



BY FAX (356-6595)

April 25, 2007

Hon. Olga Ilich
Minister of Labour and Citizens' Services
Parliament Buildings
Victoria BC V8W 4X4

Dear Minister:

Bill 25-2007 (Labour and Citizens' Services Statutes Amendment Act, 2007)—Freedom of Information and Protection of Privacy Act—OIPC File No. F07-31478

I write to express my deep concern that Bill 25 fails to address the serious imbalance that now exists under s. 13 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") between the public's right to know and government confidentiality.

Before dealing with s. 13, I should say that the amendments in ss. 1-19 of Bill 25 are welcome and I support them. A number of the amendments implement unanimous legislative reform recommendations found in the May 2004 report of the all-party Special Committee to Review the Freedom of Information and Protection of Privacy Act.

Other recommendations made by the special committee, however, have not been included in Bill 25. I understand government may implement some of the committee's recommendations through policy, not legislation. Other committee recommendations, however, require legislation. I have already publicly called on the government a number of times to move ahead quickly with the committee's recommendations and do so again now, noting that it is just under three years since the committee called for action.

My main concern is that s. 13(1) of FIPPA—which provides that "the head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister"—should be amended now in the manner recommended by the special committee. After extensive public hearings and consultations, the committee unanimously made the following recommendation:

Amend the advice and recommendation exception [s. 13(1)] to indicate these are similar terms that set out suggested actions for acceptance or rejection during the deliberative process, and to limit the information a public body can consider to be advice or recommendations.¹

This recommendation stemmed from the committee's conclusion that the British Columbia Court of Appeal had, in a 2002 decision,² given an overly broad interpretation to s. 13(1), thus reducing the public's right of access to information under FIPPA:

Based on what we heard, the Committee thinks there is a compelling case, as well as an urgent need, for amending section 13(1) in order to restore the public's legal right of access to any factual information. If left unchallenged, we believe the court decision has the potential to deny British Columbians access to a significant portion of records in the custody of public bodies and hence diminish accountability....³

Government officials might claim that the committee's recommendation would affect the operational efficiency of government, its ability to formulate policy and its ability to advise ministers. Such a claim would be assertion without evidence. Similar arguments have surfaced from time to time since access to information legislation came into effect across Canada in the 1980s and 1990s, but I have never seen any evidence whatsoever that freedom of information adversely affects the ability of public servants or elected officials to freely discuss matters, formulate policy or make decisions.

No one in British Columbia, certainly, has shown that the situation which existed for nine years before the Court of Appeal's 2002 decision in any way adversely affected the operations of government or other public bodies. The fact is that full and frank discussions of policy advice and recommendations occurred before the Court of Appeal's decision narrowed the public's right of access, and effective discussions of issues would continue in government after enactment of the remedial amendment. By contrast, as the special committee recognized, not to amend s. 13(1) would seriously undermine public accountability by allowing public bodies to possibly withhold broad swaths of information.

This danger was adverted to and avoided by the Ontario Court of Appeal in 2005 when it rejected our Court of Appeal's expansive interpretation. In a case where the Ontario government cited and relied heavily on our Court of Appeal's decision, the Ontario Court of Appeal concluded that the Ontario Information and Privacy Commissioner's interpretation⁴ of "advice or recommendations" was reasonable and said this:

¶27 The most fundamental principle of interpretation is that words must be understood in light of the context and purpose of the whole statute.

The purposes of the statute is stated by s. 1 of the Act [Ontario's *Freedom of Information and Protection of Privacy Act*] to be

1. The purposes of this Act are,
 - (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of government information should be reviewed independently of government; and
 - (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

¶28 In my view, the meaning of "advice" urged by the Ministry would not be consonant with this statement of purpose. The public's right to information would be severely diminished because much communication within government institutions would fall within the broad meaning of "advice", and s. 13(1) would not be a limited and specific exemption. I conclude, in the words of the Divisional Court that "the Commissioner's interpretation complies with the legislative text, promotes the legislative purpose, and is reasonable."⁵

The same concerns and observations apply here in British Columbia in light of what can only be described, with deference, as the Court of Appeal's overly-generous reading of s. 13(1). The Court of Appeal's decision, which failed to interpret s. 13 in light of the explicit accountability objective in s. 2(1) of FIPPA, has compromised the accountability and openness promised by FIPPA. The appropriate balance between openness and government confidentiality must be restored by amending s. 13 at the earliest opportunity.

There is more at stake than accountability and transparency, however—the rights of individuals are also harmed by inaction, as the special committee recognized. This is what the special committee said about the impact on individuals:

The discretionary exception to disclosure in section 13(1) was not intended to cover non-personal and personal factual information — at least until a recent B.C. Court of Appeal ruling. Before discussing the impact of the court decision on this provision, the Committee would like to comment on the human dimensions of the issue at stake here.

During the consultation process we became aware of the stress some individuals and families in British Columbia are experiencing because of their inability to correct erroneous factual information about themselves obtained in the course of a public body's investigation. One grandparent, for example, complained about being denied the opportunity to challenge the

"hearsay statements" about her in an access custody report prepared by a psychologist for a court hearing. This "misinformation" had prevented her from seeing her grandchild without supervision for the past two years. We also heard similar heartfelt stories from injured workers and ex-patients about the impact that indirect collection of personal information has had on their lives. As a result, we were disturbed to learn that the 2002 court ruling in regard to section 13(1) has made it even more difficult for people to obtain personal factual information in third-party files from public bodies.

...

...Furthermore, as described earlier, we have had the opportunity to hear firsthand accounts of the devastating impact the denial of access to factual information about themselves is having on some families in British Columbia. Regardless of whether these cases are directly related to the court decision, as a matter of principle, we believe that individuals have the legal right to access and correct personal factual information in third party files, except in the most unusual circumstances. For these reasons, we urge the government to take speedy action to clarify the exception relating to policy advice or recommendations.⁶

For the above reasons,⁷ I call on the government to address the inappropriate balance between access and confidentiality by amending Bill 25 to implement the special committee's recommendation without any further delay. The amendment to s. 13 should clarify the following:

- "advice" and "recommendations" are similar and often interchangeably used terms, not sweeping separate concepts⁸,
- "advice" or "recommendations" set out suggested actions for acceptance or rejection during a deliberative process,
- the "advice" or "recommendations" exception is not available for the facts upon which advised or recommended action is based,
- the "advice" or "recommendations" exception is not available for factual, investigative or background material, for the assessment or analysis of such material, or for professional or technical opinions.

In calling on the government to act now, I note that the Supreme Court of Canada has affirmed that privacy law—including the right of access to one's own personal information, a right adversely affected by s. 13—is quasi-constitutional in nature.⁹ Consistent with the quasi-constitutional status of such laws, the *Freedom of Information and Protection of Privacy Act* mandates periodic review of the Act by the legislative branch of government. The resulting legislative reform recommendations have a special status and character because of the central importance of access to information in our democratic system and, in this light, the government should not ignore the unanimous all-party recommendations of the Legislative Assembly's special committee and should instead act on them now.

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 critic. A copy of this letter will be posted on my office's website today.

Yours sincerely,

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

cc: Harry Lali MLA
Opposition Critic

Lori Wanamaker
Deputy Minister

Dave Nikolejsin
Chief Information Officer

Sharon Plater, Director
Information, Policy & Privacy Branch

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¹ Special committee recommendation number 11.

² The Court of Appeal decision is *College of Physicians & Surgeons v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 2779.

³ Special Committee to Review the Freedom of Information and Protection of Privacy Act, *Enhancing the Province's Public Sector Access and Privacy Law* (Legislative Assembly of British Columbia, 2004). <http://www.legis.gov.bc.ca/CMT/37thparl/session-5/foi/reports/Rpt-FOIPPA37-5.pdf>, at p. 20.

⁴ The Ontario Commissioner's interpretation of "advice or recommendations" is the same as that long adopted in British Columbia, including in Order 00-08.

⁵ *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (leave to appeal denied [2005] S.C.C.A. No. 563).

⁶ Special Committee's report, at p. 18-19 and p. 20.

⁷ Further discussion of the reasons why the amendment should proceed is found in my office's s. 13(1) submission to the special committee: (http://www.oipc.bc.ca/publications/speeches_presentations/FOI_review.pdf). Also see the committee's report, at the above link.

⁸ One example of the courts treating the words "advice" and "recommendations" interchangeably is *Thomson v. Canada (Deputy Minister of Agriculture)* (1992), 89 D.L.R. (4th) 218 (S.C.C.). In *College of Physicians and Surgeons*, the Court of Appeal cited *Thomson* on another point, but did not mention that the Supreme Court of Canada in that case treated the word "recommendation" as meaning "advice". At pp. 242-243, Cory J., for the majority, said that "[r]ecommendations' ordinarily means the offering of advice". Further, there is ample authority for the proposition that legislation may sometimes contain words that have the same or overlapping meanings. See R. Sullivan, *Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworth's, 2002), at p. 173. See, also, *R. v. Goulis* (1981), 33 O.R. (2d) 55, at p. 61 (Ont. C.A.). Drafters with knowledge of the legislature's objective will use apparent repetition in a statute's wording to avoid potential misunderstanding or problems with its administration (or, where applicable, to preserve parallelism between two language versions). Where there is

reason to believe words are deliberately included in the legislation, any presumption against tautology—mentioned by the Court of Appeal in *College of Physicians and Surgeons*, is rebutted. See R. Sullivan, *Driedger on the Construction of Statutes*, at p. 162.

⁹ See, for example, *H.J. Heinz Co. of Canada Ltd. V. Canada (Attorney General)*, 2006 SCC 13, [2006] S.C.J. No. 13.