Submission on Access to Information Reform in British Columbia

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Centre for Law and Democracy
info@law-democracy.org
+1 902 431-3688
www.law-democracy.org

This Submission[1] to the British Columbia all-party Special Committee to Review the Freedom of Information and Protection of Privacy Act (FIPPA) was prepared by the Centre for Law and Democracy (CLD), an international human rights organisation based in Halifax, Nova Scotia, which provides expert legal services and advice on foundational rights for democracy.[2] It is an updated version of a Note on Access to Information Reform in British Columbia prepared by CLD in October 2015, also prepared for the Special Committee, taking into account changes since then. FIPPA requires that a special committee of the Legislative Assembly review the provisions of the Act every six years, which includes an opportunity for interested stakeholders to make submissions.

Despite being weakened recently, FIPPA remains one of the stronger Canadian laws giving individuals a right to access information held by public authorities or right to information (RTI) laws, falling in second place from among the 14 laws in Canada.[3] CLD bases that assessment on its rating of FIPPA, as well as other Canadian laws, using the respected RTI Rating methodology,[4] widely relied upon by actors such as UNESCO, the World Bank and the Millennium Challenge Corporation.[5] However, that performance must be understood in the context of the overall weakness of Canada's RTI laws. By international standards, Canada is a laggard on this important democratic indicator, languishing in 52nd position from among the 135 countries assessed on the RTI Rating,[6] far behind countries like India, Serbia and Mexico, the RTI legislation of which provides for a greater degree of openness than anything found in Canada. In considering reforms, we urge the Special Committee to aim for a law

[2] More information about CLD and its work is available at: www.law-democracy.org.

[3] See https://www.law-democracy.org/live/rti-rating/canada/, for assessments of all 14 Canadian laws.

[4] See www.RTI-Rating.org.

[5] See https://www.mcc.gov/who-we-select/indicator/freedom-of-information-indicator.

[6] The RTI Rating includes assessments of all national RTI laws globally.

which goes beyond the weak approach to access to information which is found across Canada,[7] and to commit to bringing FIPPA as fully into line as possible with international human rights standards.

We note, with regret, the amendments to FIPPA which were pushed through at the end of 2021 in the form of Bill 22, which weakened FIPPA, for example through imposing a fee for filing requests for information. Beyond their largely unfortunate substantive impact on FIPPA, the amendments, by bypassing the Special Committee process which was already ongoing at that time and by being rushed through the legislature, undermined the established democratic process for reforming FIPPA. As such, we urge the Special Committee to reject both the process and substance of the 2021 amendments and, instead, to call for and to contribute to a process of genuine RTI reform in British Columbia.

Scope

A key shortcoming of FIPPA is limitations in terms of its scope. According to international standards, the right to information, as a human right, should apply to all information held by any authority which forms part of the State or otherwise plays a public role. This includes information held by the executive, legislative and judicial branches of government, crown corporations, constitutional, statutory and oversight bodies, and any other body which is owned, controlled or substantially funded by a public authority (meaning that it receives funding to cover their core operating costs as opposed to just receiving a project grant), or which performs a statutory or public function. Although FIPPA applies to most executive authorities, its provisions do not apply to members or officers of the Legislative Assembly and the courts are also largely excluded from its scope.

When it comes to bodies which are owned or controlled by other public authorities, FIPPA, like many Canadian laws, uses a list approach, specifically the list in Schedule 2, which the government can amend by regulation. This is an inherently flawed approach both because it will inevitably mean that some bodies which are owned or controlled by government are not or not yet on the list and because it leaves this important matter up to the discretion of government. It would be preferable to provide generally that bodies which are owned or controlled by government are covered, and then to include Schedule 2 for purposes of greater certainty but not as an exclusive list.

The 2021 amendments expanded the section 76.1 powers of the government to add entities to Schedule 2 where this would be in the public interest. It may be noted that the other grounds for adding bodies to Schedule 2 are reasonably objective – such as having directors

[7] We note, in this regard, that Newfoundland and Labrador adopted a much stronger RTI law on 1 June 2015 which represents an exception to the generally weak Canadian laws.

appointed by government, being majority owned by government or performing a public function under a law – whereas this ground is far more discretionary in nature. This could potentially be used to address some of the other shortcomings of FIPPA in terms of scope, although it could also be used to remove entities from Schedule 2 on public interest grounds. In terms of addressing current scope limitations, it would be preferable to do this directly, as we recommend above, rather than through allocating discretion to the government to do this.

FIPPA applies to the bodies which regulate a range of professions, which are listed in Schedule 3. However, it does not otherwise cover private bodies which perform a public function, except to the extent that they are included in Schedule 2. We understand that "performing a public function" could be considered to be an unclear category of bodies to be covered by FIPPA. If that is the objection to adding this, it could be overcome by adding in a definition of what constitutes a public function for this purpose.

FIPPA generally has broad coverage of all information held by the public authorities it applies to. However, the 2021 amendments added language excluding any "record of metadata that (i) is generated by an electronic system, and (ii) describes an individual's interaction with the electronic system", as well as any "electronic record that has been lawfully deleted by an employee of a public body and can no longer be accessed by the employee". Completely excluding these types of information, otherwise held by a public authority, from the right to request information is not legitimate. Instead, any refusals to disclose should be based on whether the information falls within the scope of the exceptions. If the motivation for excluding certain types of metadata was privacy, this could be addressed through the exception in favour of privacy. Of course if an electronic record cannot be accessed by the public authority (as opposed to just the official who deleted it), then it would not qualify as being held by the authority.

Procedures

There are also problems with FIPPA in the area of procedures. One is the rules on time limits for responding to requests. First, FIPPA does not require public authorities to respond to requests as soon as possible. This is important to avoid situations where public authorities wait until the end of the time limit to respond to requests, even where it is simple enough to respond more quickly. According to section 7, public authorities are only required to respond to requests within 30 days. While 30-day time limits are relatively routine across Canada, Schedule 1 effectively defines this as 30 working days, whereas in other Canadian jurisdictions it is 30 calendar days. Even that is significantly longer than better practice time limits. In Finland, Poland and the Netherlands, among many others, the established time limit is just ten working days or two weeks.

FIPPA then allows extensions for up to another 30 working days at the discretion of the public authority where certain conditions are met, and then indefinitely beyond that with the permission of the Information Commissioner under similar, albeit even broader, conditions. While this overall approach is better practice in Canada (apart from the fact that FIPPA uses working days), international standards call for hard overall time limits. This is perfectly feasible and many countries which lack the resources of Canadian public authorities manage to work with hard deadlines. In India, for example, extensions beyond the original 30 days are not allowed at all, while in Brazil, Chile and Honduras extensions are limited to an additional 10 working days. Consideration should be given to introducing hard time limits for responding to requests. At the very least, FIPPA should make it clear that the approval by the Information Commissioner of extensions beyond the initial extension are exceptional and it should place clear conditions on when such extensions might be granted.

Another procedural problem is in the cost of obtaining information. International standards mandate that fees for requesting information should be limited to the actual costs incurred by the public authority in reproducing or delivering the information. FIPPA allows public authorities to charge $30 per hour where requests take longer than three hours of staff time to process. Charging for employee time in responding to a request for information is not better practice, especially where the limit is set as low as three hours.[8] Such charges, again by being based on such a low limit, may also effectively penalise requesters for poor records management practices by public authorities. Once again, it is worth noting that numerous developing countries, such as Nepal and Mexico, to give just two of many examples, only charge for direct costs and not for employee time. Federally, Canada stopped levying any charges at all for responding to requests in May 2016.

FIPPA also allows for disproportionate charges to be levied for many other information requesting services, such as charging $4 for a CD and $0.10 for a scanned electronic copy of a paper record. The latter case seems particularly unnecessary given that the per unit cost for scanning is virtually zero, especially since this fee does not cover staff time (which can be charged at $30 per hour beyond the first three hours).

According to British Columbia's most recent Annual Report, in practice fees are levied only in a minority of requests and represent an average of $5 per request overall.[9] However, it

[8] An argument can be made that charges are needed for very extensive requests so as to avoid costly fishing expeditions by requesters but three hours is far too low a limit for that.

[9] See Ministry of Citizens' Services, Report on the Administration of the Freedom of Information and Protection of Privacy Act 2017/2018 & 2018/2019, 28 November 2019, p. 9, https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/initiatives-plans-strategies/open-government/open-information/citz_-_report_on_the_administration_of_foippa_-_2017-20118_2018-2019.pdf (somewhat concerningly, it seems the 2018/2019 report is the most recent report available).

would appear that this data only includes fees paid and, if so, would not capture instances where requests were abandoned after receiving high fee quotes. There are reports of this occurring. Online magazine The Tyee complained about a $2,200 fee for records relating to a contract for a new procurement system in a case where a request for a public interest fee waiver was denied.[10] A particularly notorious example is a quote of a $500,000 fee to the casino workers' union for a request to the B.C. Lottery Corporation related to compliance with anti-money laundering rules.[11] Given that high fee quotes may serve as a deterrent to requesters, and that in practice minimum revenue is derived from processing fees, eliminating them altogether would have a minimum impact on public authorities but could remove a barrier to access.

Adding to the concern over processing fees, the 2021 amendments now empower the government to impose application fees, currently set via regulation at $10. The government is empowered to raise the fee at will, so that an anti-transparency government could easily use this as a tool to discourage requests. In any case, application fees do not align with international better practice given that making requests for information is a human right. Canada has a long practice of charging fees for requests, although $10 is more than many jurisdictions charge (requesting fees are $5 at the federal level but then information is provided for free). But this is highly anomalous internationally. From among the 135 countries on the CLD RTI Rating, Canada is one of only 15 countries which earns zero points on Indicator 24, asking whether it is free to make a request for information. It may be noted that application fees disproportionately discourage requests from people with less resources; given the importance of RTI to participation in public affairs, itself key to many important social and political issues, this could be seen as a form of systemic discrimination.

Exceptions

Although the right to information is not absolute, international law imposes clear conditions on when it may only be overridden. Specifically, information should be withheld only if its disclosure would pose a serious risk of harm to a legitimate interest which outweighs any public interest in releasing the information. This effectively leads to a three-part test for assessing the legitimacy of exceptions: (1) they should aim to protect narrowly defined and legitimate interests; (2) they should only cover information the disclosure of which would pose a serious risk of harm to one or more of those interests; and (3) they should be subject to a public interest override.

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[10] Andrew MacLeod, "Secrecy Shrouds the Province's Overdue BC Bid Tech Project", 6 April 2021, The Tyee, https://thetyee.ca/News/2021/04/06/Secrecy-Shrouds-Provinces-Overdue-BC-Bid-Tech-Project/.
[11] Liam Britten, "Union, Advocate Shocked by BCLC's Demand for $500k Fee for Money Laundering Info," 3 January 2018, CBC, https://www.cbc.ca/news/canada/british-columbia/union-advocate-shocked-by-bclc-s-demand-for-500k-fee-for-money-laundering-info-1.4471911.

Some of the exceptions in FIPPA do not relate to interests which are recognised as being legitimate under international law while others lack a harm test, as follows:

- The 2021 amendments introduced a new exclusion for records which are unrelated to the business of the public authority (section 3(5)(b)). This effectively creates a new exception. Public authorities should respond to requests based on the information they hold rather than based on their assessment of the reasons they hold that information. The absence of such an exception in the vast majority of the world's RTI laws shows that it is not necessary and, indeed, it grants officials additional discretion to refuse requests.
- Section 12(1) protects cabinet confidences and, generally, represents a better formulation than many such exceptions found across Canada, being tied to disclosures which would "reveal the substance of deliberations of" cabinet. At the same time, it would be useful to clarify that this exception would only cover advice, recommendations and so on submitted to or prepared for submission to cabinet if the release of these records would, of itself, "reveal the substance of deliberations of" cabinet.
- Section 13 protects information that reveals advice or recommendations developed by or for a public authority or minister. This is simply not legitimate, although its overreach is somewhat mitigated by the fact that the same section has a long list of exceptions to this exception. Instead, every exception should refer to an interest (none is present here) and then protect that against harm. According to international standards, it is legitimate for public authorities to refuse to disclose information if (unduly early) disclosure would harm the development or success of a policy or threaten the free and frank provision of advice (both clearly identified harms to legitimate interests). Most of this information should normally be disclosed once the deliberative process has been concluded (i.e. once a decision has been reached).
- Section 14 covers all information which is the subject of solicitor client privilege. This should be narrowed to cases where lawyers provide litigation or negotiation advice to government (to the exclusion of policy or programme advice).
- Two of the exceptions found in section 15(1), namely (e), on revealing certain types of criminal intelligence, and (g), on information used in the exercise of prosecutorial discretion, do not identify a clear interest and, as a result, also lack a harm test.
- The exception in section 16(1)(b), relating to information received in confidence from other governments, does not include a harm test. Other governments often routinely classify even non-sensitive information, which they themselves would not be able to refuse to provide under their own RTI laws, and FIPPA should not automatically render this information exempt. Instead, the test should be whether disclosure of the information would harm relations with the other government (already covered by section 16(1)(a)).
- Section 18.1, introduced by the 2021 amendments, created a new exception for information that would "harm the rights of an Indigenous people" to maintain or

protect their culture, traditional knowledge, cultural expression or science, unless the Indigenous people consent to disclosure. While this may have been well-intended, it is unclear how information held by a public authority might need to be kept secret on these grounds. Ultimately, it creates an undefined and highly discretionary exception which fails to refer clearly to an interest or harm. Among other things, it is not clear whether the reference to the "rights of an Indigenous people" means rights which are protected by law or simply an official's perception of what these rights constitute. It is important to note that this will be applied by public authorities, not Indigenous peoples. It is significant that Indigenous peoples will only mandatorily be given notice where the authority intends to disclose information which may fall within the scope of this exception (see section 23(1)), while they merely "may" be given notice where the authority intends to keep the information confidential. As such, this gives significant discretionary power to officials to keep information confidential and could result in greater secrecy even where the Indigenous peoples concerned would want the information to be made public.

- Section 20(1)(c) covers information which is required by law to be published. However, in contrast to section 20(1)(b), which also covers information which is to be published, it does not contain any time limit (of 60 days in the case of section 20(1)(b)). As such, it could lead to permanent secrecy (where the law requiring publication did not include any time limit) or long-term secrecy (where the law allowed for that). At a minimum, a time limit along the lines of the one found at section 20(1)(b) should be added here.

FIPPA contains a robust public interest override, in section 25(1), which, rather uniquely, and positively, calls for disclosure of information in the public interest whether or not a request for that information has been made. However, it applies only where there is a "risk of significant harm" or disclosure is "clearly in the public interest". While those more stringent tests might be appropriate for mandatory proactive disclosure, a more even balancing should be used when deciding on requests (i.e. in that case information should be disclosed whenever this was in the overall public interest).

Section 3(7) provides that FIPPA overrules other legislation to the extent of any conflict unless the other legislation states specifically that it overrules FIPPA. In other jurisdictions in Canada, similar clauses have given rise to a patchwork of exceptions in different laws, many of which do not include the harm and public interest tests mandated by international standards. For example, the federal Access to Information Act is overruled by numerous provisions in over 60 different laws. We were unable to assess the precise scope of this issue in British Columbia (i.e. how many other laws create exceptions which specifically override FIPPA), but any such exceptions are legitimate only if they are in line with international standards relating to exceptions.

Recommendations

- In its report, the Special Committee should make it clear that it rejects both the process and the substance of the 2021 amendments to FIPPA.
- FIPPA should apply fully to all three branches of government, including the legislature and judiciary, with any secrecy interests being protected by exceptions, rather than exclusions.
- FIPPA should include a general provision to the effect that it covers all bodies that are owned or controlled by other public authorities, with Schedule 2 only serving to provide clarity as to coverage of the bodies listed therein, and not to exclude coverage of any body.
- FIPPA should apply to private bodies which receive substantial public funding covering their core operating costs.
- FIPPA should apply to private bodies which perform a public function, to the extent of that funding. If greater clarity is sought here, "public function" could be defined in the Act.
- If the changes in terms of public authorities covered recommended above are introduced, the power of the government to add authorities to Schedule 2 based on public interest grounds should be removed.
- The 2021 amendments excluding certain types of metadata and electronic records, found in sections 3(5)(c) and (d) of the Act should be removed.
- Public authorities should be required to respond to requests for information as soon as possible, the initial time limit for responding to requests should be reduced to 10 or at most 20 working days, and a hard cap on time limits, ideally of not more than 40 working days should be introduced. If this is deemed to be too stringent, the Act should at least set out clear conditions according to which the Information Commissioner may approve extensions beyond 40 working days.
- No fee should be charged simply for making a request for information and if this fee is retained it should be capped in the legislation at $5. Public authorities should only be able to charge fees for reproducing and delivering information and not for employee time spent responding to a request. At a minimum, any charges for time should be able to be applied only after a substantially longer threshold time than three hours.
- Sections 3(5)(b), excluding information not relating to the business of a public authority, should be removed.
- Th exceptions noted above which go beyond what is considered legitimate under international law or which do not include a harm test should either be removed or amended to remove the incompatibility.
- The public interest override, at least insofar as it relates to requests, should be amended to apply whenever, on balance, the public interest in disclosure of the information outweighs the harm this would cause.
- Any legislation which explicitly overrules FIPPA, in accordance with section 3(7), should be reviewed and, as needed, amended to ensure that it only protects legitimate interests, subject to a harm test and public interest override.