C C P A
CANADIAN CENTRE
for POLICY ALTERNATIVES
BC Office

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

Presented by Keith Reynolds
On behalf of the BC Office of the Canadian Centre for Policy Alternatives
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The British Columbia office of the Canadian Centre for Policy Alternatives (CCPA) welcomes this opportunity to submit its views to the Legislative Committee to Review the Freedom of Information and Protection of Privacy Act (FIPPA).

The CCPA is an independent, non-partisan research institute concerned with issues of social, economic and environmental justice. Founded in 1980, we have a National Office in Ottawa, and provincial offices in British Columbia, Saskatchewan, Manitoba, Ontario, and Nova Scotia. We have more than 13,000 supporters across Canada. Our research and policy documents are produced both directly by CCPA staff and by research associates working in academic institutions and in community and labour organizations.

In the past year the British Columbia Office of the CCPA has produced work on areas such as the environment, the provincial economy and social policy issues such as the treatment of seniors.

The CCPA believes that in a democratic society it is critical that there be a free exchange of ideas with respect to policies chosen by government. Such a free exchange of ideas must be informed by information that frequently is only produced and held by government.
In light of the foregoing, and while respecting the vital importance of personal privacy, this submission will address primarily the question of the right of public access to government records not affected by personal privacy.

We urge the committee to address the issues that will arise in this review in the light of statutory purpose of the legislation to make public bodies more accountable to the public.

ABOUT THE AUTHOR: Keith Reynolds is a board member and a research associate with the Canadian Centre for Policy Alternatives, where he has written on the role of legislative officers in government accountability. He has a long standing interest in Freedom of Information issues and in 2010 he authored the CCPA's submission to the Legislative Review Committee. Keith's interest in this field has also led to his election as a Director with the BC Freedom of Information and Privacy Association in 2012. While this presentation covers many of the same issues as those raised in the presentation by the Freedom of Information and Privacy Association, this submission reflects only the views of the CCPA. Keith has a Masters Degree in Public Administration from Queen's University. Previously he has worked for all three levels of government (including a school board and a municipality) and as a policy consultant.

INTRODUCTION

It is now pretty well taken for granted that Freedom of Information laws play an important role in our nation's democracy. In Canada, this reaches all the way back to 1997 when Justice LaForest commented on the purpose of access to information legislation:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.[1]

However, there is another important function to Freedom of Information legislation that receives less attention. The accountability and transparency arising from the legislation promotes trust in government. When citizens are confident the decisions of government are open and transparent they are more likely to trust and support those decisions. In recent years we have seen the citizens of British Columbia reject major policy initiatives on transit and taxation, to an important degree, because they lack trust in the governments which represent them.

We believe this declining level of trust arises at least partly from a declining level of confidence in the effectiveness of Freedom of Information and Protection of Privacy legislation in British Columbia.

There was a time when our legislation was considered to be among the best such in the world. Over time, the legislation itself has remained largely static. However, judicial decisions have undermined

[1] Dagg vs. Canada (Minister of Finance) 1997, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1525/index.do

the powers of the legislation in a way contrary to the intent of the legislature that passed it. Section 13, dealing with advice to government, has been particularly weakened.

An increasing number of what were previously government functions have been privatized to private corporations beyond the reach of the legislation. Extremely long delays to acquire information from government have become too much the norm.

Most recently, accusations of a growing use of "oral government" have led people to wonder if information is being hidden from them. Without commenting on the validity of accusations it is sufficient to note the terms "triple delete" and "delete, delete, delete" have appeared dozens of times in BC newspapers in the past months with many more references on electronic media.

This Committee has the opportunity to rebuild public confidence in the legislation. This can be done by accepting the advice of the Legislature's Information and Privacy Commissioner but equally importantly, by accepting innovations introduced to such legislation by other jurisdictions both in Canada and abroad. Much of the legislation in other parts of Canada and the world was informed by our innovative legislation in British Columbia. We can return the compliment by adopting the best from other jurisdictions.

We urge the Committee to be bold in its recommendations. While we will deal with these issues in more detail later in this brief there are four areas in which the Committee should recommend real improvements to the legislation. These are:

1. **Duty to document**
   By accepting the advice of Information Commissioners across Canada, the BC Government can demonstrate its commitment to transparency by creating a legislated duty to document the deliberations, actions and decisions of public entities to promote transparency and accountability. We believe this is the most important recommendation this Committee can make.

2. **Expanding coverage of the legislation**
   We recommend the Committee call on government to expand coverage of the legislation by:

   a. Reiterating the recommendation of the 2004 Review Committee to restore the public's right to factual, investigative or background material under section 13.

   b. Extending coverage of the legislation to records held by outsourced service providers delivering a public service to the extent of that service.

   c. Extending coverage of the legislation to all corporations or entities owned or controlled by or created for public bodies or groups of public bodies covered by the legislation.

d. Recommending that release of Cabinet documents be discretionary, as it is under Nova Scotia legislation, and compiling documents covered under sections 12 and 13 in a way that explicitly separates information which is releasable from that which is not.

3. **Dealing with timelines**
   Many FOI requesters are waiting an unacceptable amount of time to receive a response to requests. This is caused by frequent failure to meet existing timelines as well as by extended delays for reviews in the Commissioner's Office. As well, by using a 30 working day standard rather than 30 calendar days, BC already has the longest timelines in Canada. We suggest the Committee recommend:

   a. Reducing the time for an initial response from 30 to 20 working days as has been recommended by the Clyde Wells committee in Newfoundland.

   b. Implementing financial or administrative penalties for public bodies and heads of public bodies which fail to meet timelines on a regular basis.

   c. An increase in funding for agencies responding to Freedom of Information requests and for the Office of the Commissioner to permit timely responses both to information requests and reviews.

   d. The identification and proactive release of information regularly subject to access requests to reduce the burden on people processing FOI requests.

Implementation of the measures recommended above would restore British Columbia to leadership in Freedom of Information legislation in Canada. It would be a bold move to restore trust in government.

Personal Information

While this brief will not comment on most issues related to personal information there is one issue we wish to address. There has been considerable discussion as to whether the TPP trade agreement invalidates the protection of section 30.1 of the legislation to ensure Canadian personal information remains within Canada.

The CCPA opposes any move to reduce or remove this protection.

DETAILED COMMENTARY ON RECOMMENDATIONS

Need for new provisions

DUTY TO DOCUMENT

The duty to document government decision making has been an issue discussed in the Freedom of Information community for several years. Canada's Information Commissioners are unanimous on the need for this measure, and in a resolution in 2013 called for reforms creating a legislated duty to document the deliberations, actions and decisions of public entities to promote transparency and accountability.

As BC's Information and Privacy Commissioner said in 2014, "I think there is general agreement about the need for government to record its key decisions, and how it arrived at and implemented them. It is only with the creation and preservation of adequate documentation of action and decision-making that access to information regimes and public archives can be effective."[2]

The Information and Privacy Commissioner has addressed this issue for a number of years, noting in a special report in 2014 that the number of "non-responsive record" responses had at least fallen from 25% to 19% after increasing in the previous four fiscal years. However, the non-responsive rate was still double what it was in 2002.

The government has specifically requested the Committee to address this issue.

As the Information Commissioner has pointed out, the duty to document provision does exist in other countries. This year's Newfoundland review of Freedom of Information legislation recommended a duty to document, however, it suggested this provision reside in other legislation.[3] We instead endorse the Freedom of Information and Privacy Commissioner's recommendation that such a provision be included in the FIPPA.

The author of this report has personal experience with "no responsive records" replies to information requests. Two Ministries received FOIs seeking information on lobbying efforts that were reported in the Province's Lobbyist registry. Both Ministries responded they had no records relating to setting the meeting up, to documents used for the meeting, to notes from the meeting or to meeting follow up. This raises issues not only related to the recording of records but to the transparency of lobbying in British Columbia.

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[2] Denham, Elizabeth, Special Report, Special Report, A Failure to Archive – Recommendations to Modernize Government Records Management, Office of the Information and Privacy Commissioner, 22 July 2014, page 17.

[3] Wells, Clyde K., Doug Letto, Jennifer Stoddart, Report of the 2014 Statutory Review Access to Information and Protection of Privacy Act, Office of the Queen's Printer for Newfoundland, March 2015.

Recommendation 1

Add to Part 2 of FIPPA a duty for public bodies to document key actions and decisions based on the definition of "government information" in the Information Management Act.

Sections of the legislation requiring amendment

SECTION 7 – TIME LIMIT FOR RESPONDING

In 2014 BC's Information and Privacy Commissioner made the following observation:

> It is therefore disheartening for me to issue this report, which shows the government's on-time performance for 2013/14 has dropped to 74%. This means one-quarter of responses exceeded the 30 business day statutory limit (not including access requests properly extended in specific cases).[4]

The Commissioner continued:

> Since the publication of our last timeliness report in 2011, the average on-time response across all Ministries has dropped from 93% to 74%, average processing times have increased from 22 business days to 44 business days, and the average number of business days overdue rose from 17 to 47.[5]

And:

> Time extension requests from public bodies to my office are also at an all-time high and have more than doubled in the last two fiscal years, with most of these requests coming from government ministries.[6]

Newspapers Canada commented on the same trend in their 2015 National Freedom of Information Audit giving British Columbia a failing grade for speed of responses.[7]
As bad as this may appear the situation is actually worse. BC bases its timelines on business days rather than calendar days. To miss a deadline by 47 days is nine weeks.

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[4] Special Report – *Report Card on Government's Access to Information Responses* (April 2013 – March 2014), page 3

[5] Ibid page 5

[6] Ibid page 16

[7] Vallence-Jones, Fred and Emily Kitagawa, National Freedom of Information Audit 2015, Newspapers Canada, 2015

Both Alberta and Manitoba complete more than 80% of their requests within required timelines, and, unlike BC, these timelines are based on calendar days.

The situation is made worse by delays in the Commissioner's Office. The author of this submission is currently awaiting review by the Commissioner's Office of a response to a request. So far the Commissioner has taken two 90 (business) day extensions. Outside of the original response time, which was late, the review has now been delayed by more than a year.
Public bodies are allowed what is basically the unilateral right to take a 30-business day extension without oversight. They can then go to the Commissioner to ask for a further extension. The author of this report has never seen such an extension declined by the Commissioner (though it may well have happened).

There are at least three reasons for the failure of the FIPPA to provide timely access to information. In order of importance we believe these are lack of consequences, lack of resources and the need for more effective proactive release of information.

Simply put, there are no consequences for a public body failing to meet its legislative timelines. In fact, the complete absence of penalties may even act as an incentive for delay. We believe in order to encourage timely responses to requests penalties should be imposed when legislated timelines are not met.

Recommendation 2

In the event that a public body fails to meet legislative timelines any fees connected to the request should be waived with the funds immediately returned to the requester if funds have been paid.

Recommendation 3

The Committee should recommend penalties of $500 per day for failing to meet the obligations of section 7. These penalties would commence when a public body was in breach of timelines for five days. Revenues obtained from this penalty should be directed to the Office of the Information Commissioner to assist the office in dealing with backlogs. Heads of public bodies should also receive financial penalties for failing to carry out their duties in compliance with the legislation.

While a lack of consequences is a critical factor in delay, we acknowledge that an important reason for delay is the lack of resources provided to meet Freedom of Information requests.

In 2014 the Information and Privacy Commissioner reported:

> It is my office's understanding that IAO [Information Access Operations] staffing levels have remained relatively consistent since centralization in 2009. This

> despite the fact that the number of closed access to information requests have risen approximately 27% from 7,750 to 9,832 during that time. IAO experienced staff turnover of as many as 15-20% of its staff over the past two fiscal years. At times, it was unable to immediately replace individuals who were retiring or left IAO during government's hiring freeze. The combination of the steady rise in volume and the turnover in staffing put IAO in a position where it was nearly impossible for it to keep up with the number of requests.[8]

The Information and Privacy Commissioner also faces resource issues. As she reported in this year's annual report with respect to the privacy aspect of her work:

> legitimate concerns about misuse of their personal information had a direct correlation to our Office's increased workload this fiscal year. Calls and emails from the public spiked to 5,200 individual requests for information, an increase of almost 30% from 2013-14.[9]

Recommendation 4

The Committee should endorse the recommendation of the Information and Privacy Commissioner that Government define and implement steps to eliminate the backlog of access to information requests and, in the forthcoming budget cycle, give priority to providing more resources to dealing with the greatly increased volume of access requests.

Recommendation 5

The BC Legislature should be encouraged to provide additional resources to the Office of the Information and Privacy Commissioner to reduce the backlog of reviews in her office.

Finally, the Information and Privacy Commissioner has identified areas in which proactive disclosure of information would reduce the necessity for management of Freedom of Information requests.

In a 2014 Special Report the Commissioner makes the following point:

> Special attention is given in this report to one type of request: calendars of Ministers and senior officials. This type of request accounts for 75% of the overall increase in volume over the last two fiscal years, and 18% of all access requests submitted to government. This report recommends government routinely release

[8] Information and Privacy Commissioner for British Columbia, SPECIAL REPORT A STEP BACKWARDS: REPORT CARD ON GOVERNMENT'S ACCESS TO INFORMATION RESPONSES, APRIL 1, 2013 –MARCH 31, 2014, page 19

[9] Information and Privacy Commissioner for British Columbia, Annual Report 2015, page 4.

> calendar information on a monthly basis. This would significantly lower the administrative burden associated with processing the large number of these requests and would also be consistent with the open government initiative.[10]

Recommendation 6

The Committee should endorse the recommendation of the Information and Privacy Commissioner that the minister responsible for FIPPA should develop a system to proactively disclose calendar information of ministers, deputy ministers, assistant deputy ministers as well as certain other staff whose calendars are routinely subject to FOI requests. This release should, at a minimum, contain the names of participants, the subject and date of meetings and be published on a monthly basis.[11]

Finally, there is no legitimate reason why British Columbia should have a longer timeline for response than most other jurisdictions which have a timeline of 30 calendar days. If other jurisdictions can meet this timeline, so can British Columbia. That being said, we recognize the legitimacy of using working days as a base.

Recommendation 7

The timeline for response to requests should be reduced from 30 working days to 20 working days.

SECTION 10 – EXTENDING THE TIME LIMIT TO RESPOND

Section 10 of the legislation outlines possible reasons for extending a time limit to respond as well as requiring the public body to inform the applicant that such an extension has been taken.

However, the section does not stipulate that the public body must inform the applicant at the time the extension is taken. As a result, the Commissioner's Office is now refusing to accept deemed refusal complaints when the public body is late unless the applicant has already contacted the public body to ask why the response is late.
In correspondence the Commissioner's Office said:

> It is the policy of the Office of the Information and Privacy Commissioner to refer a complainant back to the organization, where the complainant has not first given the organization an opportunity to respond to an attempt to resolve the issue.

[10] Information and Privacy Commissioner for British Columbia, SPECIAL REPORT: A STEP BACKWARDS: REPORT CARD ON GOVERNMENT'S ACCESS TO INFORMATION RESPONSES, APRIL 1, 2013 –MARCH 31, 2014, page 5

[11] Ibid, page 26

We believe this places a burden on applicants that was not originally intended by the legislation. Further, while regular users of the legislation are aware of this policy and act upon it, one-time users will not be aware of the policy. They will be left in limbo with no idea whether or not an extension has been taken or if the public body is simply ignoring them. This legislation must meet the needs of occasional users who are less aware of complex procedures not written in the Act or the regulations.

Recommendation 8

Section 10 should be amended so that the public body must not only inform the applicant of a decision to take an extension, they must inform the applicant at the time the extension is taken and provide reasons for the extension.

Section 10(2) permits public bodies to request a second extension from the Commissioner. Currently, public bodies are not required to provide the applicant with a copy of their request. The Commissioner is also not required to provide an applicant with her response. In the case of one CCPA research associate, this led to a situation where the Commissioner granted an extension based on an inaccurate chronology provided to her by the public body. We recommend that the clause be amended so that the public body and the applicant are placed on a more equal footing in this situation.

Recommendation 9

Section 10 should be amended to require that a public body making application for an extension under section 10(2) make the application at least seven business days before the expiry of the time limit under section 7(1) and that a copy of this request must be provided to the applicant at the time the application for extension is made. The Commissioner's response to such a request should also be provided to the applicant.

SECTION 12 – CABINET CONFIDENTIALITY

The CCPA has the same concerns about the broad use of Cabinet confidentiality that informed our presentation to the Committee six years ago. Cabinet confidentiality is a mandatory exemption, yet there are a range of subjects that might be released dealing with background information to decisions. Despite this, section 12 is often used as a blanket exemption.

However, other provincial courts have come to a different conclusion saying the BC approach uses "too broad a brush" for Cabinet confidentiality.

Other provinces have also been able to protect necessary areas of Cabinet confidentiality without resorting to a mandatory exemption. The Nova Scotia Act makes the release of such information

discretionary, something that more accurately reflects the reality that governments, for their own purposes, frequently make information public that has gone before Cabinet.

The Committee reviewing Freedom of Information Legislation in Newfoundland and Labrador also recommended a change to that province's legislation mirroring Nova Scotia's.

Moreover, Nova Scotia also requires the release of such information after ten years, rather than the 15 years in BC's FIPPA. This appears to have been accomplished without damage to necessary areas of Cabinet confidentiality in that province and there is no reason to suggest the result would be different here.

Recommendation 10

The BC Government should adopt the discretionary standard for release of information covered by Cabinet confidentiality used in the Nova Scotia legislation.

Recommendation 11

The BC government should adopt the standard of 10 years for the release of information covered by Cabinet confidentiality rather than the current standard of 15 years.

SECTION 13 – POLICY ADVICE OR RECOMMENDATIONS

It is difficult to improve upon the analysis of the problems in section 13 that was offered by the legislative FOI review committee in 2004.

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

Unfortunately, the government chose not to act on this in 2004 and the Review Committee in 2010 declined to repeat the recommendation.

Recommendation 12

The recommendations from the 2004 Committee remain valid today and we urge the current Committee to repeat the following items:

Recommendation No. 11 — Amend section 13(1) to clarify the following: (a) "advice" and "recommendations" are similar terms often used interchangeably that set out suggested actions for acceptance or rejection during a deliberative process, (b) the "advice" or "recommendations" exception is not available for the facts upon which advised or recommended action is based; or for factual, investigative or background material; or for the assessment or analysis of such material; or for professional or technical opinions
and,

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

We also recommend that section 13(3) be amended to reduce the time limit on section 13(1) from 10 years to five years. This is a reasonable improvement to the Act which has been recommended in the past both by the Freedom of Information and Privacy Association and the Freedom of Information and Privacy Commissioner.

Recommendation 13

The Committee should recommend that section 13(3) be amended to reduce the time limit on section 13(1) from ten to five years.

Finally, the Newfoundland and Labrador committee reviewing that province's Freedom of Information legislation has one other proposal that could be usefully implemented in British Columbia. In reference to a section of their legislation referring to Ministerial briefings, which was similar to the advice and recommendations section, the Committee said: "The minister responsible for the OPE [Office of Public Engagement] and the deputy minister suggest briefing records can be compiled in such a way as to enable factual material to be separated easily from policy advice and recommendations."[12]

[12] Wells, Clyde K., Doug Letto, Jennifer Stoddart, Report of the 2014 Statutory Review Access to Information and Protection of Privacy Act, Office of the Queen's Printer for Newfoundland, March 2015, page 16

Recommendation 14

Public bodies change the manner in which briefing books are assembled, so that policy advice and Cabinet confidences are easily separable from factual information.

SECTION 75 – FEES

It is now almost universally accepted that permitting the public to have access to information held by government increases transparency and accountability. However, the cost of seeking this information can be a barrier particularly to requesters with limited means and those not representing organizations – in other words, most members of the public.

Different jurisdictions in Canada have taken different approaches to ensuring cost is not a barrier to access to information. Unlike Alberta and the federal government, BC does not charge a fee to submit a request, which is commendable. Different jurisdictions also offer differing amounts of free search time.

British Columbia's legislation currently provides three hours of free search time in response to a Freedom of Information request.

The most accessible legislation in Canada, however, is Newfoundland and Labrador's, where requesters are not charged for the first ten hours of time spent locating a record held by local governments and the first 15 hours where the request is held by another public body.[13]

Recommendation 15

Government should increase the hours of free search time under the Freedom of Information and Protection of Privacy Act with consideration being given to adopting the standard now current in legislation in Newfoundland and Labrador.

Even when fees are demanded it is not uncommon for the large majority of material provided to be blanked out because of various exemptions. Applicants should not be expected to pay for information they do not receive.

Recommendation 16

The Committee should recommend amendments to the legislation waiving fees where more than 20% of the material provided is blanked out

[13] Nova Scotia Access to Information and Protection of Privacy Act 2015 section 25.

Finally, it is not uncommon for public bodies to demand fee deposits and to then fail to meet timelines under the legislation. Public bodies should not be permitted to request fees if they are not prepared to abide by the legislation that is supposed to guide them.

Recommendation 17

Section 10 should be amended to require that fees be waived in cases where the public body has failed to meet timelines under the legislation.

As the Committee is aware, if an appeal of fees is lodged with the Commissioner "the clock stops" until such time as a ruling is made (unless the requester pays the requested deposit, normally half the claimed fees). This can be another unreasonable source of delay, especially for less monied requesters.

The Office of the Information and Privacy Commissioner currently has an expedited process in place to deal with issues when a public body fails to meet its legislative timelines (deemed refusal). In a case of "deemed refusal" an order can be written for the public body to provide a response in a process that takes approximately one month.

Recommendation 18

The Committee should recommend creation of an expedited process in which the Commissioner could make a ruling as to whether or not fees should be waived. This would eliminate the possibility of fee demands being made solely to delay the process.

SCHEDULE 1 (DEFINITION OF PUBLIC BODY)

Since its implementation, the reach of the FIPPA has been diminished. In part this has occurred because information that was previously held by public bodies delivering a service are now often held either by outsourced private companies or by special purpose corporations established and owned by public bodies.

As early as 2002, the BC Ombudsperson complained that increasing privatization of services was placing services out of the reach of oversight. In his 2002 Annual Report the Ombudsperson said, "Services to the public that were previously subject to our oversight have been restructured in ways that have resulted in the loss of our jurisdiction to investigate complaints."[14]

A significant portion of British Columbia government and local government services are now delivered by private corporations. This would include areas such as water treatment (Britannia

[14] BC Ombudsman, 2002 Annual Report, June 2003, page 8

Mine), non-medical hospital services, the SRO renewal initiative, accommodation for workers at the Site C project, and maintenance on provincial roads and bridges. In some cases, where services are divided among the public and private sectors, the public sector is accessible under FOI and the private sector is not. One such example is TransLink, which operates the Expo and Millennium transit lines but not the Canada Line, which is operated by the private sector company, InTransitBC.

In England and Scotland, both of which have seen significant privatization, steps have been taken to ensure information on privately delivered public services remains accessible. The UK Freedom of Information Act 2000 says the Secretary of State:

> may by order designate as a public authority for the purposes of this Act any person who is neither listed in Schedule 1 nor capable of being added to that Schedule by an order under section 4(1), but who—
>
> (a) appears to the Secretary of State to exercise functions of a public nature, or
>
> (b) is providing under a contract made with a public authority any service whose provision is a function of that authority.
>
> (2) An order under this section may designate a specified person or office or persons or offices falling within a specified description.
>
> (3) Before making an order under this section, the [Secretary of State] shall consult every person to whom the order relates, or persons appearing to him to represent such persons.[15]

As the UK Justice Committee noted in 2012 when it was reviewing FOI legislation,

> "if more and more services are delivered by alternative providers who are not public authorities, how do we get accountability? The Prime Minister dealt with that the other day in one respect, by saying that it is about accountability, through tracking expenditure and outcomes. That is certainly part of it, but we nevertheless need to find ways of holding the alternative providers to account if they are trousering very large sums of public money and carrying out public purposes contracted by authorities."[16]

In response to recommendations from the Justice Committee the Ministry of Justice said,

> The Protection of Freedoms Act will, from next year, bring over 100 additional bodies within scope by including companies wholly owned by any number of public authorities. We intend to continue consultations with over 200 more organisations, including the Local Government Group, NHS Confederation,

[15] UK Freedom Of Information Act 2000 http://www.legislation.gov.uk/ukpga/2000/36/section/5

[16] UK Ministry of Justice, Government Response to the Justice Committee's Report: Post legislative scrutiny of the Freedom of Information Act 2000, November 2012

> harbour authorities and awarding bodies, about their possible inclusion in relation to functions of a public nature that they perform; and then to consult more than 2000 housing associations on the same basis. Where we conclude that such bodies are performing functions of a public nature, we intend to legislate under section 5 of FOIA to bring them within the scope of FOIA in relation to those functions, unless there are very good reasons not to, by spring 2015.

There are similar powers in the Freedom of Information Act (Scotland) 2002.

Recommendation 19

Add to Schedule 1 of the legislation private bodies paid by a public body to exercise functions of a public nature or to provide services which are the function of a public body. The application of the Freedom of Information and Protection of Privacy Act would only apply to those public functions provided by the private company and paid for by a public body.

Another issue in British Columbia is the creation by educational public bodies of private corporations owned and controlled by them. These private bodies are screened from Freedom of Information because of judicial interpretations of the legislation.

BC's FIPPA partially deals with this issue in the definition of local government public bodies in Schedule 1:

> any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in paragraphs (a) to (m) and all the members or officers of which are appointed or chosen by or under the authority of that body,

This characterization – expanded to include groups of public bodies – should be added to the definition of all public bodies in FIPPA.

The Committee reviewing Freedom of Information legislation in Newfoundland and Labrador also concluded that it was necessary for the legislation to cover corporations owned by groups of public bodies saying:

> The Commissioner expressed concern that corporations owned by one or more municipalities are not currently covered under the *ATIPPA*. The Commissioner recommended that the definition of public body be expanded to include a corporation or entity owned by or created by a public body or group of public bodies.[17]

[17] Wells, Clyde K., Doug Letto, Jennifer Stoddart, Report of the 2014 Statutory Review Access to Information and Protection of Privacy Act, Office of the Queen's Printer for Newfoundland, March 2015, page 45

> Based on the views expressed by the Commissioner and his emphasis on municipalities, the Committee also concludes that the definition of public body should be expanded to include entities owned by or created by or for a municipality or group of municipalities.[18]

The Newfoundland government has committed itself to implementing recommendations from the Committee.

Recommendation 20

In Schedule 1 the definition of "educational body," "health care body," "local government public body" and "public body" should be changed to include similar provisions for the treatment of bodies created, owned or controlled by the public body. The provision should be expanded from the definition currently in "local government public body" so that the legislation covers "any board, committee, commission, panel, agency or corporation that is created, controlled or owned by a public body or group of public bodies."

Privacy and the Trans Pacific Partnership

We would like to comment on one area of privacy protection covered by the legislation and that is the current requirement under section 30.1.

> **30.1** A public body must ensure that personal information in its custody or under its control is stored only in Canada and accessed only in Canada, unless one of the following applies:
>
> (a) if the individual the information is about has identified the information and has consented, in the prescribed manner, to it being stored in or accessed from, as applicable, another jurisdiction;
>
> (b) if it is stored in or accessed from another jurisdiction for the purpose of disclosure allowed under this Act;
>
> (c) if it was disclosed under section 33.1 (1) (i.1).

Michael Geist, an expert in this field, recently commented in the Toronto Star about the Trans Pacific Partnership's potential implications for privacy:

> One of the most troubling, but largely ignored effects of the TPP involves privacy. Privacy is not an issue most associate with a trade agreement. However, the TPP features several anti-privacy measures that would restrict the ability of governments to establish safeguards over sensitive information such as financial and health data as well as information hosted by social media services.

[18] Ibid, page 46

> Two provisions are the source of the privacy concern. First, according to the Canadian government's summary, the agreement "prevents governments in TPP countries from requiring the use of local servers for data storage."[19]

Your Committee may hear presentations urging you to eliminate s. 30.1 to comply with trade agreements, however, you have also heard from presenters that s. 30.1 does not need to be eliminated. Tamir Israel, with the Canadian Internet Policy and Public Interest Clinic at the University of Ottawa's Faculty of Law, told you "While the TPP e-commerce chapter was initially reported as imposing limitations on private and public sectors alike, the final version, as adopted, excludes government procurement and government data collection from its scope. This effectively immunizes B.C. FIPPA's section 30.1."[20]

Mr. Israel concluded his remarks with, "If I could respond really briefly, I think I wanted to provide some assurance that you're probably under no immediate trade obligation to change section 30.1."

Later in the meeting our Information and Privacy Commissioner made the following comments: "Essentially, the concerns that led the Legislature to make the data localization provisions remain unchanged. When I talk to British Columbians, they tell me that their privacy is really important to them and that they don't want their sensitive personal information to be compelled to be produced under a foreign law. They want the protection of our Canadian constitution. They want the protection of our privacy laws, which they lose once the data crosses the border."

The same day Ms. Betty-Jo Hughes, government chief information officer and associate deputy minister with the Ministry of Technology, Innovation and Citizens' Services told the Committee:.

> Maintaining the data residency provisions will assist B.C. in remaining an attractive business partner to other jurisdictions by ensuring our privacy standards continue to meet those of our peers, such as the European Union, whose data protection directive has set the bar for privacy internationally.
>
> This year, the safe harbour agreement, which allowed U.S. companies working in Europe to self-certify their compliance with the EU data protection directive, was ruled invalid by the EU Court of Justice. This ruling is likely to have a significant impact on thousands of U.S.-based companies who relied on this agreement to do business in Europe.
>
> The court's dismissal of the safe harbour agreement is a strong signal to the rest of the world that the EU is serious about upholding their data protection standards

[19] Geist, Michael, How the TPP might put your healthcare data at risk, Toronto Star, 13 October 2015

[20] Israel, Tamir, Presentation to the SPECIAL COMMITTEE TO REVIEW THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT, 18 November 2015

> at all costs. In that light, B.C. must ensure that our FOIPP Act remains on par with global privacy leaders to remain a viable partner in business and trade.

All of this suggests there is no need for the protection of this section to be removed. Even if trade agreements did threaten this section the committee would need to ask itself, should the privacy protections of Canadians be traded away?

Recommendation 21

The section of the legislation requiring public bodies to store personal information in their custody or control in Canada subject to existing exceptions should not be changed.