PUBLIC REPORT NO. 26

ACCESS TO INFORMATION

AND PRIVACY

MARCH, 1991

OMBUDSMAN

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Introduction

The Office of the Ombudsman has been established to review the fairness of the administrative actions and decisions of the Provincial Government and its agencies. It does not take part in the political process of debating government legislative policy. It is independent of government, and reports to the Legislature as a whole, or directly to the public. It investigates complaints from individuals, and also initiates its own investigations into individual incidents of suspected unfairness or systemic problems in public administration. It has a preventative responsibility to recommend changes in administrative policy which may cause unfairness in the future, as well as having the role of recommending remedies for individuals who have already been treated unfairly. However, the Ombudsman's office has no power to order change - it can only make recommendations.

The recommendations in this Public Report are for a fair and effective administrative policy dealing with public access to government information and privacy of personal information. The principles set out are the standard by which the Ombudsman's Office considers complaints from the public concerning government practices in this area. Because of the wide scope of government activity, directly through provincial ministries and indirectly through various independent provincial boards, commissions, Crown corporations and private contractors delivering public services, the principles must be adapted to meet the special circumstances of each agency's role.

At its essence, democracy ensures that each individual is treated fairly. This can only be achieved through our meaningful participation in the affairs of government. However, the complexities and demands of modern society have required that we delegate most public actions and decisions, first to elected representatives and then on to public administrators.

This steady reduction in direct participation requires that we have effective accountability mechanisms to ensure individual fairness in the decisions and actions of government. Unfortunately, the traditional political and judicial accountability mechanisms are not in themselves sufficient to ensure meaningful participation and individual fairness. Administrative unfairness can occur as the

general public policy of government is translated by public servants through the exercise of discretion as they apply it to individual situations. This can sometimes lead to inconsistency and arbitrariness. Further, the nature of large public bureaucracies can often cause the attention of public servants to focus upwards through the hierarchy rather than downwards to the individual members of the public who are directly affected by their activities. In order to deal effectively with potential unfairness, public administrators must be sensitized to the impact of their actions and decisions on individuals, and individuals must be empowered to participate meaningfully in the processes of government which affect themselves and their communities. Fundamental to such sensitivity and participation is effective access to public information held by government. This report deals with the underlying principles governing such access to information, as well as with the necessary exceptions.

Access to information issues are not new. During the late 1960's and early 1970's, Gerald Baldwin, Q.C., a former member of the House of Commons, was involved in introducing a number of private member's bills which were the forerunners of the present federal legislation. In 1977, he told the House of Commons:

> Open government by a workable freedom of information law will have very definite advantages for this parliament and for the public of Canada. Canadians are entitled to know what the government is doing to or for them, what it is costing them, and who will receive the benefits of the proposals which are made...

The principles on which the federal Access to Information and Privacy Acts are based were stated by the Honourable John Crosbie, then Minister of Justice, in May 1986, in a statement to the House of Commons Standing Committee on Justice and Solicitor General:

- That government information should be available to the public;
- that necessary exceptions to the right of access should be limited and specific;
- that decisions on disclosure of government information should be reviewed independently of government;
- that the collection, retention and disposal of personal information, as well as its use and disclosure should be regulated in such a way so as to protect the privacy of individuals.

This office supports these basic principles.

1. Purpose

Presently, members of the public have no absolute right to obtain information kept by provincial government agencies in British Columbia. Decisions about what information should be disclosed in the public interest are discretionary; they are often made by individual ministers and there is no consistency.

The right of public access to government information is a basic incident of democratic participation in government, and does not require justification on the basis of any particular need. Information should not be kept unnecessarily confidential. Such a practice helps to create an atmosphere of mistrust and can lead to misinterpretation where information is partially disclosed.

One of the ultimate benefits of a thoughtful access policy is increased efficiency from improvements in records management systems employed by all government Ministries and agencies. The public has a right to expect that every government agency knows what records it has in its custody or control and where those records are located. Information should be easily accessible for internal purposes regardless of an external policy. Therefore, while the implementation of the policy may cause some initial disruption, the effect over time should be reduced costs and increased efficiency.

In jurisdictions where access to information legislation is in effect, members of the public generally exhaust less formal means to obtain information from the government before making requests under the statute. While the legislation does set the standard for disclosure, it is used primarily as a vehicle to respond to formal requests. A non-statutory policy not only sets the general standard, but also becomes the only means for disclosure. It should therefore be designed to provide direction to all government agencies and the entire public service, as well as to provide a means for the public to obtain information. The policy should also stimulate wider disclosure of information independent of specific requests from the public.

A well written policy, carefully implemented, could support an effective and non-threatening progression to the introduction of legislation in this area. It could be adapted to the specific needs and responsibilities of different agencies, with the full participation and support of the officials who would have to apply it. Relevance, realism and familiarity would thus reduce the likelihood of controversy or disruption surrounding the implementation of access and privacy legislation.

The only real and effective means to ensure that the public has reasonable access to information is to effect a change in attitude within the government service. Public servants in British Columbia

are required to swear or affirm an oath to faithfully execute their duties, powers and trusts as servants of the Crown. Some public servants may be uncomfortable with disclosing information if they believe it would constitute a violation of their duty of loyalty. They may fear that disclosure could embarrass their minister, and this would be in conflict with what they see as their main duty to protect that office. Because of these factors, it will be necessary for government to include in its policy that disclosure of information in accordance with the guidelines is required as a positive obligation of public officials, and it will not violate the oath taken, or any other duty. There should also be clear support from government at the most senior level and protection provided in respect of career advancement for those responsible for making decisions about disclosure. Some information may be potentially embarrassing for the government, and the policy should not permit any improper influence or interference with decisions on disclosure.

It is the recommendation of this office that the basic policy should be that information within the control of government[1] is generally available to the public[2]. Exceptions to this general rule should be specific, few in number and generally subject to discretionary disclosure if there is no reasonable expectation that harm would result. Whether this policy is enshrined in legislation is a matter of public policy to be decided at the political level; that decision is outside the jurisdiction of the Ombudsman's office. However, the principles involved are those of administrative fairness which must at the very least be respected in administrative policy and practice.

2. External Review

The ultimate measure of success of a disclosure policy is that there is acceptance of it within government. The Ombudsman's office is committed to effecting remedial change through reasoned discussion and cooperation. The office currently has independent oversight responsibility to monitor the fairness of the administration of government policy, including information policy. Expanding this role under comprehensive information policy or legislation would simply formalize and detail the current jurisdiction.

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[1] This should include agencies which are either within the direct control of government, are established by statute, or contract with or are otherwise funded by government to provide public services.

[2] This should include all natural or legal persons, regardless of domicile.

The Ombudsman review process would function in its normal manner. Where a Ministry or other government agency refuses a request for information in whole or in part, or there has been unreasonable delay, the Ombudsman's office would consider and investigate the complainant's request and could make a recommendation under s. 22(2), if appropriate. A useful variation might follow the model from the legislation in New Zealand, which provides that an Ombudsman recommendation must be complied with unless Cabinet intervenes to override it by Order in Council within a specified time.

3. Internal Administration

It is essential that the public be informed of its rights under an access to information policy. Legislation, by its nature, is a public method of providing rights. While a non-statutory policy can be effective, the government has a greater responsibility for publication, education and implementation. Some ministries have developed disclosure policies, but this office has found that such policies are often not widely known even within those ministries.

Those in government who are responsible for making the decisions on disclosure should be protected from real or perceived conflicts between their responsibilities under the access policy and their career prospects. Their performance should be measured by how well they comply with the spirit and intent of the policy. They need to have effective training, a clear measure of independence and positive direction for their important role from ministers, deputies and other senior officials.

Each Ministry should be responsible for

(a) publishing a comprehensive list of all records kept, for what purpose and under what authority,

(b) developing and publishing clear and objective criteria for the exercise of discretion regarding disclosure of information (including the level of staff authorized to make a decision), and

(c) keeping records and statistics of requests for information and results. (To be consistent with the policy of open access, the name of a person who requests information should normally be subject to disclosure, unless there are compelling reasons for maintaining anonymity.)

It is recognized that different types of information must be treated differently. Each ministry is encouraged to develop a policy adapted to its specific responsibilities. The Ombudsman's office is already involved in advising several ministries and

agencies of government on appropriate information policies, and is investigating and making recommendations on specific access and privacy cases.

4. Exemptions

As stated above, exceptions to disclosure should be as specific as possible. Most of them should be discretionary, and only available when a clearly stated injury test is met. While a government wide policy must by definition be stated in general terms, it is anticipated that each ministry will be able to develop specific, objective criteria for exemptions. This will enable ministry staff to make decisions on disclosure requests in an efficient, consistent and timely fashion, and without the potential for real or perceived improper considerations or influences.

Because exemptions permit information to be withheld, it is important that government approach these issues in a manner consistent with the policy of access. Exemptions should be interpreted narrowly. The proper approach is to determine how much information can be disclosed, not how much can be withheld.

It is recommended that all exemptions be subject to a "public interest override", such that information should be disclosed in circumstances where there are reasonable grounds to believe that the information reveals or could assist in addressing a serious environmental, health or safety hazard to the public. Decisions on public interest should be made by the responsible minister.

Where access is denied, the government representative should be required to provide full reasons, including the specific exemption(s) being claimed.

Exemptions should be in the following categories:

(a) Personal information not relating to the requester

This category is concerned with limitations on the disclosure of personal information to someone other than the person the information is about. This basic exemption should be mandatory.

The following are examples of types of information considered to be personal:

- residence address and telephone
- social insurance number
- education
- medical history
- employment history
- criminal record, fingerprints
- financial situation

- marital status
- national or ethnic origin, race and colour
- religion
- sex and sexual orientation
- age.

It is important that this category be clearly defined, since there are duplicate implications where access to personal information is requested by the individual involved (see Part 5 below).

Personal information which is provided to a government agency should generally be kept confidential. There are, however, some limitations to this exemption. For example, personal information could be disclosed:

- where the person about whom the information relates consents to its disclosure to a named requester for an identified purpose;

- for the authorized purpose for which it was obtained;

- for any purpose set out in legislation authorizing its disclosure;

- where the information is already public;

- to comply with a court order;

- to investigative bodies in connection with a lawful investigation;

- in compelling circumstances affecting the health or safety of the individual concerned;

- to a M.P. or M.L.A. in connection with answering a query for or dealing with a problem at the request of that individual;

- where the information relates to contracts entered into between individuals and the government or to discretionary benefits granted by the government to individuals;

- where the public interest clearly outweighs the private interest and disclosure does not constitute an unjustified invasion of privacy[3].

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[3] This exception should be very carefully drafted and it is recommended that the guidelines should help to define what constitutes an unjustified invasion of privacy. As a comparison, the federal Act simply authorizes disclosure when the head of an

(b) Third party information

Certain kinds of information which are provided to a government agency by a third party should be protected. This would normally involve confidential business information such as financial, labour relations, commercial, scientific or technical information, and trade secrets. This should be a discretionary exemption because there must be some defined and demonstrable injury resulting from disclosure.

In order for information to be withheld under this exemption, the information must have been supplied in confidence, either explicitly or implicitly, and disclosure could reasonably be expected to:

(i) prejudice the competitive position or interfere with contractual or other negotiations of the business involved;

(ii) result in similar, necessary information no longer being provided to government; or

(iii) result in undue loss or gain to any particular person, business or group.

It is also important to make a distinction between information provided to government as a result of mandatory statutory reporting requirements and that provided as a result of applications for government funding or other economic benefits. In the latter situation, the only information which might qualify for the exemption is that falling under items (i) and (iii) above.

The public interest override would permit disclosure of all types of third party information where it relates to public health, public safety or protection of the environment and where the public interest clearly outweighs a specified commercial injury to the third party. Consideration should be given to compensating a person who suffers loss as a result of disclosure made in the general public interest.

There must be a procedure which allows a potentially adversely

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agency considers that the public interest in disclosure clearly outweighs any invasion of privacy that could result. In Ontario, disclosure is permitted only if it does not constitute an unjustified invasion of privacy, and the Act gives considerable guidance on what is and what is not to be considered an unjustified invasion by providing a lengthy list of factors to be taken into account.

affected third party to contest a government decision to release information. It is essential for such a third party to be notified of any decision to release information and to be given an opportunity to make representations why the information should not be disclosed. There should be a specified period of time allowed for the third party to respond, so as not to result in undue delay.

(c) Economic interests of the province

The government should have the discretion to refuse to disclose records which contain:

- trade secrets or financial, commercial, scientific or technical information belonging to the government and which have or potentially have monetary value;

- information where disclosure could reasonably be expected to prejudice the competitive position of the government or its economic position;

- information relating to negotiations carried on by or on behalf of the government;

- scientific or technical information obtained through research by a government employee where disclosure could reasonably be expected to deprive the employee of priority of publication;

- information where disclosure could reasonably be expected to be injurious to the financial interests of the government or its ability to manage its economy.

In addition to the basic public interest override, this exemption should not be available in respect of information about the results of product or environmental testing carried out by any government agency in the public interest.

(d) Advice to government

Policy advice or recommendations regarding government operations is a common discretionary exemption which generally covers the following categories:

- advice or recommendations developed for a Minister;

- records of consultations involving government officials, a Minister, their staff or consultants;

- positions or plans for negotiations carried on by the government;

- personnel management plans and administrative plans not yet in operation.

This exemption would apply only for a stated period of time (perhaps 10 years). It should be discretionary, limited to policy advice and consultations at the political level of decision-making and should not apply to factual data used in the process, unless that data is exempt under another category. For example, it should not normally apply to reports or studies such as:

- statistical surveys;
- environmental impact statements;
- reports of products testing;
- reports on the performance or efficiency of a government agency where the information upon which the report is based was not received in confidence;
- technical studies relating to government policy or projects;
- statements of the reasons for a decision made which affects the rights of citizens or particular persons.

(e) Cabinet confidences

Information which comes before Cabinet in the form of advice, recommendations or policy considerations, and information which reflects the deliberations of members of Cabinet should be protected from disclosure on a mandatory basis, subject to the following:

- factual data contained in some documents should be available, subject to other exceptions[4];
- where Cabinet is sitting as a quasi-judicial appeal body, parties affected by a decision should have access to all information which was before Cabinet and on which Cabinet based its decision and to the reasons supporting the decision;

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[4] Traditionally, all information presented to Cabinet has been covered by this exemption. However, if the public is to be able to assess Cabinet decisions properly, factual background information should be available. Further, government will be in a better position to justify its decisions if the factual reasoning for them is disclosed.

- after a period of time (for example, 10 years) the exception would no longer apply.

Examples of Cabinet confidences include:

- agendas for Cabinet meetings and documents recording Cabinet's deliberations or decisions;
- records containing policy options or recommendations submitted, or prepared for submission to Cabinet or its committees;
- briefing papers directly related to meetings and discussions of Cabinet or its committees;
- memoranda and other records of communications between Ministers on policy matters relating to the deliberations or decisions of Cabinet;
- draft legislation except for the purposes of consultation, with the consent of Cabinet;
- other documents which contain information about the contents of the matters listed above.[5]

(f) Intergovernmental information

Information which has been obtained in confidence from another government or government agency should be protected by a mandatory exemption, but such information can and should be disclosed where the other government or agency consents to its release, makes the information public in another way or would be subject to a disclosure requirement under its own legislation. Otherwise, information relating to inter-governmental relations should be protected by a discretionary exemption subject to an injury test which balances the public interest in disclosure against the possible harm that could result.

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[5] The Document Disposal Act makes provision for the destruction of public documents seven years from the date on which they were created. Cabinet may, on the recommendation of the minister having jurisdiction over the ministry concerned, and on the recommendation of the Public Documents Committee, order that any public document or class or series of documents be destroyed at a specified date. Consideration should be given to these provisions when formulating policy on the retention of public documents and the period of time after which the exemptions in (d) and (e) would no longer apply.

(g) Law enforcement, investigations and correctional matters

There should be a discretionary exemption which protects the law enforcement records of police forces, other investigative bodies and correctional authorities where disclosure could reasonably be expected to interfere with an investigation, law enforcement or corrections matter. This exemption would apply to information obtained or prepared in the course of a lawful investigation pertaining to the detection, prevention or suppression of an offence or to the enforcement of the law or lawful penalty. It would also apply to lawful investigations by other statutory bodies.

The exemption would apply where disclosure might reasonably be expected to, for example:

- reveal investigative techniques and procedures currently in use;
- disclose the identity of a confidential source or disclose information furnished only by that confidential source;
- endanger a person's life or safety;
- deprive an accused of a fair trial or adjudication;
- unfairly expose a suspect to the harm of unproven suspicions or allegations outside the criminal court process;
- endanger the security of a building or vehicle;
- facilitate the escape from custody of a person under lawful detention;
- jeopardize the security of a provincial correctional centre;
- facilitate the commission of an unlawful act.

The exemption should include reports prepared in the course of lawful investigations or enforcement proceedings. The government should also be able to refuse to confirm or deny the existence of such records. However, information such as anonymous statistical analyses should not generally be subject to the exemption.

(h) Solicitor - client privilege

The government should have the protection of solicitor - client privilege in respect of legal advice given. However, since the

privilege belongs to the client, the government always has the option of waiving the privilege and disclosing the information in the public interest. This should, therefore, be a discretionary exemption subject to Ombudsman review and recommendation.

(i) Statutory prohibitions

Government policy would necessarily be subject to statutory prohibitions which restrict disclosure. However, these provisions were enacted without reference to an access policy. Accordingly, it is recommended that government undertake a comprehensive review of all statutory provisions which purport to limit disclosure and draft amendments necessary to ensure that all legislation complies with the substance and spirit of the access policy.

5. Personal Information

One of the major exceptions to access is that the record falls under the category of "Personal Information". On the issue of disclosure, the right to privacy is the mirror image of the right to access. In coordination with a policy on the right of access, the government should also develop clear guidelines ensuring a general right of privacy in respect of all personal information in the control of government agencies subject only to limited, specified exceptions.

The objectives of such a policy should be to:

- limit what information is collected and how it is collected,
- limit how it is used and the extent to which it is disclosed,
- allow a right of access to personal information about oneself, and
- provide a means for persons to correct errors or place their explanations or objections on the record.

(a) Limitations on collection

Each government agency should only collect personal information that relates directly to and is specifically authorized by the government program it administers. As much as possible, it should be collected directly from the person involved and not from a third party or other indirect source. Also, each agency should be required to inform individuals of the collection and its purpose.

(b) Limitations on use

Where access to general information is involved, there are no limits placed on the use of the information once it is disclosed, and any distinctions between government agencies are of little importance. Different considerations come into play where there is disclosure of personal information. Each government agency is regarded as a separate entity and one agency may not generally share information with another agency. Also, there are limits on the use to which personal information may be put.

The basic principle is that the information may only be used for the authorized purpose for which it was obtained or for a consistent use, or where the person to whom it relates consents to any other use. "Consistent use" would mean any use relevant to the purpose for which the information was collected which is necessary to the statutory duties of the agency, or where the individual might reasonably have expected that it be put to such use. There must be a reasonable and direct connection to the original purpose for which the information was obtained.

Agencies should be obliged to take all reasonable steps to ensure that personal information used is both current and accurate. The government should also inform the public about the uses made of information contained in the various personal data banks maintained by each agency. Where personal information is held in a particular government data bank, it is essential that effective protections are in place to ensure that no linkage to other public or privately held data banks is possible, and that no otherwise inappropriate access can be effected.

(c) Limitations on disclosure - exemptions

See Part 4(a) above. It is recommended that individuals be notified of impending unanticipated disclosures of personal information about them. There should be sufficient time for those individuals to seek a review of the decision (similar to third party information). If there are many individuals involved, and it would be costly and prohibitive for the government to notify each person, then the public interest in disclosure without prior notification should be compelling.

(d) Access to personal information

There should be a basic presumption that an individual has a right of access to all personal information kept by the government. In order to assist members of the public, the government should publish a guide which identifies the agencies which may have control over particular personal information, as well as the types of information which are kept.

Requests for personal information should be made either in person or in writing, and the requester must provide adequate identification. Government policy should clearly outline a standard procedure and specify what type of identification is required.

Notwithstanding the basic presumption, there may be some circumstances which justify a denial of access to personal information:

- **Medical records:** Traditionally, access to medical records has been denied to an individual where disclosure may be harmful to the person's best interests. This is a complicated area which involves specialized medical issues, including consent and competence, and it is recommended that the government carefully review this policy. Guidelines in this area should be prepared with representatives from the Ministries of Health and the Attorney General, and any restrictions on access should be according to clear and compelling criteria.

- **Personal information about another individual:** Where information about more than one person is combined, there may be justification to refuse access where the relevant information cannot be severed. However, the government should make every effort to disclose by either requesting the consent of the other person(s) involved or severing the information to the maximum extent possible.

- **Personal information contained in police or other investigative files:** Where disclosure could reasonably be expected to disrupt a lawful investigation, access should be denied.

- **Personal information regarding correctional and security matters:** This exemption should be used where disclosure could reasonably be expected to lead to a serious disruption of the institutional program of the person seeking access, where it could reveal the identity of an informant or impair the security or orderly administration of the institution.

- **Opinion material:** Where information is compiled solely for the purpose of determining suitability for employment or appointment, or in connection with awarding a government contract, access could be denied where disclosure would reveal the person(s) who provided information on a confidential basis.

(e) Correction of personal information

The right of a person to correct errors contained in personal information is necessary because of the effect the information has on the ways in which government deals with individuals. Inaccurate personal information could have serious consequences in many situations.

The government should outline a procedure whereby an individual can request that certain information be corrected. Where an agency does not agree that the information is inaccurate, the person should have the right to have an explanation or objection recorded on the file.

6. Other issues

(a) Costs and fees

Access to information is a public right and the policy should generally prohibit application fees and costs associated with a public employee's time spent fulfilling this public service. However, it is reasonable for the government to seek to recover some of the expenses associated with disclosing information. It would be appropriate for fees to be charged based on real disbursements and perhaps those costs associated with unusually large or complex requests. It is recommended that the government establish a fee schedule which would specify copying charges, and search fees only after some specified search and preparation time (five hours is the federal practice), but fees should not be payable if the search does not reveal any records.

A fee waiver policy should also be implemented. This office recommends that two main factors be considered:

(i) will there be a benefit to a population group of some size, which is distinct from the benefit to the applicant? or

(ii) can the applicant show that the research effort is likely to be disseminated to the public and that he or she has the qualifications and ability to disseminate the information?

The government should also consider a waiver of fees in all circumstances where the amount payable is below a specified amount, i.e. where the administrative cost of collecting the fee exceeds the amount; and where, due to the financial situation of an individual or group, any fee would act as an effective bar to access. Where the costs of obtaining information are excessive, access is essentially denied.

The major costs associated with disclosure of information will likely relate to two factors: the method of granting access and the nature of the request. With respect to method, it will be necessary and generally efficient for all government agencies to improve their records management systems. However, they should not be required to sort through and organize material into a specially requested format, nor should they be required to create a new record from information contained in computer databases. With respect to requests for large numbers of records, it may be appropriate to establish a fee estimate before the entire process is started. For example, Ontario uses a form of "interim notice" where the agency gives the requester a fee estimate and advises if and what exemptions may apply. The fee estimate is appealable. In British Columbia, fee disputes are reviewable by the Ombudsman.

(b) Time limits/ delay

Delay is an inevitable hazard when dealing with government information. Without legislation, it is difficult to impose time limits within which access requests must be answered. The objective is that each agency will comply with requests within reasonable time frames. It is recommended that the guidelines indicate clearly that a reasonable time would be within 30 days. However, where a large number of records is involved, consultations with other departments are necessary, or other unusual circumstances exist, a further 30 days should be allowed. There should also be reasonable time limits suggested in respect of notification to third parties or other persons affected by an access request.

(c) Severability

Where some of the information requested is subject to an exemption, then the government agency has to determine whether the balance of the record can be disclosed. The portions which cannot be disclosed must be "reasonably" severable.

Government forms should be designed with severability in mind. For example, where portions of a record are exempt from disclosure, there should be provision for the provider of the information to attach that material as appendices.

(d) Trivial or vexatious requests

It is recommended that guidelines not deal with this matter. Until an access policy is in effect, there is no basis upon which to determine whether there will be an excess of trivial or vexatious requests. Also, to permit a government agency to refuse access on

this basis could effectively frustrate a clearly defined right of access.

Conclusion

Openness is essential in a democracy in order for us to participate meaningfully in our own self-government. Personal privacy and security are also essential rights in a healthy society. The principles set out in this report are based in administrative fairness and not political philosophy. They are directed at ensuring an appropriate level of public access to information held by the provincial government and its agencies, and their application is reviewable under the Ombudsman Act.

Stephen Owen,
Ombudsman