

WHAT'S NEW IN THE WORLD OF FREEDOM OF INFORMATION?

November 26, 2021

David Loukidelis, Amy O'Connor, and
James Barth

Table of Contents:

1. **Bill 22 Amendments:**

- a) An overview of Bill 22
- b) Privacy management
- c) Privacy breaches
- d) PIAs
- e) Snooping offences
- f) Disclosure exceptions
- g) Application fees
- h) Data residency
- i) Grounds to disregard

2. **Navigating FIPPA:**

- a) Section 43 – systematic and vexatious requestors
- b) Section 23 – third party notice
- c) Section 21 – third party business interests
- d) Section 22 – third party privacy
- e) Commercial applicants

Freedom of Information and Protection of Privacy Amendment Act, 2021

BILL 22

An Overview of Bill 22

- Tabled October 18, 2021
- If passed, will be the most significant overhaul to the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) since its inception

An Overview of Bill 22

October 1994:

- FIPPA comes into force

May 11, 2016:

- Most recent special committee report

October 18, 2021:

- Bill 22 tabled

2011:

- Most recent batch of amendments

June 16, 2021:

- Current special committee appointed

Privacy Management Programs

- **FIPPA Section 36.2:**
 - Will require public bodies to develop privacy management program
 - Requirements not yet established; look to best practice guides in the meantime



Privacy Breaches

■ FIPPA Section 36.3:

- Will require public bodies to notify affected individuals and the OIPC in the event of a privacy breach, without “unreasonable delay”
- **Privacy breach:** theft or loss of personal information, or unauthorized collection or disclosure of personal information
- **Prevention is key:** financial and reputational costs of privacy breaches are high

Privacy Impact Assessments

Bill 22 Changes:

- **Section 69(5.3):**
 - Public bodies **must** conduct PIAs where appropriate
- **Section 69(10):**
 - Minister may give specific directions as to what PIAs will require depending on the type of personal information that is involved

PIA Review:

- **When to conduct a PIA:**
 - Starting new programs or activities that may involve personal information
 - Initiating major changes to programs or activities that may involve personal information
- **Threshold PIA:**
 - If no personal information is involved, no need to go further
- **Resources:**
 - BC has [standard PIA templates](#)

Snooping Offences



- **Section 65.3:**
 - It is an offence to willfully conceal, destroy or alter a record to avoid fulfilling an access request
- **Section 65.4:**
 - It is an offence to willfully collect, use or disclose personal information in an unauthorized way

Disclosure Exceptions

Section 18.1:

- Must not disclose information that could reasonably be expected to harm Indigenous peoples' interests
- **Interests:** cultural heritage, traditional knowledge, cultural expressions, sciences, technologies
- Affected Indigenous people may consent to disclosure

Section 3:

- Will exclude certain forms of information from requests:
 1. Records available for purchase by the public
 2. Records not relating to the public body's business
 3. Metadata describing individuals' interaction with electronic systems
 4. Lawfully deleted electronic records

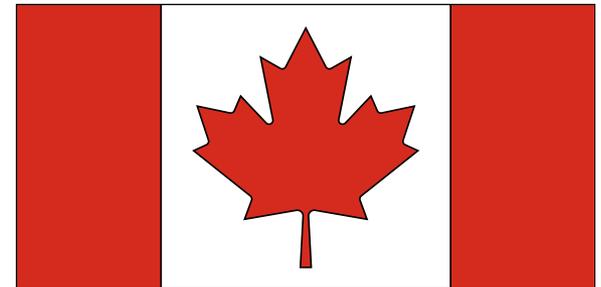
Application Fees



- **Section 75:**
 - **Current version:** can charge for specified services
 - **Bill 22:** can additionally charge a prescribed fee for initial application
 - **Fee rate:** not yet set, but ranges from \$5 to 50 in other provinces

Data Residency

- **The current rule: FIPPA s. 30.1**
 - All personal information in a local government's custody or control must be stored and accessed only in Canada
 - **Exceptions:** if the individual has consented; if external storage or access was for an allowed disclosure; if external storage or access was for collecting amount owed to BC or a local government



Data Residency



The New Rule:

- Disclosure of personal information outside of Canada allowed
- Only permissible if done “in accordance with the regulations, if any” made by the responsible minister

Grounds to Disregard Access Request

- **FIPPA Section 43**: allows a public body to ask permission from the OIPC to ignore requests
- **Proposed New Grounds**:
 1. Requested record is available elsewhere, or has been previously disclosed to requester
 2. Request is so broad in scope that it would unreasonably interfere with the public body's operations

A guide to tricky areas of FOI practice

NAVIGATING FIPPA

Section 43 – Systematic and Vexatious Requestors

- A single persistent applicant can be extremely taxing on staff and resources
- Before seeking relief, an FOI request needs to have been made
- The relief threshold is very high
- Can apply prospectively, but usually time-limited and not longer than a year
- Rare to prohibit all requests, but can limit number of open requests or hours spent by public body

Section 43 – Recent Cases

Order F21-02: <i>City of Nanaimo</i>	Order F21-31: <i>District of Kent</i>
A former City employee was in the process of filing complaint against the City and other individuals; made 23 access requests	A former district employee had resigned, alleging a toxic work environment; made 59 access requests
Held: the City’s application for section 43 relief was denied	Held: the District’s application for section 43 relief was denied
Reasons: <ul style="list-style-type: none">• “Repetitious” interpreted narrowly• Required extensive evidence of prior record disclosure to requester• Limited weight given to requester’s past conduct and character• City’s <i>in camera</i> evidence given less weight	Reasons: <ul style="list-style-type: none">• Requester withdrew majority of requests prior to adjudication; adjudicator’s decision based only on the 14 remaining requests• Applicant not prohibited from making withdrawn requests again; District would have to reapply for section 43 relief

Section 23 – Third Party Notice

- Only applies to information that may be protected under section 21 or 22 (but informal consultation always a possibility)
- Decision to disclose information potentially protected under section 21 or 22 → **must** notify third party
- Decision to refuse disclosure under section 21 or 22 → **may** notify third party

Section 21 – Third Party Business Interests

Section 21 Three Step Analysis:

Step one:	Determine whether the records would reveal the third party's trade secrets, or their commercial, financial, labour relations, scientific or technical information ("Business Interests")
Step two:	Determine whether the Business Interests information was supplied to the public body in confidence
Step three:	Determine whether disclosure of the confidentially supplied Business Interests would reasonably be expected to result in harm to the third party, as defined in FIPPA section 21(1)(c)

Section 21 – Recent Cases

■ Order F20-55, BCIT:

- **Basic rule:** contractual information isn't "supplied"
- **Exceptions:** non-negotiable information; information enabling accurate inferences about supplied information

■ Order F21-29, BC Pavilion Corporation:

- Information provided unilaterally by one party is not automatically considered supplied

■ Order F21-15, City of Vancouver:

- Information can be provided by a source other than the third party and still be supplied in confidence

Section 22 – Third Party Privacy

Section 22 Four Step Analysis:

Step one:	Determine whether the information in dispute is personal information
Step two:	Determine whether any s. 22(4) circumstances apply (if yes, disclosure <u>not unreasonable</u>)
Step three:	Determine whether any s. 22(3) presumptions apply (if yes, disclosure <u>presumed unreasonable</u>)
Step four:	Consider the impact of disclosure in light of all relevant circumstances (including s. 22(2) factors)

Section 22 – Recent Cases

■ Order F21-28, UBC

- Section 22(4)(e) applies to:
 - “objective, factual statements about what the third party did or said in the normal course of discharging her or his job duties, **but not qualitative assessments or evaluations of such actions.**”

■ Order F21-17, BC Transit

- Exempt vs. non-exempt employment information:
 - Employment, occupational, or educational history – **presumed unreasonable** per s. 22(3)(d)
 - Job duties in the normal course of work-related activities – **not unreasonable** per s. 22(4)(e)

Commercial Applicants

- **Definition of commercial applicant:**

- “A person who makes a request for access to a record to obtain information for use in connection with **a trade, business, profession or other venture for profit.**”

- **Common commercial applicants:**

- Lawyers, journalists, insurance adjusters, developers

- **Maximum fee:**

- Actual cost to the public body of providing service (which may include employees’ hourly wage and benefit load)

Questions?



Contact Information

David Loukidelis QC

Associate Counsel

Email: loukidelis@younganderson.ca

Tel: (604) 689 7400

James Barth

Articled Student

Email: barth@younganderson.ca

Tel: (604) 689 7400

Amy O'Connor

Lawyer

Email: oconnor@younganderson.ca

Tel: (604) 689 7400