CCPA
CANADIAN CENTRE
for POLICY ALTERNATIVES
BC Office

Submission to the Special Committee to Review the British Columbia Freedom of Information and Protection of Privacy Act

March 25, 2022

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The Canadian Centre for Policy Alternatives BC Office (CCPA-BC) welcomes this opportunity to submit its views to the Legislative Committee to Review the Freedom of Information and Protection of Privacy Act (FIPPA).

The CCPA-BC is an independent, non-partisan research institute concerned with issues of social, economic and environmental justice. Our research and policy documents are produced both directly by CCPA-BC staff and by research associates working in academic institutions and in community and labour organizations. In the past year, CCPA-BC has produced work on areas such as the environment and energy, the provincial economy, housing, and the impacts of COVID-19 on BC's labour market (among other issues). The CCPA believes that in a democratic society it is critical that there be a free exchange of ideas with respect to policies chosen by government. Such a free exchange of ideas must be informed by information that frequently is only produced and held by government.

Keith Reynolds is a long-time research associate with the Canadian Centre for Policy Alternatives, where he has written on the role of legislative officers in government accountability and other governance issues. He has served as a Board member for both the National CCPA organization and the BC Office. He has a longstanding interest in Freedom of Information issues and authored the CCPA-BC's submissions to the Legislative Review Committee in 2010 and 2016. Keith's interest in this field also led to his election as a Director with the BC Freedom of Information and Privacy Association in 2012. While this presentation covers many of the same issues as those raised in the presentation by the BC Freedom of Information and Privacy Association, this submission reflects only the views of the CCPA. Keith has a Masters Degree in Public Administration from Queen's University. He has worked for all three levels of government, for two unions and as a private consultant.

Introduction

British Columbia's Freedom of Information and Protection of Privacy system is in trouble. Once considered a world leader, over the years judicial decisions have undermined important provisions and exemptions covering things like advice, Cabinet secrets, the financial interest of public bodies and the interest of third parties. These have now become black holes of information.

In Canada, most freedom of information (FOI) regimes have timelines of 30 calendar days. BC has a timeline of 30 business days (42 calendar days) but significant extensions are permitted. Even with these extensions, the government only meets those timelines in 85% of cases. The only way that figure can be achieved is with the patience of requestors, whose permission to extend timelines is routinely sought. Indeed, voluntary extension by requestors has become the single biggest reason given for timeline extensions.

With the passing of Bill 22 last November, BC became one of a minority of jurisdictions in Canada to require an application fee for making an FOI request. BC's $10 fee is more expensive than in 11 other Canadian jurisdictions. This comes after other jurisdictions have reduced their fees and charges. New Brunswick removed all fees (application and processing) in 2011, in conjunction with a major overhaul of provincial access and privacy legislative provisions. The rationale was to support access and transparency. Nova Scotia's $25 fee was reduced to $5 in 2009. Newfoundland and Labrador removed its $5 application fee in 2009 and now only charge for locating material after 15 hours.[1]

It is clear from the BC government's statements that the $10 fee was introduced because it was felt that a very small group of users was abusing the system with large numbers of requests. The solution was to punish all users irrespective of their ability to pay or to the public interest of the request. The legislation forbids fees to be waived, something the Information Commissioner said at the time troubled him. Three jurisdictions in Canada permit the fee to be waived.

There could have been an attempt at balance in the legislation. Over the years Legislative Review Committees have consistently offered suggestions for improvements. The most important of these were not included in Bill 22. Similarly, BC political parties have also made commitments to changes in the legislation that have not been met.

In recent months we have seen well-funded demonstrations across Canada opposing government actions to protect the population at a time of pandemic. While those participating in these actions are a small fraction of the population, trust in government more broadly has declined. A Leger poll in May 2021 found "there has been a significant erosion of trust in government and public health bodies as a result of the pandemic." More than 60% of respondents said their trust in the federal government because of the pandemic had declined either somewhat or a lot.[2]

British Columbia fared better than other provinces in this poll, but even here, more than 20% of respondents said their trust had been eroded a lot.

Regardless of how we may feel about government measures or the degree of transparency around them, many of our citizens believe there is a problem. Transparency breeds trust and a better functioning Freedom of Information and Protection of Privacy Act (FIPPA) is a part of this.

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[1] British Columbia Open Information, Freedom of Information request CTZ-2021-14645, published February 9, 2022, https://www2.gov.bc.ca/enSearch/detail?id=26EE74C124B8476EA280E7A3C823A2D8&recorduid=CTZ-2021-14645&keyword=14645

[2] Leger Polling, May 2021 https://leger360.com/surveys/covid-19-and-trust-a-postmedia-leger-poll/

Overview of issues

Part 1: The Committee should place a priority on issues where the government has made a commitment to making changes but to this point has not done so. This would include:

- Including duty to document in FIPPA;
- Imposition of penalties;
- Amendments to Cabinet confidence provisions;
- Amendments to advice to government provisions;
- Including subsidiary organizations under FIPPA; and,
- Making the Legislature subject to FIPPA and other provincial laws.

Part 2: The Committee should also pay particular attention to new provisions in Bill 22 since the public has not yet had an opportunity to present its views on these changes. This would particularly refer to:

- Data residency; and,
- The application fee.

Part 3: Additional key matters dealt with in this submission are:

- Barriers to Freedom of Information for First Nations;
- The use of regulations;
- Delays in responding to requests;
- Proactive disclosure; and,
- Technology.

Part 1: Issues on which the government has promised to act but failed to do so

In 2017, in response to a survey by the BC Freedom of Information and Privacy Association, the province's three major political parties made commitments to changes in the FOI legislation they agreed were necessary.[3] The following are some of the points addressed.

Duty to document

In its 2016 report, the Committee reviewing FIPPA placed an emphasis on the duty to document decisions in government. At the time BC's Information and Privacy Commissioner stated her preference that such a duty be placed in FIPPA rather than in the Information Management Act (IMA). The Commissioner said, "The IMA only applies to ministries and designated government agencies whereas FIPPA applies to all public bodies. Further, there is an integral connection between the duty to document and access rights. Last, FIPPA contains the oversight framework that is needed to ensure that the duty to create and retain records has the appropriate oversight."[4]

The Committee in 2016 accepted this advice and recommended that a duty to document be added to FIPPA, rather than the Information Management Act.

During the 2017 provincial election the survey on access to information submitted to the three major political parties included the following question on duty to document:

> Will your government act on the Commissioner's recommendations to put a "duty to document" in the Freedom of Information and Protection of Privacy Act?

To this question, the BC NDP, which would then form government said, "Yes. The BC NDP has introduced legislation multiple times, including the Public Records Accountability Act, 2017, to strengthen Freedom of Information legislation and create a positive duty to document government actions for greater accountability to the public."

Earlier in 2017 the previous government had introduced a duty to document; however, it was in the Information Management Act, Not the Freedom of Information and Protection of Privacy Act. Two years later, the Province's Information Commissioner issued a statement saying:

> As it now stands, the Information Management Act designates the Minister herself as primarily responsible for ensuring her Ministry's compliance with the duty to document its decisions. Citizens would find it very surprising that, on its face, the current law makes a Minister responsible for investigating their own conduct. This is unacceptable and falls short of the independent oversight required to ensure public trust and accountability.
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> It is time for government to amend FIPPA to ensure that the vitally important duty to document has the oversight of my office, which is independent of government. The public interest requires this.[5]

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[3] UPDATE Election 2017: BC Party Leaders' Responses to FIPA's Election Questionnaire, BC Freedom of Information and Privacy Association, May 3, 2017, https://fipa.bc.ca/update-election-2017-bc-party-leaders-responses-to-fipas-election-questionnaire/

[4] British Columbia, Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act, May 2016, page 24

5 BC Information and Privacy Commissioner, Statement regarding independent oversight over government's duty to document and use of personal communication tools, May 17, 2019, https://www.oipc.bc.ca/news-releases/2312

As well, we believe the Information Management Act lacks the ability for oversight and enforcement, nor does it apply to the full range of public bodies covered by FIPPA.

RECOMMENDATION 1

The Committee should reiterate its 2016 recommendation that a duty to document be included in the Freedom of Information and Protection of Privacy Act.

Penalties

During the 2017 provincial election the survey on access to information submitted to all three major political parties included this question:

> Will your government support the creation of penalties against those who interfere with information rights?

The NDP responded, "Yes. Our proposed legislation creates the duty to investigate instances of unauthorized destruction of government information and removes legal immunity from officials who fail to disclose documents, making contraventions of the Act an offence subject to fines of up to $50,000."

Bill 22 acted on this commitment with wording saying, "A person who wilfully conceals, destroys or alters any record to avoid complying with a request for access to the record commits an offence." While this is an important improvement, the legislation needs to go further. While people and organizations may now be penalized for interfering with records during the time a request is active, there is still no penalty if a choice is made to fail to create records or if records are interfered with prior to a request being made.

RECOMMENDATION 2

The Committee should recommend government include in FIPPA penalties for deliberately failing to create records or for interfering with records when an active Freedom of Information request is not in place.

Section 12 (Cabinet confidences)

The CCPA has the same concerns about the broad use of Cabinet confidentiality that informed our presentations to the Committee in Committee reports in 2010 and 2016. Cabinet confidentiality is a mandatory exemption, yet there are a range of subjects that might be released dealing with background information to decisions. Despite this, Section 12 is often used for blanket exemptions.

Other provinces have been able to function with a Freedom of Information regime that is more permissive with respect to Cabinet confidences.

The Nova Scotia Act makes the release of such information discretionary. In the Nova Scotia legislation, while the information "may" be refused, it is not compulsory.[6]

[6] Province of Nova Scotia, Freedom of Information and Protection of Privacy Act, Section 13, https://nslegislature.ca/sites/default/files/legc/statutes/freedom%20of%20information%20and%20protection%20of%20privacy.pdf

Moreover, Nova Scotia also requires the release of such information after 10 years, rather than the 15 years in BC's FIPPA. This appears to have been accomplished without damage to necessary areas of Cabinet confidentiality in that province and there is no reason to suggest the result would be different here.

In Newfoundland and Labrador, the Clerk of the Executive Council "may disclose a cabinet record or information that would reveal the substance of deliberations of Cabinet where the Clerk is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception."[7]

In its 2017 survey, the BC Freedom of Information and Privacy Association asked:

> Certain sections of FIPPA that exempt records from release, specifically cabinet confidences (s.12) and policy advice (s.13) have long been criticized as overly broad and in need of change. What specific changes, if any, would you make to those sections?[8]

With respect to Cabinet confidences, the NDP said, "We also support the position of the Information Commissioner regarding Section 12: the Commissioner has clearly stated that 'the importance for our system of government of generally protecting the confidentiality of Cabinet proceedings and deliberations is beyond question' but that this should not be applied as a blanket mandatory exemption, as the BC Liberals have done, but rather that 'the government can maintain an appropriate and necessary level of confidentiality using a discretionary exception" exercised by Cabinet.' (Emphasis added)

The discussion around Bill 22 provided an example of how Cabinet confidence can lead to withholding of important information. On February 3rd, 2022, in response to a question from a Committee member, the Associate Deputy Minister of Citizen Services told the Legislative Committee to Review the Freedom of Information and Protection of Privacy Act that there had been an analysis of the impact of the introduction of an application fee on groups such as low income people. He said, "There's a lot of data that we can look at that can give a sense of how folks would be impacted by something like this."[9]

However, a response to a freedom of information request asking for similar information contained no data on how "folks would be impacted." Instead, 125 pages of material were redacted as Cabinet secrets.[10] This is important information that should be helping to inform decisions of the Committee.

In 2016 the Committee made the following recommendation:

> Amend s. 12 of FIPPA to permit the Cabinet Secretary to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees where the Cabinet Secretary is satisfied that the public interest in the disclosure of the information outweighs the reason for the exception.

While this would be an improvement, we believe the Committee should go further.

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[7] Province of Newfoundland and Labrador, Access to Information and Protection of Privacy Act, 2015, Section 27, Queens Printer, https://www.assembly.nl.ca/legislation/sr/statutes/a01-2.htm#27_

[8] British Columbia, Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act, May 2016, page 46

[9] British Columbia, Special Committee to Review the Freedom of Information and Protection of Privacy Act, Meeting, February 3, 2022

[10] British Columbia, Open Information, Freedom of Information request CTZ-2021-14645, published February 9, 2022, https://www2.gov.bc.ca/enSearch/detail?id=26EE74C124B8476EA280E7A3C823A2D8&recorduid=CTZ-2021-14645&keyword=14645

RECOMMENDATION 3

The BC government should adopt the discretionary standard for release of information covered by Cabinet confidentiality used in the Nova Scotia legislation.

RECOMMENDATION 4

The BC government should adopt the standard of 10 years for the release of information covered by Cabinet confidentiality rather than the current standard of 15 years.

Section 13 (advice to government)

Section 13 permits government to "refuse to disclose to applicant information that would reveal advice or recommendations developed by or for a public body or a minister." However, the section also stipulates a wide range of circumstances where information can be released. It stipulates a public body must not use Section 13 to refuse to release, "any factual material."

Instead, as the Information Commissioner told the Committee on February 3rd, the meaning of the terms "advice" and "recommendations" have become "Mack Truck of exceptions."[11]

The Information Commissioner advised the 2016 Legislative Review Committee that court decisions had broadened the barrier to release of information under Section 13 to include factual material. It has significantly undermined meaningful accountability expected by such legislation. As the Legislative Committee reviewing the FIPPA as long ago as 2004 said, "Based on what we heard, the Committee thinks there is a compelling case, as well as an urgent need, for amending section 13(1) in order to restore the public's legal right of access to any factual information. If left unchallenged, we believe the court decision has the potential to deny British Columbians access to a significant portion of records in the custody of public bodies and hence diminish accountability."[12]

The 2016 Committee recommended that Section 13 be amended so that the right to withhold information would no longer extend to "facts upon which they [advice or recommendations] are based; or for factual, investigative or background material; or for the assessment or analysis of such material; or for professional or technical opinions."[13]

In response to the to the 2017 survey from the BC Freedom of Information and Privacy Association, the NDP promised changes. With respect to Section 13 the NDP said, "we support the Commissioner's advice, reflected in the May 2016 report of the Special Committee to Review the Freedom of Information Act, that the meaning of this section should be restored to its original, pre-BC Liberal, intent."

Given the current government's support during the 2017 election for the Committee recommendation of 2016, we believe the Committee should reiterate that recommendation.

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[11] British Columbia, Special Committee to Review the Freedom of Information and Protection of Privacy Act, Meeting, February 3, 2022

[12] Legislative Assembly of British Columbia, 2004, Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act, page 20

[13] Legislative Assembly of British Columbia, 2016, Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act

RECOMMENDATION 5

Amend Section 13(1) of FIPPA to clarify that the discretionary exception for "advice" or "recommendations" does not extend to facts upon which they are based; or for factual, investigative or background material; or for the assessment or analysis of such material; or for professional or technical opinions.

Private organizations delivering public services and subsidiary organizations

One of the ways that public bodies have been able to avoid making information public is by spinning off separate organizations owned by the public bodies. These subsidiary organizations have been able to avoid the scrutiny of FIPPA.

The following question was put to the political parties during the 2017 provincial election:

> In 2017, the Special Legislative Committee reviewing FIPPA repeated the recommendation from the 2010 Committee that subsidiaries created by educational public bodies like colleges and universities should be made subject to the Act. Will your government make this change and if not, why?

Although this was not the case for all the questions in the survey, in this instance all three major parties agreed that this change is necessary.

The 2016 Committee went further than this and made the following recommendation:

> Extend the application of FIPPA to any board, committee, commissioner, panel, agency or corporation that is created or owned by a public body and all the members or officers of which are appointed or chosen by or under the authority of that public body.

Bill 22 made a small step in this direction which permits the Minister, in the public interest, to add groups, including corporations, to Schedule 2. The Information Commissioner voiced his concerns about leaving this completely to the discretion of the Minister. He said:

> "I am concerned, however, that this would be achieved by the Minister, using a discretionary order-making power to add an entity if the Minister concludes it is in the public interest. There are no criteria governing when this should be done. The recent concern about InBC investment corporation not being made subject to FIPPA—as it clearly ought to be—is an example of why this change does not go far enough. At the very least, I call on the government to ensure that it consults with my office about entities that could be covered."[14]

We urge the Committee to go further and to recommend the establishment of criteria in FIPPA for the addition of coverage for subsidiaries of public bodies and for private organizations delivering public services. This question has become a matter of increasing commentary by legislative officers over the years. The following are some examples.

As far back as 2004, both British Columbia's Ombudsperson and Information Commissioner raised the issue of public services being provided by private interests. According to the Ombudsperson, in the 1970s, government activities were generally carried out by government through ministries, boards, commissions and corporations under the Ombudsperson's jurisdiction. "More recently, however, government has undergone restructuring and services previously provided by the government agencies under the jurisdiction of the Ombudsman are now being

[14] British Columbia, Office of the Information commissioner, Letter to the Minister of citizen Services, October 20, 2021. https://www.oipc.bc.ca/public-comments/3592

provided through contract by non- government agencies or by new agencies created by statute to provide the service.[15]

In 2016 Quebec's Information Commissioner observed, "Given the increasingly frequent creation of these new associations between the public and private sectors, the Commission believes that organizations whose funding is largely dependent on the state must be held accountable to the public, particularly on how these funds have been used. In recent years, there has been increased citizen interest in matters concerning the administration and decision-making processes of organizations that receive public funds. Making more organizations subject to the Access Act would be an effective means of ensuring effective public access to this information."[16]

In 2015 Canada's Information Commissioner speaking to a Parliamentary Committee said there were several reasons to extend the Act. She said, "Broad coverage enables citizens to assess the quality, adequacy and effectiveness of services provided to the public and scrutinize the use of public funds. This increase in transparency, in turn, increases accountability to the public." She continued, "This particular issue has become especially pressing as governments, not just in Canada, but around the world continue
to downsize and divest services traditionally performed by the public service to the private sector. This criterion ensures that entities that act for the benefit of the public interest are subject to appropriate transparency and accountability mechanisms."[17]

RECOMMENDATION 6

At a minimum, the Committee should reiterate its 2016 finding that government extend the application of FIPPA to any board, committee, commissioner, panel, agency or corporation that is created or owned by a public body and all the members or officers of which are appointed or chosen by or under the authority of that public body.

RECOMMENDATION 7

The Committee should go further and recommend any organization that receives substantial public funds through contracts with the government and that performs a public function to carry out operations that would otherwise be done by government, to the extent of activities covered by that funding, be added to coverage of the Freedom of Information and Protection of Information Act.

[15] British Columbia Ombudsperson, Annual Report 2004, 6, bcombudsperson.ca/sites/default/files/files/Annual%20Reports/2004%20Annual%20Report%20of%20the%20Ombudsman.pdf

[16] Commission daces à l'information du Québec, Rétablir l'équilibre: Rapport quinquennal 2016, Septembre 2016, 12, our translation of the original French passage, cai.gouv.qc.ca/lancement-du-rapport-quinquennal-2016/

[17] Information Commissioner for Canada, "Striking the Right Balance for Transparency: Recommendations to Modernize the Access to Information Act," March 2015

Making the Legislature subject to FIPPA, whistle blower protection and provisions of the Public Service Act

In February 2019 three officers of the Legislature, the Information and Privacy Commissioner, the Merit Commissioner and the Ombudsperson, wrote to the Speaker of the Legislature.[18] They called for administrative functions of the Legislature to be subject to Freedom of Information legislation "as the more than 2,900 public bodies across the province are."

They also called for the Legislature to be subject to whistle blower protection legislation passed in May 2018 and for appointments of employees of the Legislature to be subject to the provisions of the Public Service Act. These recommendations followed a scandal over spending in the Legislature.

Three years ago, the response to these recommendations from the political parties within the Legislature was enthusiastic. The NDP House Leader said, ""It's my intention to see that all three of their suggestions are in fact implemented… These are good ideas and reforms."[19] He continued, "This is a minimum in terms of changes." The Liberal House Leader called these measures, "A step in the right direction," and the Leader of the Green Party said this was only the beginning of the many changes that were needed.[20]

This commitment was not met.

RECOMMENDATION 8

The Committee should recommend that FIPPA be amended to include coverage of the Legislature in respect of its institutional administrative functions, and;

That the Public Interest Disclosure Act be amended to apply to the Legislative Assembly to protect potential whistle blowers who report their good-faith concerns about possible wrongdoing or who cooperate with investigations, and;

That appointments of employees to and within the Legislative Assembly become subject to the provisions of the Public Service Act that apply to other public service appointments.

[18] British Columbia, Office of the Information Commissioner, Letter to the Speaker of the Legislature, February 4, 2019, https://www.oipc.bc.ca/public-comments/2274

[19] Transparency watchdogs call for B.C. legislature reform, Vancouver Sun, February 5, 2019, https://vancouversun.com/news/local-news/b-c-s-top-watchdogs-call-for-legislative-amendments-following-plecas-report/

[20] Ibid

Part 2: The need to consider all legislation, including recent amendments

Bill 22, passed in November 2021, brought significant changes to British Columbia's Freedom of Information and Protection of Privacy regime. While these changes are recent, they are, nevertheless, part of the entire Act which the Committee has been asked to review. Because these changes are so important, we believe that the Committee should express its opinion on them and their effect on the legislation.

While the government conducted considerable consultation in advance of introducing this legislation, not all the results of this consultation have been made public. The Committee will provide an opportunity for British Columbians to offer their views on these recent changes in the same way they will be able to offer their views on all matters relating to the legislation.

Data Residency

There has been a longstanding concern regarding the protection of the personal information of British Columbians if it is held outside of the jurisdiction of Canada. In 2004 BC's Information Commissioner undertook a study specifically examining whether the US Patriot Act permitted US authorities to access the personal information of British Columbians and the implications of this question.

The Commissioner concluded that that this did represent a risk to personal information held abroad and recommended that FIPPA be amended to "prohibit personal information in the custody or under the control of a public body from being temporarily or permanently sent outside Canada for management, storage or safekeeping and from being accessed outside Canada."[21]

These protections were subsequently included in FIPPA by the government of the day.

The issue was discussed again by the 2016 Legislative Committee reviewing the legislation. The Committee noted that several agencies had expressed concerns that the existing data sovereignty requirement affected their business activities and day-to-day operations. Speaking to the issue at the time, the Information Commissioner said, "constitutional protection does not follow our data when it leaves the country, whether it goes to the US and it's in the hands of the cloud provider or elsewhere. Essentially, the concerns that led the Legislature to make the data localization provision remain unchanged."[22]

While recognizing the concerns raised regarding the issue, the Committee recommended that data sovereignty provisions in the legislation be retained.

A year later, in 2017, the political parties were asked in the survey by the BC Freedom of Information and Privacy Association whether data sovereignty for British Columbians would continue to be protected given the impending renegotiation of the North American Free Trade Agreement (NAFTA).

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[21] British Columbia, Office of the Information and Protection of Privacy Commissioner, 2004, Privacy and the USA Patriot Act: Implications for British Columbia Public Sector Outsourcing, page 19, https://www.oipc.bc.ca/special-reports/1271

[22] Legislative Assembly of British Columbia, 2016, Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act, page 29

The NDP, which would soon form government, responded as follows:

> "A BC NDP government will defend the privacy of British Columbians against any move by the Trump administration to undermine these rights and will maintain BC's requirement that government and other public sector data be stored in Canada. Recent steps in Congress to weaken U.S. privacy provisions only reinforces the need for BC to remain firm."

In 2020 the provincial government introduced measures overriding the obligation that private information of BC residents must be held and accessed in Canada. The government said in a prepared statement:

> The protection of privacy is a top priority for the B.C. government, and so is protecting the health and safety of British Columbians during the novel coronavirus (COVID-19) pandemic…The public-health emergency has made it necessary for government to temporarily enable the use of technologies that would otherwise be restricted under FOIPPA's current rules...The ministerial order temporarily permits health-care bodies like the Ministry of Health, the Ministry of Mental Health and Addictions, and health authorities to use communication and collaboration software that may host information outside of Canada. The order also enables B.C. schools and post-secondary institutions to provide online learning for students who have been displaced due to the need for physical distancing. [23]

This was also a period in which the government was conducting consultations on the Freedom of Information and Protection of Privacy Act. These consultations included meetings with interest groups, a survey hosted by the government and polling by Ipsos.

Not surprisingly, pressure to eliminate data residency requirements came from the same people who had pressed for the change before the 2016 Legislative Review Committee.

As part of its consultations the government also conducted its own survey (GovTogetherBC) and had a poll of the general public performed by Ipsos.[24]

In its own GovTogetherBC survey 59% of respondents reported their top priority was that "Government data is hosted/stored in Canada," and 86% listed Canadian data residency among their top three priorities. The Ipsos poll was less supportive but even there nearly 60% of respondents listed data sovereignty among their top three priorities.

Bill 22 eliminated the requirement that the personal information of British Columbians be held and accessed in Canada.

While the 2016 Legislative Review Committee had recommended keeping the data sovereignty provisions it had also discussed other mechanisms that allow some storage of information abroad. It quoted a submission from the Canadian Bar Association saying the legislation "should be amended to give public bodies the discretion to store or access personal information outside Canada under limited circumstances where the benefit of doing so clearly outweighs the potential harm."[25]

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[23] British Columbia, Order enables broader use of tech in COVID-19 response, Information Bulletin, March 29, 2020, https://news.gov.bc.ca/releases/2020CITZ0005-000588

[24] British Columbia, Open Information Portal, Freedom of Information Request 14578, published February 3, 2022

[25] Legislative Assembly of British Columbia, 2016, Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act, page 29

What was not discussed in the debate of Bill 22 is, first, exactly what provisions will be put in place to protect the personal information of British Columbians held abroad, and second, whether the government considered less sweeping measures, such as these proposed by the Bar Association in 2016.

In effect, the responsibility for the protection of personal privacy in terms of residency has been downloaded to local governments and other public bodies. This may work very well for large post-secondary institutions, municipalities and even school boards that have the resources to carry out what may be very complicated assessments. However, there are more than 50 municipalities in British Columbia with populations smaller than 2,000.[26] Vancouver and Surrey may have no problem dealing with this but what about Masset and Radium Hot Springs? As the president of the BC Teachers Federation told this Committee on March 4, 2022, "We understand that school districts have various capacities. We have 60 school districts. The larger school districts are better able to have staff dedicated to privacy issues than smaller or mid-sized districts."[27] Smaller public bodies should be provided with the resources they need to adequately protect the personal information they hold.

At a minimum, public bodies should only be allowed to permit personal information to be stored or accessed in jurisdictions that have personal information protections equal to or higher than those in Canada.

RECOMMENDATION 9

That the Committee recommend the data sovereignty provisions, which have been removed from the BC Freedom of Information and Protection of Privacy Act, be restored at least until such time as detailed measures have been outlined to protect the personal information of British Columbians abroad, and until it is demonstrated that less sweeping removal of protections could have met the desired requirements of public bodies.

RECOMMENDATION 10

If Canadian data residency requirements are not restored, as the Information Commissioner has suggested, the Committee should recommend the government require public bodies to assess whether there is a reasonable alternative in Canada to a proposed export of personal information.

RECOMMENDATION 11

If Canadian data residency requirements are not restored, the Committee should recommend that the provincial government make resources available to assist public bodies with the protection of personal information in terms of data residency.

RECOMMENDATION 12

The Committee should recommend that public bodies only be allowed to permit personal information to be stored or accessed in jurisdictions that have personal information protections equal to or higher than those in Canada.

[26] British Columbia, Ministry of Municipalities, Municipal Statistics, https://www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework/statistics/statistics

[27] Legislative Assembly of British Columbia, Hearing of the Special Committee to Review the Freedom of Information and Protection of Privacy Act, March 4, 2022

Introduction of an Application Fee

For the first time in the 30 years since the BC Freedom of Information and Protection of Privacy Act was introduced, with the passage of Bill 22 in November 2021, British Columbians now must pay a fee to make a Freedom of Information Request for information that is not personal in nature. Personal information requests do not require a fee.

When the legislation was introduced in October, the Minister said the fee would be modest, between $5 and $50, and would not be a deterrent to citizens. The fee was set by regulation at $10 on November 25th, 2021, hours after the legislation was passed in the Legislature.

Part of the reason for the introduction of the fee was the sense that the system was being abused by a small group. Both the Opposition in the Legislature and at least one journalist had their number of applications discussed. In a September 24, 2021, Decision Note prepared for the Minister of Citizen Services, it says, "In FY2020/21, one FOI requester was responsible for 56% of all general FOI requests."[28]

The issue of whether the introduction of the fee was intended to deter people from making applications was discussed during debate on the legislation, in the media and in government documents that have become available through Freedom of Information requests.

At least one document obtained through Freedom of Information requests indicated that in general terms, costs for the process had a significant impact on the decision whether to proceed with the request. In a Decision Note to the Minister dated September 24, 2021, the observation is made that, ""In most cases, once a fee estimate has been provided to an applicant, the request is abandoned…" The author of the note says only 15% of general requests proceed once a fee estimate is given and suggests this is because "the request was not genuinely required," rather than suggesting cost was a barrier.[29]

Statements from Premier Horgan made the intention to deter requests clear. As quoted in the Abbotsford News, the Premier pointed to an "extraordinary proliferation of information requests from political parties."[30] In the same article he acknowledged that steps might need to be taken to protect individual requesters, saying, "'vigorous debate' has begun, and he would consider changes such as five free applications a year to serve most needs and deter a few frequent filers."

The possibility of introducing this fee had been discussed with interest groups and other public bodies as part of the government's consultation process before the introduction of Bill 22.

In a June 24, 2021 roundtable with local governments there was support for such a measure, including one attendee who said bluntly, "A small application fee will hopefully deter folks from requesting just because…" However, attendees also raised concerns about the equity of an application fee and said not having such a fee "promotes the concept of open and accessible government." They also raised concerns about the administration of such a fee and the cost of administering it.[31] Even among the interest groups contacted, support for an application fee appears to have been less than overwhelming.

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[28] British Columbia, Open Information Portal, Freedom of Information Request 14597, published February 8, 2022

[29] British Columbia, Open Information Portal, Freedom of Information Request 15402, published February 3, 2022, page 12

[30] Fletcher, Tom, B.C. premier defends freedom of information fee, may not be $25, Abbotsford News, October 21, 2021

[31] British Columbia, Open Information Portal, Freedom of Information Request 14571 published January 6, 2022

Among the public, there was less support for an application fee. The government conducted its own online survey (GovTogetherBC) and a province-wide poll conducted by Ipsos.[32]

The GovTogetherBC survey used the questionable methodology of forcing respondents to place their priorities in order of importance (is it more important to get accurate information or to get it on time?). But even using this methodology, nearly half of respondents listed getting their information at no cost or a low cost among their top three priorities.

The Ipsos poll of the public was even more direct. Nearly 30% of respondents listed cost as their top priority and nearly 80% listed cost among their top three priorities. The Ministry of Citizens' Services FIPPA 2021 Amendments Stakeholder Consultation Overview, April – August 2021 concluded, "The results of the public survey indicate a general concern with the parity of access, as many participants feared that access to information held by government would be limited to those who can afford it."[33]

As well as the public, a range of civic organizations expressed concerns about the deterrent effect of the application fee including the CCPA-BC, PIVOT Legal Society, Democracy Watch, the BC Civil Liberties Association, West Coast Environmental Law and the Safe Schools Coalition BC.

The Province's Information Commissioner also saw a problem saying, "Application fees pose a real barrier for many who seek information that should be readily available to the public…I am unable to understand how this amendment improves accountability and transparency when it comes to public bodies that operate in a free and democratic society."[34]

Given the negative reaction from the public and organizations, it would be useful to know what the impact of the application fee is likely to be, particularly on groups such as the media and low-income British Columbians. This information apparently does exist.

On February 3rd, 2022, Committee member MLA Adam Olsen asked in this Committee if imposing the $10 fee might cause a problem. "What investigation was done by the ministry to ensure that they were not limiting access to public information? People who can't afford a fee…" Olsen inquired.

The Associate Deputy Minister (ADM) of Citizen Services responded:

> There was quite a bit of analysis that went into this. Obviously, to make legislative change at all requires significant analysis. There are a number of mechanisms generally that have to be taken into consideration because it is a very dynamic ecosystem in this space… As I said, as part of the analysis, there are a number of things that go into that analysis. It includes looking at how things have worked in other provinces, looking at how other fees have worked. There's a lot of data that we can look at that can give a sense of how folks would be impacted by something like this, as well as, again, building that into what other mechanisms we have to share information more broadly across the system.[35]

However, as noted earlier, the same information was requested through FOI request 14645 which was made public on the government's Open Information Site on February 9, 2022. All the information in response to this question was redacted either as being a Cabinet secret, or as being advice to government.

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[32] British Columbia, Open Information Portal, Freedom of Information Request 14578, published February 3, 2022

[33] Ibid

[34] MacLeod, Andrew, BC's FOI Changes Widely Condemned, Called 'Morally Bankrupt', The Tyee, October 25, 2021

[35] British Columbia, Special Committee to Review the Freedom of Information and Protection of Privacy Act, February 3, 2022

RECOMMENDATION 13

That the Committee ask the government to share with the Committee the result of any research that has been done on potential impacts on low-income British Columbians, the media and other groups of the introduction of an application fee, and;

That the Committee ask the government to share with the Committee alternatives to a universal application fee which were considered to deal with problems identified by the government.

RECOMMENDATION 14

The Committee should recommend to the government that the application fee stipulated in FIPPA be set to $0 by regulation until such time as the fee can be eliminated from the legislation, and;

Failing this that the Committee recommend the government amend FIPA to provide an alternative solution to the issue of industrial scale users, including greater proactive disclosure.

RECOMMENDATION 15

If the application fee is to be retained, that the Committee recommend the government permit the application fee to be waived in the public interest or in the case that the requestor lacks financial resources.

Part 3: Additional Key Issues

Barriers to Freedom of Information for First Nations

On March 16, 2022, Chief Judy Wilson, representing the Union of BC Indian Chiefs (UBCIC), presented the views of the organization to this Committee. What follows is taken from the transcript.

> "First Nations involved in the research and development of specific claims heavily rely on B.C.'s freedom-of-information process to obtain records from B.C. public bodies. Access to these records is essential in order for First Nations to substantiate their claims against the Crown. Our researchers routinely access thousands of records from provincial government departments and agencies for this purpose. For this reason, the B.C. specific claims working group advocates at both federal and provincial levels to remove existing barriers to First Nations' access to information.
>
> "Provincial freedom-of-information legislation has direct impacts on the ability of First Nations to achieve justice through government mechanisms of redress, a right articulated in Article 28 of the United Nations declaration on the rights of Indigenous people. Just and fair redress for historical losses is a legal right and is also a political imperative if we are to move toward reconciliation. Reconciliation has been deemed by the court and all levels of government to be in the public interest and a political priority.
>
> "We have identified key barriers First Nations experience when attempting to obtain provincial government records through the freedom-of-information mechanism. These include prohibitive fees and the denial of request for fee waivers, prolonged delays and the unreasonable use of many exceptions to disclosure, and widespread failures to create, retain and transfer of records. These barriers must be specifically and systematically targeted such that First Nations' right to redress are advanced and protected.

Chief Wilson also raised concerns that the UBCIC had not been consulted with respect to the changes in Bill 22. Further, she called for penalties for public bodies that do not meet legislated timelines, an issue dealt with earlier in this submission.

The Canadian Centre for Policy Alternatives supports the positions taken by Chief Wilson and the remedies she has proposed. The following recommendation is based on her wording.

RECOMMENDATION 16

The Committee should recommend that the provincial government take immediate steps to meaningful, direct dialogue with First Nations as a priority to eliminate the barriers to accessing their information through Freedom of Information, required to substantiate their claims for purposes of redress for historical losses. This work must uphold First Nations' human rights as articulated within the UN declaration and outlined in DRIPA.

The use of Regulations

We completely agree with the Information Commissioner in his comments on the use of regulation in Bill 22.

> An overriding concern with Bill 22 is the unknown impact of key amendments because their substance will only be filled in through regulations, about which we know nothing. This is of greatest concern in relation to the proposed repeal of the data residency requirements in Part 3 of FIPPA, discussed below. It is crucial

> for government to disclose now what it intends to do to protect the personal privacy of British Columbians whose personal information may be exported outside Canada.
>
> On this point, I note that it is quite routine for governments to disclose draft regulations for public consultation and legislative scrutiny. For example, the federal government published draft regulations under Canada's Anti-Spam Law, giving legislators, regulators, and stakeholders ample opportunity to comment on them. There is no legal or constitutional impediment to doing so here, and I urge you to publish any draft regulations, or details of regulations, for public comment. The issues at stake—particularly respecting the data residency amendments—are too important, and meaningful debate depends on everyone knowing what is intended.[36]

To the Commissioner's concern about regulations regarding data residency, we would add the use of the application fee and the strictly discretionary ability to add organizations to Schedule 2.

RECOMMENDATION 17

That the Committee strongly urge the government to disclose draft regulations for public consultation and legislative scrutiny to ensure both legislators and the public are fully aware of the intention of amendments to FIPPA.

Delays in responding to requests

In its February 3rd presentation to the Committee, the Ministry of Citizens' Services reported there was an 85% "On time response for FOI requests."[37]

This number may seem commendable, but there are other issues. First, if the government is receiving 14,000 requests a year, that means that more than 2,000 are not dealt with "on time."

In 15% of cases, public bodies fail to meet legislated timelines even though with a timeline of 30 business days, or 42 calendar days for the initial period, BC has the longest timeline in Canada for such responses. Taking an extension of another 42 business days is permitted with virtually no oversight.

Government documents report that 13% of requests result in a fee estimate[38] and that among this group, only 15% of requests proceed when a fee estimate is given.[39] This results in more than 1,500 additional cases where a response was not provided at all.

Further, it appears to have become standard practice when a public body will not meet the timeline to simply email the requestor and ask them to consent to an extension. In 2017/18 the requestor giving consent was provided the reason for an extension in only 15.6% of cases where the initial timeline was not met. By 2019/20 this had risen to

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[36] British Columbia, Office of the Information commissioner, Letter to the Minister of citizen Services, October 20, 2021. https://www.oipc.bc.ca/public-comments/3592

[37] British Columbia, Ministry of Citizens' Services, FOIPPA Overview, report to the Special Committee to Review the Freedom of Information and Protection of Privacy Act, February 3, 2022, page 4

[38] British Columbia, Open Information, FOI Request CTZ-2021-1465, page 20

[39] British Columbia, Open Information portal, FOI Request CTZ-2021-15402, page 13

44.4%. This was the largest single reason given for extensions in 2019/20, affecting 2,142 requests.[40] The Commissioner has noted that compliance by requestors has now become the largest single reason for taking an extension.

Does this mean that FOI requestors have simply become increasingly compliant? Or does it mean that requestors are prepared to allow extensions without a reason being given in order the avoid the even more complex complaint process to the Commissioner? Or does it mean that many unsophisticated requestors are simply prepared to take the advice of the public body?

All told—between cases where the Ministry simply failed to meet its timeline, cases that were abandoned after receiving a fee estimate, and cases that were extended not because of volume of material or third parties to be consulted but only because of compliance of the requestor—5,500 cases out of the 14,00 requests in the year or nearly 40% were not completed at all or failed to meet the response timeline.

Just in terms of failure to meet timelines alone, in a 2020 report, the Information Commissioner noted that in thousands of cases timelines were not met and the number of cases appeared to be increasing.

The Commissioner noted that the percentage of such cases that were non-compliant had fallen to 10% in 2017/18 but risen again to 17% by 2019/20.

The Commissioner's report also pointed out that the percentage of requests completed in the first 30 days (42 calendar days) had fallen to 55% in 2019/20 from a completion rate high of 69% in 2017/18. By 2019/20 only 77% of requests had been completed in 60 days, down from a high of 90% 10 years ago.

Public bodies have the initial 30 business days to meet a request but may then take a second 30 days for a variety of reasons. There is almost no oversight of this extension. But even with this flexibility to extend, many extensions are taken without a reason being given.

The Commissioner said with respect to timelines being extended:

> In thousands of cases over the past three years—and this phenomenon that has gone on for many years—government failed to seek such permission. In these cases, it simply gave itself more time to answer a request without any lawful authority. This state of affairs is surely obvious to government. It is reasonable to conclude that this long-standing problem is caused by, at best, a knowing disregard for what the law requires.[41]

In terms of meeting legislated timelines, British Columbia's Freedom of Information and Protection of Privacy Act is broken.

In its briefing to the Committee by the Ministry of Citizens' Services on February 3rd dealing with the introduction of an application fee, the issue is described as "People are waiting too long to get response for their FOI requests."[42] Despite this, nothing was done in Bill 22 to guarantee that people will be able to have confidence their requests will be dealt with in a timely and responsible way. The Committee can play an important role in giving people this confidence with its recommendations to the government.

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[40] British Columbia, Freedom of Information and Privacy Commissioner, Now is the Time: A report card on government's access of information timeliness, April 1, 2017 – March 31, 2020, September 2, 2020, page 18

[41] British Columbia Fre,edom of Information and Privacy Commissioner, Now is the Time: A report card on government's access of information timeliness, April 1, 2017 – March 31, 2020, September 2, 2020, page 22

[42] British Columbia, Ministry of Citizens' Services, FOIPPA Overview, report to the Special Committee to Review the Freedom of Information and Protection of Privacy Act, February 3, 2022, page 11

RECOMMENDATION 18

The Committee should recommend that the government reduce the time limits for responding to 30 calendar days in keeping with other Freedom of Information regimes in Canada.

RECOMMENDATION 19

The Committee should recommend that in the case of a public body failing to meet legislated time limits, any fees connected to the request be waived with funds that have already been paid returned to the requestor.

RECOMMENDATION 20

The Committee should recommend that the Commissioner's Office randomly audit the appropriateness of the first 30-day extension taken by public bodies, and;

That the Commissioner's Office Monitor reliance on time extensions taken with applicants' consent and determine if this is being used only to extend timelines when other reasons permitted under the Act do not exist.

RECOMMENDATION 21

That the Committee recommend the government initiate financial or administrative penalties for public bodies that fail to meet obligations with respect to timelines.

The above recommendations deal only with timelines applying to public bodies. However, one other problem of timelines exists and brings discredit to the whole Freedom of Information process. While the Commissioner's Office has the power to review Freedom of Information outcomes the situation is stalled. Appeals for review of information withheld under Sections 12 or 13 filed in February will not even begin to be considered until October, eight months later. The process is delayed further with possible written hearings and then time for the ruling to be produced.

The provincial government has noted the dramatic increase in requests in recent years and as these work their way through the system they also affect the Commissioner's Office. In the Commissioner's Budget and Service Plan he reported:

> The OIPC continues to address the investigator's backlog within our current resources by realigning internal resources and by streamlining case file management and administration processes. OIPC case review officers and investigators also continue to seek ways to become efficient at handling more files.
>
> By contrast however, the demand for adjudicated inquiries continues to grow beyond what the OIPC can manage within existing resources. The adjudication team's streamlining of processes, and the internal reallocation of resources to contract adjudicators, has resulted in a record 104 closures last year, and we are on track for the same this year. Still, individuals and public bodies can currently expect to wait 18 months

to have their case decided. This is too long of a wait, and a projected backlog of 235 inquires at the end of this fiscal year is expected to increase that wait time to nearly 24 months.[43]

RECOMMENDATION 22

That the Committee recommend the government provide sufficient additional funding to the Office of the Information and Privacy Commissioner to show a clear path to reductions of timelines for investigations and adjudications.

Proactive Disclosure

The government has reported receiving 14,000 Freedom of Information requests in a year. Many of these came from a few users making many requests. The question that arises is, how many of these requests are routine requests to get the same information?

Important steps have been taken to increase the volume of data that is proactively released, however, the number of requests being received indicates further steps are needed.

For example, during debate on Bill 22 in the Legislature MLA Bruce Banman raised the following point:

> Each month the opposition files a request to each ministry and the Premier's office for a list of ministerial briefing notes, issue notes and decision notes. That accounts for 25 requests. Access to the briefing notes on those lists—another 25 follow-up requests must be filed. Annually to get those simple things — which the minister, I think, said were proactively released—it adds up to 600 requests per year.
>
> "Under this new regime, to pay all of those application fees, it is now going to cost the taxpayers of British Columbia $15,000 a year just to allow members of the opposition to fill our fundamental role in holding government to account at the most basic level.[44]

In response to this in the Legislature the Minister acknowledged that the issue of briefing notes was "a good example," and promised, to "take a look at things like the briefing notes for a proactive disclosure moving forward." It would be useful to have an analysis of those 14,000 requests to discover how many other such requests were regularly made and whether they would more appropriately be proactively released.

As it now stands, citizens may be forced to repeatedly submit the same requests and this inefficiency contributes to backlogs in the FOI system and poor user experience. The new application fee places an unreasonable burden on those for whom this information is important.

Another area that calls for proactive disclosure is the treatment of procurement information. In his presentation to this committee, Chris Atchison from the BC Construction Association called for unsuccessful bidders to be named and for bids to be made public, preferably within 24 or 48 hours. He said, "I think the necessity and the importance of the construction industry at large requires public procurement information to just be released. As part of holding

[43] British Columbia, Office of the Freedom of Information and Privacy Commissioner, Budget Submission Fiscal Years 2022/23-2024/25, Presented to: The Select Standing Committee on Finance and Government Services Legislative Assembly of British Columbia, November 10, 2021, page 7

[44] Legislature of British Columbia, Official Report of Debates, November 25, 2021, page 4417

the public procurement folks accountable and just being accountable to the taxpayer for those significant expenses, we need to be able to have full transparency on public sector procurement."[45]

This is a point which Ontario's Information Commissioner made in 2015. In Ontario, the Information Commissioner called for proactive disclosure and greater transparency "through the proactive disclosure of procurement records (that is, the publication or automatic and routine release of information in anticipation of the public's needs and interests). We believe that proactive disclosure of procurement records will strengthen clarity and accountability around government spending, while providing tangible benefits to institutions. For example, proactive disclosure can significantly reduce the number of freedom of information requests and appeals related to procurement and contracts, and their associated resources and costs."[46]

RECOMMENDATION 23

The Office of the Information Commissioner should conduct an analysis of FOI requests to identify regular requests that would more appropriately be released proactively, and to determine what impact this would have on overall request numbers. This information should be part of a public report.

RECOMMENDATION 24

British Columbia should adopt a policy of prompt and full proactive disclosure of all procurement records, including preliminary analyses, business case documents, successful and unsuccessful bids, evaluations of bids and contracts.

Technology

In the spring of 2019, the company Deloitte submitted a report looking at efforts, costs and enhancement opportunities in BC's Freedom of Information system.[47] Among other things, the report looked at cost drivers in the system and offered several technological suggestions to improve the system and reduce costs. In a 2020 report BC's Information Commissioner acknowledged, with caveats, that there could be value in these recommendations.[48]

RECOMMENDATION 25

That the Committee endorse the recommendation of the Commissioner that the government "Evaluate the automation recommendations from the Deloitte report and ensure that any implementation is not made at the expense of:

- protecting personal information;
- applicants' ability to retrieve a broad and full set of records; and
- applicants' right to understand and appeal decisions made by ministries.

And that the Committee recommend that such an evaluation be made public.

[45] Legislature of British Columbia, Special Committee to Review the Freedom of Information and Protection of Privacy Act, public hearing, March 4, 2022

[46] Province of Ontario Information and Privacy Commissioner, Proactive Disclosure of Procurement Records, September *2015*

[47] Deloitte, Freedom of Information Process Review: An assessment of effort, costs and enhancement opportunities, Spring 2019

[48] British Columbia Office of the Information Commissioner, Now is the time: A report card on government's access to information and timeliness, April 1, 2017 – March 31, 2020, September 2020

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