Note on Access to Information Reform in British Columbia

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This Note[1] was prepared in response to a call for submissions from the all-party Special Committee to Review the Freedom of Information and Protection of Privacy Act (FIPPA). 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. The Note was drafted 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]

FIPPA is one of the stronger laws giving individuals a right to access information held by public authorities or right to information (RTI) laws in Canada. However, that statement 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 and we are far behind countries like India, Serbia and Mexico, the RTI legislation of which provides for a greater degree of openness than anything

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

found in Canada.[3] In considering reforms, we urge the Special Committee to aim for a law which goes beyond the weak access to information models which are found in most of Canada,[4] and to commit to bringing FIPPA as fully into line as possible with international human rights standards.

Sources

Among the chief shortcomings of FIPPA are limitations in terms of its scope. According to international standards, the right to information should apply to all information held by any public authority. 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, or which performs a statutory or public function. Although the FIPPA applies to most public authorities, its provisions do not apply to members or officers of the Legislative Assembly. FIPPA also does not cover private bodies that receive public funding, which should be subject to the law to the extent of that funding. Although FIPPA already applies to professional associations, as listed in Schedule 3, this should be extended to include any other private body which performs a public function, such as providing power or sanitation services.

Procedures

Another problem with FIPPA is its system of time limits for responding to requests. An initial problem is that it 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 this is simply not necessary. According to s. 7, the head of the public authority is required to respond within 30 days of receiving a request. Although 30-day time limits are relatively routine across Canada, Schedule 1 states that this does not include Saturdays or holidays, resulting in a longer time limit than in most other Canadian jurisdictions. Even 30 calendar days is significantly longer than the time limit for response that better practice countries enforce. In Finland, Poland and the Netherlands, for example, the established time limit is 10 working days or two weeks.

FIPPA also fails to place an overall limit on extensions to the original 30-day limit. It does require the permission of the Information Commissioner for extensions which run to more than an additional 30 days, which is better practice in Canada. However, international standards call for overall time limits and many countries which lack

[3] These statements are based in part on the RTI Rating, an internationally recognised methodology for assessing the strength of RTI laws, which includes assessments of all national RTI laws globally. More information about the RTI Rating can be found at www.RTI-Rating.org.

[4] 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 general, weak Canadian laws.

the resources of Canadian public authorities respect that. 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.

A related 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 in line with international standards. It may, for example, have the effect of requiring requesters to pay for poor record management practices. Once again, it is worth noting that many developing countries, such as Nepal and Mexico to give just two examples, only charge for direct costs and not for employee time, which is deemed to be part of the institution's general mandate to serve the public.

FIPPA does not allow for a fee to be charged for filing access requests. Making it free to file requests is better practice in Canada, although very common internationally. It does, however, allow for disproportionate charges to be levied for many other services relating to the completion of requests, 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, since the per unit cost incurred in using a scanner is virtually zero, given that this fee does not cover staff time (which can be charged at $30 per hour beyond the first three hours).

We note that, according to British Columbia's most recent Annual Report, in practice fees are very seldom levied.[5] However, Newspapers Canada's *National Freedom of Information Audit 2014* does record one instance of a fee in British Colombia exceeding $50 (specifically, a fee for $330 for information relating to inmates).[6] In any case, the assessment in the Annual Report strengthens the argument for eliminating processing fees since doing so would have a minimal impact on public authorities and would remove a potential hurdle to access.

Exceptions

Although the right to information is not absolute, international law dictates that it may only be overridden in limited and justifiable circumstances. Specifically, information should be withheld only if its disclosure would pose a material risk of harm to a legitimate interest which would outweigh the public interest in releasing the information. This effectively leads to a three-part test for assessing the legitimacy of exceptions: (1) they should be based on narrow and legitimate

[5] See http://www2.gov.bc.ca/assets/gov/government/open-government/open-information/mtic-foi-annualreport-2015.pdf.
[6] See p. 32. Available at: http://www.newspaperscanada.ca/sites/default/files/FOI2014-FINAL.pdf.

interests; (2) they should extend only to information the disclosure of which would pose a serious risk of harm to those interests; and (3) they should be subject to a public interest override.

Section 16 of FIPPA, which protects information about intergovernmental relations and negotiations, is unnecessary. Section 17(1)(b) already protects information the disclosure of which is harmful to the commercial or financial interests of public authorities while 17(1)(e) and 17(1)(f) exempt information about negotiations. While it is legitimate to promote good relations between and among governments within Canada, at the same time it is of the greatest importance that such relations be conducted transparently. Given the protection of relevant interests and the fact that every jurisdiction in Canada already commits to openness via its own RTI rules, there is no need for the special protection provided in section 16. In other words, in light of mutual commitments to openness, other Canadian jurisdictions have no right to expect or demand openness from British Columbia beyond cases where release of the information would harm a legitimate interest.

FIPPA contains a robust public interest override, in section 25(1), but some of its exceptions lack a proper requirement of harm. Among the most problematic in this regard are sections 12 and 13, which deal with Cabinet and local public body confidences, and policy advice or recommendations. These exceptions fail to refer to any harm at all, creating what are sometimes termed class exclusions. 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). However, information the disclosure of which would not be harmful to the decision-making process should be disclosed and information should normally be disclosed once the deliberative process has been concluded (i.e. once a decision has been reached). The exceptions noted above should be amended to refer to a legitimate interest which needs protection and to apply only where disclosure would pose a clear risk of harm to that interest.

Section 79 provides that FIPPA overrules other legislation to the extent of any conflict, unless the other Act specifically 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 requisite harm and public interest tests mandated by international standards. For example, the federal Access to Information Act is overruled by 81 provisions in 58 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 should be examined to ensure they are in line with the international standards.

Recommendations:

- Schedule 1 should be amended so that FIPPA applies to members and officers of the Legislative Assembly.
- FIPPA should apply to private bodies which either perform a public function or receive public funding, to the extent of that funding or function.
- Section 7 should require public authorities to respond to requests for information as soon as possible.
- The time limit for responding to requests in Section 7 should be reduced to two weeks. If this is deemed too short, Schedule 1 should at least be amended to define a "day" as a calendar day.
- Extensions to this limit should be capped at an additional 30 calendar days.
- Public authorities should not be able to charge for employee time spent responding to a request and the fee schedule should be amended to reflect the actual costs incurred by public authorities in reproducing or delivering information.
- Section 16 should be removed.
- Sections 12 and 13 should be revised so as to protect only legitimate interests against harm, and only for as long as disclosure would pose a risk of harm, which would normally not be the case after a final decision had been reached.
- Any legislation which overrules FIPPA under section 79 should be reviewed to ensure that any exceptions contained therein protect legitimate interests and are subject to a harm test and a public interest override.