



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

Protecting privacy. Promoting transparency.

# **INVESTIGATION REPORT F13-01**

## **INCREASE IN NO RESPONSIVE RECORDS TO GENERAL ACCESS TO INFORMATION REQUESTS: GOVERNMENT OF BRITISH COLUMBIA**

Elizabeth Denham  
Information and Privacy Commissioner

March 4, 2013

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## Commissioner's Message

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A citizen's right to access government records is a fundamental element of our democracy. The right to know promotes transparency in the public policy process, and is an essential mechanism for holding government to account.

In September 2012, the Freedom of Information and Privacy Association complained to my office about the overall increase in the number of “no responsive records” replies by the Government of British Columbia. In October and November 2012, my office also received several complaints relating to “no responsive records” replies from government regarding the resignation of the former Chief of Staff in the Office of the Premier. I decided to combine these complaints into a single, comprehensive investigation in order to determine whether government is complying with its duty to assist applicants in obtaining requested information as required by the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

While our investigation found that government is complying with the legislated requirement to assist applicants, government is interpreting that requirement narrowly. Specifically, government should ensure that where it is aware that records may or do exist in the custody or control of another ministry, it communicates this information to the applicant. Government should also ensure that where it does not have responsive records, it helps applicants to better understand government's position as to why this is the case by providing some explanation in its response letter.

In the course of this investigation, we have seen evidence of the practice of “oral government”, where business is undertaken verbally and in a records-free way. There is no requirement in FIPPA to document these activities. Without a duty to document, government can effectively avoid disclosure and public scrutiny as to the basis and reasons for its actions. The lack of documentation undermines the ability of citizens, journalists and the public to understand the basis for government's actions on any particular matter.

The right to know can only be as robust as the legal measures and systems in place to allow citizens to exercise those rights. Government should continually demonstrate that it is committed to transparency, accountability and open government by creating accurate records as it goes about its multiple responsibilities. I believe the duty to document should be a legal requirement in the legislative framework of government.

Elizabeth Denham  
Information and Privacy Commissioner  
for British Columbia

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## Executive Summary

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This report investigates the growth of “no responsive records” replies by the Government of British Columbia in response to the general access to information requests of citizens. It also reports on five specific instances of “no responsive records” replies to requests made to government relating to the September 2012 resignation of the Premier’s Chief of Staff.

In the past four years, the number of “no responsive records” replies has increased from 13% in 2008/09 to 25% in 2011/12. There is no single explanation for this trend; however, government’s 2009 centralization of processing access to information requests and the high percentage of no records responses generated by the Office of the Premier are contributing factors. The dramatic increase in the Office of the Premier’s percentage last year from 30% to 45% was the single biggest cause of the increase from fiscal 2010/11 to fiscal 2011/12.

With respect to the government responses to requests for records relating to the resignation of the former Chief of Staff, our investigation was unable to find any evidence of records at the time of the requests. According to the Office of the Premier, the general practice of staff in that office is to communicate verbally and in person. We were informed that staff members do not usually use email for substantive communication relating to business matters, and that most emails are “transitory” in nature and are deleted once a permanent record, such as a calendar entry, is created. The disposal of transitory records is within the scope of the *Document Disposal Act* and is not within my jurisdiction under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

While I find government is compliant with its duty to assist under s. 6(1) of FIPPA, I have identified instances where government could respond in a more open, accurate and complete manner. This report makes six recommendations to enhance applicants’ confidence in government’s search efforts and to help reverse the increasing trend of no responsive records requests in government.

## 1.0 PURPOSE AND SCOPE OF REPORT

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### 1.1 Introduction

A citizen's right to access government records is a fundamental element of democracy. It promotes openness, transparency and accountability of government activities and of the decision-making process. Eroding this right diminishes the ability of citizens to hold their government accountable.

On September 12, 2012, the Freedom of Information and Privacy Association ("FIPA") complained to my office about the manner in which they say the Government of British Columbia is responding to access to information requests. The basis for the complaint is that government is responding to an increasing number of general access to information requests with the reply that "no responsive records" exist. This trend has become especially evident in the last four years when the percentage of no responsive records rose from 13% to 25%.

I initiated this investigation to determine whether, in its handling of general access to information requests, government is complying with its duty under s. 6(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). Section 6(1) states that public bodies must "make every reasonable effort to assist applicants and to respond without delay to each applicant, openly, accurately and completely."

As part of this investigation report, I identify specific causes that help explain the increasing percentage of no responsive records. I also make recommendations to reverse this trend and assist government in its handling of access requests.

### 1.2 Investigative Process

As the Information and Privacy Commissioner for British Columbia ("Commissioner"), I have a statutory mandate to monitor the compliance of public bodies with FIPPA to ensure its purposes are achieved.

The purposes, as stated in s. 2(1) of FIPPA, are to make public bodies more accountable to the public and to protect personal privacy. The measures to achieve accountability include giving the public a right of access to records.

Under s. 42(2)(a) of FIPPA, I have the authority to investigate complaints that a duty imposed under FIPPA has not been performed.

On September 14, 2012, I advised the Deputy Minister of the Ministry of Citizens' Services and Open Government that my office was investigating FIPA's complaint regarding the increasing percentage of no responsive records. As part of our investigation, my office discussed the complaint with FIPA and also came to an agreement with FIPA and government on the exact percentage of general access to information requests that have resulted in no records being released in each fiscal year for the last decade.

Information Access Operations ("IAO") is responsible for processing all access to information requests received by government and for that reason my office spoke with IAO on numerous occasions through the course of this investigation. My office provided IAO with an extensive list of questions regarding FIPA's complaint and received a written response. My investigators subsequently had many further discussions and correspondence with IAO regarding particular questions that arose during the investigation.

We also reviewed a statistically significant sample of files that IAO had closed over the last calendar year using government's Total Records and Information Management ("TRIM") system. We analyzed 88 files in all representing more than 10% of the total number of "no records" responses based on statistics from the 2011/12 fiscal year.

In creating our list of files to review, we asked FIPA to provide us with a selection of particular files that were of interest to them. We included these, together with a range of files my investigators chose from across government ministries and from various applicant types, with particular emphasis on ministries and applicant types that had noticeably higher percentages of "no records" responses.

During the course of our investigation, my office received five separate complaints about government's response to information requests relating to the September 2012 resignation of the Office of the Premier's former Chief of Staff. In four of these instances, government informed these applicants that there were no records responsive to their requests. In response to the fifth request, government released only the former Chief of Staff's resignation letter. The applicants complained that government's reply marked a failure to comply with its duty under s. 6(1) of FIPPA. I made the decision to look at these complaints within the scope of this investigation and advised government of my decision. My investigators reviewed government files pertaining to access requests regarding the resignation of the Premier's former Chief of Staff.

My investigators also reviewed the records themselves where necessary to confirm that certain records were outside the scope of a request. The purpose of these file reviews was to evaluate government's processing of files and communication with applicants on files where there were no responsive records.

After reviewing the files, my investigators followed up with government on matters that required further explanation. Included in our follow-up were interviews with government representatives from the Public Service Agency and the Office of the Premier regarding government's handling of the five complaint files relating to the September 2012 resignation of the Office of the Premier's former Chief of Staff.

### 1.3 Application of FIPPA to the Government of British Columbia

As is stated in s. 3(1), FIPPA “applies to all records in the custody or under the control of a public body”. This investigation specifically deals with government ministry records that are the subject of access to information requests. The definition of “public body” in Schedule 1 of FIPPA includes a “ministry of the Government of British Columbia.”

### 1.4 Government's Process for Access to Information Requests

#### IAO Overview

IAO was formed in 2009 under the then Ministry of Labour and Citizens' Services to centralize government's processing of access to information requests. Although the formation of IAO centralized the processing of requests, the head of each ministry remains responsible for compliance with FIPPA. The purpose of centralization was to provide consistent, efficient access to government records. This was, in part, government's response to a report by my predecessor regarding the lack of timeliness of government's responses to access requests.<sup>1</sup>

Citizens who request government records must do so in writing, either on paper or through an online form. IAO's Intake Services receives these requests. IAO assigns each request to an analyst, who ascertains the substance of the request and identifies the appropriate program area that has, or would have, custody and control of the requested records. The analyst requests the records from the program area within the responsible ministry and monitors legislated timelines and response requirements.

<sup>1</sup> See report titled *Timeliness of Government's Access to Information Responses* at <http://www.oipc.bc.ca/special-reports/1266>.

If the government program area finds records in response to the request for access, the analyst reviews the records to ensure that they are responsive to the substance of the request, and that disclosure is compliant with FIPPA. The analyst works with program area staff to sever whatever information they believe is subject to exceptions to disclosure under FIPPA prior to releasing the records to the requesting party. It is the delegated head of each ministry who provides formal sign-off for each request. In the event that no records exist or no records have been located in response to the request, the analyst conveys this response to the applicant and closes the file.

### **Personal Request vs. General Request**

IAO processes two different kinds of access to information requests; personal and general. The former relate to an individual seeking his or her own personal information that he or she believes government has about them. The latter relate to such general matters as plans, strategies, program information, policy and spending decisions, actions and meetings of officials and not the applicant's personal information. It is government's handling of general requests that are the subject of FIPA's complaint and of this investigation.

### **Corporate Request Tracking System ("CRTS") Statistics**

IAO has published statistical information on its website about all access requests and responses from the last 10 fiscal years.<sup>2</sup> When IAO closes a file, it denotes whether or not it has released records and, where applicable, the extent of the release.<sup>3</sup> Where government determines there are no records responsive to the applicant's request it categorizes that finding in one of three ways: "No Responsive Records Exist/Located", "No Responsive Records Located" or "Records Do Not Exist". For the purpose of the table below, I have referred to these three categories collectively as "No Records".

The complainant (FIPA) and IAO are in agreement that for each of the past 10 fiscal years, the following table<sup>4</sup> represents the total number of requests closed, the total number of requests closed where government did not release records

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<sup>2</sup> See reports at [http://www.gov.bc.ca/citz/iao/foi/crts\\_statistics/index.html](http://www.gov.bc.ca/citz/iao/foi/crts_statistics/index.html).

<sup>3</sup> The disposition types are set out in the following CRTS report: [http://www.gov.bc.ca/citz/iao/down/1yrtrends/2011\\_2012/DispositionType%20-%201%20Yr%20Fiscal%20\(2011-2012\).pdf](http://www.gov.bc.ca/citz/iao/down/1yrtrends/2011_2012/DispositionType%20-%201%20Yr%20Fiscal%20(2011-2012).pdf).

<sup>4</sup> The table is created from data in the following CRTS, which is the basis for FIPA's complaint: [http://www.gov.bc.ca/citz/iao/down/10yrtrends/2002\\_2012/ProcTimes%20ApplDisp%20GEN%20-%2010%20Yr%20%28FY%202002-2012%29.pdf](http://www.gov.bc.ca/citz/iao/down/10yrtrends/2002_2012/ProcTimes%20ApplDisp%20GEN%20-%2010%20Yr%20%28FY%202002-2012%29.pdf).



and the percentage of requests closed where government did not release records:

<b>Fiscal Year</b>	<b>Requests Closed</b>	<b>Requests Where No Records Released</b>	<b>% No Records</b>
2002/03	1885	203	11%
2003/04	1567	177	11%
2004/05	2063	196	10%
2005/06	1627	221	14%
2006/07	2081	273	13%
2007/08	1855	256	14%
2008/09	1842	245	13%
2009/10	2495	454	18%
2010/11	2778	577	21%
2011/12	3182	781	25%

It is evident that the last three fiscal years have seen marked increases both in the total number of requests that IAO closes each year as well as in the percentage of these requests where no records are responsive to the applicant's request. These increases coincide with government's centralization of the processing of access to information requests under IAO.

IAO divides those who seek information from government into nine different applicant types—media, political parties, interest groups, businesses, individuals, law firms, other governments, other public bodies and researchers. In the past fiscal year, media applicants received no responsive records replies to 34% of their general requests, significantly higher than the government average of 25%.<sup>5</sup> Media are also the only applicant type to be above the overall average for each of the last three years.

In terms of how government ministries answered general access to information requests this past fiscal year, it is noteworthy that the Office of the Premier provided no responsive record replies with respect to 45% of its closed files. No other ministry exceeded the overall yearly government average of 25% by more than five percentage points.<sup>6</sup>

In the Analysis section of this report, I look in more detail at requests by the media as well as requests made to the Office of the Premier.

<sup>5</sup> See Appendix A for a table of all applicant types for the most recent three fiscal years.

<sup>6</sup> See Appendix B for a table of all ministries for the most recent three fiscal years.

## 2.0 ISSUE IDENTIFIED

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The issue in this investigation is whether the Government of British Columbia is making every reasonable effort to assist applicants seeking information and to respond without delay to each applicant openly, accurately and completely. [s. 6(1) of FIPPA]

## 3.0 ANALYSIS

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### 3.1 Duty to Assist Applicants

**Issue:** *Is the Government of British Columbia making every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely?*

Section 6(1) of FIPPA sets out the duty to assist applicants that applies to government's handling of access to information requests. Section 6(1) states:

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Numerous Orders from my office have dealt with a public body's obligations to search for records.<sup>7</sup> A review of these Orders shows that s. 6(1) of FIPPA does not impose a standard of perfection or require a public body to establish with absolute certainty that records do not exist. However, a public body must be able to show that its search efforts have been thorough and comprehensive and that it has explored all reasonable avenues to locate records and to assist applicants.

I will evaluate government's compliance with s. 6(1) of FIPPA after first setting out government's explanation for the increase in no responsive records as well as the results of my office's review of a representative sample of government's closed access to information requests.

### 3.2 Government's Explanation for the Increase in No Responsive Records

In the three years prior to the creation of IAO, 13% of general requests resulted in the release of no records. In the three years since centralization, however, this

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<sup>7</sup> See, for example, Order F07-12, [2007] B.C.I.P.C.D. No. 17, Order 00-32, [2000] B.C.I.P.C.D. No. 35 and Order 00-26, [2000] B.C.I.P.C.D. No. 29.

has increased to an average of 21%, reaching 25% in the most recent fiscal year. Government acknowledges this increase. The primary explanation government offers is the ease with which applicants can now make requests to multiple ministries since government centralized its handling of access to information requests in 2009.

Since 2009, applicants can use just one form to request records from multiple ministries rather than having to make separate requests to each ministry. Government provided my office with statistics to show the effect of this change of process and suggested that no records responses rose only 3% over the three years since centralization when accounting for the same request to multiple ministries.

While government's explanation might partially explain the increase in no responsive records, it is not a wholly satisfactory answer. First, government is unaware of how many requests applicants made to multiple ministries prior to centralization. Without baseline statistics, we cannot state with any certainty the actual percentage increase of requests to multiple ministries since centralization.

Second, government statistics do not account for the reasons the applicant wanted records from multiple ministries. In some instances, an applicant may only be seeking one batch of records (*i.e.*, a contract) and is not certain which ministry has custody and control of the records and therefore asks multiple ministries for the records. In other instances, an applicant may actually be seeking records from multiple ministries (*i.e.*, where an applicant requests the calendars of multiple government officials).

Third, while the centralization of processing access requests may account for a one year jump it does not seem to explain the consistent increase in each of the three years following centralization from 18% to 21% to 25%. Government's statistics from the first six months of fiscal 2012/13 show a further increase to 27%.<sup>8</sup>

Later in this report, I examine other factors that help explain the ongoing nature of this increase.

### 3.3 Summary of OIPC Review of Closed Access to Information Requests

My office reviewed 88 files that IAO closed in the last year involving no records responses. We did this with a view to identifying reasons for the increasing trend and analysing whether government is meeting its s. 6(1) of FIPPA duty to assist

<sup>8</sup> Based on the statistics in the following reports: [http://www.gov.bc.ca/citz/iao/down/quarterlytrends/2012-2013/disposition\\_type\\_1st\\_q\\_fiscal\\_11-12.pdf](http://www.gov.bc.ca/citz/iao/down/quarterlytrends/2012-2013/disposition_type_1st_q_fiscal_11-12.pdf) and [http://www.gov.bc.ca/citz/iao/down/quarterlytrends/2012-2013/disposition\\_type\\_2nd\\_q\\_fiscal\\_12-13.pdf](http://www.gov.bc.ca/citz/iao/down/quarterlytrends/2012-2013/disposition_type_2nd_q_fiscal_12-13.pdf).

applicants. Along with files that FIPA had specifically identified, we chose a sample of files across ministries and applicant types. We placed an emphasis on files closed by the Office of the Premier and those requested by media applicants because, as noted above, government's statistics showed these as the file types with the highest percentage of no responsive records.

Our review of government files revealed the following issues related to government's duty to assist applicants:

- It is apparent from IAO's correspondence with a program area that in some instances records may or do exist in the custody and control of a different public body. There is evidence in many files that IAO communicates this information to the applicant; however, this is not apparent in every instance.

For example, in one file an applicant requested records from the Ministry of Energy and Mines regarding horse races (note: the Gaming Policy and Enforcement Branch ("GPEB") falls within this ministry). GPEB signed off that there were no records, but noted that British Columbia Lottery Corporation might have responsive records. IAO did not initially communicate this to the applicant in its written response. IAO did communicate this information subsequent to the applicant following up to confirm government's position.

Where it is aware that records exist with other public bodies, IAO should consistently communicate this information to applicants in its initial response letter.

- On several occasions, government worked with applicants to narrow the scope of the request (either by changing the wording of the request or reducing the number of ministries to whom the request is made). This is a desirable practice where an applicant frames the original request too broadly, which will result in a high fee in order for a search to take place. However, before government narrows the scope of a request, it should make reasonable efforts to determine whether the narrower request will result in the release of any records.

My office noted three instances where narrowed searches did not result in the release of any records. In one instance, the applicant agreed to narrow his request to one ministry on the assurance from IAO that only this ministry had the records it was seeking. Ultimately, this ministry did not have any records. Understandably, the applicant was frustrated. The handling of this file was an error and based on our review, is not representative of government's normal practice. Nonetheless, apart from instances where the initial request is overly broad in scope, I believe that IAO should be reasonably confident that the narrowing of requests will not deprive applicants of records they would otherwise receive, unless IAO informs the applicant that this may be the case.

- Government receives hundreds of requests for the calendars of specific individuals within government each fiscal year. Often these requests are from political parties. As part of our review, we looked at five requests for calendar information that led to government responding that there were no responsive records. Government responses on these requests included four responses that the Ministerial/Executive Assistant did not keep his or her own calendar.

On reviewing these files, my investigators found that IAO was reading these requests quite narrowly and was not directing the applicant to the records they were seeking. For example, while it may be true that the Ministerial Assistant did not keep a calendar, if his or her records are contained within the Minister's calendar, it would seem reasonable for IAO to include this in its response or to direct the applicant to this fact before government provides a response. Ultimately, government should be assisting applicants in obtaining the records they are seeking and, in doing so, would potentially reduce future requests that result in no records.

Similarly, in one instance the applicant was seeking records for an Assistant Deputy Minister and government found no records because there is no Assistant Deputy Minister for that public body. Instead, there is an Associate Deputy Minister. In this situation, this distinction in terminology is something that IAO could draw to the applicant's attention before providing a response. I believe IAO can reasonably provide further assistance to help the applicant receive the records he or she is seeking.

I believe that by clarifying with applicants the nature or scope of records they are seeking, government can help ensure that fewer requests (including those for government calendars) result in no records responses.

**RECOMMENDATION 1:**

I recommend that IAO communicate to an applicant when it is aware that the records the applicant is seeking exist within a different ministry than from where the applicant has originally requested the records.

**RECOMMENDATION 2:**

I recommend that IAO should be reasonably confident that before narrowing a request, the result will not deprive applicants of records they would otherwise receive, unless IAO informs the applicant that this may be the case.

**RECOMMENDATION 3:**

I recommend that IAO ensure that it interprets requests (including those for government calendars) broadly enough to assist the applicant in obtaining the records he or she is seeking.

Our review of government files revealed certain issues regarding its processing practices that, while not strictly related to its duty to assist or to the overall increase in no records responses, are worth noting in this report:

- Three of 88 files had been recorded as no responsive records where, in fact, records had been released to the applicant. Government acknowledged these inaccurate recordings. As this represents an error on 3.4% of files, it could have some effect on the overall increase. However, given that we did not examine older files to determine the accuracy of government's recorded response in those instances, I am not attributing this as a cause in the increasing trend.
- In some instances, program areas indicated to IAO that they had responsive records. However, the next case note in IAO's file is the closing letter showing that government did not find any responsive records. My office followed up on each of these files and was satisfied that the records originally identified as responsive were, in fact, out of the scope of the request. For ease of future file review by government staff or by our office, IAO should ensure that where potentially responsive records are located, but subsequently determined to be non-responsive, it include a case note setting out how this determination was made.
- Program areas do not consistently fill out the "Call for Records" form sent by IAO at the outset of a request for records. This form requires that program areas include information about their search for records (what areas or databases were searched, how long it took to conduct the search, etc.). In many instances, program areas fill in their contact information, but otherwise leave the form blank when responding that there are no responsive records in their custody and control. The information on this form is not time consuming to fill in, but is very important to be included for each file when government reviews these files for such reasons as adequate search complaints.

### 3.4 Access Requests Regarding the Resignation of Former Chief of Staff

#### Background

There are a series of responses to access to information requests that require further discussion. These relate to the September 23, 2012 resignation of the former Chief of Staff in the Office of the Premier.

Government released the Chief of Staff's September 23<sup>rd</sup> resignation letter to the public. Various access to information requests were subsequently made to government regarding this resignation. However, government's public position was that, apart from the resignation letter, it had not created any records with respect to its handling of this matter and instead had chosen to conduct a "verbal investigation".

In October and November 2012, my office received five complaints that government had not complied with its duty under s. 6(1) of FIPPA to respond openly, accurately and completely to access to information requests regarding the circumstances surrounding the former Chief of Staff's resignation.

My office reviewed the government files relating to these five requests and found that IAO's handling of each of these files is consistent with its processing of other access to information requests. In each instance, IAO sent the request to the appropriate program area and received the program area's response.

Nonetheless, I sought to verify government's position that it conducted a "verbal investigation". I also investigated why government would not create any records relating to such a potentially sensitive personnel issue. In order to do this, my investigators conducted interviews of government personnel involved in the investigation that resulted in the resignation of the former Chief of Staff.

#### Access Requests and Government's Response to OIPC Questions

**1) & 2)** The following request was made to the Office of the Premier and to the Ministry of Finance (two requests in total):

*Any and all records regarding a September 7, 2012 golf event at Metchosin Golf Club; A copy of the invitation, a list of all invitees and attendees; Invoices, receipts and expense reports for the golf and hospitality event at Metchosin, hired transportation (buses and taxis) to shuttle attendees to and from Metchosin, and a post-event gathering at the Bard & Banker Pub.*

In response to questions by my office, government says that this was not a Ministry of Finance function and that the responsible program area would hold any records about expenditures.

Similarly, government maintains this was not an Office of the Premier function, but instead was organized by government caucus and therefore the Office of the Premier does not hold any records. A representative from the Office of the Premier maintains that staff treated any records, such as email invitations, as transitory records or not related to Office of the Premier business and deleted these prior to receipt of this access to information request. As such, at the time of this access request, the Office of the Premier had no responsive records.

3) The following request was made to the Office of the Premier:

*All correspondences (emails, letters, BBMs and/or text messages) sent or received between the following: Ken Boessenkool to Premier Christy Clark, Premier Christy Clark to Ken Boessenkool, Ken Boessenkool to Lynda Tarras, Ken Boessenkool to Kim Haakstad, Kim Haakstad to Ken Boessenkool. Time limit is between September 7, 2012 and September 27, 2012.*

The scope of this request is not limited to correspondence pertaining to the investigation of the former Chief of Staff, but instead is for any correspondence between the named parties. In its response, the Office of the Premier released to the applicant the resignation letter of the former Chief of Staff.

On February 6, 2013, Kim Haakstad, then the Deputy Chief of Staff for the Office of the Premier, met with my investigators to discuss the Office of the Premier's response to this request:

- Under the guidance of staff from IAO, the Office of the Premier conducted a check for records in response to this request, but did not locate any responsive records.
- The general practice within the Office of the Premier is to communicate verbally in person. Email communications usually consist of requests to make telephone calls or meet in person. Generally, staff members in the Office of the Premier do not make substantive communication relating to business matters via email. Most of the emails are transitory in nature and are deleted once a permanent record, such as a calendar entry, is created.
- Ms. Haakstad believes that there would have been email communications between her and the former Chief of Staff during the relevant period, but these emails would have been transitory in nature and were deleted before the access request was received.



- Staff in the Office of the Premier use the following factors in determining whether a record is transitory:
  - Temporary usefulness;
  - Drafts;
  - Convenience copies of items that originate in other offices or are filed by other departments. Examples: copy of a meeting request, copy of an incoming letter to the Premier;
  - Only required for a limited time or for preparation for an ongoing record;
  - Not required to meet statutory obligations or to sustain administrative functions; and
  - Phone messages.
- In general, the Office of the Premier possesses very little non-transitory information, particularly email. Records, the Office of the Premier maintains, most often pertain to correspondence, scheduling and the Deputy Minister's office.
- The Office of the Premier is a small public body whose functions are administrative in nature. It does not deliver programs, develop legislation or write briefing notes. Therefore, it does not create most of the categories of records that ministries create.

**4)** The following request was made to the Public Service Agency:

*All correspondence, emails, letters, BBMs and/or text messages sent or received between Lynda Tarras and Ken Boessenkool. Time limit is between September 7, 2012 and September 27, 2012.*

Lynda Tarras is the head of the Public Service Agency. Ms. Tarras met with my investigators to discuss requests to the Public Service Agency regarding the former Chief of Staff. She told my investigators that she was not the government employee who spoke with the former Chief of Staff as part of government's investigation. Ms. Tarras said she did not communicate in writing with the former Chief of Staff during this time period.

**5)** The following request was made to the Public Service Agency:

*All records relating to an investigation into allegations of improper conduct by former Chief of Staff Ken Boessenkool. Please limit this request to between September 7, 2012 and September 27, 2012.*

Ms. Tarras stated in response to questioning by my office that:

- There was no written communication, or any other form of communication, between government representatives for the Public Service Agency and the former Chief of Staff regarding the circumstances that led to his resignation.
- The Public Service Agency did not create any records responsive to this access request.
- In this case, the former Chief of Staff accepted responsibility for his actions and resigned. His resignation letter was released to the public.

Ms. Tarras informed us that:

The extent of any review or investigation conducted by the Public Service Agency is entirely dependent on the unique circumstances of each case. Our approach ranges from one end of the continuum where the facts of the matter are straightforward, there is little debate of the facts or the sequence of events that have occurred and the options for an employer response are clear. In some of the cases, the only documentation on an employee's file is their letter of resignation and/or a settlement agreement between the employee (their representative) and the employer. On the other end of the continuum, we manage cases that are very complex, where conflicting evidence is presented or a gap in evidence requires significant investigation and where the path to a decision or response by the employer requires that we weigh a number of variables and legal questions. These cases will typically result in extensive documentation culminating in a detailed report that may be required to provide evidence in a hearing or court proceeding.

## Summary

The Office of the Premier states that any records that it created regarding the resignation of the former Chief of Staff that would have potentially been responsive to the access requests were transitory in nature and were deleted prior to receipt of the relevant access to information requests.

The Office of the Chief Information Officer ("OCIO"), the central office responsible for information management in government, offers guidance on transitory records on its website, stating that "Transitory records are records of temporary usefulness that are needed only for a limited period of time in order to complete a routine action or prepare an ongoing record."<sup>9</sup> The Ministry of Citizens' Services and Open Government provides a similar definition in its approved government-wide records schedule on transitory records.<sup>10</sup>

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<sup>9</sup> See Office of the Chief Information Officer webpage re transitory records at [http://www.cio.gov.bc.ca/cio/priv\\_leg/foipppa/backgrounders/transitory.page](http://www.cio.gov.bc.ca/cio/priv_leg/foipppa/backgrounders/transitory.page).

<sup>10</sup> See the Ministry's Transitory Records schedule at [http://www.gov.bc.ca/citz/iao/records\\_mgmt/special\\_schedules/transitory\\_records.html](http://www.gov.bc.ca/citz/iao/records_mgmt/special_schedules/transitory_records.html).

The OCIO makes it clear that not all drafts or working papers are transitory records. The OCIO also states that some, but not all, email records are transitory. I believe that the determination of whether a record is transitory is not dependent on the medium of communication, but instead depends on whether it is a record of action or decision-making. The Office of the Premier should ensure that its practices regarding transitory records align with the government policy as recommended by the OCIO.

The disposal of transitory records is within the scope of the *Document Disposal Act* and is not within my jurisdiction under FIPPA.

It appears that government has chosen not to document matters related to the resignation of the former Chief of Staff. The OIPC has investigated hundreds of complaints where government claimed requested records did not exist because they were never created in the first place. There is currently no obligation under FIPPA that requires public bodies to document their decision-making. As such, government did not contravene FIPPA in opting to conduct a verbal investigation regarding the former Chief of Staff.

With respect to government's duty under s. 6(1) of FIPPA to assist applicants, I believe that IAO should have provided more thorough responses to each of the applicants where it states not simply that it does not have responsive records, but provides some explanation as to why this is the case. Such explanations can greatly assist applicants in understanding government's position that no responsive records exist.

#### **RECOMMENDATION 4:**

I recommend that where government does not have records responsive to an access request, IAO provide an explanation to the applicant as to why this is the case.

### **3.5 Duty to Document**

My office and other information commissioners have long advocated that there be a legislated duty for public bodies to document matters related to deliberations, actions and decisions.

Federal Information Commissioners, for example, have called for duty to document provisions for over fifteen years. In 1994 John Grace, then Information Commissioner of Canada, called for amendments to the *Archives Act* that would impose a duty for governments to create records necessary to adequately

document government's functions, policies, decisions, procedures, and transactions.<sup>11</sup> In the 1996-97 Annual Report he had this to say:

As to the “don’t-write-it-down school,” any effort to run government without creating records would be humorous if it were not so dangerously juvenile. Though it is impossible to quantify its seriousness ... any such evasion of access poses a threat not only to the right of access, but to the archival and historical interests of the country.<sup>12</sup>

Former Information Commissioner of Canada, John Reid, continued to call for legislative amendments to address what he referred to as a “deeply entrenched oral culture.”<sup>13</sup> In his 2002-03 Annual Report to Parliament, Commissioner Reid addressed the need for legislation that dealt explicitly and comprehensively with the creation of records.<sup>14</sup> In 2005, Commissioner Reid proposed changes to the *Access to Information Act* that included requiring that every office and employee of a government institution create records that are reasonably necessary to document their decisions, actions, advice, recommendations and deliberations.

Commissioner Reid also drafted a private member’s bill, Bill C-301, the *Open Government Act*, which was sponsored by a federal Member of Parliament. Bill C-301 received First Reading on September 29, 2011, but did not proceed any further. Commissioner Reid’s *Open Government Act* was endorsed by Justice John Gomery.<sup>15</sup> In his 2006 report for the Commission of Inquiry, Justice Gomery stated:

The Government should adopt legislation requiring public servants to document decisions and recommendations, and making it an offence to fail to do so or to destroy documentation recording government decisions, or the advice and deliberations leading up to its decisions.<sup>16</sup>

Among the reasons for instituting a legislated duty to document include good governance, historical legacy of government decisions, and the protection of privacy and access to information rights. Without a legislated duty to document, government can effectively avoid public scrutiny of the rationale for its actions.

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<sup>11</sup> See p. 7 of the Information of Commissioner’s 1993-94 Annual Report at <http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx>.

<sup>12</sup> See p. 8 of the Information Commissioner’s 1996-97 Annual Report at <http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx>.

<sup>13</sup> Information Commissioner of Canada, Submission to the Commission of Inquiry into the Sponsorship Program and Advertising Activities. Ottawa, Oct. 14, 2005.

<sup>14</sup> See p. 39 of the Information Commissioner’s 2002-2003 Annual Report at <http://www.oic-ci.gc.ca/eng/rp-pr-ar-ra-archive.aspx>.

<sup>15</sup> See Commission of Inquiry into the Sponsorship Program and Advertising Activities, Restoring Accountability: Recommendations, Minister of Public Works and Government Services, 2006.

<sup>16</sup> *Ibid.*, Recommendation 16 at p. 203.

My predecessor, David Loukidelis, addressed this issue in 2009 by recommending to the Standing Committee on Access to Information, Privacy and Ethics that FIPPA be amended to include this duty.<sup>17</sup>

In my 2011 investigation into the simultaneous disclosure practice of BC Ferries, I stated that a duty to document is an important element in robust practices for proactive disclosure.<sup>18</sup>

I would reiterate that this requirement need not be an onerous one. The duty to record actions, decisions and reasons are not merely a question of creating records for the purposes of openness and accountability, but also go to good governance, the state of information management and information holdings of government.

I believe a legislated duty to document is a critical element of the Government of British Columbia's open government movement, which promotes public oversight of its actions.

#### **RECOMMENDATION 5:**

I recommend that government create a legislative duty within FIPPA to document key decisions as a clear indication that it does not endorse “oral government” and that it is committed to be accountable to citizens by creating an accurate record of its actions.

### **Government's Archiving of Records**

A corollary of the duty to document, and worthy of mention in this report, is a duty to ensure the preservation and availability of records of permanent value. Records should be preserved and remain accessible over the long-term for historical research and other purposes. Currently in British Columbia, there is a serious problem with government's practice of archiving records.

British Columbia Archives is the archives of the Government of British Columbia, and its mission is to provide access to records of enduring value to the province for both the provincial government and public researchers. In 2003, BC Archives merged with the Royal BC Museum into a Crown Corporation and introduced the charging of a “fee for service model for the management and preservation of

<sup>17</sup> Standing Committee on Access to Information, Privacy and Ethics, David Loukidelis, March 11, 2009 (1700).

<sup>18</sup> See p. 27 of Investigation Report F11-02 at <http://www.oipc.bc.ca/investigation-reports/1243>.

future government archives.”<sup>19</sup> This fee is a disincentive for ministries to archive their records. Since the introduction of this fee for service model, government has not transferred any permanent records to BC Archives.<sup>20</sup>

Archiving serves many important purposes in society, including providing a means by which to measure government accountability through maintaining vital records created and received by government. As such, it is crucial that government ensure that it adopts a properly managed system to archive its records on a regular basis.

### 3.6 Why the Increasing Trend?

My investigation leads me to conclude that no single cause explains the increasing trend in general access to information requests to government resulting in the release of no records. A multitude of factors are responsible.

#### Centralization

Centralization of government’s processing of access to information requests in 2009 led to greater ease for applicants to make the same request to multiple ministries. The fact that government made this change to its request forms is positive because it has made it easier for applicants to request records from multiple ministries.

The IAO has indicated to my office that they will work towards a classification system that more accurately reflects instances in which an individual who has made the same request to multiple ministries ultimately receives the records they were seeking, irrespective of how many ministries respond that they do not have records. On a go forward basis, this should lead to a more accurate representation of when applicants do not receive responsive records.

#### RECOMMENDATION 6:

I recommend that the IAO develop a classification system that more accurately reflects where an individual who has made the same request to multiple ministries ultimately receives the records they were seeking, irrespective of how many ministries respond that they do not have records.

<sup>19</sup> See Appendix A of the Royal BC Museum 2006-2007 Annual Report.

<sup>20</sup> See p. 17 of the Royal BC Museum Service Plan for 2012-13.

## Office of the Premier

As noted earlier in the report, the Office of the Premier had no responsive records for 45% of its closed files for general requests in the past fiscal year, with the next closest ministry having 30%.<sup>21</sup> Although the Office of the Premier has been above the government average in no responsive records in each of the last three years, its percentage increased dramatically last year from 30% to 45%. The effect that this increase had on government's overall percentage is significant:

	2009/10 % No Responsive	2010/11 % No Responsive	2011/12 % No Responsive
Total (with Office of the Premier)	18%	21%	25%
Total (w/o Office of the Premier)	18%	20.4%	21.8%

As is seen in this table, Office of the Premier requests had little effect on the overall government average until last year. But the dramatic increase in the Office of the Premier's percentage last year was the single biggest cause of the increase from fiscal 2010/11 to fiscal 2011/12.

It is understandable that applicants seeking government records who have some degree of uncertainty as to where the records are held would ask the Office of the Premier for records. But this factor should not be any more apparent in the last fiscal year than it had been previously.

My investigators did not discern any overt cause for the sudden increase in the Office of the Premier's percentage of no records responses. However, the Office of the Premier's admitted practice of communicating verbally and in person rather than using email and other communication that produces records may help to explain some aspect of this increase.

I intend to monitor whether the significant impact of the Office of the Premier's response rate on government's overall numbers is a one-year aberration or the beginning of a trend that will require further examination. I will evaluate the Office of the Premier's statistics once they become available for the current fiscal year and will do so again six months into the upcoming fiscal year.

<sup>21</sup> See Appendix B.

## Requests by Media

Media are the only applicant type to be above the overall average for requests receiving no records in each of the last three years, with the percentage rising from 25% to 29% to 34% over this time.<sup>22</sup>

My investigators did not observe any particular reason to expect that the nature of media requests has changed significantly over the previous three years. Nor did my investigators observe any distinction in government's handling of media requests as compared to requests by other applicant types.

The sudden increase in the Office of the Premier's percentage of no records responses has had a significant effect on media requests in the last fiscal year. In fiscal year 2011/12, 49% of the 149 media requests to the Office of the Premier resulted in a no records response. By comparison, in fiscal 2010/11, 37% of the 71 media requests to the Office of Premier resulted in a no records response. The substantial increase in total media requests to the Office of the Premier, as well as the increasing percentage of these requests resulting in no records responses, accounts for the majority of the increase from 29% to 34% in the last fiscal year.

I do not believe there is anything specific to media access requests that contribute to the overall increasing trend in no responsive records. Instead, I believe the increased ease of making requests to multiple ministries as well as the increasing influence of requests made to the Office of the Premier help explain both the overall trend for all applicant types as well as the increase in no records responses to media requests.

### 3.7 Is Government Compliant with its Duty to Assist Applicants?

The issue before me in this investigation is, in light of the increasing trend in general access to information requests to government resulting in a finding of no responsive records, whether government is compliant with its duty under s. 6(1) of FIPPA to "make every reasonable effort to assist applicants and to respond without delay to each applicant, openly, accurately and completely."

As I stated earlier, s. 6(1) of FIPPA does not impose a standard of perfection or require government to establish with absolute certainty that records do not exist for any particular request. Instead, in order for government to show that it is complying with s. 6(1), it must be able to show that as a matter of course its search efforts are thorough and comprehensive and that it has explored all reasonable avenues to locate records and to assist applicants.

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<sup>22</sup> See Appendix A.



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Government's handling of the majority of the 88 files my office reviewed as part of this investigation did not raise significant issues of compliance with s. 6(1) of FIPPA. For the most part, the files my investigators reviewed revealed that government's search efforts are thorough and comprehensive and that all reasonable avenues to locate records and to assist applicants were explored.

I have identified instances where government could respond in a more open, accurate and complete manner. Specifically, government should ensure that where it is aware that records may or do exist in the custody or control of a ministry other than the ministry from whom the applicant has requested records, it communicates this information to the applicant. With centralization of the government access request process, there is an onus on IAO to coordinate government's efforts in this regard.

Government should also ensure that where it does not have responsive records, it helps applicants to better understand government's position as to why this is the case by providing some explanation in its response letter. Government can also work towards consistently responding in such a manner as to provide greater guidance on future requests.

Government should also interpret requests in a manner that assists applicants in receiving the records they are seeking. I believe government is usually diligent in this regard. However, as I have noted in my review of calendar requests, government could have assisted the applicant by clarifying the request in a manner that would have pointed to responsive records.

With the above qualifications noted and keeping in mind that s. 6(1) of FIPPA does not impose a standard of perfection; I find that government is complying with its s. 6(1) duty to assist applicants in its handling of general access to information requests.

## 4.0 SUMMARY OF RECOMMENDATIONS

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### 4.1 Summary of Recommendations

#### RECOMMENDATION 1

I recommend that IAO communicate to an applicant when it is aware that the records the applicant is seeking exist within a different ministry than from where the applicant has originally requested the records.

#### RECOMMENDATION 2

I recommend that IAO should be reasonably confident that before narrowing a request, the result will not deprive applicants of records they would otherwise receive, unless IAO informs the applicant that this may be the case.

#### RECOMMENDATION 3

I recommend that IAO ensure that it interprets requests (including those for government calendars) broadly enough to assist the applicant in obtaining the records he or she is seeking.

#### RECOMMENDATION 4

I recommend that where government does not have records responsive to an access request, IAO provide an explanation to the applicant as to why this is the case.

#### RECOMMENDATION 5

I recommend that government create a legislative duty within FIPPA to document key decisions as a clear indication that it does not endorse “oral government” and that it is committed to be accountable to citizens by creating an accurate record of its actions.

#### RECOMMENDATION 6

I recommend that the IAO develop a classification system that more accurately reflects where an individual who has made the same request to multiple ministries ultimately receives the records they were seeking, irrespective of how many ministries respond that they do not have records.

## 5.0 CONCLUSION

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British Columbians are extremely engaged in the access to information process. Members of the media, political parties, interest groups and other citizens of our province are deeply interested in gaining access to records in order to ensure that government remains accountable to the public. Applicants should not be discouraged from making requests in circumstances where they are not certain that records exist and government should take all reasonable steps to assist applicants in finding the records they are seeking.

I have found that government is in compliance with its duty to assist applicants in the processing of general access to information requests, but there is still room to make improvements. Government should not interpret its duty to assist narrowly. Government can and should do a better job of its internal documentation of files and its communication with applicants. This would assist in explaining to an applicant why a particular request generated no responsive records.

I believe that government can also improve its handling of requests for such files as requests for calendars. Government should ensure it provides sufficient assistance to the applicant in clarifying the request such that government maximizes the likelihood of producing responsive records. It should also respond in such a way as to provide greater guidance to applicants on future requests for similar records.

Government's adoption of my recommendations would give applicants greater confidence in government's search efforts without adding significantly to the burden of those processing requests. I believe my recommendations can help reverse the increasing trend of general access requests leading to no responsive records.

It is important that government not only comply with its obligations under FIPPA, but that those who make requests for government records have faith that they are being treated fairly and are receiving reasonable assistance from government in locating the records they are seeking.

Government can also take steps, such as adopting a legislated duty to document its key decisions, to both ensure greater transparency of its actions and enhance public confidence in government's intention to be accountable to its citizens. I believe a legislated duty to document is a critical element of the Government of British Columbia's open government agenda, which promotes public oversight of government actions.

I will evaluate the percentage of access to information requests that result in no records responses by government in the current fiscal year once statistics are available. I will also work with government to monitor its implementation of my recommendations and report publicly on this issue again after the 2013/14 fiscal year.

## **6.0 ACKNOWLEDGEMENTS**

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I appreciate the efforts of FIPA in looking into this important issue and bringing it to my office's attention. I also acknowledge that the Government of British Columbia has cooperated fully with our investigation.

Finally, I would also like to thank Troy Taillefer, Senior Policy Analyst, and Tlell Raffard, Policy Analyst who conducted this investigation and prepared this report.

March 4, 2013

### **ORIGINAL SIGNED BY**

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Elizabeth Denham  
Information and Privacy Commissioner  
for British Columbia

OIPC File No.: F12-50508

## APPENDIX A

### % No Responsive Records by Applicant Type

<i>Applicant Type</i>	<i>2009/10 Closed Files</i>	<i>% No Responsive</i>	<i>2010/11 Closed Files</i>	<i>% No Responsive</i>	<i>2011/12 Closed Files</i>	<i>% No Responsive</i>
Business	218	37%	259	20%	201	27%
Individual	603	12%	760	22%	704	22%
Interest Group	312	13%	151	13%	155	18%
Law Firm	214	16%	260	18%	268	16%
Media	445	25%	625	29%	788	34%
Other Governments	10	20%	14	0%	15	20%
Other Public Bodies	16	6%	13	15%	21	19%
Political Party	646	17%	678	17%	1007	21%
Researcher	31	10%	18	0%	23	39%
<b>Total</b>	<b>2495</b>	<b>18%</b>	<b>2778</b>	<b>21%</b>	<b>3182</b>	<b>25%</b>

## APPENDIX B

### % No Responsive Records by Ministry

<i>Ministry</i>	<i>2009/10 Closed Files</i>	<i>% No Responsive</i>	<i>2010/11 Closed Files</i>	<i>% No Responsive</i>	<i>2011/12 Closed Files</i>	<i>% No Responsive</i>
Aboriginal Relations & Reconciliation	29	17%	33	21%	66	27%
Advanced Education	59	12%	61	23%	70	16%
Agriculture	52	15%	68	25%	54	19%
Children & Family Development	77	8%	82	13%	102	21%
Community, Sport & Cultural Development	58	14%	44	32%	82	24%
Education	62	15%	65	29%	80	24%
Energy & Mines	79	9%	93	26%	174	24%
Environment	183	14%	246	23%	259	30%
Finance	332	25%	259	23%	234	22%
Forests, Lands & Natural Resource Operations	228	7%	288	16%	276	16%
Health	171	23%	179	30%	190	24%
Jobs, Tourism & Innovation	55	31%	88	23%	127	26%
Justice	392	31%	443	18%	457	18%
Labour, Citizens' Services & Open Government	167	15%	234	20%	296	22%
Office of the Premier	144	21%	186	30%	373	45%
Social Development	189	11%	143	18%	72	26%
Transportation & Infrastructure	218	12%	266	10%	270	19%
<b>Total</b>	<b>2495</b>	<b>18%</b>	<b>2778</b>	<b>21%</b>	<b>3182</b>	<b>25%</b>