INVESTIGATION REPORT F11-02

INVESTIGATION INTO THE SIMULTANEOUS DISCLOSURE PRACTICE OF BC FERRIES

Elizabeth Denham, Information and Privacy Commissioner

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EXECUTIVE SUMMARY

[1] In response to a complaint about the practice of BC Ferry Services Inc. ("BC Ferries") of publicly posting responses to access to information requests, either before or at the same time as they are provided to the applicant ("simultaneous disclosure"), the Information and Privacy Commissioner for British Columbia conducted an investigation. The investigation examined both the practice of simultaneous disclosure as well as the general practice of proactive disclosure. The Commissioner found that the practice of simultaneous disclosure does not violate the individual right of access [s. 4(1)] or the duty to assist [s. 6(1)] under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). However, she concluded that the practice frustrates the purposes of FIPPA, because it may discourage some individuals, particularly the media, from making access requests, thereby interfering with their ability to hold government accountable.

[2] The Commissioner identified best practices for proactive disclosure, including with respect to simultaneous disclosure. On the key issue of simultaneous disclosure, the Commissioner recommended a minimum delay of 24 hours between the applicant's receipt of the response and the time the response is publicly posted. There should be a further delay upon request by the applicant on reasonable grounds. The Commissioner recommended that BC Ferries modify its simultaneous disclosure practice to support the purposes of FIPPA.

1.0 INTRODUCTION

[3] The availability of new and inexpensive internet technologies have enabled a positive and growing trend in freedom of information toward proactive disclosure initiatives. "Proactive disclosure" refers to steps public bodies take to provide information to the public on their own accord, as opposed to providing information only when responding to a freedom of information request. The Internet has raised public expectations about the contents of websites of public bodies and encouraged many of them to embrace "open government" initiatives. Proactive disclosure is a key element of such initiatives.

[4] Public bodies across British Columbia are implementing various proactive disclosure programs. These are laudable initiatives and I encourage public bodies to continue them and expand them as they are able to do so.

[5] However, there is one type of proactive disclosure which is troubling. That is the practice, adopted by BC Ferries, of simultaneous disclosure, which is publicly posting the response to a freedom of information request either before or at the same time it provides a response to the individual who made the request (the "applicant"). In this report, I refer to this practice as "simultaneous disclosure".

2.0 INVESTIGATION PROCESS

[6] In a letter dated October 5, 2010, the BC Freedom of Information and Privacy Association (FIPA) requested that I conduct an investigation under s. 42 of the *Freedom of Information and Protection of Privacy Act* into the practice of BC Ferries in relation to posting information and records produced in response to access requests on its website, either before or at the same time as the applicant receives them.

[7] Given that the issues raised by the simultaneous disclosure practice of BC Ferries have implications for proactive disclosure initiatives by all public bodies, I decided to broaden the scope of my investigation to also consider the general practice of proactive disclosure.

[8] As part of this investigation, we posed a set of questions to selected participants to this investigation, receiving 17 responses. The questions and the list of responders are attached as Appendix A and B.

[9] We also conducted research on developments elsewhere regarding proactive disclosure and simultaneous disclosure.

[10] I am issuing policy guidelines concerning best practices for public bodies with respect to proactive disclosure. I do this pursuant to my authority under s. 42(1) of FIPPA to make Orders or take other measures that promote the purposes of FIPPA. These guidelines will inform public bodies in a prospective way about how I am likely to approach any proceedings to which they relate.

3.0 BACKGROUND

[11] BC Ferries has a freedom of information "Tracker Page" on its website that hyperlinks to documents it has disclosed in response to access requests; including the letter written to the applicant in response to their request. This letter reiterates what the person requested, indicates whether or not BC Ferries is granting access to the requested records and provides an explanation of why information will not be disclosed, if that is the case. All requests and disclosed documents pursuant to those requests are posted, except for requests involving personal information.

[12] The information on the website generally identifies organizations but not individual applicants. The information can be searched by request summary, request details, applicant name, date of last update, status and fee information. Individuals can sign on to an email list, which allows members to receive automatic updates on the status of requests posted on the Tracker Page. BC Ferries reports that over 3,900 parties have signed up to the mailing list.

[13] Records responsive to requests are posted for 90 days in PDF format. After that, BC Ferries removes the records and they are no longer accessible to the public online.

[14] In its complaint letter of October 5, 2010 to this Office, FIPA stated its concern regarding the simultaneous disclosure by BC Ferries as follows:

> FIPA considers this policy to be a pre-emption of the rights of requesters and highly destructive to the purposes and proper functioning of the Act. If it is allowed to continue, it is easily foreseeable that many public bodies will bring in similar systems. If this is allowed to happen, many media and other requests for general information will lose their rationale, resulting in fewer requests, less scrutiny of public bodies, less information reaching the public, and ultimately, less accountable public bodies.

[15] FIPA also alleged that simultaneous disclosure is contrary to s. 4(1) and s. 6(1) of FIPPA, which reads as follows:

> 4(1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.
>
> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[16] With respect to s. 4(1), FIPA argued that the individual's right of access takes precedence over a general desire to put information out to the public. FIPA said that, if a public body's intention is to put information out to the public, s. 20 of FIPPA provides it with the discretion of not answering the request but making the requested records public within 60 days and without charging fees.

[17] With respect to s. 6(1), FIPA argued that the duty to assist requires a public body to ensure that the applicant is the first to receive the documents. FIPA said in its letter that:

> A fair and rational person would not expect a public body to issue news releases drawing attention to every posting of records released under FIPPA. This is further evidence that the intention of BC Ferries is not to create transparency or openness, but to prejudice the position of the requester vis-à-vis the rest of the world.
>
> A fair and rational person would not expect a public body to charge fees to a requester whose records will be publicized by the public body at the same time or even before the fee-paying requester receives those records.

4.0 ISSUES

1. Does the practice of simultaneous disclosure violate either s. 4(1) or s. 6(1) of FIPPA?

2. Is the practice of simultaneous disclosure consistent with the purposes of FIPPA?

5.0 DISCUSSION

Does the practice of simultaneous disclosure violate either s. 4(1) or s. 6(1) of FIPPA?

[18] **5.1 Individual Right of Access [s. 4(1)]**—FIPA argues that FIPPA's primary purpose is to create an individual right of access to information, which takes precedence over a broader right of access for the "public". BC Ferries' policy breaches this individual right, FIPA says, because it denies the individual applicant the right to control the subsequent disclosure of the information he or she accessed.

[19] FIPA implies that s. 4(1) of FIPPA creates an individual right of access to information that requires that the applicant receive the requested information first; before the "public" is provided access. In my view, the effect of FIPA's argument is that the right of access extends to also provide a right to control, at least for a period of time, the use and subsequent disclosure of the information that was provided in response to the access request. This would provide the applicant with a quasi-proprietary interest in the information provided. Because BC Ferries shares applicant-accessed information with the world at large, it would interfere with the applicant's quasi-proprietary interest in the collected information.

[20] In my opinion, this argument must fail. On its face, s. 4(1) only confirms the individual right to "access" information held by a public body. The plain meaning of "access" is:

> The right or opportunity to use something or see someone. (Concise OED)
> The right or opportunity to use or benefit from something.[1]

[21] To "access" something does not mean control or ownership of that thing. It only means to see or use a thing. Using or seeing information is different from owning that information. The only plausible interpretation of s. 4(1), then, is that it affirms that individuals have a right to see and use information in the hands of public bodies. It does not go further and give an individual any exclusionary or proprietary rights over the information gathered.

[1] askoxford.com: http://oxforddictionaires.com/view/entry/m_en_gb0003710#m_en_g0003710.

[22] This is true whether or not the applicant was required to pay a fee for the records. The mere payment of a fee does not transform requested information into a commodity. The fee is to compensate the public body for some of the cost of retrieval.

[23] Further, the Legislature did not intend that the purposes of FIPPA be divined from s. 4(1), although the entirety of any enactment is relevant in determining purpose. Rather, the Legislature has described the purposes of FIPPA explicitly in s. 2(1) as follows:

> **Purposes of this Act**
>
> 2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
> (c) specifying limited exceptions to the rights of access,
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
> (e) providing for an independent review of decisions made under this Act.

[24] Clearly, s. 2(1) distinguishes between the "public" and "individual" purposes of FIPPA. The public has a right of access to "records" generally. By contrast, individuals have a right of access not to "records" generally or information generally, but rather to "personal information about themselves". Thus, while an individual has a right under s. 4(1) to access information generally, it is not a stated purpose of FIPPA to treat all access requests as singular acts of individuals. FIPPA recognizes that the public is the primary beneficiary of open government and that protecting the public's right of access is FIPPA's paramount objective. FIPPA only has as a purpose the protection of an individual's ability to access information about themselves. In other words, had the Legislature intended to aim FIPPA at the preservation of only individuals' rights of access, it would have drafted s. 2(1) in different terms.

[25] Further, former Commissioner Loukidelis affirmed in various Orders that disclosure to an individual is in effect disclosure "to the world".[2] In Order 03-35, for example, Commissioner Loukidelis stated:

> [31] As I have held before – notably, in Order 01-52, [2001] B.C.I.P.C.D. No. 55, at para. 73 – the disclosure of information through an access request under the Act, other than personal information relating to an access applicant, is to be approached on the basis that it is disclosure to the world. This is because it would be a contradiction to treat the right of access under

[2] Order 01-52, [2001] B.C.I.P.C.D. No. 55; Order 03-35, [2003] B.C.I.P.C.D. No. 35; Order 01-28, [2001] B.C.I.P.C.D. No. 29 and Order 01-01, [2001] B.C.I.P.C.D. No. 1.

> the Act to information (other than personal information relating to an applicant) as a right that is limited to particular applicants or purposes when it is – as s. 2(1) of the Act affirms – a public right that is not restricted to particular purposes.

[26] This passage echoes the purpose clauses found in s. 2 of FIPPA by affirming that the rights under FIPPA are public and not private in nature.

[27] Earlier, in Order 01-28, my predecessor also stated, in the context of a request by a journalist for ICBC records:

> First, although the applicant is a journalist, not a competitor's representative, disclosure to him should be treated, in this case, as disclosure to the world at large and therefore to ICBC's competitors. My analysis of the s. 17(1) issue proceeds on that basis.

[28] Further affirmation of the public character of the rights to access information is found in s. 25(1) of FIPPA, which imposes a duty on a public body to disclose information that is clearly in the public interest. That section states:

> **Information must be disclosed if in the public interest**
>
> 25(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 or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[29] One of the leading Orders on s. 25(1) is Order 02-38.[3] In that case, the applicant requested records from the Premier's Office on the implementation of new workplace smoking regulations. The Commissioner dismissed the request to invoke s. 25 because, among other grounds, the information sought related to a shift in public policy rather than a pressing matter of public interest.

> [65] As I have already indicated, s. 25(1)(b) is intended, in my view, to require disclosure of information, as being clearly in the public interest, that is of clear gravity and present significance to the public interest. The words "for any other reason" in s. 25(1)(b) also convey that this provision refers to information disclosable in the public interest other than information already encompassed by s. 25(1)(a). As an example, this could perhaps include financial information, such as information disclosing a clear and large-magnitude error or misrepresentation in published public accounts. (Hutchison J. referred, in passing, to the possibility that this kind of

[3] [2002] B.C.I.P.C.D. No. 38.

> information might be covered by s. 25(1)(b) in *Tromp v. British Columbia (Information and Privacy Commissioner)*, [2000] B.C.J. No. 761, at paras. 18 and 19.)
>
> [66] Section 25(1)(b) does not compel disclosure of any and all policy and political advice or recommendations, and associated legal advice, in relation to a matter of significant public concern and debate. In addition to the element of need for disclosure without delay, consideration must also be given to whether the information in issue contributes, in a substantive way, to the body of information that is already available to enable or facilitate effective use of various means of expressing public opinion and making political choices.

[30] Clearly, the threshold under s. 25(1) is a high one. Still, the former Commissioner's comments reflect the fundamental public nature of the "Public Interest Override" in s. 25(1).

[31] The foregoing cases and interpretive principles have led me to the conclusion that FIPPA's primary purpose is to confer rights of access to non-personal information on the public as a collective and not on individuals.

[32] When a public body discloses information, it is presumed from the fact of disclosure that that information is now "public", as the public body can no longer control what is done with the information, in much the same way that posting something to a website is public. It does not matter whether the public body was requested to disclose or acted under s. 20 or s. 25 or some other provision. The fact remains that the information disclosed belongs not to any one person but to the general public.

[33] **For all of the foregoing reasons, I conclude that the practice of simultaneous disclosure does not violate s. 4(1) of FIPPA.**

[34] **5.2 Duty to assist [s. 6(1)]**—FIPA believes that the practice of simultaneous disclosure violates s. 6(1) of FIPPA. In essence, FIPA submits that the applicant of the information should have first opportunity to receive and use the information provided in response to the request. Otherwise, argues FIPA, individuals will be discouraged from paying fees to request information that is first, or simultaneously, disclosed to the public. In my view, FIPA's submission suggests that an applicant should have a measure of control over when, if ever, those documents will be shared with the wider public. In short, the effect of FIPA's submission is that the duty to assist implies a quasi-proprietary right in the applicant over any information that he or she obtains through an access request.[4]

[4] BC Ferries does not have a policy to waive fees when the response is posted online. However, the practice appears to be to waive the majority of the fee in most requests and fees actually charged to applicants are often zero or very low in comparison to the actual costs listed.

[35] No orders have adopted this interpretation of s. 6(1). The "fair and rational person" test set out in Order 00-32[5] has been applied almost exclusively in the context of complaints that a public body made insufficient efforts to locate records, took too long to disclose them or charged fees the requester considered excessive. No orders to date have dealt with the simultaneous disclosure or any similar practice and no orders have given s. 6(1) the interpretation FIPA advanced.

[36] Even on a purposive and generous reading of the duty to assist in s. 6(1), FIPA's interpretation cannot be sustained. In *Celgene Corp.* v. *Canada (Attorney General)*,[6] the Court stated:

> 21 The parties both relied on the approach used in *Canada Trustco Mortgage Co.* v. *Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10, which confirmed that statutory interpretation involves a consideration of the ordinary meaning of the words used and the statutory context in which they are found:
>
> > It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 *British Columbia Ltd.* v. *Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole. [para. 10]
>
> The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute.

[37] In fairness to FIPA, the purposive approach outlined above, when applied to the interpretation of s. 6(1) of FIPPA, could support an argument that the duty to assist requires not only positive action by the public body to facilitate access to information, but also forbearance by the public body from doing anything that would obstruct or discourage access. This interpretation would proceed from an understanding of access rights as individual rights rather than public rights. If FIPPA's primary purpose is to facilitate access by a given individual rather than to open up government to the public more generally, then the duty to assist could plausibly be extended to protect all of the various interests of that individual.

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[5] [2000] B.C.I.P.C.D. No. 35.
[6] 2011 SCC 1, [2011] S.C.J. No. 1.

These interests would, in turn, encompass the economic and quasi-properietary claims that an individual makes in connection with their information request.

[38] However, on further reflection, this interpretation appears too strained. It is not clear that FIPPA's overarching purpose is to create individual rights of access. Rather, I believe that FIPPA's primary purpose, as enunciated in s. 2, is to facilitate access to information by the public at large. If so, then the duty to assist applicants cannot be interpreted, even on a purposive, generous reading, as including a duty not to do anything that infringes on the perceived individual interests of the applicant in making the request.

[39] I conclude that s. 6(1) of FIPPA does not prohibit the practice of simultaneous disclosure. Nothing about the practice obstructs the individual's right to request the information. Nothing in it appears to do more than frustrate the private interests of the individual applicant in obtaining the benefit of the "bargain" with the public body: a fee in exchange for previously-hidden information. However, based on my assessment of FIPPA's purposes, this "bargain" theory of information access is not supportable. The fee is to allow the public body to recoup some of the costs of producing the record, not to form a contract between the public body and the applicant for the "sale" and exclusive use of information.

[40] Had the Legislature wished to create in an applicant a kind of ownership in the information received, it could have easily done so. Had it done so, presumably such a provision would be part of ss. 8 and 9 of FIPPA, which set out the procedure for public bodies to respond to access requests. Presently, these sections comprise a complete code for public bodies to follow in responding to access requests. They must be read in harmony with the rest of FIPPA. In my opinion, it would be an overreaching interpretation to supplement these provisions with further implied duties under s. 6(1).

[41] FIPPA's purpose is to facilitate access to information, not to encourage requests for access. It has never been part of the purpose of FIPPA to create any greater rights for the individual than the simple right to access information. In fact, some of FIPPA's provisions that exempt information from disclosure already suggest a quasi-proprietary right in information held by a public body. For example, s. 17(1) of FIPPA exempts from disclosure information that, if released, could compromise the economic or research interests of a third party. It shields from disclosure:

> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

[42] Section 17(2) also provides:

> (2) The head of a public body may refuse to disclose under subsection (1) research information if the disclosure could reasonably be expected to deprive the researcher of priority of publication.

[43] These provisions speak, of course, to the quasi-proprietary nature of information held by the public body rather than to information that is shared with an applicant. Still, the key point is that the Legislature has turned its mind to the proprietary value of certain kinds of information held by public bodies. It has chosen not to extend any such economic protections beyond the public body and any third parties that may be affected. The Legislature, therefore, can further be presumed to have deliberately refrained from extending any similar rights to applicants.

[44] **Therefore, based on my review of FIPPA, orders from the former Commissioner and applicable principles of statutory interpretation, I conclude that, even on a purposive reading of s. 6(1) of FIPPA, the practice of simultaneous disclosure does not breach the duty to assist.**

[45] **5.2 Is the Practice of Simultaneous Disclosure Consistent with the Purposes of FIPPA?**—The primary purpose of FIPPA is to make public bodies more accountable to the public by giving the public a right of access to records.[7] As stated by Mr Justice La Forest in *Dagg v. Canada (Minister of Finance)*:

> 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.[8]

[46] Proactive disclosure clearly reflects the purposes of FIPPA. In fact, there are four sections of FIPPA that deal specifically with proactive disclosure.[9]

[47] First, if there is an urgent and compelling public interest in disclosing information, the public body must do so pursuant to s. 25(1)(a) under Division 4 (Public Interest Paramount). This must be done with or without an access request. Another provision, s. 20(1)(b), speaks to the publication of information in connection with access rights under Division 1. It provides that if information is to be published within 60 days of receipt of the request, the public body may refuse to disclose information to the individual who made the request.

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[7] *Freedom of Information and Protection of Privacy Act*, s. 2(1).
[8] [1997] 2 SCR 403.
[9] *Freedom of Information and Protection of Privacy Act,* ss. 20, 25, 70 and 71.

[48] Further sections on proactive disclosure provide that public bodies must make available to the public, without a request for access, manuals, instructions or guidelines issued to its officers or employees or substantive rules or policy statements "for the purpose of interpreting an enactment or of administering a program or activity that affects the public or a specific group of the public."[10]

[49] FIPPA also states that public bodies may prescribe categories of records that are in the custody or under the control of the public body and are available to the public, on demand, without a request for access under FIPPA.[11] A public body may require a person who asks for a copy of an available record to pay a fee.[12]

[50] FIPPA thus contemplates proactive disclosure initiatives by a public body as being completely separate from the individual's right to make an access request. If the information is published or is going to be published, there is no need to make an access request.

[51] The idea of publishing responses to access requests is intuitively appealing to advocates of proactive disclosure.[13] Indeed, in my 2010 Timeliness Report, I opined that it was a step toward accountability for a public body to publish records released in response to general access requests (not personal information) on its website. One can argue that disclosure is disclosure and that documents should be disclosed at the earliest opportunity.

[52] In its submissions, public bodies expressed similar views. BC Ferries and the City of Vancouver were in favour of the simultaneous publication of responses to access requests. BC Ferries stated that FIPPA does not support an approach that would privilege some members of the public to have access to information over others because it unfairly places exclusive access and control of information with single individuals or entities. BC Ferries asserted that the public interest is best served when records released in response to access requests are widely accessible so that individuals can draw their own conclusions about the information, instead of relying on the interpretation of the media or others.

[53] The City of Vancouver stated that it is in the public interest for the general public and all media organizations to have access to the true and objective documents so that there can be timely public discourse and expressions of divergent views. A temporary or limited proprietary right over information to the exclusion of other members of the public or other media organizations for any period of times does not meet the purposes of FIPPA.

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[10] *Freedom of Information and Protection of Privacy Act*, s. 70(1).
[11] *Freedom of Information and Protection of Privacy Act*, s. 71(1).
[12] *Freedom of Information and Protection of Privacy Act*, s. 71(2).
[13] See for example, David Eaves, The Curious Case of Media Opposing Government Transparency, March 4, 2011 at http://eaves.ca.

[54] The Ministry of Labour, Citizens' Services and Open Government indicated that government has not yet made a decision on simultaneous disclosure. In its submission, it discussed time sensitivities in proactive disclosure in terms of the public interest, fairness to the applicant and rights/interests of third parties. With respect to the public interest, it noted the implication in s. 25 of FIPPA that by disclosing all information without delay a public body can mitigate its risk withholding information necessary to protect the public from harm. With respect to fairness to the applicant, it said that some may see paying a fee as analogous to paying a premium to receive better service. In discussing the media interest, it said that whether or not simultaneous disclosure leads to fewer access requests is yet unknown. However, the public interest is still being served with proactive disclosure as new technologies and social media tools allow organizations to communicate directly with the public. With respect to third parties, it noted that notification and consultation with them can affect the timing of the release.

[55] However, others have significant concerns about how responses to access requests are proactively disclosed. All media representatives who made submissions as part of this investigation opposed simultaneous disclosure because of its deleterious effect on the practice of journalism. They argue that the business of mainstream media is such that getting the "scoop" on a story serves its commercial interests. If journalists are not able to obtain responses to their access requests first, there will be no incentive for them to make access requests and incur the expense. The Canadian Association of Journalists stated that simultaneous disclosure will dramatically diminish the number of access requests made by journalists, and the stories that flow from those requests, thus making government less accountable, not more.

[56] Paul MacNeill, President of Canadian Community Newspapers Association, expressed this concern as follows:

> All Canadians benefit when media utilize access acts to dig deeper into issues of public interest. However, these requests must be viewed through the prism of a very competitive media environment. Putting my publisher hat on for a moment, it would be difficult to justify a significant investment in any freedom of information request if there were any chance a competing media could receive the information at the same time. Part of the reason for supporting such endeavours is to set one media apart from others. Media organizations rightly expect exclusivity in return for its financial investment.

[57] The Canadian Press said that simultaneous disclosure by its nature is designed to nullify competition and has the very real and perverse effect of reducing the amount of government information available to the public, not increasing it. Dean Beeby, Deputy Bureau Chief – Ottawa of The Canadian Press stated:

> As a representative of a news organization, I can assure you that newsrooms will not make investments of staff time and money in FOI requests if the results are immediately provided to competing newsrooms. A competitive news environment is a fundamental feature of democracy. The challenge of beating another reporter to a story is vital to the conduct of public affairs, providing citizens the benefit of more information than they would otherwise have in a non-competitive media landscape.

[58] *The Vancouver Sun* also made the point that the biggest disincentive of the simultaneous disclosure relates to fees. It discourages newsrooms from spending money for internal government records when their competitors can piggyback on those requests for free. The Canadian Community Newspapers Association added that not only will simultaneous disclosure have a chilling effect on how media and special interest organizations use access legislation, but journalists will also rush content to publication rather than taking the time to get it right.

[59] FIPA's view is that simultaneous disclosure has the effect of reducing the willingness of applicants operating under deadlines, such as the media, to continue to file requests. This diminishes the public's access to information about government and reduces their ability to hold government accountable, which is contrary to the purposes of FIPPA.

[60] BC Civil Liberties Association generally agreed with FIPA's submission and characterized the practice of simultaneous publication as "pre-emptive disclosure" rather than proactive disclosure, in that it does not provide information in the absence of a request and only discloses to the public in an attempt to dissuade requests.

Analysis

[61] The media argue that simultaneous disclosure limits the ability of modern journalistic institutions to be "society's antennae" on the actions of government and public bodies. This argument proceeds from the idea that the established media play a vital role in Canadian society. Their traditional functions of holding government accountable and bringing greater transparency in government continue to be fundamental to a free and open democracy. In my view, the mere fact that media are engaged in commercial activities does not detract from the importance of the role they play.

[62] The Supreme Court of Canada has affirmed the central role of journalists in a free and democratic society in a series of judgments. The Charter's guarantee of freedom of expression has been held to imply a guarantee that journalists be able to access information about public institutions such as governments and the courts. Although the extent of the constitutional recognition of journalism is circumscribed by countervailing factors in particular cases, it is well settled that Canadian journalists play a particular role in our constitutional

order. To the extent that my s. 42 discretion ought to be exercised in accordance with Charter values, a recognition of the importance of access by journalists to government information under access legislation leads to a valid objection to simultaneous disclosure.

[63] Simultaneous disclosure has the effect of sharing the fruits of the journalist's labour with the public at large. This deprives the media of the revenue upon which they depend for survival; essentially, it wastes the often considerable fees they must pay to obtain highly relevant information and in some instances pre-empts important investigative reporting by tipping off the subjects of such investigations through which they are being held accountable. This impairs the information-gathering function of the media.

[64] While I appreciate that society is better off when more people, more expertise and more perspectives are engaged in civil discourse, I maintain that it is also in the public interest to protect the ability of mainstream media to identify issues and instigate dialogue in the first place. Clearly, society benefits when more people have access to more information. That is why the unique and important role of the media to gather and disseminate information should be affirmed and protected.

[65] Arguably, simultaneous disclosure could also discourage others, besides journalists, from using access legislation. For example, academics, public interest groups, corporations or law firms may all have an interest in having exclusive access to responses to their access requests, at least for a limited period of time.

[66] The net effect of simultaneous disclosure may be to discourage some applicants from using access legislation. This ultimately has a negative effect on the ability of citizens to hold public bodies accountable. Therefore, in those situations, the practice frustrates the purposes of access to information legislation.

[67] However, while some aspects of the simultaneous disclosure may not frustrate the purposes of access to information legislation, other aspects most certainly do. In a series of reports on government's timeliness in responding to access requests, this Office has repeatedly noted the importance of proactive disclosures, including posting responses to access requests in disclosure logs as a significant method of satisfying the purposes of FIPPA. Indeed, my Office has encouraged government to adopt proactive disclosure practices, including adoption of disclosure log policies and procedures. For example, in the 2008 timeliness report, my predecessor identified proactive disclosure as a key feature of a well-functioning access to information program.

> The public body actively and regularly publishes, without formal access requests, records of interest to the public. This is known as routine release or pro-active release of records. At the very least, records such as program

> audits, financial audits, impact assessments, records previously released in response to access requests will be posted on the internet and otherwise made available as part of a well-functioning routine release process. As part of a successful disclosure program, program area staff should regularly review their records for posting and staff should be encouraged to identify records for pro-active release.[14]

[68] In my 2010 timeliness report, I also took the opportunity to indicate how effective proactive disclosure programs can be implemented.

- Program areas evaluate files and record collections that attract access requests. Identify record types in the file or collection that can be released immediately by front line staff without the need for a formal access request.

- Evaluate new access requests to determine what portion of the responsive records can be immediately and proactively released.

- Proactively release general records that have been disclosed in response to access requests.

- Create an electronic reading room and place these documents in the room. Evaluate the types of access requests that are the most common, and/or the most time consuming. Consider proactively releasing similar types of records.[15]

6.0 PROACTIVE DISCLOSURE PRACTICES

[69] Under s. 42(1) of FIPPA, I am generally responsible for monitoring how FIPPA is administered to ensure that its purposes are achieved. In my opinion, the general language of s. 42(1) gives me broad discretion to make Orders or take other measures that promote the purposes of FIPPA. This general discretion is not, in my view, in any way limited by the subsequent enumeration of the various powers set out in clauses (a) to (j). Rather, by virtue of the power set out under s. 42(1), I have the power to issue policy guidelines concerning disclosure practices by public bodies, even if those disclosure practices do not breach any specific provision of FIPPA. This includes identifying practices that may technically fall within the framework of the law but which have the overall effect of frustrating its purposes.

[70] **6.1 Developments in Other Jurisdictions**—In formulating my recommendations for best practices for proactive disclosure by public bodies in

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[14] *Timeliness of Government's Access to Information Responses, Report for Calendar Year 2008*, February 2009, p. 18.

[15] *It's About Time – Report Card on Timeliness of Government's Access to Information Responses (April 2009 – March 2010)*, August 5, 2010, p. 21.

British Columbia, I have considered the submissions from interested parties and examined policy and legislative frameworks in place in other jurisdictions for proactive disclosure and disclosure logs.

(a) Proactive disclosure

Canada

[71] In Canada, there are examples of proactive disclosure requirements at the Federal, Provincial and First Nations levels of government in both policy and in legislation.

[72] At the Federal level in Canada, Treasury Board policy requires proactive disclosure of travel and hospitality expenses for senior government officials, contracts the Government of Canada enters into for amounts over $10,000 (with only limited exceptions such as national security) and the reclassification of positions.

[73] In 2005, as part of its management improvement agenda, the Federal Government announced its commitment to proactively disclose the awarding of grants and contributions over $25,000.

[74] In addition, under the *Public Servants Disclosure Protection Act*, "founded wrongdoing" must be disclosed promptly to the public and the disclosure must contain details of the event and corrective actions taken.[16] "Founded wrongdoings" are defined in that Act and include misuse of funds, gross mismanagement, serious code of conduct breaches and more.

[75] In March of this year, the Federal Government announced it would be expanding open government through, among other things, "open information". All institutions will be expected to publish summaries of completed access to information requests in both official languages on their websites, the process for responding to access requests will be streamlined and posting of reports to a virtual library will be piloted.

[76] The *Access to Information Act* requires "government institutions" to periodically publish and update basic information about themselves in the following categories:

> (a) a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch of each government institution;

[16] *Public Servants Disclosure Protection Act*, SC 2005, c. 46, s. 11.

> (b) a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under this Act;
>
> (c) a description of all manuals used by employees of each government institution in administering or carrying out any of the programs or activities of the government institution; and
>
> (d) the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent.[17]

[77] In **Quebec**, public bodies must post documents prescribed by regulation to a website.[18] The documents prescribed by the regulation[19] include basic administrative information, financial and expense information and data produced by the public body.

[78] Access and privacy legislation enacted by the **Tsawwassen First Nation** requires its Chief Administrative Officer to "make every effort to regularly post on a website information generated by Tsawwassen Institutions that would be available if requested under this Act or that contains records that have been disclosed under this Act and that could reasonably be expected to be of general interest."[20]

(b) Publication schemes

[79] Several jurisdictions require public bodies to have publication schemes. Among these are the UK and Australia (both at the Federal level and in the state of Queensland).

United Kingdom

[80] In the **UK**, public authorities must adopt and maintain a publication scheme, publish information in accordance with the scheme and review the scheme from time to time.[21] The Information Commissioner must approve publication schemes and may also approve model publication schemes developed either by the Commissioner or other persons. Should a public authority adopt the model publication scheme, further approval by the Commissioner is not required.

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[17] *Access to Information Act*, RSC 1985, c. A-1, s. 5.
[18] *An Act Respecting Access to Documents Held by Public Bodes and the Protection of Personal Information.*
[19] Regulation Respecting the Distribution of Information and the Protection of Personal Information, c. A-2.1, r. 0.2.
[20] *Freedom of Information and Protection of Privacy Act*, s. 12.
[21] *Freedom of Information Act 2000 (UK*), s. 19.

[81] The UK Information Commissioner's Office reviewed the effectiveness of publication schemes in 2005 and concluded a more consistent approach was needed to proactive disclosure. As a result, the Commissioner approved a single new model publication scheme that requires public bodies to make available information about their functions, expenditures, priorities, decision-making processes, policies and procedures, lists and registers and services offered.[22] The classes of information as described in the Model Publication Scheme are set out in Appendix C of this report. Information must be provided on a website where it is within the capability of a public authority.

Australia

[82] Publication requirements at the Federal level in **Australia** require agencies to prepare publication plans and publish certain specified information.[23] (The categories of information are set out in Appendix C.) Agencies must either publish the information on their websites or indicate on their websites how it may be obtained.[24]

[83] Agencies must review their publication schemes at least every five years. The Information Commissioner is responsible for reviewing and monitoring publication schemes and may issue guidelines in relation to them.[25]

[84] New access to information legislation in **Queensland** reflects an emphasis on proactive disclosure and a "push" model of information release. It requires public agencies to maintain a publication scheme that complies with ministerial guidelines.[26] The guidelines set out a scheme that is very similar to the UK model publication scheme (see Appendix C) and require that information included in a publication scheme be: significant, appropriate (for disclosure in light of legislation, privacy and security issues) and accurate. Publication schemes should be routinely updated, where possible free of charge (including informal access to information requests) and flexible in format. The Office of the Information Commissioner does not approve publication schemes, but can monitor compliance with publication scheme requirements as part of its performance monitoring and reporting function.

(c) Disclosure logs

[85] Several jurisdictions have developed specific legislative provisions or policy guidelines on disclosure logs, including with respect to the simultaneous disclosure practice in disclosure logs. Generally, a disclosure log is an account

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[22] See Appendix B.
[23] Freedom of Information Act 1982 as am by Freedom of Information Amendment (Reform) Act, 2010, new ss. 8(2), 8A.
[24] Ibid, new s. 8D(3).
[25] Ibid, new ss. 8F, 9, 93A(2)(a); see guidelines at www.oaic.gov.au/publications/guidelines/part13_ips.html.
[26] *Right to Information Act, 2009*, s. 21.

of access requests received, and responses made thereto, and may or may not include links to the responsive records released to the applicant. BC Ferries makes available all responses to general access requests through an online disclosure log.

Legislative provisions on disclosure logs

[86] Quebec, Australia, the Australian states of Queensland and New South Wales and the US have enacted legislation requiring public bodies to have disclosure logs.

[87] In **Quebec,** the log must be published to the web and must contain the documents released under access requests "whose distribution is of interest for the purposes of public information".[27] It does not specify in what time frame the information must be posted.

[88] New legislative provisions in **Australia** require an agency or minister to maintain disclosure logs. As of May 1, 2011 responses to access requests must be published on a website within 10 days of providing the response to the applicant. However, this requirement does not apply where it is unreasonable to publish personal or commercial information, or if the Information Commissioner determines that other information is unreasonable to publish.[28] The Information Commissioner recently issued guidelines on disclosure logs[29] stating that information could be removed from the website after 12 months. With respect to the requirement that the information be posted within 10 days, it is open to an agency or minister to publish information at the same time that access is provided. The guidelines discuss, however, the need for co-operation and trust between agencies and applicants, and the risk of a dispute about the date of disclosure on a particular occasion flowing over and creating an unhealthy climate for the efficiency of processing access requests. The guidelines encourage agencies to consider this issue and adopt a guiding principle or practice as to when accessed information will be published so that applicants know of the practice in advance and that they will be treated similarly. In the case of simultaneous disclosure, agencies should consider reducing or waiving fees. It is interesting to note that a discussion paper released prior to the guidelines being finalized discusses informal representations made by journalists suggesting a delay of at least a few days, to enable the journalist applicant time to analyse the information and possibly write a story for publication. Journalists said that simultaneous disclosure disregards the work expended and costs incurred by the applicant in pursuing the FOI request and that there is a risk that

[27] Regulation Respecting the Distribution of Information and the Protection of Personal Information, c. A-2.1, r. 0.2, s. 4(8).
[28] *Freedom of Information Amendment (Reform) Act 2010*, new s. 8.
[29] at http//www.oiac.gov.au/publications/guidelines/part 14 – disclosure log. Html.

agencies will strategically use this device to discourage media interest in using FOI.[30]

[89] Public bodies in **Queensland** must comply with ministerial guidelines for disclosure logs and a 24-hour rule[31] whereby nothing about a response to an access request can be posted to the disclosure log until at least 24 hours after the applicant accesses the document. This 24-hour rule had been recommended by an independent review panel "in order to respect the requester's first outlay of time, effort and expense in seeking the information".[32]

[90] **New South Wales** requires public agencies to have disclosure logs, but the content of the log is almost entirely at the discretion of the agency and there are no legislated requirements of the form of the log or the timing of inclusion of information. Individual applicants may lodge an objection with the agency to the inclusion of information about their request in the disclosure log on four specified grounds. The decision to include information on a disclosure log is reviewable, by the agency itself and/or the Information Commissioner.[33]

[91] In the **US,** federal agencies must make available records that have been released under an access request, "which because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records".[34] Such records are to be kept available for a period of time at the discretion of the agency. The test to be applied regarding multiple requests is that, once a third request is received or anticipated, the record must be made available to the public. An index of records disclosed due to previous access requests must also be accessible. The Act does not require publication, but rather only that the records be made available for inspection and copying.

Guidelines for disclosure logs

[92] At least two jurisdictions have guidelines in place for the practice of disclosure logs.

[93] At the **Federal** level in Canada, recent Treasury Board guidelines suggest posting summaries of access requests within ten working days after the end of each month.

[94] In the **UK**, many public authorities publish and maintain on-line disclosure logs. The authority formerly in charge of overseeing the UK's freedom of

[30] Disclosure log, Discussion paper, Office of the Australian Information Commissioner, March 2011, p. 15.
[31] *Right to Information Act 2009*, s. 78(4).
[32] The Right to Information Reviewing Queensland's Freedom of Information Act, The report by the FOI Independent Review Panel, June 2008, chapter 3, p. 22.
[33] Ibid, s. 80(m).
[34] *Freedom of Information Act.*

information scheme, the Department for Constitutional Affairs, published a "Best Practice Guidance on Disclosure Logs" in December 2005. The choice of a "full log" where all disclosed documents are released or a "selective log" where only some disclosed documents are released is left up to the authority and will depend on the number and type of requests received and the resources of the authority. A logical and clear interface is required for full logs. The proactive release of documents alongside a disclosure log may be appropriate and beneficial.

[95] Simultaneous release of a document to a disclosure log and to the applicant is suggested as generally to be avoided, but may be appropriate for situations where the information is identified as of significant public interest. Cases of such public interest may require additional proactive disclosure to give needed context. The guide states that a document should not be published to a disclosure log before it is released to the applicant.

[96] **6.3 Views of Participants**

Proactive disclosure

[97] In their submissions, all three public bodies expressed strong support for proactive disclosure as did some of the media representatives.

[98] BC Ferries noted that the unique nature and operating environment of each public body suggests that a principles-based, as opposed to a prescription or "one size fits all", approach be used to determine the types of data a particular public body should proactively disclose.

[99] The Ministry of Labour, Citizens' Services and Open Government emphasized the importance of taking advantage of new technology and media to improve the accessibility of information.

[100] FIPA and the BC Civil Liberties Association advocated more proactive disclosure.

[101] Doug Routley, MLA advocated mandatory proactive disclosure under s. 25 of FIPPA in an expanded number of categories.

Disclosure logs

- **Timing of posting**

[102] A number of media representatives suggested that a delay in publication would resolve their concern. The general consensus was a delay of a week or two.

[103] The Canadian Community Newspaper Association said that a fair hold back time should be determined that takes into account many variables, including complexity of content.

[104] FIPA said the general public interest in viewing government information is not time sensitive. It does not appear there would be prejudice to the public or an individual if the information were made publicly available a day, week or month after it is received by the applicant. FIPA suggested that the mechanism of s. 20 of FIPPA should be used – the public body may not respond to an access request but may instead make the record available to the public. FIPA also takes the position that applicants should have the ability to request a delay before responses are posted and provide evidence that their interests in requesting the records would be harmed by automatic release to the general public.

[105] Doug Routley, MLA is of the view that public notification that the response has been published should never occur before the individual applicant receives the response.

[106] For the most part, the academics that we contacted considered simultaneous disclosure practice to be harmful to mainstream media. They all recommended a reasonable delay in publication from 48 hours to 2 weeks as a way to resolve the concern.

- **Identifying the applicant**

[107] The public bodies all agreed that applicants should be identified. BC Ferries feels that public bodies should disclose the names of applicants or applicant types as long as it does not contravene FIPPA. This means that the names of organizations are disclosed but not the names of applicants. The City of Vancouver is of the view that an applicant's identity should be released in order to allow public scrutiny of the use of a public body's resources. The Ministry of Labour, Citizens' Services and Open Government considers that applicant types should be disclosed because of the public interest in the types of applicants making requests.

[108] On the other hand, FIPA says identities of applicants should not be released as it does not serve any public interest. Identifying applicants flies in the face of the practice of respecting the anonymity of applicants. BC Civil Liberties Association agrees that applicants should not be identified by name, as sensitive information may be released or gleaned from the request made, and this will discourage applicants from pursuing important requests.

[109] *The Vancouver Sun* expressed a concern that for small organizations, identifying the name of the organization has the effect of identifying the individual

who made the request and possibly discouraging her or him from making future ones.

[110] In his submission, Doug Routley stated that the publication of the identity of applicant type would only serve to discourage certain applicants from making requests for fear of divulging their interests or receiving negative publicity.

- **Fees**

[111] BC Ferries contends that it is reasonable for applicants to pay fees for their access requests because of the costs to the public body of processing them. BC Ferries is of the view that it should not be the responsibility of taxpayers or those who pay for the services of the public body to subsidize those costs.

[112] The City of Vancouver said that partial fee waivers should be considered when information is publicly disclosed following an access request.

[113] The Ministry of Labour, Citizens' Services and Open Government said that, in the case of proactive disclosure, fees should be charged as permitted by FIPPA.

[114] *The Vancouver Sun* believes it is unfair for all the fees associated with a response to an access request to be charged to the applicant when that response is published. It is of the view that the public interest fee waiver in s. 75(5)(b) of FIPPA should be applied. The disclosure to the public implicitly acknowledges that the records in question are of vital public interest.

[115] The Canadian Association of Journalists said that applicants pay fees because they are assumed to receive a private benefit from access to documents. In its view, there is no justification for fees being levied on the applicant if the applicant is merely providing an opportunity for an agency to make information available to everyone.

[116] The Canadian Community Newspapers Association is of the view any fees charged under proactive disclosure should be limited to the cost of reproducing actual documents.

[117] FIPA said that fees should not be charged in the case of simultaneous disclosure of access requests. Drawing an analogy to s. 20 of FIPPA, it seems absurd that there is a procedure for disclosure of requested information by a public body which does not involve fees, but that public bodies can also charge fees for information they plan to publish to the world. Public bodies should follow the practice set out in s. 20 of FIPPA and not charge when there is a public release following an access request.

[118] Doug Routley, MLA is of the view that no fees should be charged when responses are published because it is a public service and may discourage individual applicants who feel they shouldn't pay for something when they will get it for free. If a fee is charged, an exclusive use period should be provided in order to allow recovery of the fee.

[119] Individuals who made submissions expressed opposing views. One said that there should be no fees for applications or information provided to the public. Another said that fees should be charged because labour costs were incurred by the public body for searching the records and the request was initiated by the applicant.

- **Notification**

[120] BC Ferries is of the view that notifying others when responses to access requests are posted is consistent with the objectives of openness and transparency and is a helpful service to interested parties. It enables simultaneous access to the records by all those who have expressed an interest in receiving information about them.

[121] The Ministry of Labour, Citizens' Services and Open Government said that the applicant should be notified of the intention to proactively release information. Depending on the request, third parties may need to be consulted and notified prior to release as well.

[122] FIPA is of the view that there is no need to notify the public that a response to an access request has been made available online as interested parties will check the disclosure logs themselves.

- **Duration of posting**

[123] BC Ferries indicated that factors such as server capacity and continued timeliness of documents are among the factors that determine how long responses are posted. BC Ferries currently posts for 90 days but would not object to posting its records for a longer period.

[124] The City of Vancouver is of the view that public postings should be kept available for as long as possible, in light of the likely perpetual internet life of any media reports stemming from the record.

[125] The Ministry of Labour, Citizens' Services and Open Government noted that, from a technology perspective, electronic versions of the documents contained in release packages can reside for years in data bases and be available to the public through searching by key words or meta-data. It stated that from a policy perspective there should not be any difference between a record being available on-line and in hard copy.

[126] *The Vancouver Sun* and the Canadian Association of Journalists said the responses to access requests should be made available online permanently.

[127] FIPA said that, once posted to a disclosure log, an access request should not be taken down as this defeats the purpose of reducing redundant requests.

[128] One individual who participated in the consultation process submitted that records posted online should be there permanently. Another individual indicated responses should be posted online for five years.

BEST PRACTICES FOR PROACTIVE DISCLOSURE

[129] **6.5 Three Types of Information Suitable for Proactive Disclosure**—There are essentially three distinct types of information suitable for proactive disclosure: disclosure of information useful to the public, disclosure of information likely to be the subject of an access to information request and publishing responses to access to information requests. All three types are present in strong proactive disclosure programs.

- *Information Useful to the Public*

[130] The first is the release of information the public body determines useful to the public. Most current proactive programs disclose this type of information. This includes things such as program information, schedules, labour market information, economic forecasts, environmental information, public announcements, minutes of public meetings, reports, audits and discussion papers. It is necessary to expand the universe of documents appropriate for this type of proactive disclosure.

[131] In her recent article in Government Information Quarterly[35], Sharon S. Dawes articulated two complementary policy principles as a framework for working through the goals and challenges of developing a robust practice of this type of proactive disclosure—stewardship and usefulness. Stewardship focuses on assuring accuracy, validity, security, management and preservation of information:

> Stewardship demands that government information be acquired, used, and managed as a resource that has organizational, jurisdictional, or societal value across purposes and over time. It thus promotes two essential requirements for information-based transparency: it protects government information from damage, loss, or misuse; and it makes information "fit for use".[36]

[35] Sharon S. Dawes, "Stewardship and usefulness: Policy principles for information-based transparency", Government Information Quarterly 27(2010), pp. 377-383.
[36] Ibid, p. 380.

[132] Usefulness, on the other hand, recognizes that government information is a valuable asset that can generate social and economic benefits through active use or innovation:

> Policies that promote usefulness enhance public access to government information, encourage public-private information partnerships, and make possible the combination or reuse of information for new purposes.[37]

[133] These policy principles are foundational to the development and implementation of this type of proactive disclosure. Based on these principles, a robust practice should have the following characteristics:

- **Strong information management practices**—these include duty to document, consistent records classification systems, retention and disposition rules.

- **Publication schemes**—public bodies need to develop a scheme that sets out what kinds of information will be proactively disclosed on a routine basis. Three examples of publication schemes and the classes of information that should be included are set out in Appendix "C".

- **Complete and in primary form**—the original record should be disclosed (with any necessary severing); information should not be aggregated or modified
- **Public involvement**—the public should have an opportunity to provide input into publication schemes of public bodies

- **Public education**—public bodies need to inform the public about their policy and the availability of the information that is being proactively disclosed

- **Equitable access**—the information must be available to a wide range of users with no requirements of registration and in a free, non-proprietary, non-exclusive format

- **Available in a timely fashion**—public bodies must provide sufficient resources to ensure that information is made available in a timely and efficient manner

- **Advanced use of technology, user-friendly formats, searchable**—documents should be easy to download and be well-organized and searchable

[37] Ibid, p. 381.

- **Training**—public bodies must appropriately train and inform staff about their obligations in information management and proactive disclosure policies

- **Regular monitoring and review**—publication schemes should be reviewed on a regular basis in order to ensure that they reflect the kinds of information the public is interested in and include new types of information

- **Proper governance and oversight**—responsibilities for developing and implementing the proactive disclosure program and procedures must be clear

➢ ***Information Likely to be the Subject of an Access to Information Request***

[134] The second type is information likely to be the subject of an access to information request.

[135] Clearly each public body will have to make its own assessment of the type of information that it proactively releases in anticipation of it being frequently requested by applicant individuals.

[136] Based on our experience, best practice would be for public bodies to proactively disclose, at a minimum, the following:

- travel and hospitality expenses for Ministers, Deputy Ministers and Assistant Deputy Ministers or equivalent
- calendars for Ministers, Deputy Ministers and Senior Executive or equivalent
- contracts and
- audit reports.

[137] As discussed previously, Treasury Board policy in place at the Federal level requires proactive disclosure of travel and hospitality expenses and contracts over $10,000, as well as position reclassifications.

[138] **I recommend that public bodies develop a policy on the kinds of information that must be disclosed on a routine basis. This list should be reviewed on an ongoing basis with a view to adding other kinds of information that are frequently requested by individual applicants. I would be pleased to provide input to government based on my experience with the requests that I receive for review of responses to access requests.**

- ***Information disclosed through access to information requests – disclosure logs***

[139] The third type is unique in that it is the posting of the response to an individual`s access request. This is typically disclosed through disclosure logs. Therefore, in identifying best practices for disclosure logs, the implications for the interests of individuals who have exercised their rights to make access requests must be taken into account. There needs to be a balance between the interests of the public in proactive disclosure and the interests of the applicant, in reactive disclosure. The balance is important to ensure that citizens robustly exercise their access rights, and in doing so, the purpose of the Act—accountable and open government—is realized.

- ***Timing of posting***

[140] Given my finding that the simultaneous disclosure frustrates the purposes of FIPPA, best practice is for public bodies to delay posting of the responses for a *minimum* of 24 hours and to permit applicants who have particular concerns to request a further delay on reasonable grounds. A short delay in all cases will not negatively affect the public interest in proactive disclosure or impede government accountability. I firmly believe that in cases where the media or others have expressed a legitimate need for exclusive access to the information for a particular purpose, the public body should consider a longer delay that allows that need to be met within a reasonable period of time.

[141] A precedent for this kind of subjective assessment already exists in FIPPA in relation to disclosure of research information. Pursuant to s. 17(2) of FIPPA, a public body may refuse to disclose research information if the disclosure could reasonably be expected to deprive the researcher of priority of publication.

[142] In terms of what is posted, my views are as follows:

- After the appropriate delay period, all responses should be posted—this avoids a subjective determination of what is or is not of interest to the public
- Post a summary of the applicant's request rather than the request itself
- Do not post the response letter because it may contain personal information
- Notifying interested parties that a request or response is posted may be useful but is not necessary.

➢ ***Identifying the applicant***

[143] In the past, my Office recommended to the Special Committee reviewing FIPPA that an applicant should have the choice to submit an access request anonymously. In looking at various examples of disclosure logs, not all of them identify the individual applicant.[38] The purpose of identifying the individual applicant is not clear and may not be permitted under s. 33 of FIPPA. While the type of applicant may be of interest for statistical purposes, it is not essential that either the name or type of applicant be included in a disclosure log.

➢ ***Fees***

[144] In my view, charging fees for access requests, when they are published at the same time, is unfair to the applicant.

[145] If posting is delayed for at least 24 hours, as I am recommending, reasonable fees could be charged as the applicant then has the benefit of receiving the records in response to the access request in advance of others.

➢ ***Duration of posting***

[146] In terms of how long information should be available, responses should be published on the Internet for as long as the information is current and relevant. They should be made available for a minimum of 12 months. However, the length of time will vary depending on the nature and type of information and the specific mandate of the public body. The BC Ferries practice of posting information for 90 days is not adequate. BC Ferries indicated in its submission that it would not object to posting its records for a longer period.

[147] Public bodies should monitor the traffic on their disclosure log websites to determine the level of interest in the requests that are published. Once the information is no longer being accessed on a regular basis, responses should be archived indefinitely so that they continue to be available. They should also be searchable so that they are readily accessible to the public.

[148] A robust proactive disclosure program must include all three types of proactive disclosure. It is important that public bodies devote the necessary resources to proactively release as much information as possible without the need for individuals to make access requests. Public bodies must focus on providing information that is useful to the public and predict information that will be requested and make that available. If that is done effectively, disclosure logs will become the least significant part of their programs, and rightly so. Access requests should always be a last resort.

[38] See for example, the disclosure log of the Office of the Information Commissioner of Canada at http://www.oic-ci.gc.ca/eng/completed_requests.aspx.

[149] How public bodies practice proactive disclosure will vary from one public body to another. It must be tailored to the particular public body's mandate, size and resources.

[150] It is important for every public body to nurture a culture of openness and transparency and recognize its value so that this practice becomes the norm. Public bodies also need to use available technology to facilitate it.

7.0 FINDINGS AND RECOMMENDATIONS

[151] This investigation addressed the following two issues:

1. Does the practice of simultaneous disclosure violate either s. 4(1) or s. 6(1) of FIPPA?

[152] I find that the simultaneous disclosure practice of BC Ferries does not violate either ss. 4(1) or 6(1) of FIPPA. The applicant's right of access to a record is not an exclusive or proprietary right. The public body's duty to assist applicants does not extend to protecting any exclusive or proprietary interest of the applicant.

2. Is the practice of simultaneous disclosure consistent with the purposes of FIPPA?

[153] I find that the simultaneous disclosure practice of BC Ferries frustrates the purposes of FIPPA. This is because it may deter individuals, particularly journalists, from making access requests. Public bodies become less, not more, accountable when journalists and others are deterred from making access requests. The public interest is best served by integrating a period of delay between the time the applicant receives the response to her or his access request and the posting of that response in a disclosure log. I am recommending a *minimum* 24-hour delay in all cases and a further delay upon request by the applicant.

[154] I recommend that BC Ferries modify its disclosure log to reflect the best practices that I have identified. BC Ferries should also review other components of its proactive disclosure program to ensure that they are being managed in a way that is in accordance with the best practices I articulate in this report.

[155] I recommend that all public bodies have proactive disclosure programs in place that reflect the best practices set out in the Attachment to this report.

8.0 CONCLUSION

[156] It is a matter of public record that I am a strong proponent of proactive disclosure. Last year, I advocated that public bodies engage in more proactive disclosure in newspaper editorials during Right to Know Week. I was also party to a resolution of Federal, Provincial and Territorial Commissioners on open government at their annual meeting. As noted above, proactive disclosure was discussed in my 2010 report, *It's About Time – Report Card on Timeliness of Government's Access to Information Responses (April 2009 – March 2010)* as well as in the previous report, *Timeliness of Government's Access to Information Responses: Report for Calendar Year 2008*. Proactive disclosure was also the subject of recommendations this Office made in a March 15, 2010 submission to the Special Committee to Review the *Freedom of Information and Protection of Privacy Act* and in a submission to the Special Committee in 2004.

[157] In general terms, the public interest is served by proactive disclosure—the more the better and the sooner the better. However, disclosure logs are unique in that public bodies are disclosing responses to access requests from individuals. Here the public interest needs to be balanced with specific interests of applicants.

[158] Pursuant to my residual discretion under s. 42(1) to take a wide range of measures to advance the purposes of FIPPA, I am promulgating policy guidelines as part of this report to guide public bodies on proactive disclosure practices, including the practice of disclosure logs.

[159] In closing, I want to emphasize that disclosure logs should be the least significant element of a public body's proactive disclosure program. The bulk of a public body's resources for its program should be expended on providing information that is useful to the public and predicting what information will be the subject of access requests. If that is successfully done, there will be fewer access requests and controversies arising from the specifics of disclosure log practices will fall away.

May 16, 2011

ORIGINAL SIGNED BY

Elizabeth Denham
Information and Privacy Commissioner
for British Columbia

OIPC File No: F10-43542

Attachment

BEST PRACTICES FOR PROACTIVE DISCLOSURE BY PUBLIC BODIES

Information useful to the public
Best practices in relation to the proactive disclosure of information that is useful to the public are as follows:

- Strong information management practices
- Publication schemes
- Disclosure of complete records and in primary form
- Public involvement
- Public education
- Equitable access
- Records are made available in a timely fashion
- Advanced use of technology, user-friendly formats, searchable
- Training
- Regular monitoring and review
- Proper governance and oversight

Information likely to be the subject of an access to information request

Best practices in relation to predicting information that will be the subject of access requests are that public bodies:

- maintain an up-to-date inventory of the types of information that are frequently the subject of access requests
- make every effort to release that type of information on a regular and routine basis and in a timely manner
- post the information on their websites in an easily accessible and searchable format.

Within government, the inventory should be developed on a government-wide basis and, at a minimum, include the following types of information:

- travel and hospitality expenses for Ministers, Deputy Ministers and Assistant Deputy Ministers
- calendars for Ministers, Deputy Ministers and Senior Executive

- contracts and
- audit reports

Information posted in response to an access to information request – disclosure logs

Best practices in relation to disclosure logs are that public bodies:

- Delay posting of responses to access requests by at least 24 hours
- Provide an opportunity for applicants to request a longer delay and agree to the request when it is made on reasonable grounds
- Post all responses
- Post a summary of the applicant's request rather than the request itself
- Not post the response letter because it may contain personal information
- Not identify individual applicants
- Update their disclosure logs regularly, at least once per month
- Post responses for a minimum of 12 months
- Remove documents that are outdated and no longer relevant
- Archive removed documents and continue to make them available
- Publish an index of archived documents
- Develop a search facility where there are large numbers of requests
- Provide links to disclosure logs from a prominent page on their websites
- Carefully consider the format of the log with a view to ensuring accessibility
- Provide information in a directly accessible format

Appendix A

Investigation into proactive disclosure by public bodies

Consultation Questions

Proactive disclosure

1. What, in your view, are the essential elements of a robust proactive disclosure practice?
2. Are there any particular types of data that should be proactively disclosed?
3. Are there any particular types of data that should not be proactively disclosed?
4. What, in your view, are the thorny issues that must be addressed in the practice of proactive disclosure?
5. What are the time sensitivities involved in the proactive disclosure of data?
6. Are you aware of proactive disclosure practices of public bodies in BC or in other jurisdictions that are good models for us to consider?
7. Are you aware of particularly poor practices or lessons learned elsewhere?

Proactive disclosure of responses to access requests

Public interest in access to information

1. In your view, does the proactive disclosure of responses to access requests serve the public interest in access to information?
2. In your view, does the proactive disclosure of responses to access requests contravene any provisions of the *Freedom of Information and Protection of Privacy Act*? If so, what sections and why?
3. If you are of the view that proactive disclosure of responses to access requests discourages individuals from making access requests, please provide us with evidence of that.
4. Are there time sensitivities that should be taken into account in publishing responses to access requests? In particular, do you have any concerns with respect to simultaneous disclosure to the applicant and to the public?

5. Should public bodies notify others when responses to access requests are made available to the public? What are the time sensitivities?
6. How should responses be made publicly available? If they are posted on the website are there time sensitivities as to when they are posted and for how long?
7. Should the names of applicants and/or the identity of applicant types be publicly disclosed?
8. When public bodies are engaged in proactive disclosure, should they charge fees to applicants in the usual way?

Public interest in access to information by media

1. What is the public interest in access to information by media?
2. What are the advantages and disadvantages to media of proactive disclosure of responses to access requests?
3. If you are of the view that journalists are disadvantaged by proactive disclosure of responses to access requests, please provide evidence of that.

Comparative information

1. Are you aware of good models of proactive disclosure of responses to access requests practices of public bodies in BC or in other jurisdictions?
2. Are you aware of particularly poor practices or lessons learned elsewhere?

Appendix B
List of Submissions

INDIVIDUALS

Stephen D. Green
Simon Lin
Frank Mitchell
Mark Weiler, PhD

INTEREST GROUPS

BC Civil Liberties Association
BC Freedom of Information and Privacy Association

MEDIA

Canadian Association of Journalists
Canadian Community Newspapers Association
The Canadian Press
Allen Garr, journalist
RTNDA Canada – The Association of Electronic Journalists
Stanley Tromp, journalist
Vancouver Sun

OPPOSITION CRITIC

Doug Routley, MLA

PUBLIC BODIES

British Columbia Ferry Services Inc.
City of Vancouver
Ministry of Citizens' Services

Appendix C

Classes of Information in Publication Schemes

UK Information Commissioner's Office
Model Publication Scheme
Classes of information

Who we are and what we do

Organisational information, locations and contacts, constitutional and legal governance.

What we spend and how we spend it

Financial information relating to projected and actual income and expenditure, tendering, procurement and contracts.

What our priorities are and how we are doing

Strategy and performance information, plans, assessments, inspections and reviews.

How we make decisions

Policy proposals and decisions. Decision making processes, internal criteria and procedures, consultations.

Our policies and procedures

Current written protocols for delivering our functions and responsibilities.

Lists and registers

Information held in registers required by law and other lists and registers relating to the functions of the authority.

The services we offer

Advice and guidance, booklets and leaflets, transactions and media releases. A description of the services offered.

Australia

Information Publication Scheme
***Freedom of Information Act 1982*, s. 8(2)**

Agencies are required to publish the following information:

- the agency plan
- details of the structure of the agency's organisation
- details of the agency's functions, including its decision making powers and other powers affecting members of the public (or any particular person or entity, or class of persons or entities)
- details of appointments of officers of the agency that are made under Acts such as appointment of statutory office holders
- the agency's annual reports
- details of arrangements for members of the public to comment on specific policy proposals for which the agency is responsible, including how (and to whom) those comments may be made
- information in documents to which the agency routinely gives access in response to requests
- information that the agency routinely provides to the Parliament in response to requests and orders from the Parliament
- details of an officer (or officers) who can be contacted about access to the agency's information or documents under the FOI Act
- the agency's operational information (information held by the agency to assist it to perform or exercise its functions or powers in making decisions or recommendations affecting members of the public—or any particular person or entity, or class of persons or entities— for example the agency's rules, guidelines, practices and precedents relating to those decisions and recommendations)

State of Queensland, Australia
Ministerial Guidelines

Operation of Publication Schemes and Disclosure Logs Under section 21(3) and section 78(2) of the *Right to Information Act 2009*

Publication Scheme Classes of Information

Seven classes of information are to be published. The classes of information are as follows:

1. *About us (Who we are and what we do)*

   Agency information, locations and contacts, constitutional and legal governance

2. *Our services (The services we offer)*

   A description of the services offered by the agency, including advice and guidance, booklets and leaflets, transactions and media releases

3. *Our finances (What we spend and how we spend it)*

   Financial information relating to projected and actual income and expenditure, tendering procurement and contracts

4. *Our priorities (What our priorities are and what we are doing)*

   Strategy and performance information, plans, assessments, inspections and reviews

5. *Our decisions (How we make decisions)*

   Policy proposals and decisions. Decision making processes, internal criteria and procedures, consultations

6. *Our policies (Our policies and procedures)*

   Current written protocols for delivering our functions and responsibilities

7. *Our Lists (Lists and registers)*

   Information held in registers required by law and other lists and registers relating to the functions of the agency