



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
*for British Columbia*

Protecting privacy. Promoting transparency.

CHECK AGAINST DELIVERY

---

**SPEECH TO THE  
SPECIAL COMMITTEE TO REVIEW THE  
*FREEDOM OF INFORMATION AND  
PROTECTION OF PRIVACY ACT***

---

**MARCH 16, 2016**

**ELIZABETH DENHAM  
INFORMATION AND PRIVACY COMMISSIONER FOR BC**

---

Thank you, Mr. Chair, for inviting me back to speak with you today.

I have approximately 20 minutes of prepared remarks.

This is my third appearance. During my first presentation, I provided a general overview of *the Freedom of Information and Protection of Privacy Act* and explained how it works. The second time I appeared before you, I offered more of a deep dive into our formal submission. Today, I am here at your request to comment on the David Loukidelis report, commissioned by government, which addressed how government could implement the recommendations arising from my “Access Denied” investigation report.

No doubt you have read Mr. Loukidelis’ report. It’s 70 pages long, and obviously considers many different matters – policy, training and culture. What is most important for this Committee, though, are the matters that deal directly with the legislation you are reviewing.

I believe you’ve each received a document from my office for your reference. This table sets out the legislative recommendations that I made in my “Access Denied” report and in my submission to this Committee, alongside those from the

“Implementation Report” submitted to government by Mr. Loukidelis. It shows that my recommendations and those in the “Implementation Report” are very closely aligned.

As you know, this is a particularly important moment for British Columbia’s access and privacy legislation. As the public discussion and submissions to this committee demonstrate, the people of BC understand that their access to information rights can only exist when they are able to exercise those rights.

This discussion is not just happening in BC. Across Canada there has been a loss of public confidence in how governments are responding to access to information requests.

We witnessed the destroyed gas plant records in Ontario, the federal Commissioner’s investigation into pin-to-pin communications, and here at home, we had the issue of email deletion. Bold measures are needed to restore public confidence. Public servants and officials must be required to create full and accurate records of their business activities.

Your request that I appear today is related to a number of inter-connected events that took place in BC over the last few months. I’d like to briefly review these events with you to put my remarks in context.

On October 22 of last year my office published the “Access Denied” investigation report. I was pleased that the Premier in the House accepted the recommendations in “Access Denied” and responded by retaining a credible subject matter expert for advice on their implementation.

I want to remind the committee, that government retained Mr. Loukidelis NOT to assess the validity of my recommendations, BUT to advise on how to implement them.

The Minister responsible for the Act also referred three matters related to my “Access Denied” report to this Committee:

- duty to document,
- oversight of destruction of records, and
- the availability of deleted electronic records for access requests.

My message to you when I appeared before you on November 18 was that everybody in BC would benefit if we build a stronger, legislated framework for access to information. Why?—because it promotes good governance.

In November I highlighted two components in my presentation that are required to build this accountability framework into the legislation: a duty to document; and

independent oversight over the unauthorized destruction of records, accompanied by complementary offences and penalties.

Together, these two pillars will provide structural integrity for government's access to information practices.

On December 16, government publically released Mr. Loukidelis' "Implementation Report." The report provides a well thought out blueprint on a range of matters. Most importantly, it provides a clear path to implementing the key aspects of my "Access Denied" report.

Let's start with a duty to document. The "Implementation Report" recommended that "government should give the most serious consideration to [my] recommendation that a duty to document be created, specifically, it should seriously consider introducing legislation creating such a duty." This recommendation echoed my earlier submission to you that the failure to create and keep adequate records poses significant risks for public bodies. These risks include diminished accountability; reduced openness and transparency; the inability to rely on proper documentation in response to litigation and audits; the loss of the historical record; and, most importantly, the loss of public confidence. The table I provided to you displays, for easy reference, my recommendations alongside those from the Implementation Report. You will see from that table how my recommendations and Mr. Loukidelis' neatly align.

I've said that the purpose of a duty to document is not to create more records, or more work. Rather, it is to ensure that public bodies focus on creating the right records to document their business activities and key decisions, whether they occur via email, via a briefing note, or in the minutes of a meeting. Of course, policies and training are important parts of implementation, but they must flow from legislation to be effective and enforceable.

As a basic function of records management, core government already identifies the type of records associated with their mandates and business activities, and applies retention schedules to those records. We are almost there. Let's take the final step, and require accountability to ensure that the necessary documents exist. It will not take a lot of work to implement a duty to document. What I am proposing adds a requirement that the records are created in the first place.

Information Commissioners across Canada also support a duty to document. In January, we joined together, calling upon our respective governments to create a legislated duty requiring public entities to document matters related to their deliberations, actions, and decisions.

Here in BC, the call for a duty to document has been supported by many submissions that have been made to this Committee. These submissions illustrate how much people in BC care about their access rights. In fact, a recent Ipsos poll, commissioned by the BC Freedom of Information and Privacy Association, showed that 96% of British Columbians polled support a duty to document. I believe that this

duty should apply not just to core government but to all public bodies that work on behalf of British Columbians.

I will turn now to the matter of independent oversight over the unauthorized destruction of records. And I appreciate the detailed treatment given to this recommendation in Mr. Loukidelis' report. He concurs with my recommendation on independent oversight over the unauthorized destruction of records, but notes that this alone will not be enough. A cultural shift that includes executive-level leadership in creating a culture of proper records management is also required.

And this is consistent with my message in "Access Denied." However, I recognize that my focus today -- and the focus of this Committee -- is on the legislative solution to this issue. I cannot emphasize strongly enough that the oversight mechanism must be independent if the public is to have confidence in it. Any potential for conflict, or even the appearance of a conflict on the part of those assessing whether records have been improperly destroyed would erode confidence in the process.

As noted in the "Implementation Report," my recommendation for this oversight is based on model language that already exists in Alberta's equivalent law. The Alberta language gives the Commissioner the authority to conduct investigations to ensure compliance with the rules related to the destruction of records set out in any other piece of legislation in the province, or in accordance with the rules of local public bodies.

Ontario has also recently added provisions to its *Freedom of Information and Protection of Privacy Act* that give the Commissioner oversight over the failure of an institution to preserve records according to records retention requirements.

There should be independent oversight of allegations of deliberate record destruction in contravention of any enactment of BC, or any local by-law or similar policy or legal instrument. This means that it would apply across the public sector.

In other words, those who are alleged to have destroyed records should not be able to police their own actions.

Currently, my authority under FIPPA to investigate an allegation of destruction of records is very narrow. I can only investigate when it is alleged that records have been deleted, after an access request has been made. For example, just last week I noted the reports of the destruction of records about BC Place Stadium. I'm not saying there was any wrong-doing, but this is an example of an incident of destruction over which my office does not have jurisdiction. My office must have clear jurisdiction to investigate allegations of unlawful records destruction, whether an access request has been made or not. Our "sister statute" in Alberta contains model language that closes this gap.

What is also missing in the Act is an offence for the destruction of records. Without it, there is no direct consequence for the unlawful destruction of records. Mr. Loukidelis' report urges government to establish disciplinary measures for Public Service

employees who engage in the deliberate destruction of records. He also discusses the creation of an offence for such acts, and asks us to remember that this offence should contain a requirement that the “intent” is to evade an access request. I agree.

The general offences section of FIPPA requires offences to be carried out “wilfully”. If an offence were added for the destruction of records it would be clear that intent would be required for someone to be found guilty of the offence. When there is deliberate destruction of records, the consequences ought to be severe. This is why we need an explicit offence written into the Act.

I want to stress that other sanctions should also be available. The circumstances and severity of the conduct would determine which sanction should be applied. This can include discipline, or dismissal with cause. But an offence for unauthorized destruction of records necessitates a legislative amendment. The presence of an offence in FIPPA would send a very clear signal that government does not condone wilful and unlawful records destruction.

These are my key recommendations to this Committee for legislative change.

Minister Virk also asked this Committee to comment on, and I quote, “the idea that deleted electronic records remain available for response to access requests.” OIPC Orders and Investigation Reports have been clear on this point. Employees should search deleted mailboxes in response to access requests. They should search their recovered items folder when there is a reasonable belief that this folder may contain responsive records. Backup folders should be searched in exceptional circumstances. These practices should be supported by training and policies that support access to information. And therefore, I do not believe there is any need for a legislative change on this matter.

As I mentioned at the beginning of my presentation this is a pivotal moment for BC’s privacy and access legislation. We are witnessing an emerging consensus on how to deal with these very important issues. The work of this Committee is very timely. Your recommendations can contribute to restoring BC as a leader in Canada and indeed around the world in information rights.

Both Mr. Loukidelis and I agree that the framework we need includes a legislative duty to document, and independent oversight over the destruction of records that is accompanied by offences and penalties.

Thank you for asking me to address these matters and to speak in more detail about the recommendations I have submitted to the Committee. As always, I look forward to your questions.