

**BILL 13 – 2008**  
**LABOUR AND CITIZENS' STATUTES**  
**AMENDMENT ACT, 2008**

**Summary of Amendments to the**  
***Freedom of Information and Protection of Privacy Act***

***In Brief***

On April 7, 2008, amendments to the *Freedom of Information and Protection of Privacy Act* (FOIPP Act) were passed as part of the Labour and Citizens' Services Statutes Amendment Act, 2008.

All of the amendments concerning the FOIPP Act came into effect when the bill received Royal Assent on May 1, 2008. The full text of the bill is available at [http://www.leg.bc.ca/38th4th/3rd\\_read/gov13-3.htm](http://www.leg.bc.ca/38th4th/3rd_read/gov13-3.htm).

The amendments will:

- Ensure that a public body's time period for transferring an access to information request begins only when the public body has sufficient detail to identify the records being sought and the applicant's authority to request the records;
- Require employees and service providers of public bodies to notify the public bodies of unauthorized disclosures of personal information;
- Permit public bodies to routinely disclose predetermined personal information that they can already release in response to access to information requests;
- Permit school boards to disclose personal information to museums and archives for archival or historical purposes;
- Allow the Information and Privacy Commissioner ("Commissioner") to require that applicants attempt to resolve complaints and requests for review with a public body before the Commissioner opens a file and ensure that if a matter is referred back to an applicant in such a manner, the referral time does not count against the 90 days the Commissioner has to review the matter;
- Protect the Commissioner and his staff from testimonial compulsion;
- Enable the Commissioner to order a public body to perform its duty to sever excepted information within a specified period; and
- Allow for the enforcement of the Commissioner's orders as orders of the Supreme Court of British Columbia.

## **Questions and Answers Relating to Amendments to the *Freedom of Information and Protection of Privacy Act (FOIPP Act)***

### **Bill 13 – 2008: Labour and Citizens' Services Statutes Amendment Act, 2008**

#### **Amendment to section 11 (Transferring a request)**

The amendment to section 11 clarifies public bodies' response time periods for access to information requests that are to be transferred or have been transferred.

#### **Q: What is the purpose of this amendment?**

**A:** Before this amendment came into effect, there was an inconsistency in the FOIPP Act between when the time period began for a public body to transfer an access request and when it began for directly responding to an access request. The time period for transferring the request began when the public body first received the request, no matter how clear or unclear it was. However, the time period for directly responding to the request only started when the public body had sufficient detail to identify the records, and written proof of the applicant's authority to request the records when acting on behalf of another person in accordance with the FOIPP Regulations.

This amendment ensures that the time period for transferring an access request commences only when a public body has sufficient detail to identify the records and the applicant's written proof of authority to request the records. It also ensures that the public body receiving the transferred request is not required to begin processing the request until it too is able to determine what records are being requested and the applicant's written proof of authority to request the records.

This amendment responds to a recommendation of the 2004 Special Legislative Committee that reviewed the FOIPP Act.

#### **Q: What is the effect of this amendment?**

**A:** This amendment ensures that a public body does not run out of time either to transfer a request or to respond to a transferred request because it is unable to determine the specific records the applicant is requesting or because it does not have the applicant's written proof of authority to request the records when acting on behalf of another person in accordance with the FOIPP Regulations.

**Q: Why couldn't a public body start processing the request but then take an extension under the existing provisions in section 10 allowing for extensions when applicants do not provide enough detail for the public body to identify the requested records?**

**A:** The extension provisions under section 10 are typically used when a public body begins to process a request but then determines more detail is needed from the applicant. In such cases, the general nature of the request is understood but further specifics are needed to respond fully.

This amendment is meant to address those cases where the request, when it is received, is unclear to the point that the public body is unable to begin processing as it cannot understand what records are being requested or whether the person has written proof of authority to access the requested records on behalf of someone else.

Additionally, the FOIPP Act was previously amended so that the time period for a public body responding directly to a request (as opposed to transferring it) only begins when there is sufficient detail to identify the records and the applicant's written proof of authority to request the records. This new amendment makes provisions within the FOIPP Act consistent by ensuring that the same criteria exist in all instances where a request is being received by a public body. .

#### **Addition of section 30.5 (Notification of unauthorized disclosure)**

This new provision requires public body employees, service providers, employees of service providers and service provider associates to report the unauthorized disclosure of personal information.

**Q: What is the purpose of this amendment?**

**A:** The FOIPP Act requires public bodies and their service providers to ensure that they disclose personal information only as it permits. However, prior to this amendment the FOIPP Act did not specifically require a public body's employees, service providers, service provider employees or associates to notify the head of the public body when an unauthorized disclosure of personal information had occurred. This new provision specifically requires public body employees, service providers, service provider employees or associates of public bodies to notify heads of public bodies immediately after they become aware of such a disclosure.

The requirement to report the unauthorized disclosure of personal information will also apply to the employees and service providers of Officers of the Legislature.

**Q: What is the effect of this amendment?**

**A:** This amendment ensures that the unauthorized disclosure of personal information can be addressed by the public body as soon as possible.

**Q: What is the “unauthorized disclosure of personal information”?**

**A:** The “unauthorized disclosure of personal information” has the same meaning as in section 30.2 (1) of the FOIPP Act. In that section, “unauthorized disclosure of personal information” means the “disclosure of, production of or the provision of access to personal information to which this Act applies, if that disclosure, production or access is not authorized by this Act”.

The circumstances in which disclosure, production or access are *authorized* are listed in sections 33.1 or 33.2 of the Act.

**Q: Are there any penalties if an employee or service provider does not report the unauthorized disclosure of personal information?**

**A:** Yes. A person commits an offence when they fail to notify a public body that an unauthorized disclosure of personal information has occurred. In addition, an employee or associate of a service provider who fails to notify a public body that an unauthorized disclosure of personal information has taken place, in relation to personal information that the service provider holds in its role as a service provider, also commits an offence.

**Addition of section 33.1 (1) (a.1) (Disclosure inside or outside Canada)**

This change allows public bodies to routinely disclose personal information that they can currently disclose when responding to access requests.

**Q: What is the purpose of this amendment?**

**A:** The FOIPP Act sets out separate processes for personal information that can be disclosed in response to an access to information request and for the personal information that may be disclosed routinely (see sections 33, 33.1 and 33.2). With access requests, the FOIPP Act lists certain categories of personal information whose disclosure would not be an unreasonable invasion of privacy (see section 22 (4) of the FOIPP Act) and therefore could be disclosed if no other exceptions were applied.

However, until this amendment, these same categories of information could not be routinely disclosed by public bodies where no access request had been made. The result was that people seeking the routine release of these categories of personal information received less information than if they submitted an access request for the same information.

This amendment permits public bodies to routinely disclose predetermined personal information whose disclosure would not be considered an unreasonable invasion of privacy when responding to an access request.

**Q: What is the effect of this amendment?**

**A:** There are two effects. First, it removes an inconsistency within the FOIPP Act where personal information predetermined not to be an unreasonable invasion of privacy could not be routinely released. Second, it enhances public accountability by removing a barrier to access by permitting public bodies to proactively release this predetermined information.

**Q: Why does the new provision include just some of the categories of personal information whose disclosure in response to an access request would not be an unreasonable invasion of privacy?**

**A:** The remaining categories of personal information whose disclosure specifically would not be an unreasonable invasion of privacy were already listed under the personal information disclosure provisions.

**Amendment to section 36 (Disclosure for archival or historical purposes)**

This provision allows school boards or francophone education authorities to disclose personal information for archival or historical purposes.

**Q: What is the purpose of this amendment?**

**A:** Schools are a repository of much local history but preservation beyond required student records is not part of their funded mandate. School boards want to preserve the memorabilia of closed schools by sending it to organizations such as museums.

Before this amendment, section 36 permitted only the archives of the government or a public body to disclose personal information for archival or historical purposes. This meant that school boards and francophone education authorities that did not have archives were not able to disclose personal information to another organization (such as a museum) for the purpose of preserving school memorabilia.

This amendment responds to a recommendation of the 2004 Special Legislative Committee that reviewed the FOIPP Act.

**Q: What is the effect of this amendment?**

**A:** School boards and francophone education authorities without archives can now disclose personal information to a museum or other such body in order to preserve school memorabilia.

However, they may do so only in the narrow circumstances listed in the amendment. These are if:

- The disclosure would not be an unreasonable invasion of privacy under section 22 (Disclosure harmful to personal privacy);
- The disclosure is for historical research and is in accordance with section 35 (Disclosure for research or statistical purposes);
- The information is about someone who has been dead at least 20 years; or
- The information is in a record that has existed for at least 100 years.

**Q: Can school boards and francophone education authorities disclose personal information to *any* archives or museum under this section?**

**A:** No. School boards and francophone education authorities can only disclose personal information to museums and archives that are, or form part of, public bodies under the FOIPP Act or are organizations under the *Personal Information Protection Act*. This ensures that the personal information will continue to be protected by British Columbia's public or private sector privacy legislation.

**Q: Will other public bodies without archives be able to disclose personal information under this provision?**

**A:** No. Only school boards and francophone education authorities may disclose personal information as permitted by this provision.

**Amendment to section 44 (Powers of commissioner in conducting investigations, audits or inquiries)**

This amendment allows the Commissioner to refer a person back to a public body to resolve their request for review of the public body's response to an access request or their complaint about the public body.

**Q: What is the purpose of this amendment?**

**A:** Before this amendment, the FOIPP Act did not require complainants to attempt to resolve their concerns with public bodies before going to the Commissioner, and the Commissioner had no authority to refer the complainants back to the public body.

This amendment enables the Commissioner to require applicants to attempt to resolve complaints and requests for review with a public body before the Commissioner opens or continues an investigation or an inquiry.

This amendment responds to a recommendation of the 2004 Special Legislative Committee that reviewed the FOIPP Act.

**Q: What is the effect of this amendment?**

**A:** This provides the Commissioner with an effective method of resolving disputes informally, and allows the Commissioner's office to use its resources more efficiently

by focusing on complaints and requests for review that cannot be resolved by the public body alone.

**Q: The Commissioner has 90 days to complete an inquiry into a review of a public body's response to an access request. How will the Commissioner's 90 day review period be affected by this change?**

**A:** The Commissioner can now defer beginning an investigation or inquiry, or may adjourn an investigation or inquiry that has already begun while such referrals occur. This 'stops the clock' for the 90 day review period for matters that are the subject of a request for review.

This change also responds to a recommendation of the 2004 Special Legislative Committee that reviewed the FOIPP Act.

**Amendment to section 47 (Restrictions on disclosure of information by the commissioner and staff)**

This amendment limits the testimonial compulsion of the Commissioner and the Commissioner's staff.

**Q: What is the purpose of this amendment?**

**A:** Before this amendment, the Commissioner and his staff were restricted from disclosing information obtained while performing their duties, powers and functions under the FOIPP Act. However, the Commissioner and his staff were not specifically protected from being compelled to testify in court about information they received in confidence. This amendment ensures such protection, subject to some limited exceptions.

It also responds to a recommendation of the 2004 Special Legislative Committee that reviewed the FOIPP Act.

**Q: What is the effect of this amendment?**

**A:** This amendment will assure public bodies, applicants and third parties that the information they provide in confidence to the Commissioner's office will not be disclosed through testimony in other proceedings. Such assurance will enhance the Commissioner's office's ability to perform its functions.

**Addition of section 54.1 (Order for severing of records)**

This amendment allows the Commissioner to order a public body to fulfill its duty to sever records in response to an access request.

**Q: What is the purpose of this amendment?**

**A:** A public body responding to a request for access to information can withhold information that falls under exceptions provided in the Act. However, if the excepted information can reasonably be severed from a record, the public body must sever the information to be withheld and provide access to the remainder of the record.

Sometimes a public body responding to an access request may neglect or refuse to sever records as required, especially when the access request involves a large number of records. Instead, the public body will simply withhold the records in their entirety and the applicant is compelled to apply to the Commissioner for a review.

Until this amendment, the Commissioner did not have the authority in the subsequent inquiry to order a public body to perform its duty to sever the records, and the Commissioner had to do the severing. This amendment enables the Commissioner to confirm that a public body has failed to sever the records and order the public body to perform its duty to sever records in accordance with the directions and time period the Commissioner sets out. Such an order must not be for a period of less than 30 days.

This amendment responds to a recommendation of the 2004 Special Legislative Committee that reviewed the FOIPP Act.

**Q: What is the effect of this amendment?**

**A:** This amendment improves efficiencies for the Commissioner's Office and increases the accountability of public bodies by permitting the Commissioner to order a public body to perform its duty to sever the records and disclose the remainder.

**Q: Will the Commissioner use this provision to instruct public bodies how they should sever records?**

**A:** This amendment is not intended to enable the Commissioner to tell public bodies how the records should be severed but simply to allow the Commissioner to order a public body to perform its duty to sever records when it has not done so.

**Q: Can a public body apply for a judicial review of an order made under this provision?**

**A:** Yes, the public body may apply for a judicial review during the period set out by the Commissioner in the order.

**Addition of section 59.01 (Enforcement of orders of commissioner)**

This amendment permits the filing of orders of the Commissioner with the Supreme Court of British Columbia.

**Q: What is the purpose of this amendment?**

**A:** A person who willfully fails to comply with an order of the Commissioner commits an offence and is subject to a fine of \$5,000. However, in some cases this method of enforcement may be complex or expensive.

This amendment provides another avenue of enforcement for the Commissioner and other parties. The Commissioner can file orders made under section 54.1 (orders to sever records) and section 58 (orders resulting from requests for reviews or investigations) with the Supreme Court so that they have the same force and effect as judgments of that court. Other parties affected by orders resulting from requests for reviews or investigations under section 58 can also file those orders with the Supreme Court.

In all cases the orders can only be filed once the periods for public bodies or others to apply for judicial reviews or subsequent appeals have expired.

This amendment responds to a recommendation of the 2004 Special Legislative Committee that reviewed the FOIPP Act.

**Q: What is the effect of this amendment?**

**A:** This amendment enhances the effectiveness of the Commissioner's orders by allowing the Commissioner, applicants and other parties to an order to rely on standard court processes for enforcing an order.