



BY FAX (387-6176)

April 27, 2006

Hon. Mike de Jong
Minister of Labour & Citizens' Services
Parliament Buildings
Victoria BC V8W 1A4

Dear Minister:

Bill 30 (Miscellaneous Statutes Amendment Act, 2006)—Amendments to the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) and the *Personal Information Protection Act* (“PIPA”)—OIPC File No. F05-26470

I write to comment on the above Bill, introduced in the Legislative Assembly by the Attorney General, in relation to the amendments it contains to FIPPA and PIPA.

My focus is on the proposed s. 17(1)(f) and s. 21.1 of FIPPA, which would radically affect the landscape of freedom of information in British Columbia and significantly affect the accountability and openness of public bodies when they enter into certain major contractual commitments on taxpayers' behalf.

The proposed changes would affect only certain contracts designated by the minister responsible for FIPPA. Eligible contracts would appear to include those commonly described as joint service delivery request for proposal (“JSRP”) arrangements. They might possibly include other designated outsourcing initiatives of the provincial government and other public bodies. I therefore acknowledge that the proposed s. 21.1 would not apply to all contracts entered into between public bodies and other parties.

I am aware from public statements in the past that JSRP is said to be a unique, world-leading, process that involves creation by government and a selected private sector proponent of joint solutions for private sector delivery of public services. It has been said that the JSRP process involves the exchange of much more information than normal between the participants—including sensitive information of the proponent—the disclosure of which would harm the proponent competitively. It has also been said that JSRP participants may create information jointly, with that information in effect becoming a joint asset relating to the proposed project.

My own experience in the 1990s negotiating public-private partnerships for local governments—including involving the design, building and operation of water utilities and sewer utilities—leaves me in the dark as to the special categories of information of the kinds said to be involved with JSRP projects. Perhaps the nature of the services being negotiated in the JSRP process is different or more complex than those involved

in local government public-private partnerships, but I am aware of no information that supports this.

I am also not aware of evidence to support the claim that a reduction in the public's right of access to information under FIPPA is necessary in order to protect either public body interests or the informational assets of a private party in the JSRP context. The first question I ask you, therefore, is what objective and specific evidence or supporting documentation exists to support such a critical change, including in the nature of a regulatory impact statement or access to information impact assessment and ask you to release any such information publicly.

It is reasonable to suppose that business representatives would, if asked, express a preference for, or would say they insist upon, confidentiality for JSRP or similar processes and contracts. They might even like to have complete secrecy for all contracts with public bodies. I note, however, that several significant, long-term, high-value agreements have been entered into under the present s. 21, the existence and implications of which would have been known to proponents and service providers. Moreover, examples of significant contracts between the provincial government and private sector organizations can be found dating back to the early days of FIPPA's implementation in the 1990s and examples can be found in other provinces of large contracts having been entered into under the same access-to-information conditions.¹

It is reasonable to suggest that expectations based on private sector experience should not drive public policy relating to the negotiation, award and performance of contracts between public and private sector organizations. Public sector contracts with private sector organizations have long been subject to different rules, ranging from access to information legislation of the kind in issue here, to public sector rules and controls on tendering processes, to the criteria for the award of contracts and the monitoring of contracts. The recent Gomery Report and resulting federal accountability proposals illustrate this point.

The clear policy underlying the existing s. 21(1), in force since 1993, remains to ensure an appropriate degree of transparency around contractual commitments, made on behalf of taxpayers, to pay money to private parties or to assume other liabilities to a private party. FIPPA also ensures transparency as regards obligations assumed by the private sector party and as to that party's performance of its obligations. Further, I suggest that transparency is more, not less, important in relation to long-term, high-value, contracts under which the public sector's capacity to deliver a particular public service may be handed over to a private sector service provider, with possible long-term implications for service delivery. The following passage from my February 2004 submission to the most recent Special Committee to review FIPPA remains my position:²

No persuasive case has been made that the balance struck in FIPPA is wrong or now outdated. To the contrary, the present level of scrutiny through s. 21 is

¹ For example, in or around 1995, IBM Canada was awarded a contract to operate the Ministry of Health's MSP computer system. Examples from Ontario include *Boeing Co.*, below, which involved the sale of de Havilland, and *Ministry of Transportation*, below, which involved agreements for the privately built and operated Highway 407 toll highway.

² Submission of the Information and Privacy Commissioner to the Special Committee to Review the Freedom of Information and Protection of Privacy Act (February 2004), at p. 24. <http://www.oipc.bc.ca/publications/speeches_presentations/FOI_review.pdf> The submission discusses at some length the policy behind and history of s. 21 of FIPPA and similar provisions elsewhere in Canada.

appropriate and ever more vital as alternative service delivery and public-private partnerships move ahead at all levels of government in British Columbia. In an era of public-private partnerships and private sector delivery of public services, the case for accountability is in fact stronger now than it was a decade or more ago. Long-term contractual commitments on taxpayers' behalf can have significant financial consequences for taxpayers and meaningful, though not unrestricted, scrutiny of such deals must be preserved under the Act.

On two occasions changes to s. 21 have been unanimously rejected by all-party Special Committees of the Legislative Assembly after extensive public hearings, consultations and research. In its May 2004 report to the Legislative Assembly, the Special Committee to Review the Freedom of Information and Protection of Privacy Act noted that witnesses had sought "further protection of contract information" and went on to say this:

Their submissions focused on the need to clarify in section 21(1)(b) whether information supplied in confidence during contract negotiations could be withheld from disclosure. After careful consideration, the Committee has concluded that the case for strengthening protection of third-party business information lacks concrete examples of harm suffered. Furthermore, we think the existing protection in the Act is adequate and consistent with other access laws in Canada.³

In its July 1999 report to the Legislative Assembly, the first Special Committee to Review the Freedom of Information and Protection of Privacy Act also declined to recommend any such change to s. 21.⁴

Provisions very similar to s. 21 are found in other Canadian access to information statutes and those provisions have consistently been interpreted elsewhere in Canada in essentially the same manner as in British Columbia, including by the Federal Court of Canada and, very recently, by the Ontario Court of Appeal and Ontario Divisional Court.⁵

The policy underlying provisions such as s. 21 merits some emphasis. Like other similar provisions across Canada, s. 21 balances the public interest in accountability for the spending of taxpayers' money or the disposal of publicly-owned assets or skills against the public interest in avoiding harm to private business interests through disclosure of businesses' informational assets. Canadian access to information laws, and the case law that has developed across the country, affirm the appropriateness, and effectiveness, of that balance. The price of doing business with government is a degree of scrutiny not found in purely private business deals. This has been the case across Canada for many years—at the federal level for more than 20 years and in British Columbia for well over a decade.

³ "Enhancing the Province's Public Sector Access and Privacy Law", Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act (May 2004), at p. 23. <<http://www.legis.gov.bc.ca/cmt/37thparl/session-5/foi/reports/Rpt-FOIPPA37-5.pdf>>

⁴ Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act (July 1999). <http://www.leg.bc.ca/cmt/36thParl/foi/1999/review_act.htm#Third-party%20business%20information> The report does not expressly decline to amend s. 21 on this point, but such a change had been requested in submissions to the Special Committee.

⁵ A full review of decisions from across Canada up to 2002 on the supply requirement is found in Order 03-02. For recent Ontario decisions, which involve complex and large outsourcing or privatization agreements, see *Ministry of Transportation v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), *Ministry of Northern Development & Mines v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4048 (C.A.), and *Boeing Co. v. Ontario (Ministry of Economic Development & Trade)*, [2005] O.J. No. 2851 (Ont. Div. Ct.).

I am deeply concerned by the proposed s. 21.1 because it would significantly reduce the public's right of access to information. It would turn back the clock on access to information and accountability in British Columbia at a time when the trend elsewhere in Canada is toward more access to information and greater accountability. I urge you to delete the provision from this Bill and preserve British Columbians' right of access to information in the interests of accountability.

Consistent with our longstanding practice when commenting on a Bill tabled in the Legislative Assembly, I am sending a copy of this letter to the Opposition critics for your Ministry and for the Ministry of Attorney General, the Minister who tabled this Bill.

This letter will be posted on our website later this afternoon.

Yours sincerely

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

cc: Hon. Wally Oppal
Attorney General

Harry Lali, MLA
Opposition Critic, Labour

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