

British Columbia's Bill 22: Needed Reforms

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Centre for Law and
Democracy

info@law-democracy.org

+1 902 431-3688

www.law-democracy.org

British Columbia's Parliament is currently considering Bill 22, which would amend the Freedom of Information and Protection of Privacy Act (FIPPA). Bill 22 would negatively impact access to information in British Columbia, introducing a number of changes which would increase secrecy and undermine the fundamental right to access information held by government or the right to information.

This Note provides a brief overview of the major amendments introduced by Bill 22 to the freedom of information provisions of FIPPA; it does not discuss the privacy components of FIPPA. For each, it highlights the key aspects of the amendment and makes a recommendation as to whether the amendment should be retained, amended and/or removed.

Overall, however, our recommendation is that Bill 22 should be rejected for several reasons. First, it would do far more harm than good, lowering the overall score of British Columbia's system for the right to information by a significant six points (see table below). Second, it simply fails to engage in meaningful reform of FIPPA, ignoring most of the more serious problems with the current legal framework for access to information. Third, it completely ignores the ongoing process of review of FIPPA by the parliamentary Special Committee to Review the Freedom of Information and Protection of Privacy Act, which is undemocratic and, ultimately, an insult to the work of the Committee, not to mention undermining the scheme for review that is built into FIPPA.

In terms of the second point above, Bill 22 simply ignores or in some cases further exacerbates a number of the weaknesses currently found in FIPPA, as assessed against international standards. For example, the legislature and judiciary are largely excluded from the scope of the Act as it applies to the right to information. The time limits for responding to requests are unduly long as compared to international practice. FIPPA is weak on promotional measures, such as requiring the appointment of information officers or requiring the publication of lists of documents held. And many of FIPPA's exceptions do not require a showing of harm, which is important to ensuring that information is only withheld when disclosing it would be likely to harm a protected interest.

In assessing Bill 22, we are guided by our RTI Rating (rti-rating.org), a globally recognised methodology for assessing the strength of the legal framework for right to information laws, which has been applied to all national laws around the world. Currently, based on this methodology, FIPPA scores 98 out of a possible maximum of 150 points. Bill 22 would drop this score by six points, as shown by the table below, which groups the points awarded under the RTI Rating's seven main categories.

Section	Max Points	Current Score	Score for Bill 22
1. Right of Access	6	5	3
2. Scope	30	14	18
3. Requesting Procedures	30	21	18
4. Exceptions and Refusals	30	12	18
5. Appeals	30	23	25
6. Sanctions and Protections	8	6	6
7. Promotional Measures	16	9	4
Total score	150	90	92

This Note summarises the amendments in the categories of Scope, Requesting Procedures, Exceptions and Refusals and Sanctions and Protections, as these all see scoring changes under Bill 22.

1. Scope

Exclusion of the Office of the Premier and Executive Council from Access to Information Obligations: The Premier's Office and the Executive Council would be struck from Schedule 2, meaning they would no longer be included in the list of public authorities which must disclose information under FIPPA.

Analysis: This is entirely unjustified. Strong right to information laws should apply to all public authorities, just as other human rights obligations do, and especially those in key policy- and law-making positions. Both of these entities engage in policy making which has a significant impact on the lives of British Columbians. Voters also need access to information about how their Premier and cabinet function in order to make informed voting decisions. Excluding the Office of the Premier and Executive Council significantly undermines transparency.

Needed Reforms: This amendment should be removed. There is no justification for excluding the Office of the Premier and Executive Council from the scope of FIPPA, which only serves to increase secrecy around executive branch activities.

Inclusion of Two Police Professional Associations on the List of Public Authorities Subject to Access to Information Obligations: Another amendment to Schedule 2 adds the Association of Chiefs of Police and BC Association of Municipal Chiefs of Police. This would make them subject to access to information obligations.

Analysis: This has been a [longstanding recommendation](#) of the Information Commissioner due to the nature of these groups and their influence over policy decisions. Some other analogous professional associations are already included in Schedule 2. This expansion is therefore a positive development. However, it should be noted that the addition of these groups is a relatively minor change given that much broader reforms are needed to ensure that the scope of coverage of FIPPA aligns with international standards.

Needed Reforms: This is a positive amendment and should be retained. However, a more comprehensive review and then expansion of the scope of FIPPA is needed.

Expanded Powers to Add to and Remove Public Authorities from the List of Those Subject to Freedom of Information Obligations: The government would have greater powers, under an amended section 76.1, to add authorities to Schedule 2 via regulation, which determines whether or not they are required to provide information under FIPPA. Specifically, Bill 22 would create a new ground for doing this based on whether it is in the “public interest” to include a public authority on this list. An authority could also be removed on the basis that it “no longer meets the criteria established” for adding it. We presume that the public interest ground for adding could only be used to remove an authority that had been added on that ground in the first place, but this is not entirely clear.

Analysis: Generally, it is better to set clear rules on the scope of right to information legislation in the primary legislation itself, rather than granting discretion powers to a minister to alter the scope via regulation. The latter makes it too easy for political motivations to influence decisions about what entities should or should not be subject to right to information obligations. Given the highly discretionary nature of this new power, since it is based on a minister’s assessment of the public interest, this criticism is especially relevant here. At the same time, given the current approach, expanding the grounds for bringing additional public authorities within the scope of the information disclosure provisions of FIPPA is still positive.

Needed Reforms: Instead of expanding the discretionary powers of the government to add public authorities to the scope of FIPPA via regulation, FIPPA itself should be reformed to ensure that it defines the public authorities which are subject to its information disclosure obligations broadly in the first place. At a minimum, the new provision should be amended to make it absolutely clear that the removal of an authority on public interest grounds would be possible only in relation to authorities that were added on that basis in the first place.

Exclusion of Metadata and Deleted Electronic Records: Changes to sections 3(5)(c) and (d) of FIPPA exclude a record of metadata which is generated by an electronic system and which describes an individual's interaction with that system from disclosure under FIPPA. These changes also exclude electronic records that have been lawfully deleted by a government employee which can no longer be accessed by that employee.

Analysis: The rationale for excluding these types of records from the scope of FIPPA entirely is not clear. Access to information legislation should apply broadly to all records held by public authorities. The basis for non-disclosure of a record should be a properly crafted exception, subject to a harm test and public interest override, rather than a categorical exclusion of that type of record. No exception which is recognised under international law as being legitimate would cover these types of records.

For example, if the concern with metadata is that this will compromise privacy, a properly crafted privacy exception, along the lines of the one found at section 22 of FIPPA, is the appropriate means to address this rather than excluding certain categories of metadata entirely. We note that the scope of metadata which is excluded by section 3(5)(c) is certainly not limited to private information.

Similarly, it is not clear why deleted records should be excluded just because the employee who deleted them cannot access them, as long as another employee (such as a member of the IT team), can access them. It may be noted that if no one could access a record, then it would not be deemed to be "in the custody or under the control" of the public authority in the first place (see section 2(1)) and hence not subject to FIPPA in any case.

Needed Reforms: New sections 3(5)(c) and (d) should be removed from Bill 22.

2. Requesting Procedures

New Application Fees: Currently, filing an information request in British Columbia does not cost anything, although fees may be charged for various other items, such as locating, preparing, duplicating or shipping a record. Bill 22 allows fees to be charged simply for filing a request, with the amount of the fee to be set by regulation. If a fee is imposed, it would not be possible, pursuant to amended section 52(1), to appeal that fee to the Information Commissioner.

Analysis: Charging fees simply for making a request for information is not in line with international standards. The right to access to information held by public authorities is a fundamental human right. It is not appropriate to charge fees to those seeking to exercise human rights. At the federal level, Canada is already an outlier by charging a \$5 fee for requests. In comparison, out of the 134 countries assessed on

the RTI Rating, only 14 other countries than Canada score no points on Indicator 24, which is about charging to make requests (and in several of those countries, these fees are allowed but not charged in practice). A large number of relatively impoverished countries with a far less well-resourced public services than Canada score the full two points on Indicator 24, as well as peer group countries like the United Kingdom, Australia and the United States.

Beyond just the right to information, from an equity perspective, application fees disproportionately impact less well-resourced requesters. Even a small fee can be burdensome if a requester needs to file multiple requests, particularly given that additional charges may be levied for responding to a request. Lisa Beare, the Minister of Citizens' Services, suggested that the fee would likely be \$25. This would put it on par with the highest fee in Canada and is far too high, indeed a level which would undoubtedly deter requests for information. If someone needed to request information from multiple authorities, for example, the application fees alone could easily run into the hundreds of dollars.

Needed Reforms: New section 75(1)(a), which allows authorities to impose a "prescribed application fee", should be removed.

Alternatively, if this is not possible, at a minimum language should be added to cap the application fee at a reasonable level, such as \$5. Leaving the amount to be set by regulation, without any restriction, too easily enables an anti-transparency government to impose higher fees to discourage requests.

3. Exceptions and Refusals

New Exclusion for Records Unrelated to the Business of the Public Authority: Bill 22 would amend section 3(5)(b) so that the obligation to provide information under FIPPA would not apply to records which are unrelated "to the business of the public body".

Analysis: This new language effectively creates a new and potentially quite discretionary exclusion to the right to information. The right to information should apply whenever a public authority holds information in the first place (or has it in its custody or control, to use the language of FIPPA). If it does, and if that information does not implicate a protected interest, it should be disclosed. Whether or not the record relates to the authority's own business is irrelevant, because the record may still contain public interest information. Furthermore, public funds are inevitably being spent to hold the information, and the public has a right to know about this. Put differently, public authorities should not be holding information that is entirely unrelated to their work. A further problem is that this will allow officials to engage in an assessment in the first place of whether or not information relates to their business, which could lead to highly discretionary decisions.

Furthermore, under international standards, a record may only be withheld where its disclosure would cause harm to a protected interest under FIPPA and where this harm overrides the public interest in accessing the information. This exclusion would avoid such an analysis.

Of course there will be cases where publicly run information systems, such as email, or publicly-owned devices, such as work mobile phones, are used by staff for both business and personal matters. In such cases, the information would likely be protected by the privacy exception. If a specialised provision is deemed necessary for such cases, it should be limited to the (otherwise legitimate) use of public information systems for private purposes.

Needed Reforms: Proposed section 3(5)(b) should be removed from Bill 22. If necessary, a more tailored exception could be adopted to cover the personal use of publicly-run information systems or publicly-owned devices.

New Exception for Harm to Indigenous Peoples: Bill 22 would add a new exception though a new section 18.1 for information which would “harm the rights of an Indigenous people”, unless the Indigenous people consent to disclosure. It would apply whenever the disclosure of information “could reasonably be expected to harm the rights of an Indigenous people to maintain, control, protect or develop” their “cultural heritage”, “traditional knowledge”, “traditional cultural expressions” or “manifestations of sciences, technologies or cultures”.

Analysis: The government [claims](#) this amendment will increase information sharing with Indigenous peoples. But, because it creates a new, undefined and highly discretionary category of information which may be kept secret, the new exception could result in *greater* secrecy around issues impacting Indigenous peoples, potentially including in relation to those peoples. It may be noted that the language used to describe the exception is incredibly broad and, on this ground alone, it does not meet the international law standard for a restriction on the right to information. The Centre for Law and Democracy regularly rejects broad exceptions to right to information laws which purport to protect “rights”, given the potential for them to be abused.

The [most recent report](#) on public consultations on FIPPA indicated that outreach to Indigenous groups was “still underway”. Those supporting this new exception need to clarify what specific legitimate interest it seeks to protect, beyond the very broad language currently used.

Furthermore, although the amendment allows for disclosure with the consent of the Indigenous people concerned, it simply tacks the procedure for such consultation onto existing procedures for consulting with third parties. As such, it fails to

consider what special issues may arise in consulting meaningfully with Indigenous groups. Without a clearer consultation process, access to information may be denied under this exception, even when Indigenous peoples themselves have an interest in the information being made public.

Needed Reforms: Instead of rushing through a new and very vague exception, the government should engage in meaningful consultations to determine what legitimate secrecy interests are engaged in this space, including how the release of information under FIPPA could potentially harm those interests. Then, any new exception to the right of access should be carefully and narrowly tailored to protect those interests. As part of this, the government should also engage in discussions to determine the various ways in which it can ensure better access to information for Indigenous peoples generally, instead of focusing only on creating a new exception.

4. Sanctions and Protections

Stronger Sanctions for those who Obstruct Freedom of Information: Bill 22 introduces a new section 65.5 to impose sanctions on those who wilfully conceal, alter or destroy records to avoid disclosing them in a response to a request for information. Section 65.6 substantially increases the fines which may be levied on those who commit right to information offences.

Analysis: Imposing sanctions on those who obstruct access to information is highly important to ensuring that access to information obligations are actually respected. The new proposed section 65.5, by sanctioning those who conceal or destroy records, addresses a weakness in FIPPA and would earn British Columbia an additional point on the RTI Rating.

One further reform could make FIPPA much stronger in this category, however. While individuals can be sanctioned for obstructing the right to information, FIPPA lacks any means to redress poor systemic performance by public authorities. There are a number of ways to do this. For example, the Information and Privacy Commissioner could be empowered to require remedial actions by authorities which were consistently failing to meet their obligations, such as to allocate more time or training to an information officer or to improve their records management systems.

Needed Reforms: New sections 65.5 and 65.6 are positive features of Bill 22 that should be retained. A further reform to address poor systemic performance by public authorities, and not just individuals, should also be considered.