to state that, upon refusal of the applicant's request, within 30 days, a public body must supply evidence on the five points noted in that Order, to establish that it conducted an adequate search for responsive records.

Recommendation #17

Amend the *Act* to establish that an applicant who makes a formal access request has the right to anonymity throughout the entire process.

Sec. 11 - Time limit for responding

Alberta Commissioner Frank Work wrote in his 2008-09 Annual Report that, regarding *FOIP Act* requests, "Response times are within acceptable parameters generally" and "The timelines for closing cases through mediation are good." Yet, "The queues were getting longer at every stage of the process as the new laws came into force and Albertans exercised their rights under those laws. . . . It is not perfect: there are still delays."

If so, Albertans would be comparatively well off, for FOIP delays have reached a true crisis level in B.C. and Ottawa. Even if the problem is not so acute in Alberta today, the future could change, which is why I propose some ideas below for improving FOIP response times, ones that I believe would be helpful at any time or place.

To begin, if or when public bodies complain to your Committee that the current legislated 30 day time limit for responding to an Alberta *FOIP Act* request is too onerous to manage, they could be informed by way of reply that amongst the world's FOIP laws, the average request response time is *two weeks*. Eight nations mandate a reply within 10 days. At least 60 other FOIP jurisdictions in the world prescribe shorter timelines than in the Alberta law, and some of these have strong penalties for delays. The United Kingdom and the United States have a 20 day deadline (the latter amended upward from 10 days).

It has often been noted that the American state governments reply with full records to FOI requests within a few days, on request topics that would have taken many months in

Canada and with the records heavily censored. Public servants working in those regions would envy their counterparts in Canada on this matter.

Within Canada it is at least worth noting that in the FOIP law of Quebec, 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 Sec. 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 Alberta the applicant has 60 working days to appeal a *FOIP Act* refusal, and if that deadline is missed there is no second chance. By contrast governments routinely break their own deadlines with impunity; there are no penalties for delays, as there needs to be, which stands at variance with other nations' FOIP laws.

FOI delays have been a problem in the United States as well, but the issue is being 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.

One solution for further Alberta study: 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 could be placed in the Alberta *FOIP Act* or Regulations. In this new process, both applicant and agency voluntarily sign a binding "consent order" on time, and if the latter breaches the time deadline, that is a serious "deemed refusal." I have found the process has quickened replies to my requests.

• Article 19, *Model Freedom of Information Law*, 2001:

"9. (1) Subject to sub-section (3), a public or private body must respond to a request for information pursuant to section 4 as soon as is reasonably possible and in any event within 20 working days of receipt of the request.

(2) 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.

(3) A public or private body may, by notice in writing within the initial 20 day period, extend the period in sub-section (1) to the extent strictly necessary, and in any case to not more than 40 working days, where the request is for a large number of records or requires a search through a large number of records, and where compliance within 20 working days would unreasonably interfere with the activities of the body.

(4) Failure to comply with sub-section (1) is deemed to be a refusal of the request."

Recommendation #18

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 any search, preparation, and photocopying charges).

Recommendation #19

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 #20

Amend the *Act* 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 FOIP laws).

Recommendation #21

Amend the *Act* to mandate that FOIP performance measurements including response times will be recorded, and that these measurements shall be published online in an annual FOIP report card of all public bodies.

Recommendation #22

To reduce delays, “sign off” authority levels and processes must be streamlined and simplified. Consider vesting such authority at the lowest reasonable level, normally with the information officer if there is one.

Recommendation #23

To lessen overall response times, amend the *Act* so that public bodies must give records to the applicant in staged releases if he or she requests it.

Section 13 - How access will be given

The B.C. Commissioner’s submission to the 2010 B.C. legislative review proposed that public bodies be required to use information technology to facilitate efficient and cost-effective responses to access requests, which is already a statutory requirement in Nova Scotia and Prince Edward Island. This is advisable for Alberta as well.

The committee recommended that the B.C. *FOIP Act*’s Sec. 9(2) be amended to require that public bodies provide electronic rather than print records, wherever practicable. This aligns with citizens’ growing preference for receiving information via e-mail.

Disclosure of electronic records in electronic form assists applicants by reducing cost and improving timeliness of responses. Electronic documents could be released as email attachments, CDs or on thumb drives.

Similarly, in the United States, the Washington State Court of Appeals recently found that a public body was obligated to provide emails concerning public business in electronic form, rather than in print, to an applicant. In fact, in the interests of making records more easily accessible, U.S. federal public agencies have been required since 1996 to produce and store records in electronic form.

Such an amendment would make explicit in Alberta what, in our view, has already been made clear by numerous orders of the B.C. Commissioner: that government agencies are required to provide records in electronic format when they are able to do so relatively easily.

Recommendation #24

Amend Sec. 13(2) of the *Act* to require that public bodies provide electronic copies of records to applicants, where the records can reasonably be reproduced in electronic form.

Sec. 21 - Intergovernmental relations

Some writers believe that when dealing with FOI requests for intergovernmental records, the state must always err on the side of caution, for revealing another jurisdiction's sensitive records may lead to a rift or decline in relations and a reluctance or refusal to share such records in future. Others dismiss this viewpoint as too anxious or deferential.

I believe Alberta *FOIP Act* Sec. 21 is too vaguely drafted; for example, the term "relations" is far too broad. Some could also argue that, with its lack of a harms test, Sec. 21(1)(b) should be deleted entirely, because if "information received in confidence" from another government could produce harm if released, such disclosure would already have been blocked by Sec. 21(1)(a), which *does* have a harms test.

By this argument, Subsection 21(1)(b) is simply too broad, because not *all* information "received in confidence" from another government would necessarily produce harm if released - such as the draft luncheon menu or hotel budgeting for an upcoming interprovincial ministers' conference.

But others might say that deleting Sec. 21(1)(b) would go too far, because it has more to do with the principle of "comity" amongst governments than in preventing "harm" – that all records received in confidence must be secreted, period, regardless of what they are, so as to both demonstrate and receive the respect and trust of the other state.

Some Alberta public bodies asked the 2002 legislative review to expand the scope of this section to include disclosure affecting relations between a government at *any* level and any other government or its agencies (such as relations between a local government and the RCMP) and even between *any* two public bodies (such as relations between as a school board or a health care body). This is far too sweeping.

The 2002 committee also studied whether information should be considered to have been supplied in confidence merely because it was labeled “confidential.” In the end, laudably, it rejected these concepts - and hopefully will do so again this year - advising:

> Recommendation 59. That section 21(1)(b) not be amended to allow public bodies to refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal information supplied in confidence by any local public body.

At the very least, I believe Sec. 21 should be amended to make clear that, upon receiving an FOI request that might trigger the section, the Alberta government must consult with the other government to ask if it would object to disclosure of the records, as likely to cause “harm” to relations, and not just unilaterally presume that it might do so without inquiring. On some occasions, which might surprise one, the other government might not object to disclosure at all.

Lawyer and global FOI expert Toby Mendel, in for-the-record correspondence with me on Sec.21, wrote:

> Re. 21(1)(b), it should be deleted, but not just because it doesn't include a harm test (if that were the only problem, one could be added). I think there are serious problems with both this and 21(1)(a), as follows.
>
> They assume that Alberta should defer to the secrecy claims/rules of other jurisdictions, either *per se* (b) or for purposes of good relations (a). If Alberta already protects all interests worthy of protection, there is simply no need for (b). There may be a need to consult with the providing jurisdiction to understand its grounds for classification so as to apply properly the Alberta exceptions. But there is no need for a separate exception.
>
> Regarding (a), it is somehow an abdication of responsibility, because it uses the term 'relations' (e.g., instead of 'negotiations'). Jurisdictions should stand up and say that “we do business openly, subject to protecting legitimate interests. We will protect your legitimate interests, but don't expect us to be secretive beyond that.” If this is the accepted “business” model, then the conduct of relations is subject to it, rather than overrides it.
>
> In other words, the government of B.C. has discussions with Alberta on the understanding that it cannot impose more secrecy than is allowed under the Alberta Act (just as businesses do). It cannot get upset if Alberta sticks to those rules.

> I accept that the above is perhaps a bit theoretical given the real state of relations. I would at least like to add in qualifiers like causing 'serious harm' based on 'reasonable expectations of secrecy'.

As well, a definitional question arises: When can information be regarded as having been “received in confidence”? B.C. Commissioner Loukidelis very well answered the question in Order 331 (where B.C.’s Sec. 16 is the equivalent of Alberta’s Sec 21):

> Turning to s. 16 (1)(b), it is my view that - in almost all cases - the necessary element of confidentiality will not be established solely because the receiver of the information intends it to be confidential. . . .
>
> In cases where information is alleged to have been "received in confidence", in my view, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information.

Recommendation #25

Amend Sec. 21(1)(a) by changing the word “relations” to “negotiations.” Also change the term “harm” to “serious harm based on reasonable expectations of secrecy.”

Recommendation #26

Amend Sec. 21(1)(a) and (b) to state that, upon receiving an FOI request that might trigger this section, the Alberta government must consult with the other government to ask if it would object to disclosure of the records, as likely to cause “serious harm based on reasonable expectations of secrecy” to negotiations, not just unilaterally presume that it might do so without inquiring.

Recommendation #27

Amend Sec. 21(1)(b) to state that information may be withheld if it would “(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies” and add “where there is an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information, and where disclosure would cause serious harm based on reasonable expectations of secrecy.”

Sec. 22 - Cabinet and Treasury Board confidences

"Cabinet confidences and records should be included within the *Act* but have the narrowest possible definition."

- 1993 Alberta FOIP legislative review report

Probably as a consequence of the power it wields, the documents of a cabinet or a governing council are often the most important, the most controversial, the most sensitive, and the most sought after type of records in any freedom of information system.

Moreover, due to the power it wields, the cabinet realm is one area where the results of poor analysis and incorrect background papers are most perilous, and where the analytic ability of outside experts is most badly needed. (The same argument could be made about the Sec. 24 official advice exemption.) Anyone can err, and an insular "groupthink" policy enclosure in cabinet can lead to grievous mistakes that even a small degree of external scrutiny and feedback might have averted. A good deal of cabinet confidentiality is indeed necessary and justifiable in a FOIP statute - but exactly how much?

It is widely accepted that the preservation of such confidences is necessary to maintain conventions of responsible government, such as cabinet solidarity, and to protect the integrity of decision making. At one time, the common law viewed cabinet confidentiality as absolute. However, over time, through rulings, the common law has come to recognize that the public interest in cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield.[18] This concept should be expressed in the statutes.

To begin, within Canada, Nova Scotia's FOI law is the only one in which records of cabinet deliberations "may" (not must) be withheld - an example Alberta could consider. In Manitoba, the cabinet exemption is mandatory, but contains a clause to allow cabinet to release its records if it consents. In many other nations, such as the United Kingdom (Alberta's legislative model) the cabinet records exemption is discretionary.

Recommendation #28

Change Sec. 22 from a mandatory exemption to a discretionary one, whereby deliberative records may be released if cabinet consents.

[18] See the key federal *ATIA* ruling *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3.

Sec. 22 requires a harms test

The basic purpose of including exemptions to disclosure in a freedom of information statute is to avert some sort of harm or injury. Therefore it is illogical and indefensible to simply exclude entire record topics from the statute's coverage, because if harm could have been caused by the release of such records, they could have been withheld under these exemptions anyway.

Access should be denied only when disclosure would pose a "reasonable" possibility of "substantial" harms, based on a balance of probabilities, and real evidence for injury produced by public bodies and third parties, not mere assertions or speculations. Unfortunately, some FOIP laws include exemptions that are not subject to harm tests, which are often referred to as "class exemptions."

The federal Conservative Party in 2006 pledged to "to subject all *ATIA* exemptions to a "harms test." This promise was not fulfilled. Albertans have also spoken out on this matter, as the 1993 legislative review noted: "In order for a record to be exempt from disclosure, there must be a reasonable expectation of harm flowing from the release of that record. A harm-based test should be used for exemptions."

The broadly sweeping Sec. 22 and 24, for cabinet records and official advice, were presumably added to prevent some sorts of harm. The problem is that these (supposed) harms as they stand in the FOIP law are *implicit* and undefined, whereas they need to be made *explicit* and defined (and in terms understandable to the general public beyond FOI experts); only in this way can we separate the cabinet and policy records whose release might cause such harms from those that would likely not, and release the latter.

In the FOI statute of the United Kingdom, policy advice and cabinet confidences appear in sections 35 and 36. In Sec. 36, prejudice to effective conduct of public affairs, there is a harms test.

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

Scotland's FOI law expresses similar concerns for cabinet solidarity as the Canadian rationale, and yet, unlike Sec. 22 of the Alberta *FOIP Act,* it contains a harms test, and its Sec 30 (c) also 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.

In Australia, recommendations from David Solomon - a lawyer, journalist and political scientist - have delivered the revolution in FOI law that Queensland Premier Anna Bligh, asked for during her first days in office. One of Dr. Solomon's recommendations was to scrap the automatic exemption for cabinet documents; instead they would be exempt *only* if their release would adversely affect the principle of collective ministerial responsibility[19]

Recommendation #29

Add a harms test for the Alberta Sec. 22 cabinet records exemption, modeled upon the terms used in Scotland's FOI law Sec. 30.

In Alberta's Sec. 22(1), records must be withheld "including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees."

Such records prepared for cabinet consideration are exempted from FOI requests even if they were *not actually presented* to cabinet in the end. But how can a record reflect the "substance of deliberations" if it was never even deliberated upon by cabinet, and what possible harms to cabinet process and solidarity could its publication actually cause?

In Australia, political commentator Dean Jaensch pointed to the "cunning" use of the cabinet exemption clause, whereby the *Advertiser* newspaper had several FOI applications refused because documents were "prepared for submission to Cabinet whether or not it has been so submitted." This exemption is simply too broad, and at odds with the intent of most FOIP law.[20]

Recommendation #30

Delete the term "or prepared for submission" from Sec. 22(1). Records may only be withheld under Sec. 22 if they were actually submitted to and considered by cabinet, not if they were "prepared" to be but never were. They could still be withheld under other exemptions.

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[19] *The way to free up FoI*. Editorial. Sydney Morning Herald (Australia), June 12, 2008

[20] *Public's right to know is kept in the dark*, by Michael Owen. The Advertiser (Australia), July 22, 2008

As I read cabinet meeting minutes of the 1990s that I had obtained through the B.C. *FOIPP Act* (for under the Act they may only be seen after 15 years have passed), records of many of the discussions appeared so familiar and innocuous – even when I recalled the historical context - that I tried unsuccessfully to conceive of what actual harms could have resulted from most of these being published much sooner afterwards than 15 years.

In 2004, FIPA and the B.C. Commissioner agreed, as I do, that parts of B.C.'s cabinet records exemption should be made discretionary and that the time limit for withholding records should be reduced to 10 years. The same terms could be set for Alberta's *FOIP Act*, Sec. 22(2)(a).[21]

Recommendation #31

Amend Section 22 to state that the cabinet records exemption cannot be applied after 10 years (as in Nova Scotia's FOI law), instead of the current 15 year time limit.

Consider proactively releasing cabinet minutes on a government internet page 20 years after their creation (subject to *FOIP Act* exemptions other than Sec. 22), eventually moving to 10 years after their creation.

On another matter, in the Alberta *FOIP Act*, background papers to cabinet are separated out from cabinet minutes, and may be released much earlier. Yet, as two commentators on the federal *ATI Act* have noted, "Unfortunately, many documents labeled 'discussion paper' are not cabinet discussion papers and therefore will not lose their excluded status," and "the section excluding cabinet records can be abused if, for example, senior officials launder politically sensitive non-cabinet records through the exclusion by labeling them 'cabinet proposal.'"[22]

• Commonwealth Human Rights Initiative, analysis of St. Kitts and Nevis *Freedom of Information Bill, 2006*[23]

"At the very least, all of the Cabinet exemptions need to be reviewed to ensure that they are very tightly drafted and cannot be abused. Currently, the provisions are extremely broadly drafted, with section 33(2)(b) protecting even documents simply prepared for the purpose of submission to Cabinet or which was considered by Cabinet and which is related to issues that are or have been before Cabinet. Practically every government

[21] In Ottawa, in practice, cabinet minutes and other records older than 30 years are systematically released to the National Archives for the public to view; so it could be here also, to the Alberta Archives.

[22] Murray Rankin and Heather Mitchell of *Using the Access to Information Act.* International Self-Counsel Press, Ltd., Vancouver, 1984

[23] *St. Kitts and Nevis Freedom of Information Bill 2006,* analysis by Cecelia Burgman, Commonwealth Human Rights Initiative, 2007

document could be said to be related to issues that have been before Cabinet at some time or the other!

"It is notable that some MPs in some other jurisdictions have complained that broad Cabinet exemptions have been abused because Cabinet members simply take documents into Cabinet and then out again and claim an exemption.

"At the very least therefore, a provision should be added that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken shall be made public after the decisions have been taken and the matter is complete. Section 8(1)(i) of the Indian *Right to Information Act 2005* provides a good example of such a clause."

Recommendation #32

Add a provision to the Alberta *FOIP Act* Sec. 22 to state that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken (although not the deliberations on the matter, *per se*) shall be made public within five years after the decisions have been taken and the matter is complete.

Recommendation #33

Section 22 should be amended to clarify that "substance of deliberations" only applies to the actual deliberations of Cabinet, not any other material.

Other nations

Of 68 national FOI statutes, I counted just 17 with a cabinet records exemption. One good Commonwealth example is that of India, where:

> 8(1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen [….]
>
> (i) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers: Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over: Provided further that those matters which come under the exemptions specified in this section shall not be disclosed.

In the Australian FOI law, there is some discretion for individual ministers and departments to decide whether or not to release draft cabinet submissions and briefing materials for use by ministers in cabinet.[24]

In Australia, if the agency is able to delete the cabinet references in a document, access must be granted to the remainder of the record (unless that remainder itself is exempt under another section of the law). Even better, internal working documents are not automatically exempt under Sec. 36 (the equivalent of Alberta's Sec. 24, official advice); to justify withholding these, the agency must consider if release would be contrary to the public interest and explain why.

Sec. 23 - Local public body confidences

Section 23 of the *Act* permits a local public body to refuse to disclose information if the disclosure could reasonably be expected to reveal: draft resolutions, and the deliberations of *in camera* meetings.

These records have a 15 year time limit, which is too lengthy, as the 1999 legislative review noted: "In the context of local public body confidences, it was argued that a 15-year blanket exemption from disclosure was disproportionate to the scope of decision-making, and that there were other exceptions in the *Act* for the kind of information that a local public body might wish to keep confidential." I believe 5 years is a reasonable time.

Recommendation #34

Amend Sec. 23 to reduce the time frame after which exception to disclosure no longer applies for local public body confidences from 15 years to 5 years.

Sec. 24 - Advice from officials

In British Columbia, the most widely abused section of the B.C. *FOIP Act* is surely Sec. 13 – the equivalent of Sec. 24 in the Alberta law - for it created an ever-growing vacuum of secrecy for "policy advice or recommendations developed by a public body or for a minister." But in fact, with the much broader scope of Alberta's office advice exemption, as noted below, the potential risks of too-wide interpretations may be even greater than they are in B.C.

The B.C. *FOIP Act* in Sec. 13 exempts only "advice or recommendations," while the Alberta *Act* Sec. 24 goes further, exempting "advice, proposals, recommendations, analyses or policy options," then also adds "(b) consultations or deliberations."

[24] On this matter, one Australian newspaper editor opined that "The notion that every document prepared for cabinet needs to be exempt is ridiculous. Freedom-of-information laws in Zealand allow cabinet documents to be routinely made public and no one suggests that that is harming the country." - *The law needs fixing, and so does the culture*, by Matthew Moore, Herald Freedom-of-Information Editor. Sydney Morning Herald, Australia, Nov. 30, 2007

Also regrettably, the number of subjects that can be withheld under the Alberta's Sec. 24 are far more numerous than those in Sec. 13 of the B.C. *Act* - such as items Sec. 24(1)(b) to (h), which do not appear in B.C.'s law at all. The most unfortunate is this one:[25]

> (f) the contents of agendas or minutes of meetings
>
> (i) of the governing body
>
> of an agency, board, commission, corporation, office or other body that is designated as a public body in the regulations, or
>
> (ii) of a committee of a governing body referred to in subclause (i),

Recommendation #35

That the Alberta *Act*'s official advice exemption Sec. 24 be amended to more closely match the similar Sec. 13 of the B.C. Act, so as to reduce the number of items that may be withheld under Sec. 24.

Limit Sec. 24(1) to exempt only "advice or recommendations," as in the B.C. Act. Delete Sec. 24(1)(f).

Recommendation #36

Amend section 24(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, not sweeping separate concepts

(b) "advice" or "recommendations" set out suggested actions for acceptance or rejection during a deliberative process

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[25] The Alberta 1999 legislative review also thought this went too far, and advised: "Recommendation 37. That section 23(1)(f) of the *Act [later renumbered as Sec. 24(1)(f)]* should be amended to clarify that the exception to protect agendas or minutes of meetings applies only to the governing body or subcommittees of the governing body of agencies, boards, commissions and other public bodies that are listed in the FOIP Regulation*."*

(c) the Sec. 24 exception is not available for the facts upon which advised or recommended action is based; nor for factual, investigative or background material; nor for the assessment or analysis of such material; or for professional or technical opinions.

Recommendation #37

Delete Sec. 24(1)(h), by which the public may refuse to release "the contents of a formal research or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on the report for at least 3 years."

The intent of the most legislatures in the design of an official advice exemption is likely to protect the legitimate interest of society in allowing public servants to freely and candidly provide advice or recommendations to decision makers in government without fear of premature disclosure. However, this is generally only intended to protect the advice and recommendations of public servants, not to create a blanket that could be thrown over any information provided for use in the deliberative process.

The 2009 Alberta *FOIP Guidelines and Practices* manual, pg. 179, notes that: "The Commissioner has determined that a statement of fact that is not directed toward action to be taken does not qualify as advice under Sec. 24(1))(a). See IPC Order 97-007." This interpretation is valuable, but this principle should be voiced more explicitly in Sec. 24.[26]

Recommendation #38

That Sec. 24 be amended to include only information which recommends a decision or course of action by a public body, minister or government.

The 15 year time limit for records of official advice in Alberta's Sec. 24(2)(a) is excessive. Nova Scotia's FOIP law (in Sec. 14) permits the records' release in 5 years, and this is advisable for a reformed Alberta *Act* also. At the very least, Alberta could match the 10 year limit mandated in the B.C. and Quebec FOIP laws.

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 15 years after the fact as in the Alberta *Act*.

[26] Some might even wish to extend this principle further, to state that Sec. 24 should not exempt "opinions that are not directed to action." Mere opinions are not necessarily advice, although some writers might wish to stretch the concept to say that some opinion is implicitly advisory.

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.[27]

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

The Quebec FOI law - as a reformed Alberta *FOIP 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.

Recommendation #39

Amend Sec. 24 to include a section on the model of Quebec's FOIP law Sec. 38, whereby the Alberta 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 Alberta 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 Alberta government may only withhold the record for five years (on the model of Nova Scotia's FOIP law, Sec. 14).

To fulfill the intent of the *Act*, I urge the Alberta government to routinely release records of the subjects in Sec. 24 that are excluded from the exemption, that is, Sec. 24(2)(a) to (g), and preferably on the internet. These include statistic surveys, environmental testing, and substantive rules.

I also urge this list be expanded to include all the subjects found in the B.C. law, Sec. 13(2)(a) to (n), but not yet in the Albertan – that is, "any factual material," public opinion polls, environmental impact statements, economic forecasts, final audits, consumer tests, task force reports, and "information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy."

[27] Incidentally, amongst the FOI statutes of 68 nations, I counted 31 laws with an exemption for advice or recommendations, described in various terms, and they are most prevalent in Commonwealth nations; many nations' FOIP laws have none at all.

The B.C. legislative review of 2010 supported several witnesses' views on this idea, and reiterated the call for routine Sec. 13(2) disclosure made by the prior FOIP committee in 2004. It advised this year: "Recommendation 8. Amend section 13(2) to require the head of a public body to release on a routine and timely basis the information listed in paragraphs (a) to (n) to the public."

This practice has already been implemented at the federal level in Canada. If implemented, routine disclosure would also align Alberta with the trend towards open government in the United States and with municipal initiatives underway in the cities of Vancouver and Nanaimo.

Recommendation #40

That the Alberta government routinely release records of the subjects in Sec. 24 that are excluded from the exemption, that is, Sec. 24(2)(a) to (g), and preferably on the internet. Expand this list to include all the subjects found in the B.C. Act Sec. 13(2)(a) to (n).

A Harms Tests for the Policy Advice Exemption

On the matter of a harms test to the exemption, it is difficult to think of a persuasive rationale that could be raised against the addition of one to the Alberta *FOIP Act*. Harms should be qualified as "serious" or "significant." Such a test exists in the draft FOI bill of Kenya, Sec. 5. (1), wherein the release of policy advice records may be blocked if such would have the potential:

> (f) to significantly undermine a public authority's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

At least three Commonwealth jurisdictions - South Africa, the United Kingdom and Scotland - do include a harms test in their FOI law's policy advice exemption, and such a test, with "substantial" injury, could be included in the Alberta *FOIP Act*. In South Africa's statute, Sec. 44 (1), records of recommendations or consultations may be withheld:

> (b) if —
>
> (i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting the candid—
>
> (aa) communication of an opinion, advice, report or recommendation; or
>
> (bb) conduct of a consultation, discussion or deliberation; or
>
> (ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.

The United Kingdom's FOI law expresses similar concepts:

> 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.

Scotland's exemption, in Sec. 30, echoes the terms of the U.K. one but is stronger; here, such release must "prejudice substantially" the effective conduct of public affairs.

In the early 1980s (and still in some forms recently), Canadian Treasury Board guidelines set a harms test for the *Access to Information Act* policy advice exemption Sec. 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."

Laudably, a 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 FOIP law amendment to guarantee this right is essential. (It is always worth recalling that policy advice records could still be withheld under other exemptions of the *Act*, e.g., security, privacy.)

Recommendation #41

Amend Sec. 24 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), the United Kingdom (Sec. 36), or Article 19's *Model Freedom of Information Law* (2001).

Recommendation #42

Do not amend the Act to expand the scope in any way of Sec. 16 (Disclosure harmful to business interests of a third party), Sec. 25 (Disclosure harmful to economic and other interests of a public body), or Sec. 20 (Disclosure harmful to law enforcement)

Sec. 27 - Privileged information

The 1999 Alberta legislative review committee was concerned about the overly broad scope of Sec. 27:

> Members debated the rationale for keeping such documents permanently exempt from disclosure. It was also considered that solicitor-client privilege, in terms of legal advice to public bodies in their policymaking role, was not intended to be protected to the same degree as solicitor-client privilege in law enforcement matters by the FIPPA.
>
> It was noted that solicitor-client privilege can be waived, and that if government is the client in cases of legal advice, government has the option of waiving its right to exemption under the FIPPA. The Committee agreed to recommend that this issue should continue to be examined, with a view to public bodies' gradual adoption of the latter practice. . . .

In many FOIP statutes, the legal advice exemption is over-broadly worded, and over-applied in practice, raising complaints from FOIP commentators and legislative committees across the country and beyond.[28]

In B.C.'s *FOIP Act*, the exemption for this topic is confined to a single line: "Legal advice. 14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege." In Alberta's law, by contrast, Sec. 27 is far more elaborate, with many more clauses, some extending over to parliamentary privilege.

Global FOI expert, lawyer Toby Mendel of Halifax, examined this section in the Alberta law and in for-the-record correspondence wrote to me this year:

> I believe the provision [Sec.27] is quite problematical. I accept legal or solicitor client privilege, since confidentiality is central to safeguarding relationships. Parliamentary privilege is a wide category, most of which does not depend on, or even relate to, confidentiality (e.g., it protects the freedom of speech of parliamentarians, which is almost the opposite). I therefore do not support a blanket protection of it in this section. It may be that certain aspects of parliamentary privilege (e.g., the enforcement side, which is almost analogous to the courts) might need specific protection. This should be detailed in clear, narrow and harm-based exceptions, which is clearly not the case here.
>
> 27(1)(b) and (c) are not necessary at all. If the information is not protected by another exception, then it does not need to be protected here. At the very least, these provisions should identify a particular interest sought to be protected (as opposed to categories of information), along with the specific harm to be avoided by secrecy. Yet I simply believe they are unnecessary.

[28] Toby Mendel also wrote this year: "Public bodies abuse the idea of solicitor-client privilege to cover all sorts of information that is not sensitive at all. For public bodies, this exception should be restricted to litigation privilege, that is communications with lawyers that are related to actual or potential litigation. Otherwise, public bodies can throw a cloak of confidentiality over anything simply by consulting their lawyers about it."

> 27(3) runs contrary to the recognized rule that it is not for parliament but for the courts to decide, in general, the limits to parliamentary privilege (for fairly obvious reasons).

Furthermore, the lack of any time limit, conceivably even for *centuries,* for legal advice in Alberta's *FOIP Act* is simply insupportable (e.g., it could in principle be applied to a solicitor's advice written in the 1930s regarding Premier Aberhart's passage of statutes declared unlawful by the federal courts).

This concept was rebuked by former federal Information Commissioner John Reid, on the national *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.[29]

Yet in the FOIP law of the United Kingdom, a record cannot be withheld after 30 years under its Sec. 43, Legal professional privilege. This time limit is advisable for Sec. 27 of the Alberta *FOIP Act*. What is done in the U.K. – Canada's parliamentary model – would surely be workable for Alberta.

Justice Gomery in his report, *Restoring Accountability* (2006) noted that: "The Commission supports amendments that would substantially reduce the kinds of records that the Government may withhold on the basis of the injury test [. . . .] the [federal *Access to Information Act*'s] section 23 category of records where solicitor-client privilege is claimed."

Elsewhere in the world, the solicitor-client exception as described is present in many FOIP laws, but not all. Even where does occur in some form, however, it is often far more narrowly defined than in the Canadian laws, with language indicating what harms could occur from record release. For example, in Mexico's statute, Art. 13, information is "classified" if its disclosure could impair "procedural strategies in judicial or administrative processes that are ongoing."

Above all, I plead with your committee to assiduously avoid the disastrous path taken by the 2010 B.C. legislative review committee, which advised on B.C.'s Sec. 14 (the equivalent of Alberta's Sec. 27):

> • Recommendation #13 - Make section 14 a mandatory exception, by changing "may refuse" to "must refuse", except when the public body is the client and can choose to waive privilege, or, if the client is a third party, the client agrees to waive privilege.

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

- Recommendation #14 - Amend section 14 of the Act to state that decisions on the privileged status of materials when FOI requests are made must be referred to the Supreme Court of British Columbia.

This action would run contrary to the vast majority of FOIP statutes in Canada and the world. The B.C. committee report did not cite a single case where the current system resulted in improper release of privileged documents. It also does not say how this amendment would actually work in practice. One thing is certain - this recommendation would make the system more complicated, slower and more costly.

Recommendation #43

Amend Section 27 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 ongoing judicial or administrative processes, or any type of information protected by professional confidentiality that a lawyer must keep to serve his or her client.

Another serious concern has arisen. This year, B.C.'s acting information and privacy commissioner Paul Fraser reported to the B.C. legislative FOIP review that in a 2008 decision, *Canada (Privacy Commissioner)* v. *Blood Tribe Department of Health*, the Supreme Court of Canada held that the Privacy Commissioner of Canada did not have a right to access solicitor-client documents to determine whether a claim by a public body to withhold them on the basis of solicitor-client privilege has been properly exercised under the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

In the Court's view, that role is reserved for the courts unless there is clear and explicit language in legislation that permits a statutory official to "pierce" solicitor-client privilege. (PIPEDA is a federal law that applies to private sector organizations in some provinces.) This unfortunate outcome was echoed in another recent court ruling from Newfoundland and Labrador.

Mr. Fraser noted that following the *Blood Tribe* decision, the B.C. Commissioner's Office implemented a solicitor-client privilege case review process that is separate from the standard case review process for other exceptions to disclosure under the *FOIP Act* and the *PIPA*. (This can be read at http://www.leg.bc.ca/foi/submissions/organizations/Information_and_Privacy_Commissioner.pdf, pg. 37-39) He added:

"This solicitor-client privilege case review process is a sound approach under the existing legislative framework. At the same time, the *Blood Tribe* decision has made it clear that both *FIPPA* and *PIPA* require more explicit language protecting the fundamentally important right of solicitor-client privilege and defining the Commissioner's independent review and adjudication mandate in this area." To this end, Mr. Fraser made this Recommendation 19, which I advise for Alberta as well:

FIPPA should be amended by adding a new section that would explicitly permit the Commissioner to review records that are being withheld by a public body on the basis of solicitor-client privilege in order to verify that the privilege applies. The amendments should:

1. Give the Commissioner specific, explicit authority to investigate, inquire into and issue orders concerning whether a public body or organization is authorized to refuse access to information or records on the ground of solicitor-client privilege under s. 14 of FIPPA; and

2. Expressly preserve and protect the substantive solicitor-client privilege despite the Commissioner's confidential examination of records in issue, when examination is necessary to verify the existence of the privilege.

Recommendation #44

Amend the Alberta *FOIP Act* Sec. 27 to reflect Recommendation #19 of the acting B.C. Information and Privacy Commissioner's submission to the 2010 B.C. legislative review, regarding solicitor-client privilege.

Furthermore, delete Sec. 27 (3) – "Only the Speaker of the Legislative Assembly may determine whether information is subject to parliamentary privilege."

Sec. 29 - Information available to the public

There is a section in the Alberta *FOIP Act* that renders it far too easy for government to prolong delays in releasing information:

Sec. 29(1) The head of a public body may refuse to disclose to an applicant information

(a) that is readily available to the public,

(a.1) that is available for purchase by the public, or

(b) that is to be published or released to the public within 60 days after the applicant's request is received.

(2) The head of a public body must notify an applicant of the publication or release of information that the head has refused to disclose under subsection (1)(b).

(3) If the information is not published or released within 60 days after the applicant's request is received, the head of the public body must reconsider the

request as if it were a new request received on the last day of that period, and access to the information requested must not be refused under subsection (1)(b).

The B.C. legislative review of 2010 advised that for B.C.'s Sec. 20, the equivalent of Alberta's Sec. 29: "Recommendation 15. Amend s. 20(3) to provide for immediate release of all requested records if 90 days have elapsed since receiving the applicant's request." I advise the same general course for Alberta, but 60 days.

Recommendation #45

Amend Sec. 29 to state that if the government does not release requested information within 60 days if it promised to do so, then it must release all the sought information immediately, without exemptions or costs to the applicant, unless doing so would cause "grave harm" to the public interest.

Regarding the public body's right to refuse to disclose to an applicant information that is available for purchase, I cannot understand why a crucial question has been missed in the law and many discussions on it: "'Available' at what price?" Is there to be an utter disregard for the lowest income information seekers?

Under the current *Act*'s Sec 29(1)(a.1), in practice, the government could simply charge any astronomically high fee it wished to, even as a means of limiting access for some political reason (such as one containing a ministerial embarrassment), and the applicant today has *no* recourse. It would be naïve to assume such an event could never occur.

The taxpayers paid for the creation of this information, and they have a right to access it without paying twice. (Routine release on government websites would be even better.) Some very highly-priced information may be truly in the public interest for readers, e.g., regarding health, safety and the environment. Hence the following recommendation.

Recommendation #46

Amend Sec 29(1)(a.1) - whereby the public body may refuse to disclose to an applicant information that is available for purchase – to allow an applicant to appeal to the Commissioner a government information sale price of more than $1,000. Permit the Commissioner to publicly comment on the reasonableness and affordability of the price, but not to make an order upon it.

Sec. 32 - Disclosure in the public interest

"A high level of interest was expressed in ensuring that the Act would allow for the disclosure of information about a risk of significant harm to the environment, public health or safety, or where disclosure would be clearly in the public interest."

- 1993 Alberta FOIP legislative review report

"Section 32 of FOIP recognizes the need for public bodies to communicate matters of public interest. It is preferable that elected representatives decide what is in the public interest, but the section is there to be used."

- Alberta Commissioner Frank Work, 2008-09 Annual Report

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

It 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.

In sum, though, the concept suggests that the needs or rights of the *whole* at times override those of the *one* or few, that is, the community may prevail over individuals or certain groups. 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[30]; a government might reveal the chemical formula of waste that a company has spilled into a river, overriding its trade secret rights.

For example, the value of the override was well illustrated by Commissioner Work in his important Order F2005-030:

An applicant made an access request to Alberta Environment under the *FOIP Act* for a remediation agreement between Environment and Imperial Oil. This contained the terms for achieving clean-up of lands in the Calgary contaminated by hydrocarbon vapours and lead, had resulted in cancellation of related environmental protection orders that had been issued by Alberta Environment.

In withholding the agreement, Alberta Environment relied on *FOIP Act* sections 16, 27, 24(1) and 25(1)(c)(iii). The Commissioner did not accept that any of these exceptions applied, and ordered the information released.[31] The ruling noted:

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[30] In 2006-07, the Commissioner received 20 notifications from law enforcement agencies, primarily concerning the release from prison of persons who might pose a danger to others.

[31] The company later appealed in judicial review.

> As well, he took into account that in balancing the competing interests between confidentiality and disclosure, the principle that the public should know about the outcomes resulting from a mediated solution to a regulatory problem, in particular the question of the remediation of a contaminated site, defeats the public interest in facilitating the negotiation of settlements.

As the override stands in Alberta's *FOIP Act*:

> 32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant
>
> (a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or
>
> (b) information the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this *Act*.
>
> [Subsections 3 and 4 deal with notifications.]

Provinces across Canada have some form of the public interest override in their FOIP laws, but I believe that today there are generally at least three main problems with it: the too-high bar set to trigger the override, a lack of definitional precision, and in practice a lack of will to apply it more proactively.

[1] The bar to trigger the Sec. 32 public interest override is set too high, making it far too difficult to apply in practice.

In B.C., successive interpretations of this section have resulted in a standard which is unreasonably high and which is not found anywhere in the language of the section. It was added by interpretation by the B.C. Commissioners in rulings (who said the need to trigger the override must be "urgent and compelling"), and by judicial review.

The preferred solution to this problem would be for the override section to be amended to restore its original intent. It is unfortunate that the *Act*'s override has not fulfilled its purpose for a variety of political and bureaucratic reasons. Chief among these is the subjectivity of the term "public interest" and the question of who has the privilege of defining it.

In his Order 02-38, B.C. Commissioner Loukidelis wrote that the override application required first, "a clear gravity and present significance which compels the need for disclosure without delay." If so, I find it very difficult to conceive of an event where the override would be applied in reality. Later, acting B.C. Commissioner Fraser sensibly wrote to the 2010 B.C. legislative review, on the override:

> We believe the wording of this section is too narrow to have any real impact. The terms "without delay" indicate that the duty to disclose records in the public

> interest only materializes in the event of an urgent or compelling risk. This section cannot be used to require the disclosure of records that have significant public interest, such as reports addressing how a public authority dealt with a public health issue.

He advised in his Recommendation #10: "Amend s. 25 to require pro-active disclosure despite any other provision of FIPPA where there is a significant public interest in the disclosure that outweighs any potential harm from the disclosure." Similar proposals were submitted by advocacy groups, unions, librarians and a drafter of the original B.C. Act. There are also many better statutory modes to follow worldwide (as detailed in Chapter 5 of my book *Fallen Behind*).

FIPA suggested an amendment to take into account the ruling on public interest by the Supreme Court of Canada in *Grant v. Torstar Corp*., which was accepted and made a recommendation by the B.C. 2010 committee reviewing the B.C. *FOIP Act.*

[2] To hopefully reduce – although never eliminate - the amount of argument and litigation over the meaning of the override, some more defining features are required. I believe the catch-all term "for any other reason" in Sec. 32(10(b) is most welcome and should be retained, but it would be enhanced by several examples to help partially flesh it out in the statute (although I would emphasize that these terms are not exhaustive).

Others have made the same point. The 1999 B.C. legislative review noted that some witnesses wanted guidelines on what the override section means, and that committee suggested: "That the Office of the Information and Privacy Commissioner issue guidelines to clarify the meaning and intent of "public interest" in section 25(1)(b)." FIPA observed in 2010 that "Section 25 should be amended to include a clear set of factors to define and determine 'public interest.'"

Recommendation #47

Amend Sec. 32 to include a clear set of factors to define and determine "public interest." Retain the term "for any other reason" in Sec. 32(1)(b).

[3] While the passage of an override clause in a *FOIP Act* is valuable political accomplishment, a gap usually generally appears, unsurprisingly, between its principle and practice. In B.C. at least, the override section makes a bold statement, but of all the provisions that freedom of information advocates fought for in the early 1990s, it has been the biggest failure in implementation. The override should be the strongest and most compelling section of the *Act*. It has turned out to be the weakest and least invoked. More than any other flaw in the law, this cries out for a remedy.

The proactive intent of this section is often forgotten, i.e., the public body must release the records "whether or not a request for access is made," and as with a muscle, the override requires exercising so it will not wither from disuse.

I have summarized many Alberta news stories about very serious risks to public health, safety and the environment - articles that were made possible only through journalists'

FOIP requests. Without the media's work, it seems most doubtful the topics would ever have reached the public eye. The public would be justified, then, in asking: "Why did the government not proactively release this information on risks, as Sec. 32 obliges it to do, instead of waiting for FOI requests for this?"

One cannot, of course legislate a change in attitude. But even if this proactive publication goal is half achieved, or a serious public discussion ensues from this proposal, it could be a major step forward for the public interest. The Commissioner's assistance is essential to realize this basic right.

Recommendation #48

Seek and consider input on further measures to compel the government to proactively publish all information concerning serious risks as noted in Sec. 32 of the *Act*.

I also believe this recommendation of the 1993 Alberta FOIP legislative committee merits more study: "It is suggested that 'whistle blower' protection for public sector employees be included for situations where there has been a request made that has been denied and all avenues of appeal exhausted, or no request made, if there is a public interest and disclosure does not fall within the stated exemptions."

Part 2 - Protection of Privacy

"In the Information Age, the Information Economy, the Information Technology revolution, the deck is seriously stacked against us as individuals. The potential for us to be stripped naked, laid bare, without our consent, against our will, and often without our knowledge is staggering."[32]

– Alberta Information and Privacy Commissioner Frank Work, 2003 speech

The Privacy Commissioner of Canada has rightly said that any proposal that seeks to limit the right to privacy must meet a four-part test:

1) it must be demonstrably necessary in order to meet some specific need;

2) it must be demonstrably likely to be effective in achieving its intended purpose. In other words, it must be likely to actually make us significantly safer, not just make us feel safer;

[32] For more on this issue, see *Public-sector Outsourcing and Risks to Privacy*. Office of the Information and Privacy Commissioner. Alberta, February 24, 2006, 40 pg http://www.oipc.ab.ca/Content_Foniles/Files/Publications/Outsource_Feb_2006_corr.pdf

3) the intrusion on privacy must be proportional to the security benefit to be derived; and

4) it must be demonstrable that no other, less privacy-intrusive, measure would suffice to achieve the same purpose.

This is an eminently sensible approach, and I commend it to you for your *FOIP Act*.

Then-acting B.C. Information and Privacy Commissioner Paul Fraser, in his submission to the 2010 B.C. legislative review, offered superb guidance for B.C. that could be adopted in Alberta too:

> Recommendation 10: The *Act* should be amended to require public bodies to consider, as part of any assessment respecting the privacy impact of a law, policy, program or technology under consideration, with that assessment being conducted according to a privacy charter incorporated in the *Act* or enacted as a free-standing statute. Where the privacy impacts cannot be minimized to an acceptable level, the proposal should be abandoned.

Mr. Fraser told the same B.C. committee that "The government had not yet established what we call a 'culture of privacy.' That's not just a buzz word. It's a real expression of concern." Indeed, senior government officials told the committee that they needed sweeping new powers to collect people's information, without their consent, and share it across the government as well as with non-governmental organizations and the police. They also wanted to be able to have that data stored outside of Canada.

One purpose of the B.C. *FOIP Act* Sec. 2 is: "(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies." This phrase does not appear in the Alberta statute, but ideally should. The term used in Alberta's Sec. 2 is somewhat less robust: "(b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information."

Regrettably the 2010 BC legislative committee, in its Recommendation #20, advised instituting a system of "consent" for the collection, use and disclosure of personal information by a public body. This means that people could be asked to consent to uses of their personal information that are not otherwise allowed by the act - basically waiving their privacy rights.

This is hardly "voluntary" consent, since it is usually given to obtain government services. Whatever validity consent might have in the private sector context, where there is a competitor providing similar services, this does not exist in the public sphere. If you do not want to sign a consent releasing your information, then you do not receive the government services, and there is no other government to turn to. This course was pushed by the B.C. government during hearings, and I urge your committee to reject it entirely.

The following are adopted from recommendations to strengthen privacy protections that FIPA made in 2010 to the B.C. legislative review, here worded for the Alberta context:

Recommendation #49

The privacy impact of programs and practices should be measured against a legislative yardstick such as a privacy charter. If not justifiable, they should be modified or abandoned.

Recommendation #50

Access to personal information be further limited and particularized by upgrading Alberta *FOIP Act* sections 39, 40 and 41 to meet the standards embodied in *PIPEDA* and *PIPA*.

Recommendation #51

In particular, the definitions of "consistent use" "collection" and "disclosure" are too broad and should be amended. Sec. 41 should be amended to provide that the purpose of a use or disclosure of personal information is a consistent purpose only if a person might reasonably have expected such a use or disclosure.

Recommendation #52

Sec. 88 should be amended to require public bodies to make personal information available to the individual without charge, with limited exceptions for costly records as X-rays and other special cases.

Recommendation #53

The *Act* be amended to include privacy protection requirements for subsequent handling of personal information when it is released to third parties, and the *Act* be amended to clearly extend to government services that are privatized or contracted out, and when personal information is given to non-government organizations.

Recommendation #54

Amend the Alberta *FOIP Act* purpose Sec. 2 to add a term adapted from the B.C. law, so that one purpose of the *Act* is to "prevent the unauthorized collection, use or disclosure of personal information by public bodies."

Recommendation #55

That the Alberta government firmly reject the intent of the 2010 BC legislative committee's Recommendation #20, which advised instituting a new system of "consent" for the collection, use and disclosure of personal information by a public body.

New information technologies enable data sharing initiatives on a scale and frequency that were never contemplated at the time the Alberta *Act* was drafted. The new ways in

which the personal information contained in electronic databases is being collected, used and disclosed in data sharing projects raise significant privacy issues.

B.C. Commissioner Fraser, in his submission to the 2010 B.C. legislative review, wrote a lengthy and astute analysis of the new privacy risks stemming from data sharing, matching and mining, i.e., "dataveillance", and concluded that,

> We are adamant that no legislative amendments to *FIPPA* are needed to authorize data sharing and data matching activities within government, and would strongly oppose any weakening of the existing right to privacy. What is needed at this time, however, is a code of practice that sets out the privacy obligations of public bodies in the conduct of their data sharing projects.

He added that this code of practice would ensure that privacy protection is embedded into the design of all data sharing projects, it should be developed by government in an open and transparent manner with stakeholder consultation through something like a White Paper process. Finally, the OIPC should review and approve the code of practice once it is drafted.

I fully agree with this advice, and there is a strong precedent for this measure. A public consultation process on data sharing was successfully conducted by government and the U.K. Information Commissioner's office in Britain in recent years. In October 2007, the Commissioner issued a comprehensive "Framework Code of Practice for Sharing Personal Information"[33] providing guidance on adherence to fair information practices in the sharing of personal information by organizations. The Code was reviewed in 2008 and recommendations were made to entrench it in law.

Recommendation #56

The Alberta government should not proceed with any data sharing initiatives until a meaningful public consultation process has occurred, and the outcome of that process is an enforceable code of practice for data sharing programs.

In his 2010 submission, acting Commissioner Fraser observed that the B.C. *FOIP Act* currently allows the Commissioner to "comment on anything that affects access and privacy rights" (these same terms appear in Alberta's law, Sec. 52(1)(f)), but does not require public agencies to disclose to the OIPC any proposals that may raise privacy concerns, including large-scale data sharing initiatives. There should be an explicit oversight role for the OIPC with respect to reviewing and approving data sharing arrangements between ministries.

Efforts made at the federal level to require review of data sharing proposals by the Privacy Commissioner without legislative authority have not been successful and are illustrative of the problems that can arise in introducing an oversight role by policy only.

[33] www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/pinfo-framework.pdf

In 2006, the Privacy Commissioner of Canada suggested that data-matching guidelines be legislated. Government departments rarely notified her office of information-matching programs and many managers involved in data-matching programs appeared to be unaware of the policy.

There are precedents set across the world for this type of oversight. Australia and New Zealand allow data sharing only with prior authorization of the Commissioner. Under the New Zealand *Privacy Act*, government can engage in data matching only with the prior authorization of the country's privacy commissioner.

Recommendation #57

The *FOIP Act* should be amended to give the OIPC a statutory mandate to review and approve all data sharing initiatives.

Mr. Fraser's submission also suggested that some form of specific ethics review is necessary for government's data sharing activities for the purposes of research. Complementary research-governance measures should be adopted in addition to the approval role for the OIPC.

A committee of experts should be appointed by government that would function in a manner similar to research ethics boards of universities and the stewardship committees of the Ministry of Health Services. It would apply the criteria in s. 35(1) of the B.C. *Act* (the same basic wording as Sec. 41(1) of the Alberta law), and such other criteria as are considered desirable in the committee's terms of reference. The committee's approval should be a mandatory precondition to disclosure of personal information by any public body for research purposes.

Alberta FOIP Regulation No. 9, on "Researcher agreements," states that "An agreement under section 42 of the *Act* must include the following:" and it prescribes many good safeguards in No. 9 (a) to (j). But this new recommendation would go further. The 2010 B.C. legislative committee report endorsed the following measure, as I do.

Recommendation #58

Amend the *FOIP Act* to require that data sharing projects for the purpose of research must be subject to ethics review by an arm's length stewardship committee.

The B.C. *FOIP Act*, Sec. 69 states that, for any new project, program, system or legislation: "(5) The head of a ministry must conduct a privacy impact assessment and prepare an information-sharing agreement in accordance with the directions of the minister responsible for this *Act*." This term does not appear in the Alberta *FOIP Act* or Regulations. It should be added to the Alberta *Act*, and in a stronger form.

These B.C. PIAs, while important, are insufficient. They are insufficient because they are essentially compliance reviews, and fail to identify and justify the privacy risk any initiative creates for the personal privacy of individuals whose lives and personal information are affected. They fail to address the fundamental question of whether or not the privacy intrusion is "reasonable and justifiable."[34]

On this matter, the B.C. legislative review advised: "Recommendation 25. Add a requirement in the Act that privacy impact assessments must be completed at the conceptual, design and implementation phases of an electronic record project. This requirement should apply to health authorities as well as government ministries."

Recommendation #59

Amend the Alberta *FOIP Act* to state that, for any new project, program, system or legislation, "The head of a ministry must conduct a privacy impact assessment and prepare an information-sharing agreement in accordance with the directions of the minister responsible for this *Act*. Such privacy impact assessments must be completed at the conceptual, design and implementation phases of an electronic record project. This requirement should apply to health authorities as well as government ministries."

Sec. 43 - Disclosure of information in archives

Before the *Act* was passed, the 1993 Alberta legislative review noted that, "A strong representation was evident from libraries, museums, archives and historical societies with respect to the Act not restricting access to information that is currently available for research, historical, archival and genealogical purposes." This course was also "strongly recommended" by the 1999 legislative review in B.C., and I agree.

Recommendation #60

Amend the *Act* to state that archived documents that were open before the enactment of the *Act* be exempt from its provisions.

[34] Case example: No PIA has ever been done of the B.C. Integrated Case Management Project, despite the B.C. Commissioner's repeated requests over more than two years. See FIPA's report on this serious problem at http://fipa.bc.ca/home/news/241

Sec. 52 - Financing of operations

In January 2010, Alberta's highest court said the province's backlogged Information and Privacy Commissioner can no longer take "routine extensions" in privacy cases under *PIPA*, a decision that could extend to complaints under Alberta's health and access to information laws. In a 2-1 decision, the Court of Appeal said the commissioner can extend the legislated 90-day time limit only if he can justify the extension in each case.

The big loser is the requester, not the commissioner, but the appeal of this case is now going to be heard by the Supreme Court of Canada. Regardless of the ultimate outcome, this case highlights the need for adequate resources for the resolution of disputes under FOI and privacy legislation. To quote one reaction:

> Sharon Polsky, national chair of the Canadian Association of Professional Access and Privacy Administrators, said the decision could give the commissioner the leverage he needs to get that money. "If they need more people and they need more resources, the court has now said those resources have to be provided," she said. Critics, however, say governments deliberately choose not to provide adequate resources to information and privacy offices.[35]

In B.C. and Ottawa the underfunding of information commissioners' offices has caused a crisis of backlogs for applicants. Although this problem might not be quite as extreme in Alberta today, one cannot be certain this will always be so, hence I advise the following.

Recommendation #61

Consider placing a principle in the *Act* that: "The government shall supply the Information and Privacy Commissioner's Office with adequate resources to fulfill its legislated duties."

Sec. 53 - General powers of Commissioner

In Sec. 53(1), the Commissioner may "(f) comment on the implications for freedom of information or for protection of personal privacy of proposed legislative schemes or programs of public bodies." This capability should be stronger.

In B.C., for example, one year the Commissioner complained that a government amendment to weaken the FOIP Act (to expand the scope of cabinet committee secrecy) was introduced in a miscellaneous statutes amendment act without informing him. This should not be permitted in any province.

[35] *Top court ruling derails 180 current privacy cases*; *Alberta's information boss must justify delays.* By Karen Kleiss, Edmonton Journal, Jan. 29, 2010

The 1999 B.C. legislative FOIP committee worried that a legal requirement to consult the OIPC before implementing a policy or programs went too far, that it "could infringe on parliamentary privilege or cabinet privilege." I believe this would not be the case, for the commissioner (who is an officer of the Legislature) should only be able to comment on such plans, but never to veto them.

Recommendation #62

That Section 53 should be amended to require public bodies to provide draft legislation to the Commissioner before its introduction in the Legislature, so that the Commissioner may comment on implications for access to information or protection of privacy of that draft legislation. The Commissioner may publicize his or her comments, subject only to the exemptions for harms contained in the FOIP Act.

Recommendation #63

That public bodies incorporate consultation with the Information and Privacy Commissioner in their policy development processes.

As the Montreal Gazette noted, the federal information commissioner's office issues regular report cards" on agencies that have been conspicuously stubborn about divulging information, "and the net effect appears to be an improved response rate."[36] The following is the laudable Recommendation #29 from the 2010 B.C. legislative review, here adapted for Alberta:

Recommendation #64

Amend Sec. 53 to explicitly give the Alberta Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom-of-information requests, in a form and manner that the Commissioner considers appropriate.

[36] *Arsenal of tools can delay or block release of information*. Montreal Gazette, Sept. 22, 2007

"Oral Government," and Duty to Create Records

"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."

- Alberta Commissioner Frank Work, 2005 speech

There can be no public access to records if records are not created. Unfortunately, it has been widely noted - including by the Alberta Commissioner - that an "oral culture" is growing in government as officials choose not to record sensitive information or to delete it as soon as possible. This is in complete opposition to the *FOIP Act*'s legislated purpose of making public bodies more open and accountable.

When government officials avoid scrutiny by failing to create records, this is a threat not only to access, but also to the archival and historical interests of the province. Left without records of their predecessors' thoughts, decisions and precedents, other officials are deprived of the benefit of their wisdom - and their folly. History is impoverished and our collective wisdom is "dumbed down." As the saying goes, those who fail to learn the lessons of history are doomed to repeat them. If there is no history, it will be impossible to learn any lessons at all.

The British Columbia Commissioner's office reports it has investigated *hundreds* of complaints concerning the fact that a requested record does not exist, as one was never created. Former Commissioner Loukidelis believed that a duty to document should be introduced in B.C. He stated to a federal House of Commons committee in March 2009:

> I have recommended in the past that there be a legislative duty to document here in British Columbia – not, I would argue, an onerous one by any means, but some duty on the part of public servants to record actions and decisions and reasons therefore. One can control this by prescribing certain criteria that would surround the extent of it. Again, if you were making a policy decision or taking a decision to embark on a program or cancel it, it seems to me there should be some duty to document.

As well, the federal Conservative Party in 2006 pledged to "oblige public officials to create the records necessary to document their actions and decisions." This promise was not fulfilled. Yet several other countries' FOIP laws prescribe record creation, and the duty to catalogue records in a way that facilitates access.

On this matter, the B.C. government passed the *Local Government Act* in 1999 (later revised as the *Community Charter*), which prescribes that certain types of documents must be generated by civic councils, e.g. records of resolutions and decisions; why should the public accept any less of senior governments?

Justice Gomery in his report, *Restoring Accountability (*2006) well advised: **"**Recommendation 16: The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to decisions."

Recommendation #65

That a positive duty to oblige officials to create and maintain records necessary to document their actions and decisions be incorporated into the FOIPP Act or other legislation.

We heartily commend Alberta for including rules on record destruction in its *FOIP Act* Sec. 3(e), which also grants the Alberta Commissioner powers to investigate compliance with these rules in Sec. 53(1). Such clauses are not found in the B.C. *FOIP Act*. Record retention and destruction in Alberta is a vital issue that has been more expertly discussed by others, particularly archivists.[37]

On a related matter, the only provincial FOIP law that prescribes record management to assist applicants is that of Quebec in Sec.16, which might be advisable for Alberta also:

> 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 [….]

Sec. 88 - Records available without request

"While there is always room for improvement, Government of Alberta performance on access to information requests is good. However, I am concerned about the general degree of transparency shown by the Government of late. That is, I am concerned about the degree to which the Government is routinely communicating with Albertans on provincial matters, outside of specific access to information requests."

- Alberta Commissioner Frank Work, 2008-09 Annual Report

[37] As noted by the 1999 review committee, Alberta records and information management practices are governed by the *Government Organization Act* and the Records Management Regulation administered by Public Works, Supply and Services. Retention and disposition schedules for Government records are approved by the Alberta Records Management Committee (ARMC), which is comprised of senior officials from several Ministries.

If “Open Government” is the goal, “routine release of information’” is what gives it reality. Routine release, or proactive disclosure, is the trend in government information management in all the world’s democracies, and it has been embraced by organizations as large as the government of the United States, and the City of Vancouver and the City of Nanaimo. We urge you to highlight the need for this move to greater openness in your recommendations. This information was paid for with taxpayers money, they own it, and should have access to it.

The Alberta government now regularly posts the following information online: ministers' office expenses, all government payments made to third parties, environmental studies, flight manifests for government aircraft, and inspection reports for all supportive living facilities. This is welcome, of course, but more should be done.

Because most if not all records now exist in electronic form, much more government information should be available on government websites. Under the Obama administration’s Open Government Initiative, government agencies must preserve and maintain their electronic information, publish it online in "open formats" and proactively release it using modern technologies instead of waiting for FOIP requests.

The Alberta *Act* states that: “88(1) The head of a public body may specify categories of records that are in the custody or under the control of the public body and are available to the public without a request for access under this *Act*.” This should be worded as “must,” not may.

Recommendation #66

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

Recommendation #67

Add a new section at the beginning of Sec. 88 of the Alberta *Act* requiring public bodies - at least at the provincial government level - to adopt schemes approved by the Commissioner for the routine disclosure of electronic records, and to have them operational within a reasonable period of time.

The Alberta legislature’s intent in the Sec. 3 Scope clause of the *FOIP Act* appears clear enough: “3. This Act (a) is in addition to and does not replace existing procedures for access to information or records […]”

Yet it is often forgotten that one may still request any records routinely, and sometimes receive them. On this matter, Ontario’s FOIP law includes an enlightened provision, which could also be placed in the Alberta *FOIP Act*:

Pre-existing access preserved. 63 (2) This *Act* shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this *Act* comes into force.

Recommendation #68

Place a provision in the Act to preserve pre-existing access to information, on the model of Ontario's FOIP law Sec. 63 (2).

An additional benefit is that, as the state came to realize, releasing records routinely is far less labour-intensive and costly to taxpayers than the FOI process.

Yet such publication should never be solely internet-based because, even today, not all of the public has internet access or expertise, such as some elderly or very low income persons. As the London-based human rights and FOIP organization Article 19 said: "It is not sufficient that the public bodies 'make available' the information, but should be obligated to 'publish and disseminate widely'… We submit that simply publishing the information on its website does not satisfy this latter obligation."[38]

In 2004 the B.C. Commissioner rightly praised the framework of routine disclosure in the system of publication schemes under the United Kingdom's FOI law, and features of 1996 amendments to the U.S. FOIA; these could be applied to Alberta as well.

In her 2007 annual report, Ontario Information and Privacy Commissioner Ann Cavoukian recommended the government publicly disclose both winning and losing bids for all contracts awarded by provincial organizations. Such a move would also be advisable for a reformed Alberta *FOIP Act* as well.

On the subject of pro-active publication and routine release, the rest of the world has left Canada far behind. Most nations from Albania to Zimbabwe prescribe the release of many vital types of information in sections of their FOI statutes and, unlike the Alberta *FOIP Act*'s perfunctory Sec. 88, many of those are exhaustive, sometimes over 400 words each. (All of theses can be read in my *World FOI Chart*, column X)

Yet obviously, real transparency entails more than just what a government chooses to release, and FOI laws are mainly designed for, and will always be necessary for, records that the state definitely does *not* want released. Routine release is a welcome supplement to, but never a complete substitute for, a good FOI process.

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[38] (*Memorandum on the Chilean draft Access to Government Held Information Bill*, by Article 19. London, 2007) The group adds that Art. 7 of the Mexican *Federal Transparency and Access to Public Government Information Law 2002* and Sec..4 of the Indian *Right to Information Bill* 2004 provide excellent models for consideration.

Sec. 92 - Offences and penalties

If the current wording and interpretation of the Public Interest Override Sec. 32 is preferred, with the very high standard it creates, then penalties or presumption of liability should be added to Sec. 32.

If the head of a public body, under a statutory requirement to release information in the public interest, fails to do so when health or safety of individuals is involved, the head should be made to pay a price. This could be either in the form of a direct penalty, or it could be a statutory presumption of negligence and liability to those suffering damages as a result of the failure to release the information in the public interest.

As the Alberta Court of Appeal stated in a privacy decision released this year,[39]

> the PIPA process exists to serve the larger public interest in a number of ways, as well as vindicating privacy rights both generally and specifically. The time rules intend to promote inquiry efficiency and the expeditious resolution of privacy claims. Timeliness is a necessary feature of how PIPA serves the public interest**.** Academic debates about privacy encroachments years after the fact are not likely what the Legislature had in mind. Both claimants and respondents have a reasonable expectation of timely resolution of complaints.

Timeliness is just as important in the context of freedom of information requests. The FOIP Act is one of the few statutes on the books that is routinely violated without any chance of a penalty being imposed on those who violate it. This needs to change.

Recommendation #69

That the *Act* be amended to provide for penalties for heads of public bodies who flagrantly breach the duty to assist.

That the *Act* state that penalties be imposed on the head of a public body who does not release information where such release is found to be in the public interest as currently interpreted.

That the *Act* state that the Commissioner should have the power to apply this section on penalties and override decisions of public bodies to deny access.

• Article 19, *Model Freedom of Information Law*, 2001:

'49. (1) It is a criminal offence to wilfully: – (a) obstruct access to any record contrary to Part II of this Act; (b) obstruct the performance by a public body of a duty under Part III of this Act; (c) interfere with the work of the Commissioner; or (d) destroy records without lawful authority.

[39] *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)* 2010 ABCA 26

(2) Anyone who commits an offence under sub-section (1) shall be liable on summary conviction to a fine not exceeding [insert appropriate amount] and/or to imprisonment for a period not exceeding two years."

• Article 19, *Principles of Freedom of Information Legislation,* by Toby Mendel, 1999, endorsed by the United Nations:

"Upon the conclusion of an investigation, the administrative body should have the power … to fine public bodies for obstructive behaviour where warranted and/or to impose costs on public bodies in relation to the appeal."

• Commonwealth Human Rights Initiative, *Open Sesame: Looking for the Right to Information in the Commonwealth,* 2003:

'The law should impose penalties and sanctions on those who wilfully obstruct access to information. Penalties for unreasonably delaying or withholding information are crucial if an access law is to have any real meaning."

Recommendation #70

Regarding penalties, consider amending the Alberta Act's Sec. 92 along the models of Article 19's *Model Freedom of Information Law (*2001) and the Commonwealth Secretariat's *Model Freedom of Information Bill (*2002).

Section 93 - Fees

"Reasonable fees should be established for access to records other than the applicant's own personal information; provided establishment of fees should not be for the purpose of full cost recovery."

- 1993 Alberta FOIP legislative review report

"The Committee was of the view that fees should not be expected to recover the full cost of the access to information process and wanted to ensure that any increases in fees should not create a barrier to access."

- 2002 Alberta FOIP legislative review report

In the spirit of these two previous reports, I have a number of suggestions on fees:

• The Alberta *Act* states: "93(2) Subsection (1) does not apply to a request for the applicant's own personal information, except for the cost of producing the copy."[40] This

[40] Under the Alberta *FOIP Regulation 12*, fees can be charged for copies of one's personal records: "Where the amount estimated exceeds $10, the total amount is to be charged."

last clause ("except for…") should be deleted. The 1993 Alberta FOIP legislative review report opined: "No fee should be charged for access to an applicant's own personal information." Such a fee exemption for personal records, *including copies*, is the norm in other Canadian FOIP laws, such as B.C.'s *FOIP Act* law Sec. 75(3). There is also no charge to obtain personal information under the federal *Privacy Act*.

• In law, eliminate the $25 *FOIP* request application fee (as set in Regulation 11(2)). In 2009, federal information commissioner Robert Marleau advised parliament to drop the $5 fee to make an *Access to Information Act* request because he estimated it cost $55 to process the $5 cheque; the same general principle of inefficiency likely applies in Alberta.

Perhaps the $25 fee was added to impede a truly mischievous applicant from filing thousands of frivolous requests for free; but if so, such a case would be far too rare to design a general principle upon; even if it did ever occur, the government could apply Sec. 55(1)(b) to bar requests that are "frivolous or vexatious."

It is possible the $25 fee has discouraged potential FOI requests from very low-income public interest researchers, student and alternative media. This dampening effect runs contrary to the democratic intent of the Act. There is no cost to file FOIP requests in B.C., the Yukon, Saskatchewan, Manitoba, Quebec, the United Kingdom and the United States.

• In the Act, "93(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head, (a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or (b) the record relates to a matter of public interest, including the environment or public health or safety." The relief from fees in Sec. 93(b) - concerning the public interest - should be mandatory, not discretionary. Of course, one could also appeal to the Commissioner, per. Sec. 65, to determine if the term "public interest" rightly applies in such cases.

(This concept was well applied in the FOIP Commission office's Order F2005-022. A print media reporter requested access to information concerning the death of a young person who fell down an elevator shaft of a courthouse, while in custody. Alberta Solicitor General and Public Security refused to waive the $496 fees for access. The Adjudicator found that the records related to a matter of public interest, and ordered the fees reduced to zero.[41])

• In B.C., FIPA has heard disturbing stories about public bodies refusing to accept requests for fee waivers that accompany the request for information, insisting that such requests can only be made once fees have been assessed and requested.

I do not know if this practice has occurred in Alberta, but there should be measures put in place to discourage it. In Alberta's law,

[41] The Alberta Commissioner's office also made two other good rulings to order fee waivers, F2007-017 and F2007-020. In the first case, it ordered the fees waived on the ground of public interest for records relating to public complaints, inspections and statistical data regarding restaurant inspections. In the second, an Adjudicator waived fees based on public interest for information related to security issues or errors made in regard to $400 resource rebate cheques.

> 93. (4.1) If an applicant has, under subsection (3.1), requested the head of a public body to excuse the applicant from paying all or part of a fee, the head must give written notice of the head's decision to grant or refuse the request to the applicant within 30 days after receiving the request.

To my view, there is no reason why this obligation could not be met by a letter of response saying that a request for a waiver would be looked at *while* assessing whether or not to charge a fee, and what that fee might be.

- The 2002 Alberta FOIP legislative review's preliminary report advised in Recommendation 27: "That section 93 of the Act be amended to refer to a new provision in the Regulations setting out criteria for the waiving of fees consistent with the Commissioner's Order 96-002."

The Commissioner replied in his submission: "I do not agree with this recommendation. When the Commissioner first established the fee waiver criteria in Order 96-002, he did not intend for the criteria to be an exhaustive list but instead recognized that the criteria would, of necessity, evolve on a case by case basis." Indeed, I agree that a complete list of such criteria should not be set in Regulations.[42]

- In Alberta FOIP Regulation 11(6), "A fee may not be charged for the time spent in reviewing a record." I advise amending this to "reviewing and severing a record," and placing this provision in the statute's Sec. 93.

- The 2010 B.C. review committee agreed with the original drafters of the B.C. *Act* that fees were never intended to be so prohibitive that people could not make applications for records. Examples of fees cited by witnesses struck some committee members as "quite astronomical" and defeating the whole purpose of access rights – for example, $16.50 a minute for the cost of using a central mainframe processor for producing a record. "We believe a review of the fee schedule is long overdue and recommend that it be updated to reflect current technology," the report said.

Recommendation #71

State in the *Act* that a fee may not be charged for an applicant's personal information.

Recommendation #72

Eliminate the $25 application fee to file a *FOIP Act* request.

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[42] But I do encourage public bodies to refer to p. 77-81 in the overlooked (and non-legally binding) Alberta *FOIP Guidelines and Practices* manual, where there is an excellent, detailed discussion of fee criteria. The guidance is derived from his rulings and elsewhere, and it should be emphasized that these are only illustrative examples and non-restrictive.

Recommendation #73

Amend the *Act* to state that the relief from fees in Sec. 93(b) - concerning the public interest – will be mandatory, not discretionary.

Recommendation #74

Amend the law so that that a fee may not be charged for reviewing or severing a record.

Recommendation #75

Amend the *Act* to mandate that the time spent locating and retrieving a record be set at 5 hours without charge (which is the standard in the federal *Access to Information Act,* Sec. 11).

Recommendation #76

Amend the *Act* to state: "For both personal and general record requests, the first 100 pages of photocopies shall be provided free of charge."

Recommendation #77

That the Government compile and release yearly statistics on the number of FOIP requests that were abandoned after a processing fee estimate (not application fee) was assessed.

Recommendation #78

Amend the Act Sec. 93(4.1) to clarify that a fee waiver can be requested as part of the initial request for information.

Recommendation #79

Review Alberta's FOIP Regulations on fees with an emphasis on meeting the original objectives of the legislation and use the criterion of reasonableness throughout the whole process.

List of Recommendations

Recommendation #1 - Amend Sec. 2 to state that the Alberta *FOIP Act*'s purposes include increasing public participation in policy making, scrutinizing government operations, and reducing wrongdoing and inefficiency; and add phrases modeled upon the purpose clauses in the FOI law of Nova Scotia.

Recommendation #2 - Amend Sec. 2 to require that for an infringement of the right to privacy to be lawful, it must be "proportional to the public interest that is achieved."

Recommendation #3 – a] Place the criteria for designating a public body as noted in Regulation 2 directly into the FOIP statute instead.

b] In Regulation 2(a), the wording should extend beyond "the Government of Alberta," to add "educational body, health care body, local government body, and local public body" – for their subsidiaries should not be excluded from coverage either.

c] Amend the wording of Regulation 2, "The Lieutenant Governor in Council may designate. . ." to read "must designate."

d] Delete from Regulation 2(b) the phrase: "and the Minister responsible for the enactment recommends that the Lieutenant Governor in Council make the designation."

Recommendation #4 - Amend the Act to conform to Recommendation 77 of the 1999 Alberta legislative FOIP review: That the *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 #5 - Amend the *FOIP Act* (not regulations) to explicitly mandate the coverage of delegated administrative organizations (DAO), only insofsar as records of their public duties are concerned.

Recommendation #6 - Amend the *Act* so that any Officers of the Legislature created in future be automatically added to the law's Definition section and relevant schedule.

Recommendation #7 - Amend the *Act* Sec. 1(i)(xii) to remove the exclusion of "EPCOR Utilities Inc. or ENMAX Corporation or any of their respective subsidiaries" from the *Act*'s scope, and so to include these in the scope again

Recommendation #8 - That the Alberta *Act* be amended to include the records of self-governing professions, as in British Columbia.

Recommendation #9 - That the Government of Alberta, when negotiating its contracts for municipal policing services with the RCMP, include a clause bringing the RCMP within the scope of the Alberta *FOIP Act* to extent it provides municipal policing services within the province.

Recommendation #10 - Amend the Definitions Sec 1(n)(iii), after "the individual's age, sex, marital status or family status," to add "sexual orientation."

Recommendation #11 - Amend the Alberta *FOIP Act* to clarify that records created by or in the custody of a service-provider under contract to a public body are under the control of the public body on whose behalf the contractor provides services.

Recommendation #12 - Amend Sec. 3 of the *Act* to state that the law's coverage extends to any institution that is established by the Legislature or by any public agency - that is publicly funded; publicly controlled; wholly owned; performs a public function and/or is vested with public powers; or has a majority of its board members appointed by it. This includes public foundations and all crown corporations and all their subsidiaries.

Recommendation #13 - That an all-party committee study the necessity of each paramountcy clause in other Acts that override the Alberta *FOIPP Act*, with a view to repealing or amending those clauses, and consider the necessity of retaining Sec. 5. Consider advice from the same review process that occurred in the United Kingdom

Recommendation #14 - Delete Sec. 6 (4), and include ministers' briefing books under the *Act*'s scope again.

Recommendation #15 - Delete *FOIP Act* section 6(7), and include all audits within the *Act*'s scope, for harmful information releases can be prevented by applying other existing FOIP exemptions. If this section is not deleted, at least reduce its 15 year time limit to 5 years.

Recommendation #16 - In response to the problems noted in OIPC Order F2007-029, add a new sub-section to Sec. 10 – or a new regulation pursuant to Sec. 10 - to state that, upon refusal of the applicant's request, within 30 days, a public body must supply evidence on the five points noted in that Order, to establish that it conducted an adequate search for responsive records.

Recommendation #17 - Amend the *Act* to establish that an applicant who makes a formal access request has the right to anonymity throughout the entire process.

Recommendation #18 - 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 any search, preparation, and photocopying charges).

Recommendation #19 - 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 #20 - Amend the *Act* 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 #21 - Amend the *Act* to mandate that FOIP performance measurements including response times will be recorded, and that these measurements shall be published online in an annual FOIP report card of all public bodies.

Recommendation #22 - To reduce delays, "sign off' authority levels and processes must be streamlined and simplified. Consider vesting such authority at the lowest reasonable level, normally with the information officer if there is one.

Recommendation #23 - To lessen overall response times, amend the *Act* so that public bodies must give records to the applicant in staged releases if he or she requests it.

Recommendation #24 - Amend Sec. 13(2) of the *Act* to require that public bodies provide electronic copies of records to applicants, where the records can reasonably be reproduced in electronic form.

Recommendation #25 - Amend Sec. 21(1)(a) by changing the word "relations" to "negotiations." Also change the term "harm" to "serious harm based on reasonable expectations of secrecy."

Recommendation #26 - Amend Sec. 21(1)(a) and (b) to state that, upon receiving an FOI request that might trigger this section, the Alberta government must consult with the other government to ask if it would object to disclosure of the records, as likely to cause "serious harm based on reasonable expectations of secrecy" to negotiations, not just unilaterally presume that it might do so without inquiring.

Recommendation #27 - Amend Sec. 21(1)(b) to state that information may be withheld if it would "(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies" and add "where there is an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information, and where disclosure would cause serious harm based on reasonable expectations of secrecy."

Recommendation #28 - Change Sec. 22 from a mandatory exemption to a discretionary one, whereby deliberative records may be released if cabinet consents.

Recommendation #29 - Add a harms test for the Sec. 22 cabinet records exemption, modeled upon the terms used in Scotland's FOI law Sec. 30.

Recommendation #30 - Delete the term "or prepared for submission" from Sec. 22(1). Records may only be withheld under Sec. 22 if they were actually submitted to and considered by cabinet, not if they were "prepared" to be but never were. They could still be withheld under other exemptions.

Recommendation #31 - Amend Section 22 to state that the cabinet records exemption cannot be applied after 10 years (as in Nova Scotia's FOI law), instead of the current 15 year time limit.

Consider proactively releasing cabinet minutes on a government internet page 20 years after their creation (subject to FOIPP Act exemptions, other than Sec. 22), eventually moving to 10 years after their creation.

Recommendation #32 - Add a provision to the Alberta *FOIP Act* Sec. 22 to state that all decisions of the Cabinet along with the reasons thereof, and the materials on which the decisions were taken (although not the deliberations on the matter, *per se*) shall be made public within five years after the decisions have been taken and the matter is complete.

Recommendation #33 - Section 22 should be amended to clarify that "substance of deliberations" only applies to the actual deliberations of Cabinet, not any other material.

Recommendation #34 - Amend Sec. 23 to reduce the time frame after which exception to disclosure no longer applies for local public body confidences from 15 years to 5 years.

Recommendation #35 - That the Alberta *Act*'s official advice exemption Sec. 24 be amended to more closely match the similar Sec. 13 of the B.C. Act, so as to reduce the number of items that may be withheld under Sec. 24. Limit Sec. 24(1) to exempt only "advice or recommendations," as in the B.C. Act. Delete Sec. 24(1)(f).

Recommendation #36 - Amend section 24(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, not sweeping separate concepts

(b) "advice" or "recommendations" set out suggested actions for acceptance or rejection during a deliberative process

(c) the Sec. 24 exception is not available for the facts upon which advised or recommended action is based; nor for factual, investigative or background material; nor for the assessment or analysis of such material; or for professional or technical opinions.

Recommendation #37 - Delete Sec. 24(1)(h), by which the public may refuse to release "the contents of a formal research or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on the report for at least 3 years."

Recommendation #38 - That Sec. 24 be amended to include only information which recommends a decision or course of action by a public body, minister or government.

Recommendation #39 - Amend Sec. 24 to include a section on the model of Quebec's FOIP law Sec. 38, whereby the Alberta 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 Alberta 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 Alberta government may only withhold the record for five years (on the model of Nova Scotia's FOIP law, Sec. 14).

Recommendation #40 - That the Alberta government routinely release records of the subjects in Sec. 24 that are excluded from the exemption, that is, Sec. 24(2)(a) to (g), and preferably on the internet. Expand this list to include all the subjects found in the B.C. Act Sec. 13(2)(a)-(n)

Recommendation #41 - Amend Sec. 24 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), the United Kingdom (Sec. 36), or Article 19's *Model Freedom of Information Law* (2001).

Recommendation #42 - Do not amend the Act to expand the scope in any way of Sec. 16 (Disclosure harmful to business interests of a third party), Sec. 25 (Disclosure harmful to economic and other interests of a public body), or Sec. 20 (Disclosure harmful to law enforcement)

Recommendation #43 - Amend Section 27 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 ongoing judicial or administrative processes, or any type of information protected by professional confidentiality that a lawyer must keep to serve his or her client.

Recommendation #44 - Amend the Alberta *FOIP Act* Sec. 27 to reflect Recommendation #19 of the acting B.C. Information and Privacy Commissioner's submission to the 2010 B.C. legislative review, regarding solicitor-client privilege. Furthermore, delete Sec. 27 (3) – "Only the Speaker of the Legislative Assembly may determine whether information is subject to parliamentary privilege."

Recommendation #45 - Amend Sec. 29 to state that if the government does not release requested information within 60 days if it promised to do so, then it must release all the sought information immediately, without exemptions or costs to the applicant, unless doing so would cause "grave harm" to the public interest.

Recommendation #46 - Amend Sec. Sec 29(1)(a.1) - whereby the public body may refuse to disclose to an applicant information that is available for purchase – to allow an applicant to appeal to the Commissioner a government information sale price of more than $1,000. Permit the Commissioner to publicly comment on the reasonableness and affordability of the price, but not to make an order upon it.

Recommendation #47 - Amend Sec. 32 to include a clear set of factors to define and determine "public interest." Retain the term "for any other reason" in Sec. 32(1)(b).

Recommendation #48 - Seek and consider input on further measures to compel the government to proactively publish all information concerning serious risks as noted in Sec. 32 of the *Act*.

Recommendation #49 - The privacy impact of programs and practices should be measured against a legislative yardstick such as a privacy charter. If not justifiable, they should be modified or abandoned.

Recommendation #50 - Access to personal information be further limited and particularized by upgrading Alberta *FOIP Act* sections 39, 40 and 41 to meet the standards embodied in *PIPEDA* and *PIPA*.

Recommendation #51 - In particular, the definitions of "consistent use" "collection" and "disclosure" are too broad and should be amended. Section 41 should be amended to provide that the purpose of a use or disclosure of personal information is a consistent purpose only if a person might reasonably have expected such a use or disclosure.

Recommendation #52 - Section 88 should be amended to require public bodies to make personal information available to the individual without charge, with limited exceptions for costly records as X-rays and other special cases.

Recommendation #53 - The *Act* be amended to include privacy protection requirements for subsequent handling of personal information when it is released to third parties, and the Act be amended to clearly extend to government services that are privatized or contracted out, and when personal information is given to non-government organizations.

Recommendation #54 - Amend the Alberta *FOIP Act* purpose Sec. 2 to add a term adapted from the B.C. law, so that one purpose of the Act is to "prevent the unauthorized collection, use or disclosure of personal information by public bodies."

Recommendation #55 - That the Alberta government firmly reject the intent of the 2010 BC legislative committee's Recommendation #20, which advised instituting a new system of "consent" for the collection, use and disclosure of personal information by a public body.

Recommendation #56 - The Alberta government should not proceed with any data sharing initiatives until a meaningful public consultation process has occurred, and the outcome of that process is an enforceable code of practice for data sharing programs.

Recommendation #57 - The *FOIP Act* should be amended to give the OIPC a statutory mandate to review and approve all data sharing initiatives.

Recommendation #58 - Amend the *FOIP Act* to require that data sharing projects for the purpose of research must be subject to ethics review by an arm's length stewardship committee.

Recommendation #59 - Amend the Alberta FOIP Act to state that, for any new project, program, system or legislation, "The head of a ministry must conduct a privacy impact assessment and prepare an information-sharing agreement in accordance with the directions of the minister responsible for this Act. Such privacy impact assessments must be completed at the conceptual, design and implementation phases of an electronic record project. This requirement should apply to health authorities as well as government ministries."

Recommendation #60 - Amend the Act to state that archived documents that were open before the enactment of the Act be exempt from its provisions.

Recommendation #61 - Consider placing a principle in the Act that: "The government shall supply the Information and Privacy Commissioner's Office with adequate resources to fulfill its legislated duties."

Recommendation #62 - That Section 53 should be amended to require public bodies to provide draft legislation to the Commissioner before its introduction in the Legislature, so that the Commissioner may comment on implications for access to information or protection of privacy of that draft legislation. The Commissioner may publicize his or her comments, subject only to the exemptions for harms contained in the FOIP Act

Recommendation #63 - That public bodies incorporate consultation with the Information and Privacy Commissioner in their policy development processes.

Recommendation #64 - Amend section 53 to explicitly give the Alberta Commissioner the power to require public bodies to submit statistical and other information related to their processing of freedom-of-information requests, in a form and manner that the Commissioner considers appropriate.

Recommendation #65 - That a positive duty to oblige officials to create and maintain records necessary to document their actions and decisions be incorporated into the FOIPP Act or other legislation.

Recommendation #66 - Add a new section stating that the Alberta Act recognizes that new information technology can play an important role in achieving the purposes outlined in Sec. 2, particularly with respect to promoting a culture of openness and informal access to information and by enhancing privacy protection.

Recommendation #67 - Add a new section at the beginning of Sec. 88 of the Alberta Act requiring public bodies - at least at the provincial government level - to adopt schemes approved by the Commissioner for the routine disclosure of electronic records, and to have them operational within a reasonable period of time.

Recommendation #68 - Place a provision in the Act to preserve pre-existing access to information, on the model of Ontario's FOIP law Sec. 63 (2).

Recommendation #69 - That the *Act* be amended to provide for penalties for heads of public bodies who flagrantly breach the duty to assist.

That the *Act* state that penalties be imposed on the head of a public body who does not release information where such release is found to be in the public interest as currently interpreted.

That the *Act* state that the Commissioner should have the power to apply this section on penalties and override decisions of public bodies to deny access.

Recommendation #70 - Regarding penalties, consider amending the Alberta Act's Sec. 92 along the models of Article 19's *Model Freedom of Information Law (*2001) and the Commonwealth Secretariat's *Model Freedom of Information Bill (*2002).

Recommendation #71 - State in the *Act* that a fee may not be charged for an applicant's personal information.

Recommendation #72 - Eliminate the $25 application fee to file a *FOIP Act* request.

Recommendation #73 - Amend the *Act* to state that the relief from fees in Sec. 93(b) - concerning the public interest – will be mandatory, not discretionary.

Recommendation #74 - Amend the law so that that a fee may not be charged for reviewing or severing a record.

Recommendation #75 - Amend the *Act* to mandate that the time spent locating and retrieving a record be set at 5 hours without charge (which is the standard in the federal *Access to Information Act,* Sec. 11).

Recommendation #76 - Amend the *Act* to state: "For both personal and general record requests, the first 100 pages of photocopies shall be provided free of charge."

Recommendation #77 - That the Government compile and release yearly statistics on the number of FOIP requests that were abandoned after a processing fee estimate (not application fee) was assessed.

Recommendation #78 - Amend the Act Sec. 93(4.1) to clarify that a fee waiver can be requested as part of the initial request for information.

Recommendation #79 - Review Alberta's FOIP Regulations on fees with an emphasis on meeting the original objectives of the legislation and use the criterion of reasonableness throughout the whole process.

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The *World FOI Chart* - Explanatory Notes

As an aid to freedom of information scholars, I thought in 2007 to cross-reference the most relevant documents on freedom of information law that could be found: *i.e.,* the texts of 68 national FOI laws, 29 draft FOI bills, 12 Canadian provincial and territorial FOI laws, the commentaries of 14 global and 17 Canadian non-governmental organizations.

Their key topics were entered into a comparative Excel spreadsheet, to create the *World FOI Chart* at www3telus.net/index100/foi. It is the foundation for the report *Fallen Behind: Canada's Access to Information Act in the World Context,* 2008, and could also serve as a reference for law and political science classes. When FOI provisions are compared, new patterns and surprises may emerge (particularly within regions, or the Commonwealth).

Although the Report contains interpretation on Canadian FOI issues, the *Chart* has been conceived to be as neutral and comprehensive as possible which is why, whenever possible, the original statute texts (or available translations) have been quoted, rather than sections paraphrased, and there are internet hotlinks to the original texts.

The *Chart* was prepared for both Canadian and global readers, in a manner that hopefully makes the topics accessible to all. One of the goals of this *Chart* is to encourage more real engagement and dialogue between sectors that have hitherto been mainly segregated in FOI discussions - journalists, lawyers, academics, politicians, the bureaucracy, the private sector, applicants and the general public – both in Canada and around the world. (Hopefully, we will also one day see more international conferences for FOI users and scholars.) For instance, Column K might be used as a reference for FOI applicants across borders in our global community, e.g., as I have make FOI requests to other nations.

The multi-purpose *Chart* (word searchable using Ctrl-F) can also assist FOI applicants and scholars in each global jurisdiction to study how their FOI statutes compare to similar laws in other provinces or nations; to perhaps press for higher standards in their own nations' access laws or practices; or to cite the commentaries when arguing general principles in their FOI legal disputes.

The focus here is mainly on FOI requests for general records, more than requests for one's own personal records, which are often the mandate of separate privacy laws. In the *Chart*, blank fields remain, where information was not available or could not be located (and sometimes a law's silence on a matter can be eloquent).

Special columns (N and O) have been created for what are, at least in Canada, probably the two most overapplied and contentious FOI exemptions: those for policy advice, and cabinet records. If the *Chart* was to be expanded in future, it would be valuable to create a new column for each exemption type, e.g., personal privacy, third party trade secrets.

For space restrictions, several topics are absent, such as the privacy protection parts of the laws; the transfers of FOI requests; ignoring 'systematic and repetitious' requests; when a public body may 'refuse to confirm or deny' the existence of a record; full lists of types of public bodies covered (e.g., universities, hospitals); if the state must make an

annual report on FOI; applicants acting on behalf of others, records released so many years after a person's death; notices to third parties; who is delegated to make access decisions, etc.

But those who wish to read of these features may go to the original texts, which are hotlinked from within the chart. In fact, I would urge the reader to find and read the entire original section in the official statute text, because they may contain important technical detail that could not fit into this *Chart*'s cells.

In several cells, I placed a {*} symbol, as a kind of modest award, next to a rare and outstandingly positive feature of a freedom of information statute or policy, one that might serve as an inspiration for other jurisdictions. If you disagree with my choices for the {*} mark, or have other choices of your own, I would be keen to hear them.

We are all indebted to David Banisar at www.freedominfo.org, and Toby Mendel of Article 19, without whose groundbreaking analysis of FOI statutes and draft bills, such a *Chart* would not have been possible.

Incomplete and imperfect, the *Global FOI Chart,* the world's first as far as I know*,* is not the end point in the comparative study of FOI laws, but just the beginning. (For one thing, as laws are revised, the *Chart* would require revision as well.) Although the struggle for open government seems a very uneven one, the goal of this *Chart* is to educate and perhaps empower the public worldwide who are pressing for more transparency, to hopefully create a somewhat more level playing field.

On my website I have also posted my *Global Index of FOI Rulings*, whereby litigants can seek guidance or precedents when arguing principles in their FOIP disputes before an Information Commission or a court. http://www3.telus.net/index100/indextorulings

- Stanley L. Tromp, Vancouver, B.C., Canada

(Note. This *Chart* is not meant as legal advice of any kind, and we bear no liability for errors, omissions or consequences of using these works. The *Chart* may be widely distributed without further permission, but only without any charge or profit.)

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 the Langara College journalism program (Vancouver, 1993). He was named best Langara journalism student by the B.C. Yukon Community Newspaper Association (BCYNA), and won the 1996 essay prize on the Responsible Use of Freedom from St. Mark's College at UBC.

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 battle, a successful B.C. Supreme Court appeal, and an influential ruling for disclosure by the B.C. Information and Privacy Commissioner (http://www.oipcbc.org/orders/2001/ Order01-20.html) His FOI requests have been the subject of 12 rulings by the Commissioner since 1996.

He has been nominated for a Canadian Association of Journalists award (1997) and a B.C. Newspaper Foundation award (1999), and has been invited to give lectures to UBC and Langara journalism classes on FOI. He 1998 he helped compile a collection of 150 notable stories produced from B.C. *FOIPP Act* requests, for the book *For the Record*, published by the B.C. Press Council, at http://www.direct.ca/bcjc/archives.htm

For news articles, he has made hundreds of FOI requests, including to foreign countries and American states. His stories have been published in the *Globe and Mail*, the *Vancouver Sun*, the *Georgia Straight*, *Vancouver Magazine*, the *Vancouver Courier*, and many other publications.

He initiated the FOI caucus of the Canadian Association of Journalists at its annual general meeting in 2004, and was one of the founders of the group B.C. Journalists for Freedom of Information (BCJC) in 1998.

In 2006 he gave oral presentations to the House of Commons and Senate committees in Ottawa considering access to information amendments to the Accountability Act, *Bill C-2*. He has also made two presentations to British Columbia legislative reviews of the B.C. *FOIPP Act*.

In Right to Know Week of 2009, he was invited by the Information Commissioner to Ottawa to speak on two panels on FOI law. He may be reached at stanleytromp@gmail.com