OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

CHECK AGAINST DELIVERY

SPEECH TO THE
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I would like to begin by acknowledging that I am speaking to you today from the traditional territories of the lək̓ʷəŋən speaking people, also known as the Songhees and Esquimalt First Nations. It is with deep appreciation that I live and work on this beautiful territory.

I'd also like thank our hosts, the BC Freedom of Information and Privacy Association (FIPA), and Mike Larsen and Jason Woywada in particular, for bringing us together and for inviting me to join you for this annual event.

I never take for granted, nor should any of us, the important role of a strong civil society. It is worth remembering that FIPA played a pivotal role in bringing about ground-breaking information and privacy laws in our province some 30 years ago, and ever since have have carried on a determined effort to defend and advocate the improvement of those rights. Given our respective roles, there are times, of course, when we come at things a little differently, but we absolutely share common goals of ensuring government accountability and transparency, as well as strong privacy rights for our citizens.

Today, I wanted to share a few updates with you on the work of my office and on the state of transparency and privacy in BC as we see it.

If you detect a theme woven in my remarks today, it would be that upholding the information rights of British Columbians requires strong and effective oversight of public and private bodies, especially in times of crisis.

Before diving in, here's a bit of background on the Information and Privacy Commissioner for those who are less familiar.

The OIPC was established in 1993, providing for the independent oversight of over 2,900 public bodies under the *Freedom of Information and Protection of Privacy Act*. The Legislature added the *Personal Information Protection Act* (PIPA) to the Commissioner's responsibilities in 2004 with regulatory authority over any private sector organization in BC collecting, using and disclosing people's personal information.

About me, I'm a lawyer who had early experience with freedom of information because I was an advisor to the Attorney-General who piloted the original Bill through the legislature back in 1992. Things went full circle when I joined the OIPC in 2007, first as an adjudicator, then as Deputy Commissioner before my six-year appointment as Commissioner by unanimous motion of the Legislative Assembly in 2018. Somewhere in between I spent time in the UK helping investigate Facebook and a then-obscure company called Cambridge Analytica. As the Bon Jovi song from the '80s goes, I'm halfway there in my term of office and I have to say not a day goes by that I do not appreciate the honour of serving the Legislature and the citizens of our province.

It has been about a year since I last presented to you, so this is a good catch up on matters from the last twelve months that will hopefully leave an opportunity for questions.

Last month, I filed our annual report with the Legislature, providing an overview of our work from April 2020 to March of this year. It was a particularly intense time during which our office, like so many others, felt the effects of the global pandemic. I am incredibly proud of our team for delivering uninterrupted service to British Columbians during these uncertain times with commitment, with expertise and with great purpose.

You can read the report in its entirety online[1] but I did want to point to a few of the highlights, and in particular a number of investigations undertaken, in tandem with other commissioners' offices across Canada. In particular I note our investigations into Clearview AI, Cadillac Fairview and LifeLabs, which raised issues about surveillance, the use of biometrics, and privacy breaches. On the access side, an upswing, though not a significant one, in access complaints, and we published our office's sixth report card on government's timeliness in responding to access requests, which I also spoke to you about last time. It pointed to the troubling trends about public bodies taking time extensions without lawful authority.

I'll briefly share a few other matters, outside the annual reporting period, that may be of interest. With advances in machine learning, guard rails when applying artificial intelligence (AI) are essential. This past summer, we issued a call to strengthen regulation and oversight of AI in public

[1] https://www.oipc.bc.ca/annual-reports/3578

sector decision-making. We did this in conjunction with the BC and Yukon Ombudspersons; apropos because of the role those offices play in ensuring fair decision-making processes. In addition, we released a compliance review into the practices of private liquor and cannabis retailers, where we identified gaps to be addressed.

We also launched an investigation into the Liberal Party of Canada's use of facial recognition for its nominating processes leading up to the Federal election. How political parties collect and use your personal information is an important matter. The election was also an opportunity to see where the parties stood on access to information, and FIPA should be credited with pressing the different parties on their stance on government transparency[2].

All along there's been a lot of work for our Office in terms of access and privacy on pandemic-related matters, including inquiries, complaints and applications on how the statues apply, and around issues such as contact tracing and vaccine passports.

A few moments ago, I referred to the importance of oversight of information rights as a critical ingredient for maintaining trust in our democratic institutions. These rights directly affect our ability to scrutinize public policymaking which takes on even greater importance when our society is in any kind of crisis.

As my federal, provincial, and territorial (FPT) colleagues and I stated in a joint resolution we issued this summer, "protecting information rights is essential for governments to be held accountable for their actions and decisions, and to maintain the public's trust in times of widespread crisis."

So, I'd like to look at this issue through the lens of some of the challenges we're currently seeing with our public sector freedom of information and records management systems, as well as the legislative gaps that need to be addressed in both the public and private sectors.

I'll start by sharing some observations about how the access to information system has been functioning during the COVID-19 pandemic. We have been looking at the work of a number of public bodies over the past few months and what follows here is a brief review of that survey.

The access to information system can be divided into two branches; the first is the one most recognizable to this audience. Someone makes an access request to a public body, that body in turn conducts a search for records and thereafter results in a decision on whether and what records to release. The second branch of the system, and one which has gained more prominence during COVID, is the proactive release of records.

[2] https://fipa.bc.ca/2021-federal-election-letters/

I need to say this off the top: the pandemic has at points strained the access to information system, particularly for those public bodies and employees working on the front lines to fight the virus and to whom we are of course indebted.

In regard to the first branch of access requests, there has been an increase in those requests for some public bodies - and not surprisingly some of those are connected with health. At least in the initial stages of the pandemic, public bodies in that sector found themselves scrambling to shift resources to address immediate priorities. In one example, we saw a health authority send out a call for records to their finance department only to discover that staff had been redeployed to distribute personal protective equipment.

That said, for the most part, and despite certain challenges, we believe that public bodies have adapted their processes to the new reality, shifted or added resources for extra support, and have taken advantage where needed of time extensions provided for in the legislation. My staff have also been encouraged by reports from access to information officers in some public bodies who tell us that, as a result of the stresses on the system related to COVID, there is greater awareness within their organizations about the importance of FOI and the desire for more collaboration within those organizations to help satisfy requests.

As I outlined last year, reasonable flexibility was something my office exercised under s.10(2) of FIPPA to grant limited time extensions to public bodies at the pandemic's outset. It was not *carte blanche*. Those who utilized the discretion were required to report to me.

While we've seen good examples of resilience in maintaining the public's access rights during the pandemic, I've also been deeply disappointed that a small number of public bodies have simply chosen not to respond to access requests during the pandemic, for completely unjustified reasons. For those, we have been forced to investigate and order them to do so. We have some other cases right now before our office where claims have been made that public bodies are not discharging their legal obligations under FIPPA. While of course I can't comment specifically on those files, I can in general way these types of matters will continue to be thoroughly and impartially investigated and adjudicated by my office.

The second branch of the access to information system - the proactive release of records by public bodies - has gotten far less attention until very recently. I can't order proactive disclosure of specified records, other than in limited circumstances under s. 25 of FIPPA, but my Office has always encouraged it, especially those records that are frequently asked for. The joint resolution of FPT Commissioners I mentioned earlier calls on governments to do exactly that by routinely releasing significant public interest information related to policymaking, public health, public safety, the economy, procurement, and benefits.

The recent spotlight on proactive record release of course relates to briefings by BC's Public Health Officer (PHO). Those disclosures have both been necessary and unprecedented. The approach taken has been, at various points, praised and at others criticized. I think what is also important to observe is that in the wake of this very public and, for the most part, respectful dialogue involving the Public Health Officer, media, civil society and other groups, the PHO has modified its approach to information disclosure as circumstances have evolved. We have seen this in respect of more granular geographical data as well as changes to the disclosure policy on school exposures.

All of this illustrates why constructive dialogue and openness on these matters is not only important but I also think instructive for all public bodies to take notice of and consider proactively identifying and disclosing records that are both of public import and in demand.
To summarize all of this, I would describe the state of BC's access to information system during the pandemic as one which has been stretched. At points it has required making adjustments to its workings and other points that system has been punctuated by troubling cases. But overall, my office has seen access rights and their importance both recognized and respected.

None of this can be taken for granted. Ongoing vigilance by civil society, the media, the public and oversight by my office are necessary to ensure the statutory access rights of British Columbians are respected and upheld.

I want to shift now to a topic that on its face some might describe as decidedly dull. I assure you it is not. And in fact, the topic at hand plays a critical role in a properly functioning access to information system. Here I speak of the importance of government having a robust record keeping system and the need for this system to be subject to independent oversight.

Good recordkeeping is essential to good governance.

We need to manage information properly so that it's available for sound decision-making. We have a duty to preserve information with historic value for our future generations. And it is vital to meeting the requirements of FIPPA, to having an effective access to information regime and to government transparency. I would also add that it supports good privacy management as well.

With all of that said I find myself troubled about where we now find ourselves in regard to our record management systems in BC.

Some of you may know that for a long time in this province, the organization and disposition of records was governed by the *Document Disposal Act* of 1936, a depression-era law that only contemplated paper records, from around the time they invented scotch tape and the shopping cart. So clearly an update was long overdue. We pushed vigorously for much-needed reform and government responded – to a degree.

The *Information Management Act* (IMA) was finally brought into force in 2016. The IMA applies to government and court information and was intended to streamline information management and bring it into the 21st century. And in some ways, it has. For example, the law now recognizes digital records and was amended to include a duty to document key decisions – BC being the first Canadian province to do so.

Unfortunately, in a couple of fundamental ways, government got it wrong and it is arguable the IMA represents a step backwards for information rights. Let me explain what I mean by that.

The proper regulation of records management must include real consequences for non-compliance. Unfortunately, offences for destroying records that existed in the *Document Disposal Act* were conveniently left out of the IMA. It should be noted that this is in contrast with Alberta's law, which includes penalties for these kinds of violations within their Freedom of Information Act. Without penalties, there aren't enough disincentives to improper record keeping.

Another glaring weakness in the IMA is the lack of its independent oversight, and I believe this was a missed opportunity.

The IMA created the position of Chief Records Officer (CRO), within the Ministry of Citizens' Services, whose role it is to approve information schedules, manage the digital archives, and promote effective information management.

The CRO is also essentially charged with assessing compliance with the IMA, by examining, evaluating, and reporting on the management of government information by government bodies and making recommendations considered advisable.

If you look at the CRO's most recent annual report[3] from this past June they've done a lot of work implementing the IMA, particularly in terms of awareness-raising and information schedules. But when it comes to monitoring compliance, which as a regulator I think is pretty important, the CRO's priority has been to have public bodies assess their own compliance. I'm not suggesting these self-assessments are not useful exercises – they can be. But they are not a substitute for a third party – and a truly independent one – to assess compliance, either in response to a complaint or proactively in accordance with risk. Even if the CRO took a more proactive role in examining organizations' information management practices, they are accountable to the executive branch of government. It's a self-policing system. At least with the 1936 law, there was independent oversight through the Legislature.

[3] https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/crown-corporations/central-agencies/cirmo-spl/cro-annual-report-2020-21-final-signed.pdf

As a member of the Victoria Grey Leafs' old guys hockey team, and for those of you who know the sport, a lack of independent oversight is the difference between hockey's pre-season intra-squad scrimmages, where they referee themselves, versus a regulation game with referees. Only here we're talking about a difference that impacts democratic, quasi-constitutional rights, so we need to up our game.

I'm not suggesting we throw the proverbial baby out with the bathwater or that we hop into a time machine to go back to 1936. However, I think it is reasonable to expect legislative amendments that would result in a more robust framework.

If there are penalties in hockey, then there can be penalties for evading information management requirements, for example by destroying records. And there should be a specific oversight role for my office like that of my counterpart in Ontario to undertake independent reviews of government information practices. Without these elements in place, I'm afraid the current approach to records management in BC is not fit for purpose and ultimately diminishes the information rights of our citizens.

This leads me to the final issue I wanted to raise in terms of improved oversight. My office exists to promote and protect the information rights of British Columbians and we must have the right tools in order to do that. Modernization of both our private sector privacy law, PIPA, as well as FIPPA, our public sector information and privacy law, is essential to this. And now's the time to do it. This is the year FIPPA is supposed to be reviewed. Meanwhile, there is a Special Committee in place to review PIPA.

I want to say that we really appreciate FIPA's advocacy efforts to push for reform for both privacy and access laws in British Columbia.

Let me share a few of the things we want to see in new-and-improved public sector access and privacy law. I already told you we should have oversight over the record-keeping practices of public bodies and the ability to impose sanctions for violations. Given the alarming increase of privacy breaches and cybercrimes, we must have mandatory breach notification. Privacy impact assessments, for mitigating the privacy risks of programs that involve personal information, should also be required by legislation for all public bodies. Subsidiary corporations spun off by public bodies should be subject to access to information law. We continue to press the government on all these points.

There is equally an urgent need to update our private sector privacy law, drafted nearly two decades ago, before the advent of social media and when we were only speaking on telephones attached to the wall. BC's law is already out of step with the rest of our increasingly globalized

world, as is the federal privacy legislation. A world in which safe and secure data *flows* is critical to citizen trust and international trade.

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) was found "adequate" by the European Union several years ago, thus allowing Canada to do more frictionless business with Europe. BC is part of that adequacy equation because PIPA is "substantially similar" to Canada's current federal law, a legal requirement. That is, until now. This adequacy/substantial similarity Rube Goldberg type contraption was set up well before the E.U. raised the privacy stakes world-wide in a major way when they passed the *General Data Protection Regulation* (GDPR). The world is advancing while Canada and BC sit on their hands. Other provinces are not waiting. Quebec just adopted Bill 64, a major modernization of privacy law, and Ontario is considering, for the first time, its own private sector privacy law.

Canada must move on this reform front. Like our colleagues in Quebec and Ontario, we in BC can't wait for the federal government to act.

My office has offered a number of recommendations about what BC's laws should look like. I also want to commend FIPA for its strong advocacy on this issue. Our submissions share a number of elements. From my vantage point the changes that British Columbians most require include private sector mandatory breach notification and improvements to better capture consent (for example, notices that stand out, in plain language instead of legalese). I should note here I'm especially uncomfortable with some of the overly broad exceptions to consent proposed by the federal government last year. We also need to be able to impose sanctions for non-compliance with the law. A modernized law should also better regulate automated decision-making. Finally, I would observe that many of the issues we deal with are borderless in nature and regulation requires greater collaboration with our international colleagues; amending PIPA to explicitly provide for entering into information sharing agreements would be exceedingly beneficial.

Are we coming into a new era for information and privacy rights in British Columbia? I'd like to think so. I remain cautiously optimistic about the progress to come. I think it's fair to say there is a deeper appreciation among legislators, organizations, and the public generally about the need for reform in the public and private sectors. That is in no small part due to the work of civil society, FIPA and others in this audience who care deeply about these issues. That said, now is not the time to take our foot off the accelerator pedal of reform.

COVID-19 has hastened societal trends already in motion. From the explosion of digitization, virtual health care to online schooling to the need for clear and straightforward information to help us understand the world around us…

All of it has underscored the evolving nature of our society and the fact there now exists an even greater expectation for accountability by public bodies and organizations – of all types and on a wide-range of issues.

We need to make sure that proper oversight mechanisms are put in place to ensure these public expectations are met so that British Columbians can have even greater confidence in their democratic institutions.

With that, I'd like to thank you for your attention, and I'd welcome the chance to hear your thoughts and answer your questions in the time we have left.