

FULL DISCLOSURE – AT TIMES

B.C. governmental internet publication
of Freedom of Information request
responses: Rhetoric vs. Reality

A report from the B.C. Freedom of Information
and Privacy Association (FIPA)

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As a demonstration of their commitment to public transparency, governments around the world are following a trend to post much more information on the internet.

So on July 19, 2011, the government of British Columbia proudly announced in a press release that: “With a new, citizen-focused government website, release of open datasets and proactive posting of freedom of information requests and government expenses, B.C. has become a national leader in open government, said Premier Christy Clark.”

This came soon after a controversy was mainly resolved in regards to BC Ferries. In May 2011, provincial information and privacy commissioner Elizabeth Denham in a report rebuked BC Ferries’ practice of posting FOI requests online before or as it releases a copy to the original requester. (See http://www.oipc.bc.ca/news/2011Releases/NR_IR_F11-02.pdf)

Denham issued a set of guidelines for public bodies that might adopt similar schemes, including a minimum 24 hour delay before posting requested information to the Web. As a result, the B.C. government the provincial government changed its policy to give requesters at least 72 hours with the documents before posting them online for others to see, with a maximum up to five days. FIPA urges that this 72 hour time frame never be lessened.

(Denham added: “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.” This has not yet been done, but FIPA advises that it be so.)

B.C. is also the first provincial government to create a site like DataBC (www.data.gov.bc.ca) - a catalogue of nearly 2,500 sets of data that, over time, will increase as new datasets become available. A broad range of datasets are available, such as birth rates, carbon emissions statistics and information on schools.

At the time, FIPA had mixed reactions to the government’s new policy. (See http://fipa.bc.ca/library/News_Releases/FIPA_News_Release_July_19_2011.pdf)

With its new "Open Information – Open Data" policy, the BC government took a big step forward on how it releases information to the public. But according to FIPA Executive Director Vincent Gogolek, there was still much work to be done to change an entrenched government culture of secrecy: "The policies announced by Premier Clark are more than cosmetic. However, several important pieces that were expected are missing. Hopefully those will be coming soon."

From the political declarations above, the general reader might reasonably assume that the B.C. government had planned to post all the completed ministerial FOI responses quests online. However, FIPA discovered that this did not occur. This report will highlight the reality behind the “open government” internet rhetoric.

The policy and practice on the online release of General FOI responses is described in a document entitled *Open Information and Open Data Policy*, at http://www.cio.gov.bc.ca/local/cio/kis/pdfs/open_data.pdf. (Office of the Chief Information Officer, Knowledge and Information Services Branch Ministry of Labour, Citizens' Services and Open Government, Version 1.0, July 2011) It reads:

2.1 Proactive Disclosure of Responses to General FOI Requests

The following policy requirements apply to the Proactive Disclosure of responses to General FOI Requests:

2.1.1 Responses to General FOI Requests must be posted to the Open Information Website, unless an exemption is approved. Responses to General FOI Requests include the response letter and the responsive Records.

2.1.2 In limited circumstances, an exemption to posting a response to a General FOI Request may be approved where specific exemption criteria apply. Exemption criteria are set out in Appendix A.

Appendix A – Proactive Disclosure Exemption Criteria

Responses to General FOI Requests will be considered for exemption from Proactive Disclosure and posting on the Open Information Website if they contain:

- Personal Information or information that could lead to the identification of the Applicant or other persons;
- information that may harm relations with a First Nation;
- information that may harm relations with another government;
- information that may harm a third party's business interests; or,
- information that is not suitable for Proactive Disclosure based on a formal risk assessment that disclosure to the public may threaten the safety of a person or harm the security of any property or system.

Information Access Operations, Ministry of Labour, Citizens' Services and Open Government may recommend an exemption from Proactive Disclosure in limited circumstances where one or more of the above criteria are met. The deputy minister, head or designate, of the responsible ministry must approve any recommended exemption.

With respect, FIPA believes that the criteria noted above for not posting records is entirely illogical and unnecessary. The records already had exemptions applied before being sent to the applicant. So why “apply exemptions,” in effect, a second time here, when considering whether to post these - is that not redundant?

Posting the *already* exempted records, just as they are, could not result in any harmful material being revealed – i.e., there is nothing added or subtracted to the FOI-completed records, per se, by the mere process of posting the PDFs of them online. Blanked out sections on a page are exactly the same whether printed on paper (to be mailed to an FOI applicant), or scanned versions of those same papers are later posted online.

There is another curiosity in the policy above: why were only those particular exemptions selected for special treatment and not others? i.e., why is there no mention in the policy of sec. 12, 13, 14, or 17 as grounds for not posting records. All FOI exemptions are considered sensitive, but why were these noted in the policy apparently deemed super-sensitive?

It is not always clear who in government – “deputy minister, head or designate of the responsible ministry” - actually makes the exemption and posting decisions, and we wish to know more on this.

Below is a table that FIPA compiled for the past year of FOI responses that were posted. Statistics were supplied to us by the Open Information Planning branch of Information Access Operations – a division of the Ministry of Labour, Citizens' Services and Open Government.

They are all Formal General requests (as distinct from “Personal” i.e., requests for one’s own private records) for all ministries.

Throughout this discussion, it is essential to not confuse the concept of FOI “responses” with “records.” That is, responses noted below refer to all material, whether this includes actual records, or just a letter stating that no records were found, or other kinds of replies. (These numbers will all be broken down in Table 2.)

“For Open Information website purposes, only requests that have records released under a full or partial disclosure are considered for publication,” said a ministry spokesperson (who added, “we have a three or five business day delay for publication on the Open Information website, so it is not always the case that a request will be published in the same month that it was closed”).

Table 1. BC FOI RESPONSES POSTED AT <http://www.openinfo.gov.bc.ca>

August 2011 - 81 responses were posted of 238 closed (34%)

September 2011 - 59 responses were posted of 336 closed (18%)

October 2011 - 117 responses were posted of 382 closed (31%)
November 2011 - 102 responses were posted of 281 closed (36%)
December 2011 - 85 responses were posted of 269 closed (32%)
January 2012 – 85 responses were posted of 254 closed (34%)
February 2012 - 104 responses were posted of 319 closed (33%)
March 2012 - 114 responses were posted of 288 closed (39%)
April 2012 - 79 responses were posted of 223 closed (35%)
May 2012 – 98 responses were posted of 331 closed (30%)
June 2012 – 99 responses were posted of 279 closed (35%)
July 2012 - 150 responses were posted of 384 closed (39%)

TOTALS (August 2011 to August 2012)

General FOI responses closed - 3,584

General FOI responses posted online - 1,173

= 32.7 % of the total closed responses were posted, while 67.3 % were not

The numbers above are remarkably consistent from month to month (that is, roughly one-third of responses were posted), suggesting a pattern rather than randomness.

Below we use the eight month period of August 1, 2011 to April 1, 2012 for a more detailed breakdown for Table 2 (and we believe that the four months thereafter would likely follow a fairly similar pattern). The numbers are from a 194 page PDF file of data that FIPA obtained by our FOI request #CTZ-2012-00048, a response that was itself not posted.

Of the 2,378 total closed General Formal in that period, only some requests that were in the “Disposition” column marked “Full Disclosure” or “Partial Disclosure” were Published, while all the others were Not Published.

Table 2 – FURTHER BREAKDOWN OF 2,378 RESPONSES

Some Published

Full Disclosure = 344 (14.6% of total responses).

75 of those 344 were not posted, the other 269 were (78% of full disclosures).

Partial Disclosure = 943 (40% of total responses).

449 of those 943 were not posted, the other 494 were (52% of partial disclosures).

All Unpublished

No Responsive Records = 565 (24% of total)

Abandoned = 131 (5.5%)

Transferred = 162 (6.8%)

Access Denied = 79 (3.3%)

Withdrawn = 87 (3.7%)

Cancelled = 17 (0.7%)

Routinely Releasable = 22 (0.9%)

Outside Scope of Act = 12 (0.5%)

Government might plead: “If no records were found, why should the response letter alone be posted? Is that not a wasted effort?” (The financial cost, however, would be negligible in the digital age.) There are several reasons.

Firstly, if no records indeed existed, it would save a new applicant - who notices that reply letter while scanning the database - the trouble of making a similar request. Or he or she might still wish to anyways, for records on that topic might have been created since the period covered by that last request which found no records.

Secondly, the claim of “no records found” might be incorrect, due to an inadequate search, or other reasons. A new applicant may wish to try again, and appeal a non-responsive claim to the OIPC. (One example might be the claim that no memo was found on the cost of the HST changeover in the premier’s office, yet upon a new request being made, one was located.)

Thirdly, the fact of no records being found on a topic might be very important in itself, such as if no inspection records for years were ever created upon a controversial school or hospital.

Government might also plead: “If the responsive records are mostly blanked out pages, why post those?” The reason is that a new applicant could apply for these same records – and could appeal the overuse of those exemptions to the OIPC.

WHAT WAS MISSING?

Below are ten examples (culled from many more FIPA had found) amongst the closed general FOI responses that were *not* posted to the www.openinfo website, and yet many deal with important topics of the public interest.

(1) PSS-2011-00826

Copies of final/primary documents relating to incident reports involving threats, attempted assaults or incidents where staff were injured in responding to inmate-on-inmate violence for BC correctional institutions for 2010.

Justice / August 15, 2011 / Partial Disclosure / Media / Do Not Publish

(2) FNR-2011-00248

All records concerning the Pacific Great Blue Heron colony at Wireless Road, Comox including but not limited to records of correspondence between the Ministry of the Environment and the Department of National Defence with reference to CFB Comox Project: Remove Trees from Obstacle Limitation Surfaces to Runway 30 at 19 Wing Comox; All records and data relating to the heron colony at Wireless Road, Comox; All records relating to the Coastal Douglas Fir ecosystem at Wireless Road, Comox.

Forests, Lands and Natural Resource Operations / February 21, 2012 / Partial Disclosure / Individual / Do Not Publish

(3) FNR-2011-00265

Records relating to fish kills, fish stranding and negative environmental impacts related to the Ashlu Creek Independent Power Project from June 2009 to May 18, 2011, including any material that is deemed out of scope.

Forests, Lands and Natural Resource Operations / January 30, 2012 / Partial Disclosure / Interest Group / Do Not Publish

(4) HTH-2011-00124

Evaluation materials for interior of BC, eight-week trial period, for dedicated helicopter air ambulance service. Document types: Final reports, Executive and interim project reports, information and decision briefing notes. Time frame is after the trial period ended September 17, 2010 to August 30, 2011.

Health / December 01, 2011 / Partial Disclosure / Interest Group / Do Not Publish

(5) AGT-2011-00219

Any and all correspondence and documents (including emails) sent or received from the Office of the Attorney General from July 1, 2011 to August 26, 2011 regarding the Stanley Cup Riots and subsequent investigation/prosecutions; Any and all correspondence and documents (including emails) sent or received from the Office of the Deputy Attorney General July 1, 2011 to August 26, 2011 regarding the Stanley Cup Riots and subsequent investigation/prosecutions.

Justice / February 20, 2012 / Partial Disclosure / Political Party / Do Not Publish

(6) GCP-2012-00033

All records including emails, policy documents, briefing notes, memos, binders and other correspondence relating to same-sex marriage and/or divorce for foreign gay couples wed in Canada; Records related to the validity of these same sex marriages. Time frame is 2004 until [February 14, 2012].

Labour, Citizens / March 22, 2012 / Partial Disclosure / Media / Do Not Publish

(7) TRA-2011-00050

All records from the Southcoast region bridge program area pertaining to suicide prevention initiatives and measures for bridges in the Lower Mainland. More specifically, all records specific, but not limited to, prevention methods on Lions Gate Bridge, including any review of the suicide prevention emergency phones and any records pertaining to plans to expand the program to other bridges or install additional or alternative methods on bridges in the Lower Mainland. The timeframe for these records is from 1998 through 2011.

Transportation and Infrastructure / November 14, 2011 / Partial Disclosure / Individual / Do Not Publish

(8) HTH-2011-00144

All emails and letters received from the public, and government officers, and responded to, within the Ministry, pertaining to second hand smoke in multi-unit dwellings; Including smoke from marijuana and illegal drug; Also including any reports and plans addressing legislation prohibiting second hand smoke in multi-unit dwellings, and how it specifically relates to seniors housing, subsidized housing, and children; And as well any communication, recommendations, plans, reports, between BC Region, Tobacco Control Program of Health Canada. Timeframe January 2011 to [October 6, 2011].

Health / January 04, 2012 / Partial Disclosure / Individual / Do Not Publish

(9) FML-2010-00034

Copies of all files (communications, memos, reports, etc.) concerning the McAbee fossil site near Cache Creek, BC, including (but not be restricted to) the report commissioned by the Ministry of Agriculture and Lands by Peter Read and Richard Hebda; including files from other ministries that previously existed but no longer do, for example, the Ministry of Sustainable Resource Management, which had communications and possibly internal discussions of this issue under then Minister Stan Hagen in 2002 and under then Minister Abbott in 2003; also any files with comments, information, or direction to ministries concerning this issue by anyone within the Premier's Office.

Forests, Lands and Natural Resource Operations / February 07, 2012 / Partial Disclosure / Individual / Do Not Publish

(10) FNR-2011-00090

Entire file, email, reports, notes about the historic site of Emily Carr's House of All Sorts located at 646 Simcoe Street, Victoria, BC and its provincial designation.

Forests, Lands and Natural Resource Operations / October 12, 2011 / Partial Disclosure / Individual / Do Not Publish

PARTIAL or FULL DISCLOSURES?

The above are examples of "Partial Disclosure." FIPA does not accept the rationale that Partial Disclosure requests should not be published because of their exemptions. But even if we did, this excuse cannot justify the non-publication of "Full Disclosure" requests, because there are simply no exemptions to consider in those cases. By the government's own logic and policy, 100 percent of these would have been posted.

Of the 344 Full Disclosure responses noted in the table above, 75 of those were not posted (or 22 percent of them). Most of these not posted ones were for the calendars of ministers and their aides, or records on the processing of others' FOI requests - both topics of which the government

might say are of little interest to the general public. But there were also others of potentially much wider interest that were not posted, for example:

OOP-2011-00631

Any and all records related to lobbyist Ken Dobell including but not limited to calendar records, meeting records, briefing records, expense records and receipts, and communications of any kind (letters, emails text messages, pin messages, BBM messages, memos) with the Premier and/or any of her staff. Timeframe is August 1 to December 19, 2011.

Office of the Premier / February 07, 2012 / Full Disclosure / Political Party / Do Not Publish

HOU-2011-00007

All correspondence, including emails, received by the Building and Safety Standards Branch or Assistant Deputy Minister Jeff Vasey since May 1, 2011, on the province's decision to allow six-storey wood-framed buildings

Energy and Mines / August 04, 2011 / Full Disclosure / Media / Do Not Publish

HOU-2011-00037

All records pertaining to drifting second-hand smoke in multi-unit dwellings, including smoke from marijuana and illegal drugs. Time frame is March 1, 2011 to present [September 26, 2011].

Energy and Mines / November 15, 2011 / Full Disclosure / Individual / Do Not Publish

MOE-2011-00243

Any and all correspondence including emails between the Minister, the staff of the Minister and members of the Legislative Assembly of British Columbia regarding the Metro Vancouver Solid Waste Management Plan: Any and all records showing meetings between the Minister and members of the Legislative Assembly of British Columbia regarding the Metro Vancouver Solid Waste Management Plan. Time frame is March 14, 2011 to [December 13, 2011].

Environment / January 26, 2012 / Full Disclosure / Political Party / Do Not Publish

As an aside, the government proudly proclaims that it is posting more datasets of information. So for FIPA's inquires for this report, we were advised to read an online dataset for all central government FOI requests closed in the fiscal years 2010-11 and 2011-12: "Fields include request

numbers, receiving ministry, applicant type, start date, end date, request type, processing days, overdue days, extensions and disposition.”

While of some use, this dataset however did not include any information on whether the responses were ever published or not. For that feature, we had to ask the ministry separately (statistics which it supplied, to its credit, without the need for an FOI request for them).

This is a good illustration of the fact that what is included in a dataset can be as selective - politically or otherwise - as the decision on which FOI responses to post or not, so that only the very naïve would view such postings as the best measure of government transparency. Indeed, FOI advocates fear that governments are posting such datasets online as one means to satisfy and divert public attention away from urgently needed structural FOI law reform.

In Summary

Firstly, in FIPA’s view, to not post FOI responses because some of the material has been whited out because of exemptions is illogical.

Secondly, an adherence to the rule of law would remove the risk of such decisions being made by bureaucratic or political whim and fiat.

When the policy on FOI-response postings is followed so loosely or perhaps by an unseen pattern, it can raise public suspicions about a risk of political intervention in the decision-making upon which responses (and records) should be posted or not.

Such an outcome would be completely unsurprising, however, except to the very naive. Consider, for example, records on the premier’s meeting with a lobbyist. The record itself is the same, but the real-life consequences can ultimately be very different whether it is mailed to a single applicant, or else posted online for billions in the entire world to read and easily locatable by a Google search. From this political reality, would it not be extraordinary - although not impossible - if any government, at the end of the transparency process, could relinquish the option of final control entirely?

FIPA does not here conclude that politics was a factor in deciding which responses to post or not, for we have no evidence to know either way. Yet several important questions arise - noted above - and the ball is now in the government’s court to more fully explain its policies.
