

BACKGROUND #1 – ANALYSIS OF BILL 25

2007 Legislative Session: 3rd Session, 38th Parliament
FIRST READING
BILL 25 – 2007

LABOUR AND CITIZENS' SERVICES STATUTES AMENDMENT ACT, 2007

[EXCERPTS]

FIPA COMMENT

Bill 25 contains 19 amendments to the Freedom of Information and Protection of Privacy Act (FOIPPA).

- Nine amendments relate to the privacy protections in the Act.
- Nine amendments relate to powers of the Information and Privacy Commissioner and the processing of complaints and appeals to the Commissioner.
- Only one amendment directly affects the making of FOI requests – see no. 2 below (boxed).

This amendment creates yet another pretext for public bodies to delay FOI requests. It also creates the potential for great mischief if an official wishes to stall, misdirect or discourage a requester. It is the 16th amendment made to the FOIPPA by the current administration since 2001 that makes it more difficult for a person to exercise their right of access to government information.

Freedom of Information and Protection of Privacy Act

1 Section 3 (3) of the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, is amended by adding the following paragraph:

(e.1) section 30.5 (notification of unauthorized disclosure); .

2 Section 11 is repealed and the following substituted:

Transferring a request

11 (1) Within 20 days after a request for access to a record is received by a public body, the head of the public body may transfer the request and, if necessary, the record to another public body if

- (a) the head of the public body is satisfied that the request meets the requirements of section 5 (1), and

COMMENT

This is the only amendment in Bill 25 that directly affects the making of FOI requests. Its impact is negative – see italicized portion of section below and accompanying comment.

<p>(b) one or more of the following applies:</p> <ul style="list-style-type: none"> (i) the record was produced by or for the other public body; (ii) the other public body was the first to obtain the record; (iii) the record is in the custody or under the control of the other public body. <p>(2) If a request is transferred under subsection (1), the head of the public body who transferred the request must notify the applicant of the transfer.</p> <p>(3) If the head of the public body to which a request is transferred under subsection (1) is satisfied that the request meets the requirements of section 5 (1) (a) and (b), the head of the public body must respond to the applicant</p> <ul style="list-style-type: none"> (a) in accordance with section 8, and (b) not later than 30 days after the request is received by that public body, unless this time limit is extended under section 10. 	<p>This change requires the head of a public body to whom a request is transferred to respond within 30 days only if s/he is satisfied that the request meets the standard of s. 5 (1)¹. The clock stops until “satisfaction” is reached – and there is no maximum time limit for responding. What if a head is never satisfied?</p> <p>This contrasts with the requirement of a head under s. 7 to respond within 30 days, with the option under s. 10 to extend the time limit only up to 30 days if the applicant does not provide enough detail to identify a record.</p>
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3 Section 30.2 (2) is amended by striking out "If a public body, an employee of a public body" **and substituting** "If the head of a public body or an employee, officer or director of a public body".

4 Section 30.4 is amended by striking out "A person referred to in section 31.1" **and substituting** "An employee, officer or director of a public body or an employee or associate of a service provider".

5 The following section is added:

Notification of unauthorized disclosure

30.5 (1) In this section, "unauthorized disclosure of personal information" has the same meaning as in section 30.2 (1).

¹ **Section 5 -- How to make a request**

- (1) To obtain access to a record, the applicant must make a written request that
 - (a) provides sufficient detail to enable an experienced employee of the public body, with a reasonable effort, to identify the records sought,
 - (b) provides written proof of the authority of the applicant to make the request, if the applicant is acting on behalf of another person in accordance with the regulations, and
 - (c) is submitted to the public body that the applicant believes has custody or control of the record.

(2) An employee, officer or director of a public body, or an employee or associate of a service provider, who knows that there has been an unauthorized disclosure of personal information that is in the custody or under the control of the public body must immediately notify the head of the public body.

6 Section 33.1 (1) is amended by adding the following paragraph:

(a.1) if the information or disclosure is of a type described in section 22 (4) (e), (f), (h), (i) or (j); .

7 Section 36 is amended

(a) by renumbering the section as section 36 (1), and

(b) by adding the following subsections:

(2) For the purposes of subsection (3), "**institution**" means a museum, an archives or a similar institution that is or forms part of a public body or an organization, as the latter is defined in the *Personal Information Protection Act*.

(3) A board or a francophone education authority, as those are defined in the *School Act*, may disclose personal information or cause personal information in its custody or under its control to be disclosed to an institution if

(a) the disclosure would not be an unreasonable invasion of personal privacy under section 22,

(b) the disclosure is for historical research and is in accordance with section 35,

(c) the information is about someone who has been dead for 20 or more years, or

(d) the information is in a record that has been in existence for 100 or more years.

8 Section 44 is amended by adding the following subsections:

(3.1) The commissioner may require a person to attempt to resolve the person's request for review or complaint against a public body in the way directed by the commissioner before the commissioner begins or continues an investigation under section 42 or an inquiry under section 56.

(3.2) Subsection (3.1) applies whether or not a mediator has been authorized under section 55.

9 Section 47 is amended by adding the following subsections:

(2.1) The commissioner and anyone acting for or under the direction of the commissioner must not give or be compelled to give evidence in court or in any other proceedings in respect of any records or information obtained in performing their duties or exercising their powers and functions under this Act.

(2.2) Despite subsection (2.1), the commissioner and anyone acting for or under the direction of the commissioner may give or be compelled to give evidence

- (a) in a prosecution for perjury in respect of sworn testimony,
- (b) in a prosecution for an offence under this Act,
- (c) in an investigation, a determination or a review referred to in section 60 (1), or
- (d) in an application for judicial review of a decision made under this Act.

(2.3) Subsections (2.1) and (2.2) apply also in respect of evidence of the existence of proceedings conducted before the commissioner.

10 The following section is added:

Order for severing of records

54.1 (1) After the head of a public body has responded to a request under section 5 and a request for review of that response has been received under section 52, the commissioner may, at any time, by order,

- (a) confirm that the head of a public body has failed to sever the records that are the subject of the review, as required by this Act, and
- (b) require the head of the public body to sever the records in accordance with the directions and within the period set out in the order.

(2) The commissioner may not set a period for severing a record under subsection (1) that is less than 30 days after the date a copy of the order is given to the head of the public body concerned.

11 Section 56 is amended

(a) in subsection (6) by striking out "An inquiry" and substituting "Subject to subsection (8), an inquiry", and

(b) by adding the following subsections:

(7) If the commissioner has required a person to attempt to resolve a matter under section 44 (3.1), the commissioner may defer beginning or may adjourn an investigation under section 42 or an inquiry under this section to enable the resolution of the matter in the way required under section 44 (3.1).

(8) The period of an adjournment or deferral under subsection (7) must not be included for the purpose of calculating a deadline under subsection (6).

12 Section 59 is amended

(a) in subsection (1) by striking out "Not later" and substituting "Subject to subsection (1.1), not later",

(b) by adding the following subsection:

(1.1) If the commissioner gives the head of a public body or a service provider a copy of an order made under section 54.1, the head of a public body or a service provider, as applicable, must comply with the order within the period set out in the order, unless an application for judicial review of the order is brought before that period ends. , **and**

(c) in subsection (2) by adding "or set out in an order given under section 54.1 " after "subsection (1)".

13 The following section is added to Division 1 of Part 5:

Enforcement of orders of commissioner

59.01 (1) Subject to subsection (3), the commissioner may file a certified copy of an order made under section 54.1 or 58 with the Supreme Court.

(2) Subject to subsection (3), a party affected, or a person designated, by an order made under section 58 may file a certified copy of the order with the Supreme Court.

(3) An order may be filed under subsection (1) or (2) only if

(a) the order is not, or is no longer, the subject of an application for judicial review, or the subject of an appeal or further appeal, as the case may be, from a decision on judicial review in respect of the order,

(b) the date by which a person must comply with the order under section 59 (1) or (1.1), as the case may be, has occurred, and

(c) the period for commencing an appeal or further appeal, as the case may be, from a decision on judicial review in respect of the order has expired.

(4) An order filed under this section has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.

14 Section 61 is amended by adding the following subsection:

(3) Section 47 (2.1) to (2.3) applies to an adjudicator and the staff of an adjudicator.

15 Section 65 is amended

(a) by repealing subsection (1) and substituting the following:

(1) An adjudicator has the powers, duties and functions given to the commissioner by sections 54.1, 55 and 56 (1), (4) and (7), and sections 56 (2), (3), (5), (6) and (8) and 57 apply to an inquiry conducted by an adjudicator. , **and**

(b) by repealing subsection (3) and substituting the following:

(3) Sections 59 and 59.01 apply to an order of an adjudicator.

16 Section 69 is amended

(a) in subsection (1) by striking out "information sharing agreement" and substituting "information-sharing agreement",

(b) in subsection (3) (b) by striking out "information sharing agreements" and substituting "information-sharing agreements", and

(c) in subsection (5) by striking out "information sharing agreement" and substituting "information-sharing agreement".

17 Section 69.1 is amended

(a) in subsection (1) by striking out "health information sharing agreement" and substituting "health information-sharing agreement",

(b) in subsection (3) (b) by striking out "health information sharing agreements" and substituting "health information-sharing agreements", and

(c) in subsection (5) (b) by striking out "health information sharing agreement" and substituting "health information-sharing agreement".

18 Section 74 (1) (c) is amended by striking out "section 58" and substituting "section 54.1 or 58".

19 Section 74.1 is amended

(a) in subsection (1) by adding "or 30.5 (notification of unauthorized disclosure)" after "section 30.4 (unauthorized disclosure)", and

(b) in subsection (3) by striking out "or" at the end of paragraph (c), by adding "or" at the end of paragraph (d) and by adding the following paragraph:

(e) contravenes section 30.5 (notification of unauthorized disclosure), .

Explanatory Notes

Freedom of Information and Protection of Privacy Act

SECTION 1: [***Freedom of Information and Protection of Privacy Act, section 3***] states that the new section 30.5 applies to officers of the Legislature, and their employees and service providers.

SECTION 2: [Freedom of Information and Protection of Privacy Act, section 11]
clarifies that the 20 day period for transferring a request only applies when the head of the public body is satisfied that the request meets the requirements of section 5 (1), and limits the obligations on the head of the public body to whom a request is transferred to circumstances in which the request, in the opinion of the head, meets the requirements of section 5 (1) (a) and (b).

SECTION 3: [Freedom of Information and Protection of Privacy Act, section 30.2]
states that this section applies to directors and officers of public bodies.

SECTION 4: [Freedom of Information and Protection of Privacy Act, section 30.4]
sets out the category of persons to whom this section applies.

SECTION 5: [Freedom of Information and Protection of Privacy Act, section 30.5]
requires an employee, officer or director of a public body, or an employee or associate of a service provider who knows that there has been an unauthorized disclosure of personal information held by the public body to notify the head of the public body.

SECTION 6: [Freedom of Information and Protection of Privacy Act, section 33.1]
allows disclosure of information that is referred to in section 22 (4) (e), (f), (h), (i) or (j).

SECTION 7: [Freedom of Information and Protection of Privacy Act, section 36]
allows a school board or francophone education authority to disclose personal information to a museum, an archives, or a similar body that is or forms part of a public body or an organization as defined in the *Personal Information Protection Act*.

SECTION 8: [Freedom of Information and Protection of Privacy Act, section 44]
permits the commissioner to require a person to try to resolve a request for review or a complaint against a public body before the commissioner starts or continues an investigation or inquiry.

SECTION 9: [Freedom of Information and Protection of Privacy Act, section 47]

- protects the commissioner and the staff of the commissioner from being compelled to testify in court or other proceedings about information they receive as part of their functions and duties under this Act;
- establishes that this rule does not apply in certain circumstances, including a prosecution for an offence under this Act, proceedings referred to in section 60 (1), and an application for judicial review of a decision under this Act.

SECTION 10: [Freedom of Information and Protection of Privacy Act, section 54.1]
permits the commissioner to confirm that a public body has failed to sever records as required by the Act, and to require the public body to sever the records in accordance with the directions and within the period set by order of the commissioner, as long as that period is not less than 30 days after the date a copy of the order is given to the head of the public body.

SECTION 11: [Freedom of Information and Protection of Privacy Act, section 56]
sets out that if the commissioner requires a person to attempt to resolve a matter under section 44 (3.1), the commissioner may defer or adjourn an investigation or inquiry, and establishes that the period of the adjournment or deferral is not included for the purpose of calculating the deadline under section 56 (6).

SECTION 12: ***[Freedom of Information and Protection of Privacy Act, section 59]*** requires the head of a public body to comply with an order of the commissioner under section 54.1, within the period set out in the order, unless an application for judicial review is brought in that period.

SECTION 13: ***[Freedom of Information and Protection of Privacy Act, section 59.01]*** states that, in certain circumstances, the filing of an order of the commissioner made under section 54.1 or 58 with the Supreme Court has the same force and effect as an order of the Supreme Court.

SECTION 14: ***[Freedom of Information and Protection of Privacy Act, section 61]*** states that section 47 (2.1) to (2.3) applies to an adjudicator and the staff of an adjudicator.

SECTION 15: ***[Freedom of Information and Protection of Privacy Act, section 65]*** establishes that the powers of the commissioner set out in sections 54.1, 55, 56, 57, 59 and 59.01 apply to an adjudicator and to an inquiry held by an adjudicator.

SECTION 16: ***[Freedom of Information and Protection of Privacy Act, section 69]*** hyphenates "information sharing" to accord with current drafting style.

SECTION 17: ***[Freedom of Information and Protection of Privacy Act, section 69.1]*** hyphenates "information sharing" to accord with current drafting style.

SECTION 18: ***[Freedom of Information and Protection of Privacy Act, section 74]*** makes it an offence to fail to comply with an order of the commissioner under section 54.1.

SECTION 19: ***[Freedom of Information and Protection of Privacy Act, section 74.1]*** establishes that contravention of section 30.5 is an offence.