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In the Public Interest: Unlock the Vault

Law Reform to ensure proactive disclosure of “Public Interest” Records

Submitted to the Special Committee to Review the Freedom of Information and Protection of Privacy Act, on behalf of the BC Freedom of Information and Privacy Association

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Introduction

“Open Government” has been described as “the transparency of government actions”, the “accessibility of government services and information”, and “the responsiveness of government to new ideas, demands and needs.”¹ The concept of “Open Government” has gained wide public support in recent years. Open government is one of the rare political issues that does not polarize— people of every political stripe agree that government should not operate in secrecy.

Access to information is essential to the functioning of democracy. Transparent government is an accountable government. Without information, it is difficult, if not impossible, for citizens to meaningfully participate in democracy. As Mendel writes:

Voting is not simply a political beauty contest. For elections to fulfil their proper function- described under international law as ensuring that ‘[t]he will of the people shall be the basis of the authority of government’- the electorate must have access to information.²

Access to information is the way we battle corruption in democratic governments. The Carter Center notes:

“Transparency is the remedy to the darkness under which corruption and abuse thrives...Poor public access to information feeds corruption. Secrecy allows back-room deals to determine public spending in the interests of the few rather than the many. Lack of information impedes citizens’ ability to assess the decisions of their leaders”.³

Justice La Forest has also commented on the importance of access to information to democracy, writing in the Supreme Court of Canada case *Dagg v. Canada (Minister of Finance)*:

As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them...

The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his

¹ “Ch. 1: Open Government”, *Modernising Government: The Way Forward*, Organisation for Economic Co-operation and Development (OECD), OECD Publishing (2005) at p. 29

² Toby Mendel, *Freedom of Information: A Comparative Legal Survey* (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 4

³ *Access to Information: A Key to Democracy* (The Carter Center, 2002), ed. Laura Newman, online: <http://www.cartercenter.org/documents/1272.pdf> at p. 5

classic article, “How Much Administrative Secrecy?” (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:

Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.”⁴

A government that cloaks itself in secrecy by hiding information subverts democracy. The oft-quoted phrase “knowledge is power” is true. If citizens are not aware of what their government is doing or what decisions their elected officials are making, the exercise of democracy is weakened.

Information must not only be made available reactively (in response to access requests) – but also proactively. As Mendel writes in his Freedom of Information report for UNESCO, “[t]o give practical effect to the right to information, it is not enough simply to require public bodies to accede to requests for information. Effective access for many people depends on these bodies actively publishing and disseminating key categories of information even in the absence of a request.”⁵ British Columbia’s Information and privacy law is ahead of its time. Our *Freedom of Information and Protection of Privacy Act* includes a groundbreaking provision, section 25 [See Appendix 3], which – as newly interpreted by the Commissioner⁶ – requires that government agencies proactively release all information that discloses a significant risk to the environment or to the health or safety of the public, or is otherwise in the public interest. While this provision is a major step toward Open Government, there is still a lot of work to do. A struggle in many jurisdictions attempting to “open” their governments has been actual compliance with open government provisions and policies. Possible reasons for this include a culture of secrecy that seems to pervade the public service, along with the practical difficulty of sorting through the vast amounts of government held information and releasing public interest information.

One way of combating government resistance to proactive disclosure is to make clear exactly what information is public interest information. In her 2013-14 Annual Report, Commissioner Elizabeth Denham referenced a resolution passed at the annual 2013 meeting of Canada’s Information and Privacy Commissioners and Ombudspersons. On the topic of proactive disclosure, the resolution urged government to “recommit to the fundamental democratic values underpinning access and personal privacy legislation” and to “modernize access and privacy legislation in light of modern information

⁴ *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403, online: <https://www.canlii.org/en/ca/scc/doc/1997/1997canlii358/1997canlii358.html?autocompleteStr=dagg%20v.%20&autocompletePos=1> at paras. 60-1

⁵ Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online: http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 33

⁶ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02, “Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies”* (July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814>

technologies, evolving government practices and citizens' expectations."⁷ The resolution made a number of recommendations, one of which was that government "establish minimum standards for proactive disclosure, including identifying classes or categories of records that public entities must proactively make available to the public and, in keeping with the goals of Open Data, make them available in a usable format."⁸

In this submission, we urge the Special Committee to recommend specific amendments to sections 25, 71 and 71.1 of BC's *Freedom of Information and Protection of Privacy Act (FIPPA)*, to strengthen and create a wider legal obligation to proactively disclose information. In this submission, we make the following recommendations:

RECOMMENDATION 1: The principles laid out in the Commissioner's Report (July 2015) should be legislated. Section 25 should be amended to:

- i. explicitly require public bodies to proactively disclose information whenever a disinterested and reasonable observer, knowing what the information is and knowing all of circumstances, would conclude that disclosure is plainly and obviously in the public interest,**
- ii. include two more explicit categories of "public interest" information that must be proactively released by government:**
 - a. information about a topic inviting public attention; a topic about which the public has a substantial concern because it affects the welfare of citizens; or a topic to which public notoriety or controversy has attached, and**
 - b. information that promotes government accountability.**

RECOMMENDATION 2: Amend s. 25 to require proactive disclosure of specific categories and classes of records.

RECOMMENDATION 3: Amend s. 25 to require the proactive disclosure of environmental information described in the Aarhus Convention and adopted by the United Kingdom:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;**
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);**
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the**

⁷ Office of the Information and Privacy Commissioner for British Columbia, *2013-14 Annual Report*, (Victoria: OIPC, July 2014), online: https://www.oipc.bc.ca/media/16312/ar_2013-14.pdf at p. 13

⁸ Office of the Information and Privacy Commissioner for British Columbia, *2013-14 Annual Report*, (Victoria: OIPC, July 2014), online: https://www.oipc.bc.ca/media/16312/ar_2013-14.pdf at p. 13

- elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).⁹

RECOMMENDATION 4: The legislature should establish a category of proactive disclosure requiring environmental compliance orders, authorizations, convictions, contraventions, penalties and assessments to be proactively released.

RECOMMENDATION 5: The law should require the proactive disclosure of environmental quality reports, including air pollution surveys, water quality reports, and reports examining the health of particular species.

RECOMMENDATION 6: The legislation should require the proactive disclosure of all compliance orders, authorizations, inspection reports and penalties under all administrative schemes.

RECOMMENDATION 7: The law should require the proactive disclosure of contracts over \$10,000 and information about the procurement process.

RECOMMENDATION 8: The law should require the proactive disclosure of final audit reports.

RECOMMENDATION 9: The law should require the proactive disclosure of all budget and expenditure information.

RECOMMENDATION 10: Government should seriously consider making certain policy information, including project charters and research reports, a category of records that must be proactively disclosed under s. 25.

RECOMMENDATION 11: Following the recommendations by the Commissioner and by the 2004 and 2010 Special Committees, we recommend that *FIPPA* be amended to require that the exceptions listed in s.13(2) be proactively released.

RECOMMENDATION 12: Include a provision that permits the Minister to prescribe additional categories or records of information that must be proactively disclosed under s. 25.

RECOMMENDATION 13: The law should prescribe a maximum timeframe for the prompt proactive release of s. 25 information.

⁹ *The Environmental Information Regulations 2004*, United Kingdom, online: <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made> at section 2

RECOMMENDATION 14: Section 25 should be amended to require that proactively released information be posted online by each Ministry, either on the Data BC or Open Information website or on specific open information webpages linked to each Ministry’s website

RECOMMENDATION 15: Section 71 should be amended to more closely match the publication scheme requirement in the United Kingdom. It should be amended so that it requires:

- public bodies to produce publication schemes or lists of information that will be available proactively;
- that the publication schemes include any public interest information that falls under s. 25;
- that the publication schemes be posted online; and
- that the information listed in the publications schemes be posted online.

RECOMMENDATION 16: Section 71 should be amended to provide the Commissioner with the power to review and approve the publication schemes created by public bodies under s. 71.

RECOMMENDATION 17: The law should require that the lists be produced and posted within a legislated timeframe under s. 71.

Why legislative reform?

Current scheme

i. Section 25 of BC’s Freedom of Information and Protection of Privacy Act

Currently, s. 25 requires proactive disclosure of information that is “clearly in the public interest”. Sections 25(1)(a) and (b) set out the requirement for proactive disclosure of public interest information:

25 (1) Whether or not a request for access is made, the head of the public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

Information must be proactively released if it discloses a risk of significant harm to the environment or the health or safety of the public, or if it is “for any other reason” in the public interest to disclose.

The rest of s.25 determines that public interest information will be disclosed “despite any other provision” of the *Act*, including privacy provisions. It also requires the public body disclosing the information to notify both third parties to whom the information relates and the Information and Privacy Commissioner.

The determination of what documents are in “the public interest” is largely left to the discretion of the heads of government bodies making the decision to release information proactively. *FIPPA* does not identify any examples of public interest information.

ii. Sections 70 – 71.1 of the Act –The Open Government Initiative

Sections 70-71.1 of *FIPPA* [See Appendix 4] touch on categories of documents that may be disclosed without a request. These sections were enacted as a part of the government’s 2011 amendment package.

Section 70 is the only legislated provision that sets out a specific category of documents to be made available without request. It specifically requires that all policy manuals be made available without request. (Policy manuals include instructions or guidelines issued to officers or employees of the public body and substantive rules or policy statements adopted by the public body.)

In addition, sections 71 and 71.1 provide for the establishment of categories that will be made available without request. Section 71 requires the head of a public body to “establish categories of records that are in the custody or under the control of the public body and are available to the public without a request for access”. Section 71.1 gives the minister responsible for *FIPPA* (the Minister of Technology, Innovation and Citizens’ Services) the power to establish categories of records that must be made available to the public without a request.

In her 2013 review of the Open Government Initiative¹⁰, the Information and Privacy Commissioner, Elizabeth Denham, notes that allowing public bodies to identify what documents are to be released without a request is an approach that acknowledges that:

...individual ministries are likely to be best placed to assess which categories of records ought to be made publicly available. This is because these ministries are intimately familiar with their specific mandates and any particular laws affecting their operations. This puts them in the position of being able to assess which kinds of records should be made available as a priority, not to mention being able to best assess other pertinent factors that will shape, on an ongoing basis, their proactive disclosure program.¹¹

She notes that giving the minister responsible for *FIPPA* the power to intervene and require specific categories of information to be released is laudable because the “minister has a larger-scale knowledge

¹⁰ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553>

¹¹ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 10

and expertise respecting information rights across the provincial government” and “is likely to be most attuned to what kinds of records are most frequently requested under *FIPPA* overall.”¹²

While individual ministries must create categories of information that is disclosable without a request, s. 71 does not require any specific categories – and does not require that “public interest” information form a category. Furthermore, section 71.1 does not require that the minister create any categories; it only gives the minister discretion to do so.

iii. Government policy and official direction

In 2011, the Office of the Chief Information Officer released the “Open Information and Open Data Policy.”¹³ This Policy was produced at the time of the BC Government’s Open Government Initiative, and as a response to the BC Premier’s direction to ministries “to expand the public availability of Government Data, and, to the extent practicable and subject to the *Freedom of Information and Protection of Privacy Act*.”¹⁴ This Policy sets certain requirements outlining ministries general responsibilities, including:

2.2.1 Ministries should consider making information that they determine to be of interest or useful to the public, available to the public on a routine basis (i.e., without a request for access under the FOIP Act) unless its release is limited by law, contract or policy.¹⁵ (emphasis added)

The above policy “requirement” is discretionary; ministries “should consider” making the information described publicly available. With the Commissioner’s recent interpretation of s.25, however, information that is clearly in the public interest must be proactively disclosed.¹⁶ This policy should be updated to reflect this interpretation, and should be legislated.

In 2011, in line with the 2011 Open Information and Open Data Policy, the BC government began proactively posting information online by way of two websites – openinfo.gov.bc.ca and data.gov.bc.ca. On the Open Info website, government posts travel expenses of ministers and “information releases”.

¹² Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 10

¹³ Open Information and Open Data Policy (2011), Office of the Chief Information Officer, Knowledge and Information Services Branch, Ministry of Labour, Citizens’ Services and Open Government, online: http://www.cio.gov.bc.ca/local/cio/kis/pdfs/open_data.pdf

¹⁴ Open Information and Open Data Policy (2011), Office of the Chief Information Officer, Knowledge and Information Services Branch, Ministry of Labour, Citizens’ Services and Open Government, online: http://www.cio.gov.bc.ca/local/cio/kis/pdfs/open_data.pdf at p. 1

¹⁵ Open Information and Open Data Policy (2011), Office of the Chief Information Officer, Knowledge and Information Services Branch, Ministry of Labour, Citizens’ Services and Open Government, online: http://www.cio.gov.bc.ca/local/cio/kis/pdfs/open_data.pdf at p. 5

¹⁶ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, “Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies” (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814>

These information releases are copies of information released in response to (some but not all) FOI requests. The Data BC site posts datasets organized by various categories, such as “natural resources” and “education”.

A “Tip Sheet” about “How to know when you must disclose information under s.25” was released by the Privacy and Legislation Branch in 2014.¹⁷ This Tip Sheet provides an overview of s.25 and the procedure for ministry approval of release of information under s.25. The Tip Sheet focuses on the requirement that information disclose “risks of significant harm” and provides a list of examples:

An example of a “risk of significant harm to the environment” could be the accidental release of a pesticide into a stream, which will affect fish and other aquatic life.

An example of a “risk of significant harm to the health of the public or a group of people” could be the presence of the polio virus in the public drinking water.

An example of a “risk of significant harm to the safety of the public or a group of people” could be a natural gas leak which could cause an explosion in a populated area.¹⁸

Finally, the “FOIPP Act Policy and Procedures Manual” includes direction on s. 25¹⁹. However, the manual has not been updated since 2007 and does not reflect the new interpretation of s.25 explained by the Commissioner in her summer report.

iv. Office of the Information and Privacy Commissioner - Reports

In June 2015, Commissioner Denham released a report that redefined her office’s interpretation of s. 25(1)(b) and clarified the meaning of “clearly in the public interest”. The previous interpretation of this provision was that public interest information would only be proactively disclosed if it was connected to urgent circumstances, or circumstances of “temporal urgency”. In the 2015 report, the Commissioner removed the requirement that temporally urgent circumstances exist in order for information that is “clearly in the public interest” to be released.

The Commissioner also examined the meaning of the phrase “clearly in the public interest”. She determined that “s. 25(1)(b) requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest.”²⁰ She then continued to consider what is meant by the term

¹⁷ TIP SHEET, Privacy and Legislation Branch, Ministry of Technology, Innovation and Citizens’ Services, online: http://www.cio.gov.bc.ca/local/cio/priv_leg/documents/foippa/s25tipsheet.pdf

¹⁸ TIP SHEET, Privacy and Legislation Branch, Ministry of Technology, Innovation and Citizens’ Services, online: http://www.cio.gov.bc.ca/local/cio/priv_leg/documents/foippa/s25tipsheet.pdf

¹⁹ FOIPP Act Policy and Procedures Manual, “Section 25 – Information Must Be Disclosed if in the Public Interest”, Ministry of Technology, Innovation and Citizens’ Services, online: http://www.cio.gov.bc.ca/cio/priv_leg/manual/sec20_29/sec25.page?

²⁰ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, “Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies” (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 6

“public interest”, drawing on Canadian case law and reasoning by Information and Privacy adjudicators in Ontario. She reasoned that:

...the public interest is that which affects, or is in the interests of, a significant number of people, something that transcends private interest, that is of concern or interest to the public. This is consistent with the Supreme Court of Canada’s observation, in the context of defamation law, that a subject will be of public interest if it is ‘one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached.’²¹

She also reasoned that information that would encourage government accountability qualified as information in the public interest, noting that “[t]here may be cases where pro-active disclosure is clearly in the public interest in order to hold the public body, or others, accountable.”²²

Problems with the current scheme – Compliance and Inaction

Despite the various legislative, regulatory and policy tools that government has created to encourage proactive disclosure of information, government bodies have been failing to meet their legal obligation to proactively release information in the public interest under s.25.

Sections 71 and 71.1 -- the only legislative provisions that are intended to create a regime permitting certain kinds of documents specific to ministries to be made available without request -- have not had much effect on the release of information. Section 71 does not require public bodies to list any specific categories for disclosure, and gives them the discretion to choose what should be publicly available. The Commissioner has pointed out that public bodies have yet to create any lists or release any information under ss.71 and 71.1. In her 2013 review, the Commissioner noted that in the “18 months since the passage of ss.71 and 71.1, neither the minister responsible nor any ministries [had] established categories of records.”

Failure by public bodies in exercising their discretion to define what will be proactively released is not unique to BC. The struggle experienced by public bodies to develop publication schemes in the United Kingdom, where public bodies are legally required to develop publication schemes, led the UK’s Information Commissioner’s Office (ICO) to publish model publication schemes outlining non-exhaustive lists of categories that the ICO would expect specific public bodies to proactively release.²³ It is clear that

²¹ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, “Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies” (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 30

²² Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, “Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies” (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 32

²³ Information Commissioner’s Office, “Definition documents”, online: <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/publication-scheme/definition-documents/>

giving public bodies the *discretion* to determine what they will release and requiring them to produce a list has not been an effective method of encouraging proactive disclosure.

Public interest information has not been proactively released, and information falling within this category continues to be subject to FOI requests. While arguably much of the information released through the Data BC and Open Info websites could fall under s.25, there is still a large amount of information and records clearly falling within s.25 that has not been released. Commissioner Denham noted in her report that the data posted to the DataBC website is limited to data about “basic information about the province” or meant to “spur innovations” -- but did not include data meant to increase government transparency or accountability.²⁴

For example, proactive release of information relating to threats to the environment or to public health or safety is clearly required by s.25(1)(a). Compliance orders against operations that present a threat to the environment, public health or safety falls squarely within s.25(1)(a) [and within s. 25(1)(b)]. Whether or not a threat is imminent, it is in the public interest that information about how our government is managing these threats be proactively released, because it relates to the public interest in government accountability.

Unfortunately, information relating to industries operating in our environment is not being proactively released. While the Ministry of Environment has released information relating to the Mount Polley dam failure, including permits, orders, and reports²⁵, these were released in response to the Commissioner’s investigation into the failure to release public interest information about the Mount Polley dam. Legislative reform is necessary to ensure that public information is proactively released before there is a Commissioner’s investigation into non-compliance with s. 25.

An Example

The Commissioner’s July 2015 Report is being ignored, and the need for reform is palpable. For example, this fall, the Environmental Law Centre at the University of Victoria requested access to MOE authorizations issued pursuant to a compliance order governing the spraying of manure effluent by a farm in an area with very high nitrate levels in its drinking water. These nitrate levels were apparently caused by the farm’s release of effluent in the past, which led to an MOE compliance order requiring that the farm seek special MOE authorization whenever it intended to spray effluent on the field near the aquifer. It also led to Interior Health issuing a Drinking Water Advisory for residents, warning of a potential health hazard. High nitrate levels in drinking water is particularly dangerous for infants and people with compromised immune systems. Drinking water containing high nitrate levels can cause a condition called methaemoglobinaemia, commonly known as “blue baby syndrome”, which is a result of

²⁴ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 31

²⁵ These documents can be accessed via this webpage: Government of British Columbia, “Mount Polley Mine Tailings Dam Breach, Likely, August 4, 2014”, online: <http://www.env.gov.bc.ca/eemp/incidents/2014/mount-polley/updates.htm#6>

oxygen deprivation. Nitrate contamination of drinking water is also linked to certain types of cancer, thyroid dysfunction and impacts on the immune-compromised. The compliance order authorizations to spray effluent clearly fall within both ss.25(1)(a) and (b) of *FIPPA*. The release of effluent by this farm presents a potential risk to the environment and to the health of the people who drink the water in that watershed. Disclosure of the authorizations themselves is clearly in the public interest -- because citizens are interested in how their government manages threats to their health and to the environment. Yet, the compliance order and subsequent spraying authorizations were not posted online.

When the ELC asked the Ministry of the Environment for the spray authorizations, the ELC was asked to complete a formal FOI request. The ELC made the request and included the file number of the compliance order and authorizations. The Ministry responded to the request with an initial estimate of a cost of \$150. The ELC called Information Access Operations BC to ask why the fee was so high, and was told that the cost could increase, perhaps to \$600, depending on how long it took to find the records (despite being provided with the file reference number). One official suggested that they might not be released at all. The ELC submitted a revised request in an attempt to further specify the authorizations they were seeking. Eventually, 39 business days after the revised request, the ELC received the authorizations.

If s. 25 of *FIPPA* was being respected, the ELC would not have had to submit a request to access these authorizations. These authorizations would have been posted proactively online.

Common reasons for government resistance to proactive disclosure

i. Cost

There is no doubt that it will require resources for public bodies to begin to comply with s.25. Employees in each public body will need to spend time surveying the information that they hold, determining what information is in the public interest, and then releasing the information. Public bodies will have to set up processes for ensuring that new information is proactively released as required. They may need to develop web pages or reading rooms to ensure the information is accessible.

It is important to note that the World Bank report *Proactive Transparency* recognizes that “proactive disclosure regimes have high start-up costs” but notes that “over time, having such systems in place is likely to save money.”²⁶ The report notes:

For countries planning to use the Internet as the primary vehicle for disclosing information, information will need to be in digital format. Resources may therefore be needed for digitizing slightly older information (the scanning of documents over five to ten years old for example). The cost of this can be weighed against the increased internal benefits of better information

²⁶ Helen Darbishire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online: <http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf> at p. 33

management, as internal filing systems are ordered and digitized, and from the increased ability to share information not only with members of the public but also with other public bodies, as well as the reduced burden of responding to requests from the public.²⁷

Mendel notes that proactively disclosing information online is easier and less expensive than the relative cost of processing information requests, and argues that it “is likely the case that the request load in countries which upload actively is far less than it would be if they did not do this.”²⁸ The report points to India as a jurisdiction that “expressly recognizes the role of proactive publication in reducing the number of requests for information, specifically requiring public bodies to endeavour to increase proactive publication to this end.”²⁹ Similarly, in a 2012 Special Report to the Canadian Parliament by the Information Commissioner of Canada, it was noted that “some institutions have had success in reducing the number of incoming requests by taking a proactive approach to access to information” and that this approach “can sometimes divert the number of formal requests to the institution.”³⁰

ii. The need for certainty about what information is “clearly in the public interest”

What information is “clearly in the public interest” has been clarified recently by the Commissioner in her 2015 report. Still, s.25 leaves public officials wide discretion in determining what information is in the public interest. A complex balancing of interests is required to determine what must be released under s. 25. Even though s. 25(2) operates to provide for public interest disclosure regardless of any other provision in the Act, it is still necessary to consider the interests of individuals who may be impacted by disclosure. The Commissioner notes in her 2015 report that a public body considering disclosure under s. 25 must also “consider the purpose of any relevant access exceptions (including those protecting third-party interests or rights that will be, or could reasonably be expected to be, affected by disclosure)” and determine whether the “nature of the information and of the rights or interests engaged, and the impact of disclosure on those rights or interests” weigh in favour of public interest disclosure.³¹ This creates some uncertainty when deciding whether particular information should be released in the public interest or not.

²⁷ Helen Darbishire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online:

<http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf> at p.

²⁸ Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 147

²⁹ Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 147

³⁰ Information Commissioner of Canada, *Measuring Up: Improvements and Ongoing Concerns in Access to Information, 2008-2009 to 2010-2011*, A Special Report to Parliament (Ottawa, May 2012), online:<http://publications.gc.ca/site/eng/422536/publication.html> at p. 28

³¹ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02, “Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies”*

The Centre for International Media Assistance have commented that without “clear guidance in the law, lower-level public officials are apt to approach FOI cases in an ad hoc or politically motivated way – or to avoid them altogether.”³² Fear of releasing something that should have been kept confidential can also lead officials to err on the side of caution and opt for non-disclosure.³³ Clear, legislated categories of information that must be proactively disclosed would provide clear direction to public officials making disclosure decisions – and reduce uncertainty and time-consuming examination and assessment of particular individual records.

iii. Combatting a culture of secrecy

As Mendel notes, “[i]n most countries, there is a deep-rooted culture of secrecy within government, based on long-standing practices and attitudes.”³⁴ Roberts argues that “[t]he first challenge that will confront advocates of transparency in years ahead is ongoing official resistance to transparency requirements.”³⁵ Although cultural change is required to move bureaucratic culture from one of secrecy to one of transparency, clear laws defining what information must be released can help encourage this culture change. Clear legislated requirements for the release of information would make it easier for citizens to assert their right to such information. Legislated requirements would also encourage public officials to release information because to not do so would be clearly against the law.

Recommendations for s. 25 reform

1. The principles laid out in the Commissioner’s Report (July 2015) about how to determine whether information should be released “in the public interest” should be adopted by legislation

(Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 29

³² Craig L. LaMay, Robert J. Freeman, and Richard N. Winfield, *Breathing Life into Freedom of Information Laws: The Challenges of Implementation in the Democratizing World*, The Center for International Media Assistance (Washington, D.C., September 10, 2013) online:

http://www.centerforinternationalmediaassistance.org/wp-content/uploads/2015/02/CIMA-Freedom_of_Information_ISLP_09-10-13.pdf at p. 21

³³ Mitchell W. Pearlman, “Proactive Disclosure of Government Information: Principles and Practice”, National Freedom of Information Coalition (2012), online: <http://www.nfoic.org/proactive-disclosure-of-government-information>

³⁴ Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online: http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 33

³⁵ Alasdair Roberts, “Open Government: The Challenges Ahead”, *Access to Information: Building a Culture of Transparency* (The Carter Center, 2006), online: <https://www.cartercenter.org/documents/2364.pdf> at p. 134

The Commissioner's Mount Polley Report (July 2015)³⁶ provided clarification about how public bodies should determine whether information should be released "in the public interest" under s. 25. This clarification should be adopted by legislation.

As mentioned above, the Commissioner examined the meaning of the phrase "clearly in the public interest". She determined that "s. 25(1)(b) requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest."³⁷ This test should be legislated.

The Commissioner also identified two possible factors in determining whether information is in the public interest:

- information about a subject "inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached"³⁸; and
- information that "may contribute, in a meaningful way to holding a public body accountable for its actions or decisions"³⁹.

These two categories—information about a topic which the public has a substantial concern or to which public notoriety or controversy has attached, and information that promotes government accountability—should be included as specific public interest categories under s. 25. This would help clarify what information is "clearly in the public interest", and would provide a clear legislative direction to public bodies as to the information that they can and must disclose. Any added categories should be additions to s. 25. Section 25(1)(b) should remain to provide for further types of information that may

³⁶ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814>

³⁷ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 6

³⁸ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 30

³⁹ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 32

be in the public interest.⁴⁰ See Appendix 1 for more about adding categories of public interest information.

RECOMMENDATION 1: The principles laid out in the Commissioner’s Report (July 2015) should be legislated. Section 25 should be amended to:

i. explicitly require public bodies to proactively disclose information whenever a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest,

ii. include two more explicit categories of “public interest” information that must be proactively released by government:

- a. Information about a topic which the public has a substantial concern or to which public notoriety or controversy has attached, and**
- b. Information that promotes government accountability.**

2. Legislating a requirement for proactive release of specific types of “public interest” records

Legislating a requirement for proactive release of specific types of records would be an effective way of ensuring public bodies meet the proactive disclosure requirements already imposed on government by s.25. In her 2013 review, the Commissioner points out:

Observers in other jurisdictions have noted that a standardized approach is most effective. Adopting a consistent approach may promote harmonization of disclosure respecting common, basic, functions of all ministries (e.g., records about budgeting processes and financial controls). It

⁴⁰ Section 25(1)(b) provides for disclosure of information in the public interest that falls outside of the currently legislated category of information disclosing a significant risk to the environment or to the health and safety of the public: “the disclosure of which is, for any other reason, clearly in the public interest.”

can also make it easier for citizens to find information that they may find useful or relevant across the ministerial public sector.⁴¹

Beyond promoting consistency across public bodies, a legislated requirement to release specific types of information would place a clear duty on public bodies to release this information, and could help combat the culture of secrecy and assumption of non-disclosure that pervades our public service. Legislated acknowledgement of the kinds of information that must be released proactively sends a clear message to public bodies that this information is meant to be public.

The Open by Default report from a working group examining Ontario's Freedom of Information legislation also recommends that their Act be reformed to require "proactive publication of certain types of information."⁴² In making this recommendation, the report acknowledges the long wait times and high costs for access to information by request. The report recommends that "government move to a default practice of proactive disclosure for certain types of information such as briefing notes, survey data, policy papers and other analysis."⁴³

i. Examples from other jurisdictions

Many jurisdictions have legislated lists of specific documents that must be proactively released. In 2013, 72% of OECD countries required certain categories of information to be proactively disclosed by law.⁴⁴ These lists most often include categories of documents related to the administration of government and government employees, such as procurement contracts, employee salaries, and the layout of the bureaucratic structure. A few jurisdictions have made the effort to expand their lists to include a broader range of information. Some sample jurisdictions are listed below.

- **New South Wales**

In New South Wales, Schedule 1 of the *Government Information (Public Access) Regulation 2009* provides a list of information that must be proactively released.⁴⁵ This includes plans of management for

⁴¹ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, "Evaluating the Government of British Columbia's Open Government Initiative" (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 10

⁴² Open Government Engagement Team, *Open By Default: A new way forward for Ontario*, (Queen's Printer for Ontario, 2014), online: <https://dr6j45jk9xcmk.cloudfront.net/documents/2428/open-by-default-2.pdf> at p. 31

⁴³ Open Government Engagement Team, *Open By Default: A new way forward for Ontario*, (Queen's Printer for Ontario, 2014), online: <https://dr6j45jk9xcmk.cloudfront.net/documents/2428/open-by-default-2.pdf> at p. 32

⁴⁴ OECD (2011), *Government at a Glance 2011*, OECD Publishing, online: <https://books.google.ca/books?id=bFDWAgAAQBAJ&pg=PA142&lpg=PA142&dq=proactive+disclosure+of+audits+open+governmnet&source=bl&ots=pWicgijyS&sig=44D6weMjsxk9jXN4eHf3xOXAvSc&hl=en&sa=X&ved=0ahUKEwjaulX6n6XJAhVL1mMKHbpFDOQ4ChDoAQgbMAA#v=onepage&q=proactive%20disclosure%20of%20audits%20open%20governmnet&f=false> at p. 142

⁴⁵ New South Wales Legislation, *Government Information (Public Access) Regulation 2009*, online at: <http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+343+2010+cd+0+N>

community land; environmental planning instruments; development applications pursuant to the *Environmental Planning and Assessment Act* and associated documents, including land contamination consultant reports; applications for approvals under Part 1 of Chapter 7 of the *Local Government Act*, which include approvals for sewerage work and management and treatment of human waste; applications for approvals “under any other Act and any associated documents received in relation to such an application”; “orders given under the authority of any other Act”; and “leases and licences for use of public land classified as community land.” For the full list, see Appendix 7.

- **India**

India’s *Right to Information Act* provides an extensive list of records that must be proactively published in s. 4(1)(b).⁴⁶ The list includes budgetary information and information about the structure of the organization, but also information about its subsidy programmes including the amounts granted to beneficiaries of the program and particulars of recipients of concessions, permits or authorizations granted by it. While information about beneficiaries of subsidy programmes would likely infringe on privacy rights in Canada (in India that might include people receiving disability or low-income benefits, for example), the Indian example shows how legislatures can require more information to be released than just information about the structure of the Ministry, its policies and its employees. The legislation also provides for the release of “such other information as may be prescribed”. This provides more flexibility to the government in addressing future proactive release categories. For the full list, see Appendix 8.

- **Mexico**

Mexico also has legislated specific categories of government information that must be proactively disclosed to the public. This year, legislation was passed by the Mexican congress that updates their previous freedom of information and laws, and applies federally and at the state level.⁴⁷ The new legislation added to the previous categories of information that was required to be proactively released. These categories include results of any audit compelled by the law, all concessions, permits or authorizations granted and their recipients specified, and information about land use permits.⁴⁸

⁴⁶Government of India, *The Right to Information Act*, 2005, No. 22 of 2005, online:

<http://rti.gov.in/webactrti.htm>

⁴⁷Margarita Garate, “Mexico: The New ‘Transparency & Access to Public Information Act’ Enters into Force”, mondaq (June 2015), online:

<http://www.mondaq.com/mexico/x/408112/Human+Rights/The+New+Transparency+Access+To+Public+Information+Act+Enters+Into+Force>

⁴⁸ The previous version of the Act is available in English here: *Federal Transparency and Access to Governmental Public Information Act*, June 6, 2006, online:

<https://www.wilsoncenter.org/sites/default/files/LFTAIPG%20traducci%25C3%25B3n%20certificada.pdf>

The most recent version of the Act is available here, but in Spanish:

<http://www.diputados.gob.mx/LeyesBiblio/pdf/LGTAIP.pdf>

Note: Cabinet documents are not required to be proactively released. Cabinet documents are also, however, not included in legislative exemptions to disclosure in Mexico.

- **Nova Scotia**

Nova Scotia's *Environment Act* lists specific records that must be included in their Environmental Registry. While this registry is not accessible online – currently, the records are made “routinely available to the public upon request.”⁴⁹ East Coast Environmental Law, in partnership with the Environmental Law Student Society at the Dalhousie University, wrote a report criticizing the government of Nova Scotia for not complying with this provision and continuing to require formal FOI requests to be made for access to the information listed in s. 10.⁵⁰ However, in theory, this list of records is a good start, and reflects the types of information that should be proactively released. Section 10 of the *Environment Act* requires that the environmental registry contain information like approvals, orders, directives, appeals, decisions and hearings made under the *Environment Act*, and more. See Appendix 6 for the full list.

RECOMMENDATION 2: Amend s. 25 to require proactive disclosure of specific categories and classes of records.

ii. What are the specific records that must be proactively released?

A. Environmental Information

Excell writes that “a right to access environmental information is a central tool to promote democratic accountability and transparency in decision making on the environment.”⁵¹ Access to environmental information encourages the promotion of sustainable development and a healthy environment, and allows the minimum standards of environmental health to be monitored and enforced by citizens.⁵²

The development of a right to access environmental information is a recent one. It has its start in Europe, where the European Directive on Freedom of Access to Environmental Information emerged out of the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters. The Directive creates a right to environmental information, a right to participate in environmental decision-making, and a right to procedure to challenge public decisions made without appropriately informing the public of environmental effects or without considering

⁴⁹Nova Scotia Environment, “Environmental Registry”, online:

<http://www.novascotia.ca/nse/dept/envregistry.asp>

⁵⁰ *Failure to Enforce? Time for transparent and effective environmental enforcement in Nova Scotia*, East Coast Environmental Law, (June 2014), online: <http://www.cbu.ca/wp-content/uploads/2015/10/NOFRAC-5-Failure-to-enforce.pdf> at p. 5

⁵¹ Carole Excell, “The Right to Environmental Information”, *Access to Information: Building a Culture of Transparency* (The Carter Center, 2006), online: <https://www.cartercenter.org/documents/2364.pdf> at p. 105

⁵² Carole Excell, “The Right to Environmental Information”, *Access to Information: Building a Culture of Transparency* (The Carter Center, 2006), online: <https://www.cartercenter.org/documents/2364.pdf> at p. 105

environmental law generally.⁵³ Canada is not yet a signatory to this convention. The United Kingdom has implemented the Directive through its *Environmental Information Regulations* [See Appendix 5]. Section 2 of the *Environmental Information Regulations* provides a wide and complete definition of “environmental information”:

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)⁵⁴

Section 4 of the *Environmental Information Regulations* requires public authorities to “progressively make the information available to the public by electronic means which are easily accessible”, and to “take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.”⁵⁵

Environmental information is increasingly demanded by the Canadian public. Cairns et al. recommend that proactive disclosure of environmental information is the best solution to increasing access requests:

⁵³ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>

⁵⁴ *The Environmental Information Regulations 2004*, United Kingdom, online: <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made> at section 2

⁵⁵ *The Environmental Information Regulations 2004*, United Kingdom, online: <http://www.legislation.gov.uk/uksi/2004/3391/regulation/4/made> at section 4

Proactive dissemination of environmental enforcement information would more adequately respond to the growing interest in access environmental information among the Canadian public. This interest is reflected in a 35 percent increase in ATIP requests to Environment Canada from 2008 to 2009. The current “reactive disclosure” approach for environmental enforcement information is inefficient. The backlog of requests suggests that the principle of community right to know is unlikely to be achieved through access to information requests. An effective realization of this right is inextricably linked to the governments’ ability to publish data comprehensively, accurately, accessibly and in a timely manner... Instead of the current cumbersome ATIP approach, the public would benefit from the dynamic opportunities Internet technology provides for immediate and universal access to such data.⁵⁶

Environmental information that discloses a risk of serious harm is already required to be released under s. 25(1)(a), but all relevant environmental information, no matter how serious the risk harm, is in the public interest pursuant to s. 25(1)(b). Therefore, key environmental information should be specifically required to be proactively released, as it is in the United Kingdom.

RECOMMENDATION 3: Amend s. 25 to require the proactive disclosure of environmental information described in the Aarhus Convention and adopted by the United Kingdom:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;**
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);**
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the**

⁵⁶ Meredith Cairns, Ceyda Turan and William Amos, “Disclosure of Environmental Law Enforcement in Canada: Lessons from America”, McGill International Journal of Sustainable Development Law & Policy, (2012) 7:2, online: https://www.mcgill.ca/jsdlp/files/jsdlp/jsdlp_volume7_issue2_203_232.pdf at p. 215

- elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;**
- (d) reports on the implementation of environmental legislation;**
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and**
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)**

B. Environmental assessments, compliance orders, authorizations, convictions, contraventions and penalties

Assessments of specific and/or proposed industries' or operations' impact on the environment, compliance orders, convictions, contraventions and penalties imposed against specific operations, and authorizations for the release of pollution into the environment by land, air, or water, is all information that should be required to be proactively disclosed under s.25. This kind of information often engages both ss. 25(1)(a) and (b) of the Act. The operation of industry in our environment presents the risk of accidental or intentional release of pollutants that can have serious effects on the health of our environment and on the health and safety of people. Furthermore, compliance orders, authorizations and assessments are also in the public interest because they disclose how government is regulating industrial actors in our environment, and how they are ensuring compliance with environmental and health legislation meant to protect the public.

Proactive disclosure of compliance information can itself be an important mechanism to ensure compliance with environmental rules. Cairns et al. note that public disclosure of environmental information "provides an incentive to facilities to control their pollution emissions, adding a different source of pressure to comply with laws and regulations in addition to other enforcement instruments such as penalties, fines and inspections."⁵⁷ Schatz notes that governments "traditionally use information

⁵⁷ Meredith Cairns, Ceyda Turan and William Amos, "Disclosure of Environmental Law Enforcement in Canada: Lessons from America", McGill International Journal of Sustainable Development Law & Policy, (2012) 7:2, online: https://www.mcgill.ca/jsdlp/files/jsdlp/jsdlp_volume7_issue2_203_232.pdf at p. 216

to pressure firms to reduce toxic chemical releases from the environment” and that one major benefit of disclosure is that it is “more politically feasible than direct regulation, because it is framed as a ‘right to know’ law, and is not easily characterized as coercive.”⁵⁸ A study out of the United States on the Toxics Release Inventory (TRI) showed that providing accessible information to the public about the release of toxic chemicals lead to significant reductions in health risks.⁵⁹ Another study from Massachusetts found that a requirement that drinking water utility companies directly mail reports of their drinking water violations to consumers reduced total violations by 30 – 44%, and severe health violations by 40 – 57%.⁶⁰ Cairns et al. recommend that the federal government “provide the public with access to an online environmental enforcement and compliance database, updated monthly, that includes all non-sensitive information about all inspections, investigations and prosecutions, as well as compliance information concerning facilities that respect the law.”⁶¹ This recommendation can be extended to provincial governments.

The BC Forest Practices Board has identified significant problems arising from the BC Government’s failure to release information about environmental enforcement. The Board has noted the BC Government’s failure to release decisions imposing fines on those that contravene Forest and Range Practices and Wildfire laws. The independent Board has recommended that government “establish a publicly-accessible, online database of all penalty determinations under the [*Forest and Range Practices Act*] and the [*Wildfire Act*].”⁶² This recommendation was discussed in the Board’s 2014 Special Investigation into Timeliness, Penalty Size and Transparency of Penalty Determinations, where the Board noted that “[w]ith respect to transparency, government does not publish determination letters, which means penalties are not effective in promoting compliance in the wider regulated community or contributing to public confidence in enforcement.”⁶³

A legislative requirement that environmental assessments, compliance orders, and authorizations be released would be evolutionary rather than revolutionary. Some proactive disclosure of environmental

⁵⁸ Andrew Schatz, “Regulating Greenhouse Gases by Mandatory Information Disclosure”, *Virginia Environmental Law Journal* (2008) 26:335 at pp. 335-6

⁵⁹ This study also noted that accessible information (i.e. processed and structured information), in contrast to raw data, resulted in reduced health risks. Hyunhoe Bae, Peter Wilcoxon, and David Popp, “Information Disclosure Policy: Do State Data Processing Efforts Help More Than the Information Disclosure Itself?”, *Journal of Policy Analysis and Management* (2010) 29:1

⁶⁰ Lori S. Benneer and Sheila M. Olmstead, “The Impacts of the “Right to Know”: Information Disclosure and the Violation of Drinking Water Standards”, *Journal of Environmental Economics and Management* (2008)

⁶¹ Meredith Cairns, Ceyda Turan and William Amos, “Disclosure of Environmental Law Enforcement in Canada: Lessons from America”, *McGill International Journal of Sustainable Development Law & Policy*, (2012) 7:2, online: https://www.mcgill.ca/jsdlp/files/jsdlp/jsdlp_volume7_issue2_203_232.pdf at p. 216

⁶² Forest Practices Board, *Special Investigation: Timeliness, Penalty Size and Transparency of Penalty Determinations*, (October 2014), online: <https://www.bcfpb.ca/reports-publications/reports/timeliness-penalty-size-and-transparency-penalty-determinations/> at p. 8

⁶³ Forest Practices Board, *Special Investigation: Timeliness, Penalty Size and Transparency of Penalty Determinations*, (October 2014), online: <https://www.bcfpb.ca/reports-publications/reports/timeliness-penalty-size-and-transparency-penalty-determinations/> at p. 7

assessments, orders and authorizations is already occurring in BC and other jurisdictions, even without a legislative requirement. Below are some examples:

British Columbia

- The Environmental Assessment Office (EAO) posts information about various industrial projects that are required to complete an environmental assessment online through their project information centre (e-PIC).⁶⁴ Section 25 of the *Environmental Assessment Act* requires the executive director of the EAO to maintain the e-PIC, and gives the executive director discretion to determine what records should be made available and in what format.⁶⁵
- Meta-information regarding BC water licenses issued to individuals or corporations for water use are also available on the “Water Licenses Query” website⁶⁶, and scanned copies of water licenses and orders are available in an online directory⁶⁷.
- Applications and permits for the use of Crown land can be accessed and viewed online on the Ministry of Forests, Lands and Natural Resources Operations website.⁶⁸
- A fracking information website, fracfocus.ca, provides listing of chemicals used in BC wells fractured after January 1, 2012.⁶⁹ However, at the time of this submission, the search function that grants users access to well- specific information was not functional.
- The Ministry of Environment operates an online database⁷⁰ of some environmental compliance reports, searchable by name or company, enforcement action, or year. The database provides meta- information about what kind of enforcement action was taken (e.g. ticket), under what statute, location, monetary penalty (if any), and a short description of the offence (e.g. Introduce waste into environment by prescribed activity). However, it is important to note that users cannot access the specific individual compliance order or penalty for more detailed information.

⁶⁴ “Project Information Centre (e-PIC)”, Environmental Assessment Office, Government of British Columbia, online: <https://a100.gov.bc.ca/pub/epic/projectStatusCategoryReport.do#curr>

⁶⁵ *Environmental Assessment Act*, [SBC 2002] Chapter 43, online: http://www.bclaws.ca/civix/document/id/complete/statreg/02043_01#section25 at section 25

⁶⁶ http://a100.gov.bc.ca/pub/wtrwhse/water_licences.input

⁶⁷ “Water Licenses Query”, Government of British Columbia, online:

http://www.env.gov.bc.ca/wsd/water_rights/scanned_lic_dir/

Note: this directory is not user-friendly. It is not searchable and the folders are not marked in a meaningful way.

⁶⁸ Ministry of Forests, Lands and Natural Resource Operations, “Applications and Reasons for Decision” search database, online: <http://www.arfd.gov.bc.ca/ApplicationPosting/search.jsp>

⁶⁹ Frac Focus, “Chemical Disclosure Registry”, online: http://www.fracfocus.ca/find_well

⁷⁰ Ministry of Environment, “Environmental Violations Database (EVD)”, online: <https://a100.gov.bc.ca/pub/ocers/searchApproved.do?submitType=menu>

Other jurisdictions

- In stark contrast to our experience in seeking copies of orders issued to a dairy farm in British Columbia, in Alberta the Natural Resources Conservation Board proactively releases environmental compliance orders against farms on its website.⁷¹ The operational division of the Board is responsible for the ongoing regulation of confined feeding operations, including cows. Two kinds of orders are posted on their website; enforcement orders and emergency orders. Enforcement orders can be issued “if an operator is creating a risk to the environment or an inappropriate disturbance, or is contravening or has contravened the act, the regulations or a permit issued under the act.”⁷² Emergency orders “are issued when a release of manure, composting materials or compost into the environment may occur, is occurring or has occurred, and the release is causing or has caused an immediate and significant risk to the environment.”⁷³ Users of the website can view both “Active Orders” and “Archived Orders”.
- Ontario’s *Environmental Bill of Rights*⁷⁴ requires the government to post notices of government proposals, like Acts or Regulations, which will have an effect on the environment. These are posted on the Environmental Registry.⁷⁵ A summary of the government action is posted on the website for comment by the public. Summaries are also posted for permits and for variations of existing permits, and include links to relevant orders issued by the public body. The address of the government body that holds further information is also provided, and users are directed to contact the body for more information if they wish to.
- The Canadian government operates the National Pollutant Release Inventory (NPRI).⁷⁶ Users of the NPRI can search pollutant releases by company or facility name or by postal code. This information is collected and posted pursuant to ss. 46 – 50 of the *Canadian Environmental Protection Act*, which permits the Minister for the Environment to collect and publish information about toxic substances.⁷⁷ The Minister of the Environment sets the minimum

⁷¹ Natural Resources Conservation Board, “Confined Feeding Operations: Enforcement and Emergency Orders”, online at <https://cfo.nrcb.ca/Compliance/Orders.aspx>

⁷² Natural Resources Conservation Board, “Confined Feeding Operations: Enforcement and Emergency Orders”, online at <https://cfo.nrcb.ca/Compliance/Orders.aspx>

⁷³ Natural Resources Conservation Board, “Confined Feeding Operations: Enforcement and Emergency Orders”, online at <https://cfo.nrcb.ca/Compliance/Orders.aspx>

⁷⁴ *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28, online: <http://www.ontario.ca/laws/statute/93e28>

⁷⁵ “Environmental Registry”, Government of Ontario, online: <http://www.ebr.gov.on.ca/ERS-WEB-External/>

⁷⁶ Environment Canada, “National Pollutant Release Inventory: Tracking Pollution in Canada”, Government of Canada, online: <https://www.ec.gc.ca/inrp-npri/default.asp?lang=En&n=4A577BB9-1>

⁷⁷ *Canadian Environmental Protection Act*, 1999 (S.C. 1999, c. 33), online: <http://laws-lois.justice.gc.ca/eng/acts/c-15.31/page-13.html#h-21> at Section 46

quantities of pollutant releases that will require reporting, so small-scale emitters may not be included in the inventory.⁷⁸

- In the fall of 2015, the National Energy Board began posting compliance inspection reports for pipeline facilities proactively on its website.⁷⁹ They have committed to proactively publish safety inspection reports, environmental protection inspection reports, integrity management inspection reports, and damage prevention inspection reports. This is in addition to their regular publication of compliance orders and other enforcement documents.⁸⁰
- In the United States, the federal Environmental Protection Agency operates ECHO (Enforcement and Compliance History Online). This is an online inventory of all orders made by the EPA. Users can access summaries of compliance history of industries and individuals subject to environmental regulation, but not the actual compliance orders.⁸¹

The above examples highlight the fact that different public bodies have determined that proactive release of environmental information is a good idea.

As mentioned above, s. 10 of Nova Scotia's *Environment Act* provides a list of records that must be held in their Environmental Registry. This list covers all enforcement orders, authorizations, and other actions or documents that may be produced in the enforcement of environmental legislation:

10 (1) The Minister shall establish an environmental registry containing

- (a) approvals;
- (b) certificates of qualification;
- (c) certificates of variance;
- (d) orders, directives, appeals, decisions and hearings made under this Act;
- (e) notices of designation given pursuant to this Act;
- (f) notices of a charge or lien given pursuant to Section 132;
- (g) policies, programs, standards, guidelines, objectives and approval processes established under this Act;
- (h) convictions, penalties and other enforcement actions brought under this Act;

⁷⁸ Environment Canada, "The National Pollutant Release Inventory Oil and Gas Sector Review", Government of Canada, online: <https://www.ec.gc.ca/inrp-npri/default.asp?lang=En&n=02C767B3-1>

⁷⁹ National Energy Board, "All Companies under the National Energy Board's (NEB) Jurisdiction – Transparency of NEB Compliance Verification Activities UPDATE" Government of Canada (23 November 2015), online: <https://www.neb-one.gc.ca/sftnvrnmnt/cmplnc/2015-11-23nbl-eng.html>

⁸⁰ National Energy Board, "Compliance and Enforcement", Government of Canada, online: <https://www.neb-one.gc.ca/sftnvrnmnt/cmplnc/index-eng.html>

⁸¹ "ECHO: Enforcement and Compliance History Online", United States Environmental Protection Agency, online: <http://echo.epa.gov/?redirect=echo>

- (i) information or documents required by the regulations to be included in the registry;
- (j) annual reports; and
- (k) any other information or document considered appropriate by the Minister.⁸²

This list of records could be adopted by the legislature as records requiring proactive disclosure. The legislature should adopt a category of proactive disclosure requiring environmental compliance orders, authorizations and assessments to be proactively released. This information falls squarely within s. 25 because it often relates to serious risks to our environment or to public health and safety. The information is also otherwise in the public interest because it discloses how government is regulating environmental risks, and provides the opportunity for the public to hold government accountable for the decisions it makes about the environment and public health.

RECOMMENDATION 4: The legislature should establish a category of proactive disclosure requiring environmental compliance orders, authorizations, convictions, contraventions, penalties and assessments to be proactively released.

C. Environmental Quality reports

Such information is in the public interest because it relates to the health of the environment and the public. While environmental quality reports may not always disclose a “serious risk”, disclosure of these reports is still important to the public because it allows the public to be aware of the state of their environment and to make more informed decisions about how we should manage our environment and our resources. While this information is often provided online (for example, the Ministry of Environment releases hourly air quality ratings on their website⁸³), a legislative requirement that this information be proactively released will ensure that this approach continues and that similar kinds of environmental quality information is released.

RECOMMENDATION 5: The law should require the proactive disclosure of environmental quality reports, including air pollution surveys, water quality reports, and reports examining the health of particular species.

D. Inspection reports and penalties

⁸² *Environment Act* Chapter 1 of the Acts of 1994-5, Nova Scotia, online: <http://nslegislature.ca/legc/statutes/environment.pdf> at section 10

⁸³ “BC Air Quality”, British Columbia, online: <http://www.bcairquality.ca/readings/index.html>

Records of ministerial inspections to ensure compliance with the law should generally be considered “public interest” records. Not only can these reports contain information that can warn of risks to the environment or to public health and safety, reports and penalties provide information that reveals how the government is managing risks to the public and enforcing the law.

Most jurisdictions proactively release at least some kinds of inspection reports and penalties. In BC, Health Inspection reports are made available online through the governing health authorities.⁸⁴ WorkSafeBC also releases information about compliance with workplace safety rules, posting detailed summaries of penalties issued online⁸⁵, and compliance related data such as injury rates, claim costs and injury characteristics, and assessment rates.⁸⁶ In almost every province, food establishment inspection reports are posted online. In Florida, the Department of Health posts online metadata regarding compliance with health regulations regarding swimming pools, septic tanks, biomedical waste, mobile homes and RV parks, migrant labour camps, tanning and body piercing facilities, and food hygiene.⁸⁷ A similar approach is taken in other states, including California.⁸⁸

A category including inspection reports and compliance orders should be added to s. 25. Many public bodies already post this information proactively, and including the category would encourage other public bodies to do so as well.

RECOMMENDATION 6: The legislation should require the proactive disclosure of all compliance orders, authorizations, inspection reports and penalties under all administrative schemes.

F. Contracts over \$10,000 and procurement related documents

Government contracts are frequently the subject of FOI requests in BC.⁸⁹ Commissioner Denham has recommended that the BC government proactively disclose contracts worth \$10,000 or more in her July 2013 report and her BC Ferries report. The publication of contracts “enhances transparency as to how

⁸⁴ See, for example, the Vancouver Island Health Authority Inspection reports, online:

<http://www.healthspace.ca/viha>

⁸⁵ Work Safe BC, “Penalties”, online:

http://www2.worksafebc.com/Topics/AccidentInvestigations/Penalties.asp?_ga=1.71411987.1243913321.1445720596

⁸⁶ Work Safe BC, “Open Data”, online: http://www.worksafebc.com/about_us/open_data/default.asp

⁸⁷ Florida Health, “Inspection Reports and Data”, online: <http://www.floridahealth.gov/statistics-and-data/eh-tracking-and-reporting/>

⁸⁸ Kings County California, “Online Inspection Reports”, online:

<http://www.countyofkings.com/departments/environment-health-service/online-inspection-reports>

⁸⁹ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 16

much government is paying to deliver services and programs to citizens.”⁹⁰ In her July 2013 report, the Commissioner recognized that the BC government had determined that it was more efficient to post contracts by request, but noted that “what should drive the decision to proactively disclose information is the clear public interest in its disclosure.”⁹¹ She recommended that contract-related information should include:

- with whom the government is contracting;
- the purpose, value and duration of contracts; and
- information about the procurement process.⁹²

Other jurisdictions require proactive disclosure of government contracts worth a similar amount and accompanying procurement information. The federal government requires the proactive disclosure of contracts worth over \$10,000 and amendments to contracts worth \$10,000 or more,⁹³ and has developed a website where it posts procurement information and tenders.⁹⁴ This fall, a new directive from the Alberta Treasury Board mandated that all sole-source service contracts worth more than \$10,000 but less than \$75,000 be posted online, but in implementing the directive the Alberta government included contracts worth more than \$75,000 on their disclosure website.⁹⁵ The United Kingdom requires proactive disclosure of government contracts worth £10,000 or more and posts this information, along with procurement information and data, online.⁹⁶

We support the Commissioner’s recommendation that government contracts worth \$10,000 or more and any accompanying procurement information must be proactively released, and recommend that these be included as a category of public interest information under s. 25.

RECOMMENDATION 7: The law should require the proactive disclosure of all contracts over \$10,000 and information about the procurement process.

⁹⁰ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553>

⁹¹ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 16

⁹² Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 16

⁹³ Treasury Board of Canada Secretariat, “Guidelines on the Proactive Disclosure of Contracts”, Government of Canada, online: <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=14676>

⁹⁴ Public Works and Government Services Canada, Buyandsell.gc.ca, online: <https://buyandsell.gc.ca/>

⁹⁵ Alberta Government, “Government releases list of sole source service contracts”, (September 17, 2015), online: <http://alberta.ca/release.cfm?xID=385359854D039-EF88-D134-D1B220EA03FOA891>

⁹⁶ GOV.UK, “Contracts Finder”, online: <https://www.gov.uk/contracts-finder>

G. Audit reports

In her July 2013 report, the Commissioner recommended, for the second time, that public bodies proactively disclose final audit reports. This kind of information should form a category of disclosure under s. 25. This summer, the Commissioner explored the meaning of “public interest” in her Mount Polley Report, and reasoned that information may be in the public interest where it “may contribute, in a meaningful way to holding a public body accountable for its actions or decisions.”⁹⁷ The Commissioner writes in her July 2013 report that audit reports are important to the public because they are about “government operations and decision-making and measure compliance with law, policy and best practices.”⁹⁸ She notes that “proactive disclosure of audit reports is, thus, critically important for greater government transparency and accountability.”⁹⁹

The BC Court of Appeal decision in *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*¹⁰⁰ surprisingly limits what can be released. In that case, the Court upheld the public body’s denial of a request for summaries of audits under the policy exemption found in s. 13(1). Still, final audit reports, however, should not be denied to the public – and should be proactively released.

In 2013, 72% of OECD countries required proactive release of audit reports.¹⁰¹ The World Bank’s report on Proactive Transparency lists audit reports as one of the basic minimum standards for proactive

⁹⁷ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, “Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies” (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 31

⁹⁸ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 17

⁹⁹ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 17

¹⁰⁰ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322, online: <https://www.oipc.bc.ca/orders/1197>

¹⁰¹ OECD (2011), *Government at a Glance 2011*, OECD Publishing, online: <https://books.google.ca/books?id=bFDWAgAAQBAJ&pg=PA142&lpg=PA142&dq=proactive+disclosure+of+audits+open+governmnet&source=bl&ots=pWicgijyS&sig=44D6weMjsxkJ9XN4eHf3xOXAvSc&hl=en&sa=X&ved=0ahUKEwjaulX6n6XJAhVL1mMKHbpFDOQ4ChDoAQgbMAA#v=onepage&q=proactive%20disclosure%20of%20audits%20open%20governmnet&f=false> at p. 142

disclosure worldwide.¹⁰² Mexico requires that any formal audit compelled by the law and completed by a government body must be proactively released.¹⁰³ We recommend that we do the same here in BC.

RECOMMENDATION 8: The law should require the proactive disclosure of final audit reports.

H. Budget and expenditure information

Budget and expenditure information fits within s. 25, because it is public interest information, as it relates to government accountability. As the International Budget Partnership points out, the budget “is a government’s plan for how it is going to use the public’s resources to meet the public’s needs” and argues that “open budgets are empowering; they allow people to be the judge of whether or not their government officials are good stewards of public funds.”¹⁰⁴ The World Bank’s Proactive Transparency report lists “budget information”, including projected budget, actual income and expenditure, salary information, and other financial information, as one of the minimum standards for proactive disclosure.¹⁰⁵

Most jurisdictions proactively release budget information. British Columbia has an entire webpage dedicated to budget information.¹⁰⁶ Adding a category of budget information to s. 25 should be relatively easy and uncontroversial.

A recent BC OIPC order, released on December 3, 2015, dealt with whether the costs of legal fees paid by government to government and contracted lawyers was “public interest” information within the meaning of s. 25. These costs were sought by a former of employee of the Ministry’s Pharmaceutical Services Division, in connection to the investigation into the health data breach in 2012. Adjudicator Barker determined that the costs associated with these fees were not required to be released, because they did not rise to the level of “clearly in the public interest.” She reasoned that:

¹⁰² Helen Darbshire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online:

<http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbshireProactiveTransparency.pdf> at p. 21

¹⁰³ Instituto Federal de Acceso a la Informacion Publica, *Transparency, Access to Information and Personal Data: Regulatory Framework*, (Mexico:2004), online: https://www.ip-rs.si/fileadmin/user_upload/Pdf/Publikacije_ostalih_pooblastencev/foia_in_mexico.pdf at Article 7(10), at p. 17

¹⁰⁴ “Open Budget Initiative”, International Budget Partnership, online:

<http://internationalbudget.org/opening-budgets/open-budget-initiative/>

¹⁰⁵ Helen Darbshire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online:

<http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbshireProactiveTransparency.pdf> at p. 21

¹⁰⁶ BC Budget, “Balanced Budget 2015”, British Columbia, online: <http://bcbudget.gov.bc.ca/2015/default.htm>

While I accept that the LSB fees may be interesting to the public in the sense that it is generally concerned with how its tax dollars are spent, there was nothing to indicate that disclosing the amount paid to [the Legal Services Branch] over an eleven month period would change or contribute in any significant way to the public discourse about the health data breach investigation.¹⁰⁷

The costs of investigations, the payment of employees, intergovernmental budgetary distribution, and the costs of contracts with outside counsel, is information that relates to the government's budget. This information is clearly in the public interest not because it may relate to an issue that has gained public notoriety, but because it relates to the ability of the public to hold government accountable for its spending of tax dollars. The above order now provides a precedent in BC that budgetary information related to legal costs is not in the public interest. The law should be reformed to make it clear that budgetary information, including the spending distributed to specific ministries and branches of government (including the Legal Services Branch) and to contracted workers is in the public interest and must be proactively released.

RECOMMENDATION 9: The law should require the proactive disclosure of all budget and expenditure information.

I. Policy and research information, including project charters and research reports

In order for the public to both assess their government's direction and to provide input into government decisions, it is necessary that government policy information be made available to the public. As Mendel notes, it is difficult for the public "to provide useful input to a policy process without access to the thinking on policy directions within government, for example, in the form of a draft policy, as well as background information upon which that thinking is based."¹⁰⁸ Usually, policy information is expressed in project charters and in research reports that are created to inform what kind of policy the government should take to address a problem. Ontario's Open by Default report also recommends proactive publication of policy and research information, including opinion polling that is publicly funded and research reports and studies related to bills.¹⁰⁹

Some concerns with the proactive release of policy information arise. One major concern with proactively releasing policy documents is the need to sometimes protect the confidentiality of stakeholders who provide input into the policy decision process. Stakeholders and their input must

¹⁰⁷ *Order F15-64*, 2015 BCIPC 70, OIPC, Adjudicator Barker at para. 15

¹⁰⁸ Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online: http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 4

¹⁰⁹ Open Government Engagement Team, *Open By Default: A new way forward for Ontario*, (Queen's Printer for Ontario, 2014), online: <https://dr6j45jk9xcmk.cloudfront.net/documents/2428/open-by-default-2.pdf> at p. 35

remain confidential in order to encourage open and honest input from the public in the policy decision making process. However, this concern does not arise in every case – government consultations with outside stakeholders are sometimes exempted from non-release and provided in response to FOI requests. In the case of this Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, submissions are proactively posted on its website.¹¹⁰ Another concern that may arise in the context of proactively releasing policy information and documents is that personal and private information may be released.

Other concerns are reflected in the policy exceptions to disclosure that is found in most jurisdictions' access to information legislation. Mendel points out that the policy exception common to almost all access to information regimes prohibit the release of information where the release would lead to:

- Prejudice to the effective formulation or development of public policy;
- Frustration of the success of a policy, by premature disclosure of that policy;
- Undermining of the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; and
- Undermining of the effectiveness of testing or auditing procedures.¹¹¹

While these concerns are valid, sensitive information can still be excluded from proactive disclosure under s. 25. The concerns about proactively releasing information that should be kept confidential under s. 25 are addressed by Commissioner Denham in her Oliver Dam report. In that report, Commissioner Denham directed that proactive disclosure must be made with an eye to excluding information that is not in the public interest to be disclosed.¹¹² In the case of proactive release of policy

¹¹⁰ “Special Committee to Review the Freedom of Information and Protection of Privacy Act”, Past Meetings, online: <https://www.leg.bc.ca/parliamentary-business/committees/40thParliament-4thSession-foi/calendar> . See the links titled “Meeting Documents”.

¹¹¹ Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online: http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 150

¹¹² Commissioner Denham notes that:

When disclosing information under s. 25, public bodies need only disclose information that ‘satisfies either the significant harm or clear public interest tests’; they need not disclose entire records. So, while the exceptions in Part 2 of FIPPA cannot be applied, information in records that is not compelling is not required to be disclosed.

The Commissioner has also directed:

A public body should, when deciding whether information ‘clearly’ must be disclosed in the public interest, consider the purpose of any relevant exceptions (including those protecting third-party interests or rights that will be, or could reasonably be expected to be, affected by disclosure)...the nature of the information and of the rights or interests engaged, and the impact of disclosure on those rights or interests will be factors in assessing whether disclosure is ‘clearly in the public interest’.

information, the exclusion from release of information that must be kept confidential in the public interest can still be achieved. Information that may undermine the policy-making process or engages privacy concerns does not need to be proactively disclosed under a requirement that policy information be proactively released.

RECOMMENDATION 10: Government should seriously consider making certain policy information, including project charters and research reports, a category of records that must be proactively disclosed under s. 25.

J. All the exceptions to s.13(1) listed in s.13(2) of FIPPA

Section 13(1) of *FIPPA* permits a public body to refuse to disclose “information that would reveal advice or recommendations developed by or for a public body or minister.”¹¹³ The policy rationale behind this provision is to protect the process of government decision making – it permits decision makers to discuss an issue freely before coming to a decision. Section 13(1) protects the advice and recommendations made by civil servants and those engaged by government to provide advice. However, section 13(2) sets out the types of information that does not fall under s.13(1). In the Commissioner’s 2013 Report, she recommends that the listed exceptions to s.13(1) listed in s.13(2) should be proactively released, noting that these “are all types of information that are of significant interest to the public and would enable citizens to better evaluate government policy and decision making.”¹¹⁴ In both 2004 and 2010, the Special Committee recommended that s.13(2) be amended to require the head of a public body to release on a routine and timely basis the information listed in that section.

Section 13(2) provides the following exceptions to s.13(1):

- Any factual material
- Public opinion polls
- Statistical surveys
- Appraisals

Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, “Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies” (Victoria: OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 29

¹¹³ *Freedom of Information and Protection of Privacy Act* [RSBC 1996] Chapter 165, online: [http://www.bclaws.ca/civix/document/LOC/complete/statreg/--%20F%20--/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20\[RSBC%201996\]%20c.%20165/00_Act/96165_02.xml](http://www.bclaws.ca/civix/document/LOC/complete/statreg/--%20F%20--/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20[RSBC%201996]%20c.%20165/00_Act/96165_02.xml)

¹¹⁴ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 19

- Economic forecasts
- Environmental impact statements or similar information
- A final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities
- A consumer test report or a report of a test carried out on a produce to test equipment of the public body
- A report on the results of field research undertaken before a policy proposal is formulated
- A report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body
- A plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body
- Information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
- A decision, including reasons, that is made, in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

RECOMMENDATION 11: Following the recommendations by the Commissioner and by the 2004 and 2010 Special Committees, we recommend that *FIPPA* be amended to require that the exceptions listed in s. 13(2) be proactively released.

K. Additional categories by regulation

Some proactive disclosure regimes give Government the ability to simply prescribe additional categories of information that must be proactively released. For example, India's *Right to Information Act* provides for the proactive release of a list of information, followed by a provision that requires the release "of such other information as may be prescribed".¹¹⁵ New South Wales' *Government Information (Public Access) Act 2009* has a similar provision; s. 18 defines "what constitutes open access information", and s. 18(g) provides that open access information includes "such other government information as may be prescribed by the regulations as open access information"¹¹⁶.

Ministerial prescriptions or regulations are much easier to implement than amendments to the statute. In the future, it is inevitable that we will discover that certain types of records not required for proactive release should be. A provision permitting the Minister responsible for the *Act* to create new categories

¹¹⁵ Government of India, Ministry of Law and Justice, *Right to Information Act, 2005*, online: <http://www.righttoinformation.gov.in/rti-act.pdf> at section 4(1)(b)(xvii)

¹¹⁶ *Government Information (Public Access) Act 2009* No. 52, New South Wales Government, NSW legislation, online: <http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+343+2010+cd+0+N> at section 18(g).

or records for proactive release would provide government with more flexibility in administering s. 25 of FIPPA.

RECOMMENDATION 12: Include a provision that permits the Minister to prescribe additional categories or records of information that must be proactively disclosed under s. 25

3. Legislating timelines for disclosure

Ideally in the future information will be posted as it is created or stored- a compliance order being saved on a government computer, for example, could be posted online at the same time with a click of a button. However, a major hurdle in implementing a proactive disclosure regime in government is getting it started, and releasing the vast amounts of information that is currently held by government but not currently posted.

The Commissioner has recommended that “Government should also set timelines as to when this information should be released since the timeliness of the disclosure has a direct impact on the relevance and usefulness of the information.”¹¹⁷ A provision requiring that public bodies release specific information mentioned above (environmental assessments, compliance orders, etc) within a year of the passing of the amendment would encourage public bodies to begin to release information. The provision could also set a past date as a benchmark for disclosure, to make the release of information a little bit less daunting- the provision could provide, for example, that past information from January 1, 2010, be proactively released within one year. The provision should also provide that any information produced on or after the passing of the amendment must be proactively released immediately.

A few jurisdictions have legislated timelines for proactive disclosure. India’s *Right to Information Act* provides that every public authority must publish specified categories of information “within one hundred and twenty days from the enactment of this Act” and to “thereafter update these publication every year.”¹¹⁸ In Mexico, proactive disclosure of certain categories of information must be updated “at least every three months, unless otherwise indicated” by regulation.¹¹⁹ The World Bank report notes that Hungary’s FOIA “specifies when each class of information should be updated. So for example, information about tenders has to be continuously updated, whereas other data, such as performance

¹¹⁷ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 20

¹¹⁸ Government of India, Ministry of Law and Justice, *Right to Information Act, 2005*, online: <http://www.righttoinformation.gov.in/rti-act.pdf> at Section 4(b)

¹¹⁹ Instituto Federal de Acceso a la Informacion Publica, *Transparency, Access to Information and Personal Data: Regulatory Framework*, (Mexico:2004), online: https://www.ip-rs.si/fileadmin/user_upload/Pdf/Publikacije_ostalih_pooblascencev/foia_in_mexico.pdf at p. 58

indicators, should be updated quarterly.”¹²⁰ Section 4 of the United Kingdom’s *Environmental Information Regulations* limits the disclosure requirement by setting a historical benchmark beyond which records do not need to be proactively disclosed- Section 4 requires the environmental information be proactively disclosed (as discussed above), but s. 4(2) states that “the use of electronic means to make information available or to organize information shall not be required in relation to information collected before 1st January 2005 in non-electronic form.”¹²¹

Setting specific timelines for disclosure provides public bodies with legal guidelines for the release of information and an enforceable legal requirement for disclosure.

RECOMMENDATION 13: The law should prescribe a maximum timeframe for the prompt proactive release of s. 25 information.

4. Information online

Given modern technology and the high level of internet use and access among British Columbians, the most efficient way of proactively releasing information is online. Mendel notes that a growing trend in all countries is to proactively release information on the web. He writes that disclosure online promotes “a number of efficiencies for the public sector, as well as better service provision” and that given “the relative ease and low cost of proactive publication over the Internet, it only makes sense that this should be promoted”.¹²²

Information should be released online and it should be released in a way that makes it easy to find. The World Bank notes in its report that an important part of proactive release of information is that the information is “findable”. They recommend:

Information proactively disclosed on the Internet, or using other formats and communications channels, should be organized so that it is easy to find. User’s information needs should be a primary consideration when determining where to publish information, including whether to opt for departmental, central or sectoral web portals.¹²³

¹²⁰ Helen Darbshire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online:

<http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbshireProactiveTransparency.pdf> at p. 30

¹²¹ *The Environmental Information Regulations 2004*, United Kingdom, online:

<http://www.legislation.gov.uk/ukxi/2004/3391/regulation/4/made> at section 4

¹²² Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online:http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf at p. 147

¹²³ Helen Darbshire, *Proactive Transparency: The future of the right to information?*, (World Bank Institute and CommGAP, 2011), online:

<http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbshireProactiveTransparency.pdf> at p. 31

British Columbia has two main websites geared specifically toward proactive disclosure: DataBC and Open Information. Individual ministries will also sometimes disclose information on certain sections of their websites. This can make finding proactively released information confusing. Proactively released information should be disclosed through either one centralized portal or through specifically labelled open government webpages associated with individual ministries websites. Adopting this format would make it easier for the public to search and access publicly released information.

President Obama’s Open Government Directive required that each US Government agency publish data sets on their Data.gov website, but also required that each agency create a web page devoted to its open government activities. Having a webpage devoted to proactive releases makes it much easier for users to look for information specific to each agency. Mexico opted for one centralized portal, the Portal de Obligaciones Transparencia. Either approach would make accessing information easier. Information posted on a specific “open” webpage attached to individual ministries websites would make it easier for users to find information that they know is produced by a specific ministry, while one unified disclosure website would provide a clear centralized portal to all information.

RECOMMENDATION 14: Section 25 should be amended to require that proactively released information be posted online by each Ministry, either on the Data BC or Open Information website or on specific open information webpages linked to each Ministry’s website.

5. Amend sections 71 and 71.1 to ensure that they require proactive publication schemes.

Section 71 requires the head of every public body to “establish categories of records that are in the custody or under the control of the public body and are available to the public without a request for access”¹²⁴. Section 71 does not provide any basic requirements for what kinds of documents must be included in the list. Section 71 also does not require that the list of records developed by public bodies under s. 71 be made public.

Section 71 is often discussed as a provision that encourages proactive disclosure, but in reality, it only permits it. The Commissioner in her July 2013 report expresses the opinion that as a result of s. 71, “all public bodies, including ministries, are now required to identify records that they must ‘make available’ to the public on a routine basis.”¹²⁵ However, on its face, the section does not require that the information identified under s. 71 be proactively or routinely available to the public. Section 71 only

¹²⁴ *Freedom of Information and Protection of Privacy Act* [RSBC 1996] Chapter 165 online: [http://www.bclaws.ca/civix/document/LOC/complete/statreg/--%20F%20--/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20\[RSBC%201996\]%20c.%20165/00_Act/96165_06.xml](http://www.bclaws.ca/civix/document/LOC/complete/statreg/--%20F%20--/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20[RSBC%201996]%20c.%20165/00_Act/96165_06.xml) at section 71

¹²⁵ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-03*, “Evaluating the Government of British Columbia’s Open Government Initiative” (Victoria: OIPC, July 25, 2013), 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553> at p. 10

requires that it is “available to the public without a request for access under this Act.”¹²⁶ Ian Christman argues that this simply “means that the records are reviewable without having to fulfil the formalities of s. 5 of *FIPPA*” and not that they be made publicly available.¹²⁷ This is made clear by s. 71(2), which permits the head of a public body to charge a fee in return for a copy of a s. 71 document. While s. 71 does permit a public body to release information without a request and without a fee, it does not require it. This interpretation of s. 71 has been adopted by the BC government. In the “FOIPPA Policy and Procedures Manual”, released by the Ministry of Technology, Innovation and Citizens’ Services, s. 71 is described as a section that “permits the head of a public body to designate categories of records appropriate for routine release to the public”¹²⁸ (emphasis added). The key word in this interpretation is “permits”— the government is clear that public bodies are not required to release the information.

Section 71 was adopted following the Commissioner’s recommendation in her BC Ferries report and the 2010 Report of the Special Committee¹²⁹ that government adopt a requirement that public bodies develop proactive publication schemes. The Commissioner pointed to a few good practice jurisdictions that had taken the publication scheme approach to proactive disclosure, including the United Kingdom and jurisdictions in Australia. In the United Kingdom, the *Freedom of Information Act* requires that every public authority “adopt and maintain a scheme which relates to the publication of information by the authority and is approved by the Commissioner.”¹³⁰ The Act also requires that each publication scheme specifies what information it intends to publish and how.¹³¹

RECOMMENDATION 15: Section 71 should be amended to more closely match the publication scheme requirement in the United Kingdom. It should be amended so that it requires:

- **public bodies to produce publication schemes or lists of information that will be available proactively;**

¹²⁶ *Freedom of Information and Protection of Privacy Act* [RSBC 1996] Chapter 165 online: [http://www.bclaws.ca/civix/document/LOC/complete/statreg/--%20F%20--/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20\[RSBC%201996\]%20c.%20165/00_Act/96165_06.xml](http://www.bclaws.ca/civix/document/LOC/complete/statreg/--%20F%20--/Freedom%20of%20Information%20and%20Protection%20of%20Privacy%20Act%20[RSBC%201996]%20c.%20165/00_Act/96165_06.xml) at section 71.1(1)

¹²⁷ Ian Christman, “Proactive Disclosure- New Development in Public Body Transparency”, CLE Privacy— 2013 Update, Paper 2.1, online: http://online.cle.bc.ca/CourseMaterial/pdfs/2013/732_2_1.pdf at p. 9

¹²⁸ FOIPPA Policy and Procedures Manual, “Section 71- Records Available Without Request”, Ministry of Technology, Innovation and Citizens’ Services, online:

http://www.cio.gov.bc.ca/cio/priv_leg/manual/sec70_81/sec71.page?

¹²⁹ Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, Report May 2010, Legislative Assembly of British Columbia, online: <https://www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#/content/legacy/web/cmt/39thParl/session-2/foi/index.htm> at Recommendation 7

¹³⁰ *Freedom of Information Act 2000*, c. 36, Part I Publication schemes, online: <http://www.legislation.gov.uk/ukpga/2000/36/part/I/crossheading/publication-schemes> at section 19(1)

¹³¹ *Freedom of Information Act 2000*, c. 36, Part I Publication schemes, online: <http://www.legislation.gov.uk/ukpga/2000/36/part/I/crossheading/publication-schemes> at section 19(2)

- that the publication schemes include any public interest information that falls under s. 25;
- that the publication schemes be posted online; and
- that the information listed in the publications schemes be posted online.

6. Section 71 and empowering the Commissioner to review and approve

Granting the Commissioner the power to review and approve the publication schemes created by public bodies under s. 71 was recommended by the Special Committee in 2004.¹³² Such a power would add the extra level of enforcement necessary to ensure that public bodies follow the law. As the Carter Center notes, “the law needs to have teeth, in order to take bites – big bites – out of the bureaucratic culture of secrecy.”¹³³ As noted above, the UK’s Information Commissioner’s Office (ICO) publishes model publication schemes outlining non-exhaustive lists of categories that the Commissioner’s Office expects specific public bodies to proactively release.¹³⁴

RECOMMENDATION 16: Section 71 should be amended to provide the Commissioner with the power to review and approve the publication schemes created by public bodies under s. 71.

7. Section 71 and legislated timeframes

In the 2010 submission by the Office of the Information and Privacy Commissioner to the Special Committee reviewing *FIPPA*, the Commissioner recommended that public bodies be required to adopt

¹³² In the 2010 Report of the Special Committee reviewing *FIPPA*, the Committee recommended that the legislature:

Add a new section at the beginning of Part 2 of the Act requiring public bodies – at least at the provincial government level – to adopt schemes approved by the Information and Privacy Commissioner for the routine proactive disclosure of electronic records, and to have them operational within a reasonable period of time.

Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, Report May 2010, Legislative Assembly of British Columbia, online: <https://www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#/content/legacy/web/cmt/39thParl/session-2/foi/index.htm> at Recommendation 7

¹³³ Nancy Anderson, “Enforcement Under the Jamaica Access to Information Act”, *Access to Information: Building a Culture of Transparency* (The Carter Center, 2006), online: <https://www.cartercenter.org/documents/2364.pdf> at p. 104

¹³⁴ Information Commissioner’s Office, “Definition documents”, online: <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/publication-scheme/definition-documents/>

proactive disclosure schemes to be approved by the Commissioner, but added that these schemes should be required to be operational within a reasonable period of time.¹³⁵

RECOMMENDATION 17: The law should require that these lists and/or publication schemes be produced and posted within a legislated timeframe under s. 71.

¹³⁵ Office of the Information and Privacy Commissioner for British Columbia, "Submission of the A/Information and Privacy Commissioner to the Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, (March 25, 2010), online: <https://www.oipc.bc.ca/special-reports/1275> at p. 18

Conclusion

British Columbia's *Freedom of Information and Protection of Privacy Act* is forward thinking; through s. 25, it expressly requires proactive disclosure of information to the public in certain circumstances. However, government's response to s. 25's requirement for proactive disclosure of public interest information and to ss. 71 and 71.1 that permit public bodies to create categories of information they may release without a request, has been one of neglect and inaction. Sections 25, 71 and 71.1 should be strengthened to promote and require government proactive disclosure.

For the above reasons, we respectfully submit that the Special Committee make the following recommendations for reform:

RECOMMENDATION 1: The principles laid out in the Commissioner's Report (July 2015) should be legislated. Section 25 should be amended to:

- i. explicitly require public bodies to proactively disclose information whenever a disinterested and reasonable observer, knowing what the information is and knowing all of circumstances, would conclude that disclosure is plainly and obviously in the public interest,**
- ii. include two more explicit categories of "public interest" information that must be proactively released by government:**
 - a. information about a topic inviting public attention; a topic about which the public has a substantial concern because it affects the welfare of citizens; or a topic to which public notoriety or controversy has attached, and**
 - b. information that promotes government accountability.**

RECOMMENDATION 2: Amend s. 25 to require proactive disclosure of specific categories and classes of records.

RECOMMENDATION 3: Amend s. 25 to require the proactive disclosure of environmental information described in the Aarhus Convention and adopted by the United Kingdom:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;**
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);**
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;**
- (d) reports on the implementation of environmental legislation;**

- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).¹³⁶

RECOMMENDATION 4: The legislature should establish a category of proactive disclosure requiring environmental compliance orders, authorizations, convictions, contraventions, penalties and assessments to be proactively released.

RECOMMENDATION 5: The law should require the proactive disclosure of environmental quality reports, including air pollution surveys, water quality reports, and reports examining the health of particular species.

RECOMMENDATION 6: The legislation should require the proactive disclosure of all compliance orders, authorizations, inspection reports and penalties under all administrative schemes.

RECOMMENDATION 7: The law should require the proactive disclosure of contracts over \$10,000 and information about the procurement process.

RECOMMENDATION 8: The law should require the proactive disclosure of final audit reports.

RECOMMENDATION 9: The law should require the proactive disclosure of all budget and expenditure information.

RECOMMENDATION 10: Government should seriously consider making certain policy information, including project charters and research reports, a category of records that must be proactively disclosed under s. 25.

RECOMMENDATION 11: Following the recommendations by the Commissioner and by the 2004 and 2010 Special Committees, we recommend that *FIPPA* be amended to require that the exceptions listed in s.13(2) be proactively released.

RECOMMENDATION 12: Include a provision that permits the Minister to prescribe additional categories or records of information that must be proactively disclosed under s. 25.

RECOMMENDATION 13: The law should prescribe a maximum timeframe for the prompt proactive release of s. 25 information.

¹³⁶ *The Environmental Information Regulations 2004*, United Kingdom, online: <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made> at section 2

RECOMMENDATION 14: Section 25 should be amended to require that proactively released information be posted online by each Ministry, either on the Data BC or Open Information website or on specific open information webpages linked to each Ministry's website.

RECOMMENDATION 15: Section 71 should be amended to more closely match the publication scheme requirement in the United Kingdom. It should be amended so that it requires:

- public bodies to produce publication schemes or lists of information that will be available proactively;
- that the publication schemes include any public interest information that falls under s. 25;
- that the publication schemes be posted online; and
- that the information listed in the publications schemes be posted online.

RECOMMENDATION 16: Section 71 should be amended to provide the Commissioner with the power to review and approve the publication schemes created by public bodies under s. 71.

RECOMMENDATION 17: The law should require that the lists be produced and posted within a legislated timeframe under s. 71.

Appendix 1: Public interest categories

Currently, s. 25 operates to include only one category of “public interest” information in s. 25(1)(a): “information about a risk of significant harm to the environment or to the health or safety of the public or a group of people”. More categories could be adopted, to provide clarity to what is meant by the term “public interest.” Stanley Tromp, in his 2010 plan for reform, notes that s. 25 “would be aided by several examples to help partially flesh it out.”¹³⁷ He points to the Commonwealth Secretariat Model Freedom of Information Bill, produced in 2002 as a sample bill for jurisdictions to adopt and follow, for examples of other “public interest” categories.¹³⁸ While the model bill does not have an express proactive disclosure provision, it does list exceptions to information exempt from disclosure where the release of the information is in the public interest because it discloses:

- abuse of authority or neglect in the performance of official duty;
- injustice to an individual;
- danger to the health or safety of an individual or of the public; or
- unauthorised use of public funds.¹³⁹

Kenya’s draft Access to Information law similarly defines “public interest” in stating the exceptions that apply to require disclosure of otherwise exempt information. Public interest information includes that which:

- promote accountability of public entities to the public;
- ensure that the expenditure of public funds is subject to effective oversight;
- promote informed debate on issues of public interest;
- keep the public adequately informed about the existence of any danger to public health or safety or to the environment; and
- ensure that any statutory authority with regulatory responsibilities is adequately discharging its functions.¹⁴⁰

Newfoundland and Labrador also has a proactive disclosure public interest provision in their Freedom of Information legislation.¹⁴¹ Newfoundland’s policy direction to public officials applying the public interest provision defines public interest information as relating to:

¹³⁷ Stanley L Tromp, *The Road Forward: Raising British Columbia’s Freedom of Information and Protection of Privacy Act to World Standards*. (Vancouver, 2010), online:

<http://www3.telus.net/index100/theroadforward> at p. 112

¹³⁸ Human Rights Initiative, Freedom of Information (2002), online:

http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/Cth%20model%20law%20-%20FOI%20Act.pdf

¹³⁹ Human Rights Initiative, Freedom of Information (2002), online:

http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/Cth%20model%20law%20-%20FOI%20Act.pdf at section 35

¹⁴⁰ Human Rights Initiative, Freedom of Information (2002), online:

http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/Cth%20model%20law%20-%20FOI%20Act.pdf at section 6(5)

- Good governance, including transparency and accountability;
- The health of the democratic process;
- The upholding of justice;
- Ensuring the honesty of public officials;
- And general good decision-making by public officials.¹⁴²

These lists provide a starting point for the development of additional categories of public interest information. A major commonality between the lists of public interest information in the Model Bill, Kenya’s draft bill and in Newfoundland’s policy direction is a focus on information that promotes government accountability. Information that discloses “abuse of authority or neglect”, “unauthorized use of public funds”, ensuring proper expenditure of funds, “promoting accountability”, and ensuring a public authority is adequately discharging its functions, are all related to ensuring and encouraging government accountability. This category of public interest information also arose in this summer’s OIPC report, where the Commissioner explored the meaning of the term “public interest.”

The types of information that may be in the public interest that were explored by the Commissioner in this summer’s report could form the basis of additional categories of public interest information in BC. In the report, the Commissioner identified two possible factors in determining whether information is in the public interest:

- information about a subject “inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached”¹⁴³; and
- information that “may contribute, in a meaningful way to holding a public body accountable for its actions or decisions”¹⁴⁴.

These two categories—information about a topic which the public has a substantial concern or to which public notoriety or controversy has attached, and information that promotes government accountability—could be included as specific public interest categories under s. 25. This would help clarify what information is “clearly in the public interest”, and would provide a clear legislative direction to public bodies as to the information that they can and must disclose. Any added categories should be

¹⁴¹ See Appendix 2 for a response to the BC Government’s oral submissions of November 18, 2015 to the Special Committee to Review the *Freedom of Information and Protection of Privacy Act*

¹⁴² Newfoundland and Labrador, “Access to Information: Policy and Procedures Manual” (November 2015), http://atipp.gov.nl.ca/info/pdf/Access_to_Information_Manual.pdf

¹⁴³ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, “Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies” (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 30

¹⁴⁴ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, “Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies” (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 32

additions to s. 25. Section 25(1)(b) should remain to provide for further types of information that may be in the public interest.¹⁴⁵

¹⁴⁵ Section 25(1)(b) provides for disclosure of information in the public interest that falls outside of the currently legislated category of information disclosing a significant risk to the environment or to the health and safety of the public: “the disclosure of which is, for any other reason, clearly in the public interest.”

Appendix 2: Response to BC Government's oral submissions on November 18, 2015 regarding Newfoundland's new *Access to Information and Protection of Privacy Act*

Response to the BC Government's oral submissions on November 18, 2015

In its' oral submissions on November 18, 2015 the BC government points to Newfoundland as a model jurisdiction for s. 25 reform, and suggests that they will reform s. 25 to fit with the Newfoundland approach. Their interpretation of Newfoundland's ATIPPA is that it better protects private information that may be contained in information that is of public interest:

Newfoundland and Labrador have adopted a more measured approach to the release of information that is in the public interest. This approach also requires the proactive release of information, but the information that must be released is measured against and commensurate with the nature of the exception being overridden. In particular, the bar for releasing personal information is higher than that for other types of information.¹⁴⁶

This submission is puzzling, however, because it is not clear that Newfoundland's provision requires a more "measured approach" than BC's provision. Newfoundland's proactive public release provision is found in s. 9(3) of their ATIPPA:

9 (3) Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

Subsection 9(4) provides that s. 9(3) applies regardless of any provision of the Act. The regulations do not offer any further guidance on s. 9.

On its face, s. 9(3) seems exactly the same as BC's provision. The government may have been referring to other parts of s. 9. Section 9(1) expressly directs that when considering *requests* for information, the head of a public body must disclose the information even if an exception to disclosure applies if the "public interest in disclosure of the information outweighs the reason for the exception."¹⁴⁷ Section 9(2) lists the exceptions that may be overridden if it is in the public interest to do so. It does not seem that ss. 9(1) and 9(2) are meant to apply to s. 9(3). Section 9(3) operates to provide for public interest proactive disclosure, and is exempt from any part of the Act by s. 9(4); ss. 9(1) and (2) provide exceptions to disclosure that can be overridden in the public interest when responding to requests, and guidance for the proper exercise of discretion when deciding to release information in the public interest where the exception is discretionary rather than mandatory.

¹⁴⁶ "Minutes: Special Committee to Review the Freedom of Information and Protection of Privacy Act", Committee Transcript, Wednesday, November 18, 8:30 am, Douglas Fir Committee Room, Parliament Buildings, Victoria, BC, online: <https://www.leg.bc.ca/documents-data/committees-transcripts/20151118am-FIPPARReview-Victoria-Blues> (Debates of the Legislative Assembly (Hansard))

¹⁴⁷ *Access to Information and Protection of Privacy Act, 2015* SNL 2015 Chapter A-1.2, Newfoundland and Labrador, online: <http://www.assembly.nl.ca/legislation/sr/statutes/a01-2.htm>

Furthermore, the Commissioner has made it clear that BC's s. 25 does require a measured approach. She has noted that public bodies disclosing information under s. 25 do not necessarily need to disclose an entire record, but only the information in a record that is in the public interest.¹⁴⁸ While exemptions to disclosure do not apply to information disclosed under s. 25, a public body should still consider "the purpose of any relevant exceptions (including those protecting third-party interests or rights that will be, or could reasonably be expected to be, affected by disclosure),...the nature of the information and of the rights or interests engaged, and the impact of disclosure on those rights or interests will be factors in assessing whether disclosure is 'clearly in the public interest'".¹⁴⁹ It is unclear to us what a more 'measured' approach to s. 25 would look like, unless it is to provide greater scope for officials to refuse to release information at their discretion.

¹⁴⁸ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F13-05*, "Public Body Disclosure of Information under Section 25 of the *Freedom of Information and Protection of Privacy Act*", (Victoria, OIPC, December 2, 2013), 2013 BCIPC No. 33, online: <https://www.oipc.bc.ca/investigation-reports/1588> at p. 10

¹⁴⁹ Office of the Information and Privacy Commissioner for British Columbia, *Investigation Report F15-02*, "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation-reports/1814> at p. 29

Information must be disclosed if in the public interest

25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

(3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify

(a) any third party to whom the information relates, and

(b) the commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form

(a) to the last known address of the third party, and

(b) to the commissioner.

Policy manuals available without request

- 70** (1) The head of a public body must make available to the public, without a request for access under this Act,
- (a) manuals, instructions or guidelines issued to the officers or employees of the public body, or
 - (b) substantive rules or policy statements adopted by the public body,

for the purpose of interpreting an enactment or of administering a program or activity that affects the public or a specific group of the public.

- (2) The head of a public body may delete from a record made available under this section any information he or she would be entitled to refuse to disclose to an applicant.
- (3) If information is deleted, the record must include a statement of
- (a) the fact that information has been deleted,
 - (b) the nature of the information, and
 - (c) the reason for the deletion.
- (4) If a person asks for a copy of a record under this section, section 71 (2) applies.

Records available without request

- 71** (1) Subject to subsection (1.1), the head of a public body must establish categories of records that are in the custody or under the control of the public body and are available to the public without a request for access under this Act.
- (1.1) The head of a public body must not establish a category of records that contain personal information unless the information
- (a) may be disclosed under section 33.1 or 33.2, or

(b) would not constitute, if disclosed, an unreasonable invasion of the personal privacy of the individual the information is about.

(1.2) Section 22 (2) to (4) applies to the determination of unreasonable invasion of personal privacy under subsection (1.1) (b) of this section.

(2) The head of a public body may require a person who asks for a copy of an available record to pay a fee to the public body.

(3) Subsection (1) does not limit the discretion of the government of British Columbia or a public body to disclose records that do not contain personal information.

Records that ministries must disclose

71 . 1 (1) Subject to subsection (2), the minister responsible for this Act may establish categories of records that are in the custody or under the control of one or more ministries and are available to the public without a request for access under this Act.

(2) The minister responsible for this Act must not establish a category of records that contain personal information unless the information

(a) may be disclosed under section 33.1 or 33.2, or

(b) would not constitute, if disclosed, an unreasonable invasion of the personal privacy of the individual the information is about.

(3) Section 22 (2) to (4) applies to the determination of unreasonable invasion of personal privacy under subsection (2) (b) of this section.

(4) The minister responsible for this Act may require one or more ministries to disclose a record that is within a category of records established under subsection (1) of this section or section 71 (1).

(5) If required to disclose a record under subsection (4), a ministry must do so in accordance with any directions issued relating to the disclosure by the minister responsible for this Act.

The Environmental Information Regulations 2004

Interpretation

2.—(1) In these Regulations—

“the Act” means the Freedom of Information Act 2000([1](#));

“applicant”, in relation to a request for environmental information, means the person who made the request;

“appropriate records authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“the Commissioner” means the Information Commissioner;

“the Directive” means Council Directive [2003/4/EC\(2\)](#) on public access to environmental information and repealing Council Directive [90/313/EEC](#);

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the

state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);

“historical record” has the same meaning as in section 62(1) of the Act;

“public authority” has the meaning given by paragraph (2);

“public record” has the same meaning as in section 84 of the Act;

“responsible authority”, in relation to a transferred public record, has the same meaning as in section 15(5) of the Act;

“Scottish public authority” means—

(a) a body referred to in section 80(2) of the Act; and

(b) insofar as not such a body, a Scottish public authority as defined in section 3 of the Freedom of Information (Scotland) Act 2002⁽³⁾;

“transferred public record” has the same meaning as in section 15(4) of the Act; and

“working day” has the same meaning as in section 10(6) of the Act.

(2) Subject to paragraph (3), “public authority” means—

(a) government departments;

(b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding—

(i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or

(ii) any person designated by Order under section 5 of the Act;

(c) any other body or other person, that carries out functions of public administration; or

(d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and—

(i) has public responsibilities relating to the environment;

(ii) exercises functions of a public nature relating to the environment; or

(iii) provides public services relating to the environment.

(3) Except as provided by regulation 12(10) a Scottish public authority is not a “public authority” for the purpose of these Regulations.

(4) The following expressions have the same meaning in these Regulations as they have in the Data Protection Act 1998⁽⁴⁾, namely—

(a)“data” except that for the purposes of regulation 12(3) and regulation 13 a public authority referred to in the definition of data in paragraph (e) of section 1(1) of that Act means a public authority within the meaning of these Regulations;

(b)“the data protection principles”;

(c)“data subject”; and

(d)“personal data”.

(5) Except as provided by this regulation, expressions in these Regulations which appear in the Directive have the same meaning in these Regulations as they have in the Directive.

[...]

Dissemination of environmental information

4.—(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds—

(a)progressively make the information available to the public by electronic means which are easily accessible; and

(b)take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.

(2) For the purposes of paragraph (1) the use of electronic means to make information available or to organize information shall not be required in relation to information collected before 1st January 2005 in non-electronic form.

(3) Paragraph (1) shall not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12.

(4) The information under paragraph (1) shall include at least—

(a)the information referred to in Article 7(2) of the Directive; and

(b)facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.

Environmental registry

- 10 (1)** The Minister shall establish an environmental registry containing
- (a) approvals;
 - (b) certificates of qualification;
 - (c) certificates of variance;
 - (d) orders, directives, appeals, decisions and hearings made under this Act;
 - (e) notices of designation given pursuant to this Act;
 - (f) notices of a charge or lien given pursuant to Section 132;
 - (g) policies, programs, standards, guidelines, objectives and approval processes established under this Act;
 - (h) convictions, penalties and other enforcement actions brought under this Act;
 - (i) information or documents required by the regulations to be included in the registry;
 - (j) annual reports; and
 - (k) any other information or document considered appropriate by the Minister.
- (2)** All information under the control of the Department is accessible to the public, subject only to the *Freedom of Information and Protection of Privacy Act*.
- (3)** The Minister shall ensure public access to the information and documents contained in the environmental registry during business hours of the Department.
- (4)** Where the Minister, administrator or delegated agent makes a decision under Section 34, 35, 40, 52, 54 or 56, any person who asks for a reason for the decision shall, within thirty days, and subject to the *Freedom of Information and Protection of Privacy Act*, be furnished with a written statement of the decision, setting out the findings of fact upon which it is based and the reasons for the decision. 1994-95, c. 1, s. 10; 2006, c. 30, s. 6; 2011, c. 61, s. 7.

APPENDIX 7: New South Wales Government Information (Public Access) Regulation 2009

Online: http://www5.austlii.edu.au/au/legis/nsw/consol_reg/giar2009459/

Government Information (Public Access) Regulation 2009

Current version for 12 December 2014 to date (accessed 15 November 2015 at 09:11)

[Part 2](#) » [Clause 3](#)

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3 Additional open access information

- (1) The government information listed in Schedule 1 that is held by a local authority is prescribed as open access information of the local authority.
- (2) An advertising compliance certificate issued by the head of a Government agency under the *Government Advertising Act 2011* is prescribed as open access information of that agency.

Note. The fact that information is open access information does not create an obligation to keep records indefinitely and does not interfere with records management practices and procedures of local authorities that are consistent with the *State Records Act 1998*.

Government Information (Public Access) Regulation 2009

Current version for 12 December 2014 to date (accessed 15 November 2015 at 09:06)

[Schedule 1](#)

[<< page >>](#)

Schedule 1 Additional open access information—local authorities

(Clause 3)

1 Information about local authority

- (1) Information contained in the current version and the most recent previous version of the following records is prescribed as open access information:
 - (a) the model code prescribed under section 440 (1) of the LGA and the code of conduct adopted under section 440 (3) of the LGA,
 - (b) code of meeting practice,
 - (c) annual report,
 - (d) annual financial reports,
 - (e) auditor’s report,

- (f) management plan,
 - (g) EEO management plan,
 - (h) policy concerning the payment of expenses incurred by, and the provision of facilities to, councillors,
 - (i) annual reports of bodies exercising functions delegated by the local authority,
 - (j) any codes referred to in the LGA.
- (2) Information contained in the following records (whenever created) is prescribed as open access information:
- (a) returns of the interests of councillors, designated persons and delegates,
 - (b) agendas and business papers for any meeting of the local authority or any committee of the local authority (but not including business papers for matters considered when part of a meeting is closed to the public),
 - (c) minutes of any meeting of the local authority or any committee of the local authority, but restricted (in the case of any part of a meeting that is closed to the public) to the resolutions and recommendations of the meeting,
 - (d) Departmental representative reports presented at a meeting of the local authority in accordance with section 433 of the LGA.
- (3) Information contained in the current version of the following records is prescribed as open access information:
- (a) land register,
 - (b) register of investments,
 - (c) register of delegations,
 - (d) register of graffiti removal work kept in accordance with section 13 of the *Graffiti Control Act 2008*,
 - (e) register of current declarations of disclosures of political donations kept in accordance with section 328A of the LGA,
 - (f) the register of voting on planning matters kept in accordance with section 375A of the LGA.

2 Plans and policies

Information contained in the current version and the most recent previous version of the following records is prescribed as open access information:

- (a) local policies adopted by the local authority concerning approvals and orders,
- (b) plans of management for community land,
- (c) environmental planning instruments, development control plans and contributions plans made under the Environmental Planning and Assessment Act 1979 applying to land within the local authority's area.

3 Information about development applications

(1) Information contained in the following records (whenever created) is prescribed as open access information:

(a) development applications (within the meaning of the Environmental Planning and Assessment Act 1979) and any associated documents received in relation to a proposed development including the following:

- (i) home warranty insurance documents,
- (ii) construction certificates,
- (iii) occupation certificates,
- (iv) structural certification documents,
- (v) town planner reports,
- (vi) submissions received on development applications,
- (vii) heritage consultant reports,
- (viii) tree inspection consultant reports,
- (ix) acoustics consultant reports,
- (x) land contamination consultant reports,

(b) records of decisions on development applications (including decisions made on appeal),

(c) a record that describes the general nature of the documents that the local authority decides are excluded from the operation of this clause by subclause (2).

(2) This clause does not apply to so much of the information referred to in subclause (1) (a) as consists of:

(a) the plans and specifications for any residential parts of a proposed building, other than plans that merely show its height and its external configuration in relation to the site on which it is proposed to be erected, or

(b) commercial information, if the information would be likely to prejudice the commercial position of the person who supplied it or to reveal a trade secret.

(3) A local authority must keep the record referred to in subclause (1) (c).

4 Approvals, orders and other documents

Information contained in the following records (whenever created) is prescribed as open access information:

(a) applications for approvals under Part 1 of Chapter 7 of the LGA and any associated documents received in relation to such an application,

(b) applications for approvals under any other Act and any associated documents received in relation to such an application,

(c) records of approvals granted or refused, any variation from local policies with reasons for the variation, and decisions made on appeals concerning approvals,

(d) orders given under Part 2 of Chapter 7 of the LGA, and any reasons given under section 136 of the LGA,

(e) orders given under the authority of any other Act,

(f) records of building certificates under the *Environmental Planning and Assessment Act 1979*,

(g) plans of land proposed to be compulsorily acquired by the local authority,

(h) compulsory acquisition notices,

(i) leases and licences for use of public land classified as community land.

(j) performance improvement orders issued to a council under Part 6 of Chapter 13 of the LGA.

APPENDIX 8: Proactive disclosure provisions in India's Right to Information Act

Online: <http://www.righttoinformation.gov.in/>

CHAPTER II

Right to information and obligations of public authorities

- 3 Subject to the provisions of this Act, all citizens shall have the right to information.
- 4 (1) Every public authority shall—
- (a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated;
 - (b) publish within one hundred and twenty days from the enactment of this Act,—
 - (i) the particulars of its organisation, functions and duties;
 - (ii) the powers and duties of its officers and employees;
 - (iii) the procedure followed in the decision making process, including channels of supervision and accountability;
 - (iv) the norms set by it for the discharge of its functions;
 - (v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;
 - (vi) a statement of the categories of documents that are held by it or under its control;
 - (vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;
 - (viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advice, and as to whether meetings of those boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;
 - (ix) a directory of its officers and employees;
 - (x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;
 - (xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;
 - (xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;
 - (xiii) particulars of recipients of concessions, permits or authorisations granted by it;
 - (xiv) details in respect of the information, available to or held by it, reduced in an electronic form;
 - (xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;
 - (xvi) the names, designations and other particulars of the Public Information Officers;
 - (xvii) such other information as may be prescribed and thereafter update these publications every year;
 - (c) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

- (d) provide reasons for its administrative or quasi-judicial decisions to affected persons.
- (2) It shall be a constant endeavour of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo motu to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.
- (3) For the purposes of sub-section (1), every information shall be disseminated widely and in such form and manner which is easily accessible to the public.
- (4) All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.

Explanation.—For the purposes of sub-sections (3) and (4), "disseminated" means making known or communicated the information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority.