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February 24, 2017

Drew McArthur, Acting Commissioner
Office of the Information and Privacy Commissioner
PO Box 9038
4th Floor – 947 Fort Street
Victoria, BC V8W 9A4

Dear Acting Commissioner McArthur:

On behalf of the B.C. Freedom of Information and Privacy Association, we request that you:

1. Exercise your powers under sections 42(1) and 42(2)(a) of the *Freedom of Information and Protection of Privacy Act* ["*FIPPA*"][1] to conduct a systemic study on why the Ministries of Environment, Energy and Mines, Forests, Lands and Natural Resource Operations and the Oil and Gas Commission are not proactively releasing key environmental orders, permits, contravention decisions and policy manuals, and

2. Recommend appropriate legal and policy reform to ensure that all Ministry of the Environment, Ministry of Energy and Mines, Ministry of Forests, Lands and Natural Resource Operations and Oil and Gas Commission orders, permits, contravention decisions and policy manuals are proactively posted online. [2]

[1] *Freedom of Information and Protection of Privacy Act* [RSBC 1996] Ch 165. ["*FIPPA"*].
[2] In making your recommendations we ask that you not only consider the information found in this submission, but also the *Report of the Special Committee to Review the Freedom of Information and Protection of Privacy Act*, (May 2016) online: <https://www.leg.bc.ca/content/CommitteeDocuments/40th-parliament/5th-session/foi/Report/SCFIPPA_Report_2016-05-11.pdf> ["SCFIPPA Report"].

1. The current scheme

There are three relevant provisions under the *Freedom of Information and Protection of Privacy Act* relating to proactive release of information, ss. 25, 70, 71, and 71.1.

Section 25

Section 25 has to be understood in light of Commissioner Denham's interpretation of that section in her response to the Environmental Law Centre's request that she investigate Government's refusal to release documents relevant to the Mount Polley mine disaster. In her July 2015 Mount Polley Report Commissioner Denham stated:

> "The principle underlying s. 25 is an important one. Public bodies are the stewards of large volumes of information about our health, safety, environment, and other matters of public concern. It is their legal duty under s. 25 to release information about a risk of significant harm to the environment, or health or safety of the public and also to release information if disclosure is —clearly in the public interest. This is a mandatory provision that must be acted on proactively, whether or not a request for information has been made.
>
> Section 25 of the Act is not often used, and is a powerful obligation as it overrides all other sections of the Act. That said, it is an important component of ensuring timely release of significant and important information held by public bodies."(Emphasis added)[3]

Commissioner Denham added: "With this report, I am making a finding that re-interprets s. 25(1)(b) to clarify that urgent circumstances are no longer required to trigger proactive disclosure where there is a clear public interest in disclosure of the information,"(Emphasis added) and later "I further recommend all public bodies in British Columbia promptly evaluate whether they currently have information that should be proactively disclosed as clearly in the public interest as described in this report."[4]

In defining what a "clear public interest" means Commissioner Denham stated:

> "As a result of the change in interpretation, public bodies must proactively disclose information pursuant to s. 25(1)(b) where a disinterested and reasonable observer,

[3] "Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies" (Victoria, OIPC, July 2, 2015), 2015 BCIPC No. 30, online: <https://www.oipc.bc.ca/investigation- reports/1814>, at 3.
[4] *Ibid.* at 4.

> knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest."

While the change in interpretation is positive and welcomed by the ELC, it has the potential to be toothless if there is not oversight to ensure that ministries comply with the enhanced requirements. Indeed, on the basis of recently gathered evidence, we have come to the conclusion that a number of ministries are not correctly applying Commissioner Denham's interpretation. In light of the egregious examples cited below, we request that you use your powers under sections 42(1) and 42(2)(a) of FIPPA to conduct a systemic study on why the Ministries of Environment, Energy and Mines, Forests, Lands and Natural Resource Operations and the Oil and Gas Commission are not proactively releasing information in compliance with this new interpretation of s 25.

Sections 70, 71 and 71.1

Sections 70-71.1 of *FIPPA* touch on categories of documents that may be disclosed without a request. These sections were enacted as a part of the government's 2011 amendment package.

Section 70 is the only legislated provision that sets out a specific category of documents to be made available without request. It specifically requires that all policy manuals be made available without request. (Policy manuals include instructions or guidelines issued to officers or employees of the public body and substantive rules or policy statements adopted by the public body.)

In addition, sections 71 and 71.1 provide for the establishment of categories that will be made available without request. Section 71 requires the head of a public body to "establish categories of records that are in the custody or under the control of the public body and are available to the public without a request for access". Section 71.1 gives the minister responsible for *FIPPA* the power to establish categories of records that must be made available to the public without a request.

In her 2013 review of the Open Government Initiative,[5] Commissioner Denham noted that allowing public bodies to identify what documents are to be released without a request is an approach that acknowledges that:

> "...individual ministries are likely to be best placed to assess which categories of records ought to be made publicly available. This is because these ministries are intimately familiar with their specific mandates and any particular laws affecting their operations. This puts them in the position of being able to assess which kinds of records should be made available as a priority, not to mention being able to best assess other pertinent factors that will shape, on an ongoing basis, their proactive disclosure program."[6]

She noted that giving the minister responsible for *FIPPA* the power to intervene and require specific categories of information to be released is laudable because the "minister has a larger-scale knowledge

[5] 2013 BCIPC No. 19, online: <https://www.oipc.bc.ca/investigation-reports/1553>.
[6] *Ibid.* at 10.

and expertise respecting information rights across the provincial government" and "is likely to be most attuned to what kinds of records are most frequently requested under *FIPPA* overall." [7]

While individual ministries must create categories of information that is disclosable without a request, s. 71 does not require any specific categories – and does not require that "public interest" information form a category. Furthermore, section 71.1 does not require that the minister create any categories; it only gives the minister discretion to do so.

2. Problems with the current scheme – Compliance and Inaction

Despite the various legislative, regulatory and policy tools that government has created to encourage proactive disclosure of information, the ministries named above have been failing to meet their legal obligation to proactively release information in the public interest under s. 25 or alternatively under ss. 71 and 71.1

Unfortunately, public interest information has not been proactively released, and citizens seeking such information continue to be met with demands that they file FOI requests, or denied access to such information altogether. While arguably much of the information released through the Data BC and Open Info websites could fall under s. 25, there is still a large amount of information and records clearly falling within s. 25 that have not been released. Indeed, Commissioner Denham noted in her report that the data posted to the DataBC website is limited to data about "basic information about the province" or meant to "spur innovations" -- but did not include data meant to increase government transparency or accountability.[8]

For example, proactive release of information relating to threats to the environment or to public health or safety is clearly required by s. 25(1)(a). Compliance orders against operations that present a threat to the environment, public health or safety fall squarely within s. 25(1)(a) (and within s. 25(1)(b)). Whether or not a threat is imminent, it is clearly in the public interest that information about how our government is managing these threats be proactively released, because it relates to the public interest in government accountability. This much was affirmed by Commissioner Denham when she stated that s. 25(1)(b) "will no longer be interpreted to require an element of temporal urgency in order to require the disclosure of information that is clearly in the public interest pursuant to s. 25(1)(b)".[9]

Yet, a year after the Commissioner issued this new interpretation, full documentation relating to orders made under the *Environmental Management Act* ("*EMA*")[10] are still not being proactively released for most sites in the province. The only information that is publicly available for the different orders is a limited description in quarterly Ministry reports.[11] Copies of the actual orders are only proactively

[7] *Ibid.*
[8] *Ibid* at 31.
[9] 2015 BCIPC No. 30 at 34 ["Mount Polley Investigation Report"].
[10] Environmental Management Act, [SBC 2003] ch 53, Part 7.
[11] The reports can be found online at: <http://www2.gov.bc.ca/gov/content/environment/research-monitoring-

released when that is found to be in the public interest in relation to a specific site. Unfortunately, the Ministry of Environment has continued its practice of only finding disclosure of files for a site to be in the public interest when a major problem is publicized in the media or brought to court. For example, while the Ministry of Environment has released information relating to the Mount Polley dam failure, including permits, orders, and reports,[12] these were only released in response to the ELC-initiated Commissioner investigation into the failure to release public interest information about the Mount Polley dam. Similarly, the only sites where full documentation for orders under *EMA* are being proactively released are the controversial Shawnigan Lake contaminated soil storage operation (which has been in active litigation) and the Hullcar Aquifer (where full disclosure only occurred after the ELC successfully petitioned the Commissioner to make a finding that public release of key documents was in the public interest).[13] The fact that these are the only two sites in the province where orders under *EMA* are being proactively released shows the minimal impact that the Commissioner's new interpretation of s. 25(1)(b) is having on proactive disclosure by the Ministry. The Ministry is failing to respect, and give full effect to, your Office's clear direction on this vitally-important issue.

As the Ministry of Environment's 2015 inspection report shows, the number of orders issued each year is not substantial enough to make it too costly to disclose all orders proactively, given that orders are only issued in very serious cases (1% of their 632 inspections for 2016).[14] Since the Ministry only issues compliance orders for the most serious cases, all such orders should be proactively disclosed. Issuing an order should automatically result in a finding that full disclosure of that order is in the public interest under s. 25(1)(b) -- or alternatively compliance orders should be a category of records for which proactive release is required under s. 71.1.

Yet this common-sense reform is unlikely unless you take action. When we asked the Ministry of Environment whether they planned on expanding their proactive disclosure they responded that "[t]here is no new ministry policy at this time to publicly post all Orders issued under the *Environmental Management Act.*" (See Appendix 1.)[15]

Example #1: Ministry of Environment

In fall of 2015, the Environmental Law Centre requested access to MOE authorizations issued pursuant to a compliance order governing the spraying of manure effluent by a farm near Spallumcheen's Hullcar

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reporting/reporting/environmental-enforcement-reporting/quarterly-environmental-enforcement-summary>.

[12] These documents can be accessed via webpage: Government of British Columbia, "Mount Polley Mine Tailings Dam Breach, Likely, August 4, 2014", online: <http://www.env.gov.bc.ca/eemp/incidents/2014/mount-polley/updates.htm#6>.

[13] Government of B.C., "Permitting & Compliance at Sites of Interest," online: <http://www2.gov.bc.ca/gov/content/environment/air-land-water/site-permitting-compliance>. . Additionally permits are being released for the Atlantic Power site.

[14] Ministry of Environment, "Compliance Inspections Report 2015, Environmental Management Act" (2016), online: <http://www2.gov.bc.ca/gov/content/environment/research-monitoring-reporting/reporting/env-compliance-inspection-report> at 13.

[15] Appendix 1 is found at p. 26, below.

Aquifer -- a drinking water source with very high nitrate levels. These nitrate levels were apparently caused by the farm's release of effluent in the past, which led to an MOE compliance order requiring that the farm seek special MOE authorization whenever it intended to spray effluent on the field near the aquifer. It also led to Interior Health issuing a Drinking Water Advisory for residents, warning of a potential health hazard. High nitrate levels in drinking water is particularly dangerous for infants and people with compromised immune systems. Drinking water containing high nitrate levels can cause a condition called methaemoglobinaemia, commonly known as "blue baby syndrome", which is a result of oxygen deprivation. Nitrate contamination of drinking water is also linked to certain types of cancer, thyroid dysfunction and impacts on the immune-compromised. The compliance order authorizations to spray effluent could clearly fall within both ss.25(1)(a) and (b) of *FIPPA*. The release of effluent by this farm presents a potential risk to the environment and to the health of the people who drink the water in that watershed. Disclosure of the authorizations themselves is clearly in the public interest – because citizens are interested in how their government manages threats to their health and to the environment. Yet, the compliance order and subsequent spraying authorizations were not posted online.

When the ELC asked the Ministry of the Environment for the spray authorizations, the ELC was asked to complete a formal FOI request. [16] The ELC made the request and included the file number of the compliance order and authorizations. The Ministry responded to the request with an initial estimate of a cost of $150.[17] The ELC called Information Access Operations BC to ask why the fee was so high, and was told that the cost could increase, perhaps to $600, depending on how long it took to find the records (despite being provided with the file reference number). One official suggested that they might not be released at all. The ELC submitted a revised request in an attempt to further specify the authorizations they were seeking. Eventually, 39 business days after the revised request, the ELC received the authorizations.

Following this experience, the ELC asked your Office to investigate. After investigating, Commissioner Denham concluded that the Ministry of Environment had failed to comply with both ss. 6 and 25(1)(b) of *FIPPA*.[18]

As mentioned, since the Commissioner's report, the Ministry of Environment has continued to limit proactive public disclosure to quarterly reports of enforcement actions, with a limited summary of information, and to the two more comprehensive special Shawnigan Lake and Hullcar Aquifer "Sites of Interest" websites. Actual full compliance orders are only being released for those two sites, which have been the subject of raging public and Legislative Assembly controversy.[19] This prevents communities from easily accessing information that directly affects them without first submitting a

[16] See Appendix 2.
[17] See Appendix 3.
[18] 2016 BCIPC No. 36 at 5-7.
[19] The truncated quarterly reports can be found online at: <http://www2.gov.bc.ca/gov/content/environment/research-monitoring-reporting/reporting/environmental-enforcement-reporting/quarterly-environmental-enforcement-summary> and the more comprehensive set of Shawnigan and Hullcar documents are found at: <http://www2.gov.bc.ca/gov/content/environment/air-land-water/site-permitting-compliance>.

freedom of information request. In addition, the format of the quarterly reports is not user friendly and could be vastly improved by following the example of the Ministry of Energy and Mines, which provides a searchable map for permits, inspection reports, and dam safety inspections with a link to the actual documents in full.[20]

Example #2: Ministry of Forests, Lands and Natural Resource Operations (Forest and Range Practices Act and Wildfire Act)

A consequence of the lack of proactive release of environmental contravention/penalty documents is that the promotion of deterrence and compliance – the primary purpose of penalties -- is undermined. Given that most environmental penalties are handed out by administrative bodies instead of public courts, it is essential that they be made public, for the penalties to serve their full purpose. This is clearly the case for penalty determinations made by government officials for contraventions of the Forest and Range Practices Act ["FRPA"] and the Wildfire Act ["WA"]. In its October 2014 Special Investigation *Timeliness, Penalty Size and Transparency of Penalty Determinations* the Forest Practices Board found that:

> "With respect to transparency, government does not publish determination letters, which means penalties are not effective in promoting compliance in the wider regulated community or contributing to public confidence in enforcement."[21]

The Board recommended that the Ministry of Forests, Lands and Natural Resource Operations ["FLNR"] "establish a publicly-accessible, online database of all penalty determinations under FRPA and WA". The FLNR agreed with the board's recommendation and admitted that "such action would increase awareness and deter future contraventions".[22] However, they stated that due to scope of the project the "opportunity to implement amendments to enable public reporting may be *a few years away*".[23] This public admission by the FLNR should serve as a reminder that public disclosure of penalties is essential if the penalties are to effectively deter environmentally damaging behaviour and protect the environment.

It is simply unacceptable for Government to cavalierly postpone implementation of this key deterrent to environmentally-destructive activity for "a few years" -- if ever.

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[20] See the Ministry of Energy and Mines platform at: <https://mines.empr.gov.bc.ca/>.
[21] Forest Practices Board, "Timeliness, Penalty Size and Transparency of Penalty Determinations" (2014), online: <https://www.bcfpb.ca/reports-publications/reports/timeliness-penalty-size-and-transparency-penalty-determinations/>.
[22] Gary Townsend, Assistant Deputy Minister, "Letter to Tim Ryan, Chair, Forest Practices Board" (April 23, 2015), online: <https://www.bcfpb.ca/sites/default/files/reports/SIR41-Govt-Reponse-to-Board.pdf> at 1.
[23] Emphasis added. *Ibid.*

Example #3: Ministry of Forests, Lands and Natural Resource Operations (Riparian Areas Regulation)

In 2014, the Office of the Ombudsperson conducted a study to assess the FLNR's implementation of the Riparian Areas Regulation.[24] The Ombudsperson pointed out the ongoing failure of Government to make public the "Qualified Environmental Professional" reports – the assessment reports that set the boundaries of protected riparian areas and prescribe the protective measures that must be taken. The 2014 Ombudsperson's report[25] shows that the FLNR failed to implement their 2008 Intergovernmental Cooperation Agreement commitment to make such assessment reports publicly available.[26] The Ombudsperson report found that "[c]urrently, the Riparian Areas Regulation Notification System is accessible only to qualified environmental professionals (QEPs) (with access limited to their own reports), local governments and ministry employees,"[27] which is still the case today. The Ombudsperson found that "this does not meet the ministry's own commitments under the ICA to make all QEP reports searchable and accessible by the public."[28]

Significantly, the Office of the Ombudsperson also found that:

> "The RAR is an environmental protection regulation, and the [assessment] reports are the tool through which this protection is achieved. The public's ability to access reports is important, not just because the ministry told us that it relies, in large part, on complaints from the public to learn about areas of concern and to respond, but also because the public is less likely to be able to raise any concerns if they do not have access to the report or its conclusions.
>
> […]
>
> Qualified environmental professionals are required to produce detailed maps of the property showing the extent of the riparian area and the streamside protection and enhancement area. This information could, if provided in a usable format, assist local governments in mapping the protection of riparian areas in their community"[29]

Apart from the abovementioned importance of public reporting of penalties being essential to deterrence, the Ombudsperson is correct in finding that public disclosure of assessment reports is of the outmost importance if a system of environmental oversight is largely based on complaints from the

[24] Riparian Areas Regulation, B.C. Reg. 376/2004.
[25] Office of the Ombudsperson, "Striking a Balance: The Challenges of Using a Professional Reliance Model in Environmental Protection – British Columbia's Riparian Areas Regulation", Public Report No. 50, online: <https://bcombudsperson.ca/sites/default/files/Public%20Report%20No%20-2050%20Striking%20a%20Balance.pdf>., ["Ombudsperson Report on Riparian Areas Regulation"].
[26] Intergovernmental Cooperation Agreement Respecting the Implementation of British Columbia's Riparian Areas Regulation, 2008, Richmond, B.C., Annex 2, s. 3(b), online: <http://www.llbc.leg.bc.ca/public/PubDocs/bcdocs/460904/RAR_ICA.pdf>.
[27] Ombudsperson Report on Riparian Areas Regulation, *supra* note 25, at 94.
[28] *Ibid* at 95.
[29] *Ibid*.

public.

Despite the fact that the Ombudsperson's report stated that the "the ministry could meet the commitment it made in the ICA in a relatively quick and inexpensive way,"[30] the ministry has yet to implement the recommended online disclosure system. As of March 2015 the ministry was reported to still be "working on a Privacy Impact Assessment for RAR reports".[31]

Example #4: Environmental Assessment Office – Transparency Delayed

Even in cases where proactive disclosure has been recommended by the Auditor General, government has delayed providing true and meaningful proactive disclosure. For example, in the May 2015 '"Follow-up Report of the Environmental Assessment Office (EAO)", the Auditor General commented on the implementation of the Auditor General's 2011 recommendation "that the Environmental Assessment Office provide appropriate accountability information for projects certified through the environmental assessment process".[32] The EAO had self-assessed that they had fully or substantially implemented this previous recommendation. The Auditor General instead found that:

> "The 2015/16-2017/18 service plan for the Ministry of Environment includes one compliance and enforcement related performance measure: the number of inspections completed on certified projects annually. The EAO also posts some compliance and enforcement information on their website. However, these actions are not comprehensive enough to provide sufficient accountability information for certified projects. To fully implement this recommendation, we would expect, for example, that the EAO would make warnings, advisories and results from field inspections publicly available." (emphasis added)

The Auditor General's two reports on the EAO point to a larger systemic problem. Even though the Auditor General recommended more transparency in 2011, the EAO had clearly not achieved such transparency by 2015. Although the EAO had taken some steps by 2015 to comply with the Auditor General's recommendation for proactive release, these efforts fell well short of what was needed to provide B.C. residents with a meaningful way to keep government accountable. It was only after the Auditor General reported a *second* time on the same issue that the EAO implemented full reporting of inspection reports, etc. And that commendable improvement unfortunately did not extend to other agencies such as the Ministry of Environment and Ministry of Forests, Lands and Natural Resource Operations.

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[30] *Ibid* at 96.
[31] Office of the Ombudsperson, "Striking a Balance, 2015 Update" (June 2015), online: <https://bcombudsperson.ca/sites/default/files/Striking%20a%20Balance%202015%20Annual%20Report%20Update.pdf>.
[32] Auditor General of British Columbia, May 2015, "Follow-up Report: Environmental Assessment Office", online: <http://www.bcauditor.com/sites/default/files/publications/reports/OAGBC_Follow-upReport-EnvironmentalAssessmentOffice-FINAL.pdf>, at 12.

Example #5: Annual Reports

Although annual reports are not one of the classes of documents that fall within the classes included in our submission, we raise the following examples to show the ministries' widespread failure to disclose information that increases transparency and helps citizen groups to protect the environment. Annual reporting is important for such groups because it allows them to identify patterns and systemic issues that are relevant --and gives important context to problems that have arisen in specific cases.

For example the recent Auditor General's "Report on Compliance and Enforcement of the Mining Sector" made the following finding:

> "We concluded that MEM's lack of meaningful environmental reporting may mean that the public and the Legislative Assembly do not have a complete understanding of the ministry's performance as a regulator, or of the environmental performance of B.C.'s mining sector."[33]

As a result the Auditor General recommended the ministry to publicly report the results and effectiveness of their activities, as well as the estimated liability and the security held for each mine.[34]

Another example is found in the Ombudsperson's "Report on the Riparian Areas Regulation".[35] After the responsibility of reporting the results of the implementation of the Regulation was transferred from the Ministry of Environment to the Ministry of Forests, Lands and Natural Resource Operations in 2010, the Ministry of Forests failed to produce yearly reports.[36] The Ombudsperson recommended that annual reports from 2010, 2011, 2012, 2013, and 2014 be produced.[37] To date only the 2014 report has been released.[38] When we contacted the Ministry, they informed us that a report encompassing the years 2010-2013 would be produced in 2017, *seven years late* in the case of 2010 information.[39] This is simply unacceptable. Just as "justice delayed is justice denied", it is equally true that information delayed is information denied.

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[33] Office of the Auditor General of BC, "An Audit of Compliance and Enforcement of the Mining Sector", (2016), online: <http://www.bcauditor.com/sites/default/files/publications/reports/OAGBC%20Mining%20Report%20FINAL.pdf> at 64.
[34] *Ibid.*
[35] Ombudsperson Report on Riparian Areas Regulation, *supra* note 25.
[36] *Ibid,* at 93.
[37] *Ibid,* at 94.
[38] Ministry of Forests, Lands and Natural Resource Operations, "Riparian Areas Regulation Annual Report on Implementation", (2015), online: < http://www2.gov.bc.ca/assets/gov/environment/plants-animals-and-ecosystems/fish-fish-habitat/riparian-areas-regulations/2014_annual_report_rar_final.pdf>.
[39] See Appendix 4.

3. Common reasons for government resistance to proactive disclosure

Cost

It will require resources for public bodies to begin to comply with s. 25. Employees in each public body will need to spend time surveying the information that they hold, determining what information is in the public interest, and then releasing the information. Public bodies will have to set up processes for ensuring that new information is proactively released as required. They may need to develop web pages or reading rooms to ensure the information is accessible.

It is important to note that the World Bank report *Proactive Transparency* recognizes that "proactive disclosure regimes have high start-up costs" but notes that "over time, having such systems in place is likely to save money."[40] The report notes:

> "For countries planning to use the Internet as the primary vehicle for disclosing information, information will need to be in digital format. Resources may therefore be needed for digitizing slightly older information (the scanning of documents over five to ten years old for example).
>
> The cost of this can be weighed against the increased internal benefits of better information management, as internal filing systems are ordered and digitized, and from the increased ability to share information not only with members of the public but also with other public bodies, as well as the reduced burden of responding to requests from the public."[41]

Mendel notes that proactively disclosing information online is easier and less expensive than the relative cost of processing information requests, and argues that it "is likely the case that the request load in countries which upload actively is far less than it would be if they did not do this."[42] The report points to India as a jurisdiction that "expressly recognizes the role of proactive publication in reducing the number of requests for information, specifically requiring public bodies to endeavour to increase proactive publication to this end."[43] Similarly, in a 2012 Special Report to the Canadian Parliament by the Information Commissioner of Canada, it was noted that "some institutions have had success in reducing the number of incoming requests by taking a proactive approach to access to information" and that this

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[40] Helen Darbishire, "Proactive Transparency: The future of the right to information?," World Bank Institute and CommGAP, 2011, online: <http://siteresources.worldbank.org/EXTGOVACC/Resources/DarbishireProactiveTransparency.pdf> at 33.
[41] *Ibid.*
[42] Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, (Paris: UNESCO, 2008), online: <http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf> at 147, ["UNESCO Survey"].
[43] *Ibid.*

approach "can sometimes divert the number of formal requests to the institution."[44]

It is also important to mention that in the context of BC, there are already systems in place by certain ministries that could be used as a platform to release other important documents with lower start-up costs. For example, the aforementioned Ombudsperson report on Riparian Areas Regulation states that because the ministry already has a platform called EcoCat for the public to access certain types of reports, the cost of making Riparian Areas Regulation assessment reports available could be done "in a relatively quick and inexpensive way".[45]

The need for a statutory definition of "clearly in the public interest"

Commissioner Denham clarified the meaning of "clearly in the public interest" in her 2015 report. Still, s.25 leaves public officials wide discretion in determining what information is in the public interest. A complex balancing of interests is required to determine what must be released under s. 25. Even though s. 25(2) operates to provide for public interest disclosure regardless of any other provision in the Act, it is still necessary to consider the interests of individuals who may be impacted by disclosure. The Commissioner notes in her 2015 report that a public body considering disclosure under s. 25 must also "consider the purpose of any relevant access exceptions (including those protecting third-party interests or rights that will be, or could reasonably be expected to be, affected by disclosure)" and determine whether the "nature of the information and of the rights or interests engaged, and the impact of disclosure on those rights or interests" weigh in favour of public interest disclosure.[46] This creates some uncertainty when deciding whether particular information should be released in the public interest or not.

The Centre for International Media Assistance have commented that without "clear guidance in the law, lower-level public officials are apt to approach FOI cases in an ad hoc or politically motivated way – or to avoid them altogether."[47] Fear of releasing something that should have been kept confidential can also lead officials to err on the side of caution and opt for non-disclosure.[48] Clear, legislated categories of information that must be proactively disclosed would provide clear direction to public officials making disclosure decisions – and reduce uncertainty and time-consuming examination and assessment of particular individual records.

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[44] Information Commissioner of Canada, "Measuring Up: Improvements and Ongoing Concerns in Access to Information, 2008-2009 to 2010-2011, A Special Report to Parliament" (Ottawa, May 2012), online: <http://publications.gc.ca/site/eng/422536/publication.html> at 28.
[45] Ombudsperson Report on Riparian Areas Regulation, *supra* note 25, at 94.
[46] Mount Polley Investigation Report*, supra* note 9, at 29.
[47] Craig L. LaMay, Robert J. Freeman, and Richard N. Winfield, "Breathing Life into Freedom of Information Laws: The Challenges of Implementation in the Democratizing World," (2013) The Center for International Media Assistance, online: <http://www.centerforinternationalmediaassistance.org/wp-content/uploads/2015/02/CIMA-Freedom_of_Information_ISLP_09-10-13.pdf> at 21.
[48] Mitchell W. Pearlman, "Proactive Disclosure of Government Information: Principles and Practice", National Freedom of Information Coalition (2012), online: <http://www.nfoic.org/proactive-disclosure-of-government-information>.

A culture of secrecy

As Mendel notes, "[i]n most countries, there is a deep-rooted culture of secrecy within government, based on long-standing practices and attitudes."[49] Roberts argues that "[t]he first challenge that will confront advocates of transparency in years ahead is ongoing official resistance to transparency requirements."[50] Although cultural change is required to move bureaucratic culture from one of secrecy to one of transparency, clear laws defining what information must be released can help encourage this culture change. Clear legislated requirements for the release of information would make it easier for citizens to assert their right to such information. Legislated requirements would also encourage public officials to release information because to not do so would be clearly against the law.

4. The need for a systemic study under 42(1) and 42(2)(a) of the *Freedom of Information and Protection of Privacy Act* ["FIPPA"]

What the examples cited make clear, is that the Commissioner, the Forest Practices Board, the Ombudsperson, and the Auditor General have all identified Government failures to require proactive release and transparency. Too often, Government's response to these independent and constructive critiques has been spotty or highly inadequate.

It is true that changes to policies regarding proactive release of information will have to be ministry-specific to an extent. There are unique privacy concerns and differences in the classes of documents that each ministry should be releasing. However, it is also true that the current case-specific approach to requiring proactive release has had a very limited impact. As our examples show, even when there is a commitment or an exhortation to require ministries to release documents proactively the implementation is lacking.

We believe that the Commissioner is in a unique position to launch an investigation and generate a report that looks at specific cases, but also at the systemic issues regarding proactive release of information. By launching a comprehensive study, the Commissioner will also be in a unique position to identify which systems are working and which platforms are the most effective and user-friendly for online disclosure. This work will be essential to provide valuable information and context if government is to reform *FIPPA* in the next few years, as their efforts through the Special Committee to Review *FIPPA* would indicate. Therefore, the importance of investigating several ministries at once is three-fold:

[49] UNESCO Survey, *supra* note 42, at 33.
[50] Alasdair Roberts, "Open Government: The Challenges Ahead", *Access to Information: Building a Culture of Transparency* (The Carter Center, 2006), online: <https://www.cartercenter.org/documents/2364.pdf> at 134.

1. It allows for an understanding of the common struggles and systemic issues preventing true freedom of information.
2. It is the best way to study the different platforms in place and identify the most user-friendly systems in BC and elsewhere, to encourage the different ministries to adopt the most accessible and cost-effective systems in a timely fashion.
3. The report will provide an excellent overview of the current state of proactive disclosure in the province and how it affects the protection of the environment to ensure that the issue is addressed in the eventual reforms to *FIPPA*.

We believe that specifically investigating why environmental orders, permits, contravention decisions and policy manuals are not being proactively released is a good place to start the study. We recognize that the ultimate determination of the classes of documents each ministry should proactively release is necessarily ministry specific (with the exception of policy manuals which are required under s. 70 of *FIPPA*[51]). However, citizens who advocate for environmental protection require these classes of documents in order to be effective stewards of the environment. As the Ombudsperson's report on Riparian Areas Regulation stated, a system that relies on complaints by the public to enforce its regulations requires widely available and accessible information to work effectively.[52] Many of the regulatory systems aimed at protecting the environment in BC rely heavily on groups like the ELC and other environmental advocates to ensure regulations are being enforced. Unfortunately, from our perspective the current systems of proactive disclosure:

- Provide very limited information proactively,[53] unless there is major media attention which is generated either by environmental disasters or extensive proceedings initiated by groups like the ELC, FIPA or Shawnigan Lake groups.[54]
- Ultimately require slow and expensive FOI requests to find useful information.

This system is too cumbersome to adequately protect the environment and the health of British Columbians. Therefore we request the Commissioner to conduct a systemic study on why the Ministries of Environment, Energy and Mines, Forests, Lands and Natural Resource Operations and the Oil and Gas Commission are not proactively releasing environmental orders, permits, contravention decisions and policy manuals.

[51] *FIPPA, supra* note 1, s 70.
[52] Ombudsperson Report on Riparian Areas Regulation, *supra* note 25, at 95.
[53] The quarterly reports that provide minimum information such as the aforementioned Ministry of Environment reporting (*supra* note 19) or the Oil and Gas Commission Enforcement Action report found at <http://bcogc.ca/publications/reports> are not sufficient nor adequate.
[54] As mentioned before, special websites with enhanced disclosure are available only in the most severe cases of environmental destruction like Hullcar, Shawnigan Lake, and Mount Polley.

5. The need for law reform

The limited application and impact of recommendations made by the Ombudsperson and the Auditor General to the ministries, as well the limited impact that the Commissioner's new interpretation of s. 25 had on the Ministry of Environment, points not only to the need for a broad investigation, but perhaps most important, to the need for law reform. Efforts in this regard are already underway. In May 2016 the bipartisan Special Committee to Review the *Freedom of Information and Protection of Privacy Act* released its report.[55] While both the ELC[56] and the Commissioner[57] made submissions about sections 70 and 71 to strengthen the proactive release of documents, the final recommendations by the Committee made no mention of those sections.

The Committee's recommendations relating to proactive release of documents were:

> "Amend *FIPPA* and initiate proactive disclosure strategies to reflect the principle that information that is in the public interest should be proactively disclosed, subject to certain limited and discretionary exceptions that are necessary for good governance and to protect personal information. Among other things, this could be accomplished by:
>
> - strengthening s. 25(1) to remove the requirement of temporal urgency;
> - establishing a publication scheme that would apply to all public bodies, that includes, among other things, mandatory proactive disclosure of those records listed in s. 13(2)(a) to (n); and
> - developing a system within government to proactively disclose the calendar information of ministers and senior officials at would be disclosed in response to an access request".[58]

The need for the first of these recommendations on s. 25(1) has been partially alleviated by the Commissioner through statutory interpretation.[59] Although as our findings show this re-interpretation is having a limited impact, at least on the disclosure policies of the Ministry of Environment,[60] this is a positive and important step towards transparency and proactive disclosure. The challenge under s. 25(1) remains that government, as the Ministry of Environment's example shows, is unwilling to determine that proactive disclosure of documents is "clearly in the public interest" unless there is an undeniable

[55] SCFIPPA Report, *supra* note 2.
[56] Rebecca Kantwerg "In the Public Interest: Unlock the Vault, Law Reform to ensure proactive disclosure of "Public Interest" Records" (2016), Environmental Law Centre, online: <http://www.elc.uvic.ca/wordpress/wp-content/uploads/2016/04/InthePublicInterest-UnlocktheVault-BCFIPA-submission.pdf>, ["ELC Submission"].
[57] Elizabeth Denham, Information and Privacy Commissioner, "OIPC Submission to Special Committee to Review *FIPPA*" (2015), online: <https://www.oipc.bc.ca/special-reports/1717>, ["Commissioner's Submission"]
[58] SCFIPPA Report, *supra* note 2, at 85.
[59] Mount Polley Investigation Report*, supra* note 9, at 34.
[60] *Supra* note 19.

need - accompanied by media coverage or legal action. To date only the Hullcar and Shawnigan Lake cases (for compliance) and Atlantic Power (for permitting) have met this nearly impossible standard.[61]

Therefore, we request that in conducting the s. 42 systemic study the Commissioner take into account -- and consider advocating law reform to implement -- the following recommendations:

Recommendation 1: Broaden and explicitly state the definition of "clearly in the public interest" under s. 25

Consistent with the Commissioner's 2015 Mount Polley Report, section 25 should be amended to:

> i. explicitly require public bodies to proactively disclose information whenever a disinterested and reasonable observer, knowing what the information is and knowing all of circumstances, would conclude that disclosure is plainly and obviously in the public interest,
>
> ii. include two more explicit categories of "public interest" information that must be proactively released by government:
>
> a. information about a topic inviting public attention; a topic about which the public has a substantial concern because it affects the welfare of citizens; or a topic to which public notoriety or controversy has attached, and
> b. information that promotes government accountability.

These two categories—information about a topic which the public has a substantial concern or to which public notoriety or controversy has attached, and information that promotes government accountability—should be included as specific public interest categories under s. 25. This would help clarify what information is "clearly in the public interest", and would provide a clear legislative direction to public bodies as to the information that they can and must disclose. Any added categories should be additions to s. 25. Section 25(1)(b) should remain to provide for further types of information that may be in the public interest.[62]

[61] *Ibid.*

[62] Section 25(1)(b) provides for disclosure of information in the public interest that falls outside of the currently legislated category of information disclosing a significant risk to the environment or to the health and safety of the public: "the disclosure of which is, for any other reason, clearly in the public interest."

Recommendation 2: Amend the legislation to require proactive disclosure of specific categories and classes of environmental records -- including environmental assessments, compliance and other orders, pollution authorizations/permits, convictions, contraventions, penalties and other key environmental information.

Although s 71.1 of the *Act* has been in place since 2012,[63] government has failed to utilize it to require specific classes of records to be proactively disclosed.

Legislating a requirement for proactive release of specific types of records would be an effective way of ensuring public bodies meet the proactive disclosure requirements already imposed on government by s.25. In her 2013 review, the Commissioner points out:

> "Observers in other jurisdictions have noted that a standardized approach is most effective. Adopting a consistent approach may promote harmonization of disclosure respecting common, basic, functions of all ministries (e.g., records about budgeting processes and financial controls). It can also make it easier for citizens to find information that they may find useful or relevant across the ministerial public sector."[64]

Beyond promoting consistency across public bodies, a legislated requirement to release specific types of information would place a clear duty on public bodies to release this information, and could help combat the culture of secrecy and assumption of non-disclosure that pervades our public service. Legislated acknowledgement of the kinds of information that must be released proactively sends a clear message to public bodies that this information is meant to be public.

The Open by Default report from a working group examining Ontario's Freedom of Information legislation also recommends that their Act be reformed to require "proactive publication of certain types of information."[65] In making this recommendation, the report acknowledges the long wait times and high costs for access to information by request. The report recommends that "government move to a default practice of proactive disclosure for certain types of information such as briefing notes, survey data, policy papers and other analysis."[66]

Examples from other jurisdictions

Many jurisdictions have legislated lists of specific documents that must be proactively released. In 2013, 72% of OECD countries required certain categories of information to be proactively disclosed by law.[67]

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[63] SCFIPPA Report, *supra* note 2, at 19.
[64] Open Government Engagement Team, "Open By Default: A new way forward for Ontario," (2014), online: <http://www.niagaraknowledgeexchange.com/wp-content/uploads/sites/2/2014/05/Open_by_Default.pdf> at 31.
[65] *Ibid.* at 31.
[66] *Ibid.* at 32.
[67] OECD (2011), *Government at a Glance 2011*, OECD Publishing, at 142.

These lists most often include categories of documents related to the administration of government and government employees, such as procurement contracts, employee salaries, and the layout of the bureaucratic structure. Some jurisdictions have made the effort to expand their lists to include a broader range of information. Sample jurisdictions are listed below.

New South Wales

In New South Wales, Schedule 1 of the *Government Information (Public Access) Regulation 2009* provides a list of information that must be proactively released.[68] This includes plans of management for community land; environmental planning instruments; development applications pursuant to the *Environmental Planning and Assessment Act* and associated documents, including land contamination consultant reports; applications for approvals under Part 1 of Chapter 7 of the *Local Government Act*, which include approvals for sewerage work and management and treatment of human waste; applications for approvals "under any other Act and any associated documents received in relation to such an application"; "orders given under the authority of any other Act"; and "leases and licenses for use of public land classified as community land." (emphasis added) For the full list, see Appendix 7.

Mexico

Mexico also has legislated specific categories of government information that must be proactively disclosed to the public. In 2015, legislation was passed by the Mexican congress that updates their previous freedom of information and laws, and applies federally and at the state level.[69] The new legislation added to the previous categories of information that was required to be proactively released. These categories include results of any audit compelled by the law, all concessions, permits or authorizations granted and their recipients specified, and information about land use permits.[70]

Nova Scotia

Nova Scotia's *Environment Act* lists specific records that must be included in their Environmental Registry. While this registry is not accessible online – currently, the records are made "routinely available

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[68] New South Wales Legislation, *Government Information (Public Access) Regulation 2009*, online at: <http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+343+2010+cd+0+N>.

[69] Margarita Garate, "Mexico: The New 'Transparency & Access to Public Information Act' Enters into Force", Mondaq (June 2015), online: <http://www.mondaq.com/mexico/x/408112/Human+Rights/The+New+Transparency+Access+To+Public+Information+Act+Enters+Into+Force>.

[70] The previous version of the Act is available in English here: *Federal Transparency and Access to Governmental Public Information Act*, June 6, 2006, online: <https://www.wilsoncenter.org/sites/default/files/LFTAIPG%20traducci%25C3%25B3n%20certificada.pdf> The most recent version of the Act is available here, in Spanish: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LGTAIP.pdf>.
Note: Cabinet documents are not required to be proactively released. Cabinet documents are also, however, not included in legislative exemptions to disclosure in Mexico.

to the public upon request."[71] East Coast Environmental Law, in partnership with the Environmental Law Student Society at the Dalhousie University, wrote a report criticizing the government of Nova Scotia for not complying with this provision and continuing to require formal FOI requests to be made for access to the information listed in s. 10.[72] However, in theory, this list of records is a good start, and reflects the types of information that should be proactively released. Section 10 of the *Environment Act* requires that the environmental registry contain information like approvals, orders, directives, appeals, decisions and hearings made under the *Environment Act*, and more. (emphasis added)

What are the specific records that should be proactively released?

A. Environmental Information

Carole Excell writes that "a right to access environmental information is a central tool to promote democratic accountability and transparency in decision making on the environment."[73] Access to environmental information encourages the promotion of sustainable development and a healthy environment, and allows the minimum standards of environmental health to be monitored and enforced by citizens.[74]

The development of a right to access environmental information is a recent one. It has its start in Europe, where the European Directive on Freedom of Access to Environmental Information emerged out of the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters. The Directive creates a right to environmental information, a right to participate in environmental decision-making, and a right to procedure to challenge public decisions made without appropriately informing the public of environmental effects or without considering environmental law generally.[75] Canada is not yet a signatory to this convention. The United Kingdom has implemented the Directive through its *Environmental Information Regulations* [See Appendix 5]. Section 2 of the *Environmental Information Regulations* provides a wide and complete definition of "environmental information":

> "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form

[71] Nova Scotia Environment, "Environmental Registry", online: <http://www.novascotia.ca/nse/dept/envregistry.asp>.
[72] *Failure to Enforce? Time for transparent and effective environmental enforcement in Nova Scotia*, East Coast Environmental Law, (June 2014), online: <http://www.cbu.ca/wp- content/uploads/2015/10/NOFRAC-5-Failure-to-enforce.pdf>, at 5.
[73] Carole Excell, "The Right to Environmental Information", *Access to Information: Building a Culture of Transparency* (The Carter Center, 2006), online: <https://www.cartercenter.org/documents/2364.pdf> at 105.
[74] *Ibid.*
[75] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, online: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>.

on—

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
(d) reports on the implementation of environmental legislation;
(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)[76]

Section 4 of the *Environmental Information Regulations* requires public authorities to "progressively make the information available to the public by electronic means which are easily accessible", and to "take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information."[77]

Environmental information is increasingly demanded by the Canadian public. Cairns et al. recommend that proactive disclosure of environmental information is the best solution to increasing access requests:

> Proactive dissemination of environmental enforcement information would more adequately respond to the growing interest in access environmental information among the Canadian public. This interest is reflected in a 35 percent increase in ATIP requests to Environment Canada from 2008 to 2009. The current "reactive disclosure" approach for environmental enforcement information is inefficient. The backlog of requests suggests that the principle of community right to know is unlikely to be achieved through access to information requests. An effective realization of

[76] *The Environmental Information Regulations 2004*, United Kingdom, online: <http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>, s 2.
[77] *Ibid,* s 4.

> this right is inextricably linked to the governments' ability to publish data comprehensively, accurately, accessibly and in a timely manner... Instead of the current cumbersome ATIP approach, the public would benefit from the dynamic opportunities Internet technology provides for immediate and universal access to such data.[78]

Environmental information that discloses a risk of serious harm is already required to be released under s. 25(1)(a), but all relevant environmental information, no matter how serious the risk harm, is in the public interest pursuant to s. 25(1)(b), or alternatively the Act should be reformed to require it under ss. 70 or 71. Therefore, key environmental information should be specifically required to be proactively released, as it is in the United Kingdom.

B. Environmental assessments, compliance orders, authorizations, convictions, contraventions and penalties

Assessments of specific and/or proposed industries' or operations' impact on the environment, compliance orders, convictions, contraventions and penalties imposed against specific operations, and authorizations for the release of pollution into the environment by land, air, or water, is all information that should be required to be proactively disclosed under s. 25. This kind of information often engages both ss. 25(1)(a) and (b) of the Act. The operation of industry in our environment presents the risk of accidental or intentional release of pollutants that can have serious effects on the health of our environment and on the health and safety of people. Furthermore, compliance orders, authorizations and assessments are also in the public interest because they disclose how government is regulating industrial actors in our environment, and how they are ensuring compliance with environmental and health legislation meant to protect the public.

Proactive disclosure of compliance information can itself be an important mechanism to ensure compliance with environmental rules. Cairns et al. note that public disclosure of environmental information "provides an incentive to facilities to control their pollution emissions, adding a different source of pressure to comply with laws and regulations in addition to other enforcement instruments such as penalties, fines and inspections."[79] Schatz notes that governments "traditionally use information to pressure firms to reduce toxic chemical releases from the environment" and that one major benefit of disclosure is that it is "more politically feasible than direct regulation, because it is framed as a 'right to know' law, and is not easily characterized as coercive."[80] A study out of the United States on the Toxics Release Inventory (TRI) showed that providing accessible information to the public about the release of

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[78] Meredith Cairns, Ceyda Turan and William Amos, "Disclosure of Environmental Law Enforcement in Canada: Lessons from America", McGill International Journal of Sustainable Development Law & Policy, (2012) 7:2, online: <https://www.mcgill.ca/jsdlp/files/jsdlp/jsdlp_volume7_issue2_203_232.pdf> at 215.
[79] *Ibid.* at 216.
[80] Andrew Schatz, "Regulating Greenhouse Gases by Mandatory Information Disclosure", *Virginia Environmental Law Journal* (2008) 26:335, at 335-6.

toxic chemicals lead to significant reductions in health risks.[81] Another study from Massachusetts found that a requirement that drinking water utility companies directly mail reports of their drinking water violations to consumers reduced total violations by 30 – 44%, and severe health violations by 40 – 57%.[82] Cairns et al. recommend that the federal government "provide the public with access to an online environmental enforcement and compliance database, updated monthly, that includes all non-sensitive information about all inspections, investigations and prosecutions, as well as compliance information concerning facilities that respect the law."[83] This recommendation can be extended to provincial governments. As discussed above, the BC Forest Practices Board, the Ombudsperson and the Information Commissioner have all noted the importance of proactive disclosure to ensure accountability and compliance with environmental rules.

A legislative requirement that environmental assessments, compliance orders, and authorizations be released would be evolutionary rather than revolutionary. Some proactive disclosure of environmental assessments, orders and authorizations is already occurring in other jurisdictions, even without a legislative requirement. Below are some examples:

- In Alberta the Natural Resources Conservation Board proactively releases environmental compliance orders against farms on its website.[84] The operational division of the Board is responsible for the ongoing regulation of confined feeding operations, including cows. Two kinds of orders are posted on their website; enforcement orders and emergency orders. Enforcement orders can be issued "if an operator is creating a risk to the environment or an inappropriate disturbance, or is contravening or has contravened the act, the regulations or a permit issued under the act."[85] Emergency orders "are issued when a release of manure, composting materials or compost into the environment may occur, is occurring or has occurred, and the release is causing or has caused an immediate and significant risk to the environment."[86] Users of the website can view both "Active Orders" and "Archived Orders".

- Ontario's *Environmental Bill of Rights*[87] requires the government to post notices of government

[81] This study also noted that accessible information (i.e. processed and structured information), in contrast to raw data, resulted in reduced health risks. Hyunhoe Bae, Peter Wilcoxen, and David Popp, "Information Disclosure Policy: Do State Data Processing Efforts Help More Than the Information Disclosure Itself?", *Journal of Policy Analysis and Management* (2010) 29:1.
[82] Lori S. Bennear and Sheila M. Olmstead, "The Impacts of the "Right to Know": Information Disclosure and the Violation of Drinking Water Standards", *Journal of Environmental Economics and Management* (2008).
[83] Meredith Cairns, Ceyda Turan and William Amos, "Disclosure of Environmental Law Enforcement in Canada: Lessons from America", McGill International Journal of Sustainable Development Law & Policy, (2012) 7:2, online: <https://www.mcgill.ca/jsdlp/files/jsdlp/jsdlp_volume7_issue2_203_232.pdf>, at 216.
[84] Natural Resources Conservation Board, "Confined Feeding Operations: Enforcement and Emergency Orders", online: <https://cfo.nrcb.ca/Compliance/Orders.aspx>.
[85] *Ibid.*
[86] *Ibid.*
[87] *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28.

proposals, like Acts or Regulations, which will have an effect on the environment. These are posted on the Environmental Registry.[88] A summary of the government action is posted on the website for comment by the public. Summaries are also posted for permits and for variations of existing permits, and include links to relevant orders issued by the public body. The address of the government body that holds further information is also provided, and users are directed to contact the body for more information if they wish to.

- The Canadian government operates the National Pollutant Release Inventory (NPRI).[89] Users of the NPRI can search pollutant releases by company or facility name or by postal code. This information is collected and posted pursuant to ss. 46 – 50 of the *Canadian Environmental Protection Act*, which permits the Minister for the Environment to collect and publish information about toxic substances.[90] The Minister of the Environment sets the minimum quantities of pollutant releases that will require reporting, so small-scale emitters may not be included in the inventory.[91]

- In the United States, the federal Environmental Protection Agency operates ECHO (Enforcement and Compliance History Online). This is an online inventory of all orders made by the EPA. Users can access summaries of compliance history of industries and individuals subject to environmental regulation, but not the actual compliance orders.[92]

The above examples highlight the fact that different public bodies have determined that proactive release of environmental information is a good idea.

D. Inspection reports and penalties

Records of ministerial inspections to ensure compliance with the law should generally be considered "public interest" records. Not only can these reports contain information that can warn of risks to the environment or to public health and safety, reports and penalties provide information that reveals how the government is managing risks to the public and enforcing the law.

Most jurisdictions proactively release at least some kinds of inspection reports and penalties. In BC, Health Inspection reports are made available online through the governing health authorities.[93]

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[88] "Environmental Registry", Government of Ontario, online: h<ttp://www.ebr.gov.on.ca/ERS-WEB- External/>.
[89] Environment Canada, "National Pollutant Release Inventory: Tracking Pollution in Canada", Government of Canada, online: <https://www.ec.gc.ca/inrp-npri/default.asp?lang=En&n=4A577BB9-1>.
[90] *Canadian Environmental Protection Act, 1999* (S.C. 1999, c. 33), ss 46-50.
[91] Environment Canada, "The National Pollutant Release Inventory Oil and Gas Sector Review", Government of Canada, online: <https://www.ec.gc.ca/inrp-npri/default.asp?lang=En&n=02C767B3-1>.
[92] "ECHO: Enforcement and Compliance History Online", United States Environmental Protection Agency, online: <http://echo.epa.gov/?redirect=echo>.
[93] See, for example, the Vancouver Island Health Authority Inspection reports, online: <http://www.healthspace.ca/viha>.

WorkSafeBC also releases information about compliance with workplace safety rules, posting detailed summaries of penalties issued online[94], and compliance related data such as injury rates, claim costs and injury characteristics, and assessment rates.[95] In almost every province, food establishment inspection reports are posted online. In Florida, the Department of Heath posts online metadata regarding compliance with health regulations regarding swimming pools, septic tanks, biomedical waste, mobile homes and RV parks, migrant labour camps, tanning and body piercing facilities, and food hygiene.[96] A similar approach is taken in other states, including California.[97]

A category including environmental inspection reports and compliance orders should be added to s. 25, 70, or 71. Many public bodies already post this information proactively, and including the category would encourage other public bodies to do so as well.

Recommendation 3: Grant the Commissioner the power to review and approve the publication schemes created by public bodies under s. 71

This was recommended by the Special Committee in 2004.[98] Such a power would add the extra level of enforcement necessary to ensure that public bodies follow the law. As the Carter Center notes, "the law needs to have teeth, in order to take bites out of the bureaucratic culture of secrecy."[99] As noted above, the UK's Information Commissioner's Office (ICO) publishes model publication schemes outlining non-exhaustive lists of categories that the Commissioner's Office expects specific public bodies to proactively release.[100]

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[94] Work Safe BC, "Penalties", online: <http://www2.worksafebc.com/Topics/AccidentInvestigations/Penalties.asp?_ga=1.71411987.1243913321.1445720596>.

[95] Work Safe BC, "Open Data", online: <http://www.worksafebc.com/about_us/open_data/default.asp>

[96] Florida Health, "Inspection Reports and Data", online: <http://www.floridahealth.gov/statistics-and-data/eh-tracking-and-reporting/>.

[97] Kings County California, "Online Inspection Reports", online: <http://www.countyofkings.com/departments/environment-health-service/online-inspection-reports>.

[98] In the 2010 Report of the Special Committee reviewing *FIPPA*, the Committee recommended that the legislature:

> Add a new section at the beginning of Part 2 of the Act requiring public bodies – at least at the provincial government level – to adopt schemes approved by the Information and Privacy Commissioner for the routine proactive disclosure of electronic records, and to have them operational within a reasonable period of time.

Special Committee to Review the *Freedom of Information and Protection of Privacy Act*, Report May 2010, Legislative Assembly of British Columbia, online: <https://www.leg.bc.ca/Pages/BCLASS-Legacy.aspx#/content/legacy/web/cmt/39thParl/session-2/foi/index.htm> at Recommendation 7

[99] Nancy Anderson, "Enforcement Under the Jamaica Access to Information Act", *Access to Information: Building a Culture of Transparency* (The Carter Center, 2006), online: <https://www.cartercenter.org/documents/2364.pdf> at 104

[100] Information Commissioner's Office, "Definition documents", online: <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/publication-scheme/definition-documents/>.

Conclusion

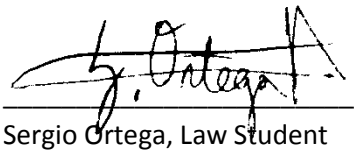
The above submission highlights what appears to be a broad systemic failure to proactively disclose key documents about the state of the environment and what Government is doing to protect the environment. Although the Information Commissioner, the Forest Practices Board, the Office of the Ombudsperson, and the Auditor General have made several ministry-specific recommendations that certain classes of documents should be disclosed proactively, these recommendations are not being fully implemented. In order to establish rational, broad and comprehensive proactive disclosure policies, the Commissioner must launch an investigation to identify common problems currently plaguing the different ministries. The Commissioner has the resources and authority to recommend best practices and collaboration by the ministries to ensure that implementation is timely and cost-effective. We urge you to do so.

As for the need for law reform: We ask the Commissioner to build on the recommendations made in the Special Committee's Report[101] and go further to identify the specific law reform measures necessary:

- To amend section 25 based on Commissioner Denham's 2015 Mount Polley Report; and

- To require proactive disclosure of specific categories and classes of records, including all Ministry of the Environment, Ministry of Energy and Mines, Ministry of Forests, Lands and Natural Resource Operations and Oil and Gas Commission environmental orders, pollution authorizations/permits, conviction and contravention decisions/penalties, environmental assessments, policy manuals and other key environmental records.

Respectfully submitted,



Sergio Ortega, Law Student

Calvin Sandborn, Lawyer/Legal Director

[101] SCFIPPA Report, *supra* note 2.

Appendix 1: Email from Christa Zacharias-Homer to ELC Legal Director Calvin Sandborn

From: Zacharias-Homer, Christa ENV:EX [mailto:Christa.ZachariasHomer@gov.bc.ca]
Sent: November-09-16 3:12 PM
To: Calvin Sandborn
Cc: Bourgeois, Jason ENV:EX; 'sergio@uvic.ca'
Subject: RE: Public Posting of environmental compliance orders?

Good Afternoon Calvin,

I understand that you are asking whether the Ministry is contemplating proactively disclosing records related to Orders outside of the FOIPPA.

It is ministry practice to report out of Orders issued under EMA, as well as other enforcement activities for other legislation under Ministry of Environment's mandate, in the Quarterly Environmental Enforcement Summaries. The link is in my original email response below.

Yesterday, the Ministry posted the Compliance Inspections Report 2015: *Environmental Management Act*. The Report and the inspections data can be found at: http://www2.gov.bc.ca/gov/content/environment/research-monitoring-reporting/reporting/env-compliance-inspection-report .

As explained in my response to you below, per the Privacy Commissioner's report, the Ministry will publicly post information including orders, environmental reports, etc. for a particular site where it is in the public interest. There is no new ministry policy at this time to publicly post all Orders issued under the *Environmental Management Act*.

Kind regards,

Christa

Christa Zacharias-Homer
Deputy Director, Regional Operations Branch
Ph: (250) 356-8185 | Fax: (250) 356-5496 | Cell: (250) 216-2467
Christa.ZachariasHomer@gov.bc.ca

Appendix 2: Email from Jason Burgeouis to ELC student Rachel Gutman

On 2015-10-06, at 12:22 PM, Bourgeois, Jason ENV:EX wrote:

Rachel, thank you for your enquiry for information regarding Compliance Order (file #76600-20/Armstrong). You have identified yourself as a law student with the Environmental Law Centre at the University of Victoria doing research on an aquifer in the Okanagan. You have not identified the purpose of your research or whether you are, or your law centre is, representing a specific client in existing or pending litigation. The issue you have identified is a sensitive one among a number of parties and we are mindful of privacy rights of everyone involved. For that reason, we are requiring that a formal Freedom of Information request be made to obtain any and all records you may be interested in.

As a courtesy to you, I have provided a document that describes several options you may wish to pursue to navigate the FOI process. Best of luck on your research.

Regards,

Jason

Jason Bourgeois, LL.B., M.Sc.
Compliance Section Head | Environmental Protection Division
Ministry of Environment
Tel: 250.371.6267 | Fax: 250.828.4000
1259 Dalhousie Dr. | Kamloops | BC | V2C 5Z5
Jason.Bourgeois@gov.bc.ca

Appendix 3: Email from Eric Shiplack to ELC student Rachel Gutman

From: "Shiplack, Eric" <IAOResourceTeam@gov.bc.ca>
Subject: FOI Request MOE-2015-53213
Date: 14 October, 2015 5:19:54 PM PDT
To: rgutman@uvic.ca

Dear Rachel Gutman:

Re: Request for Access to Records – Fee Estimate
Freedom of Information and Protection of Privacy Act (FOIPPA)

I am writing further to your request received by the Ministry of Environment. Your request is for:

Regarding the compliance order issued on March 6th, 2014 by the Ministry to HS Jansen and Sons Farms Ltd, file #76600-20/Armstrong: all subsequent records of MOE authorizations permitting the application of liquid effluent by HS Jansen and Sons Farm. (Date Range for Record Search: From 03/01/2014 To 10/09/2015)

Section 75(1) of FOIPPA provides that we may charge a fee for certain limited costs of processing your request. However, the first three hours to search for records and any time spent reviewing and/or severing information from the records is not charged to you. A complete copy of FOIPPA is available online at:
http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/96165_00

Due to the size and scope of your request, we are assessing a fee. You may wish to consider options to reduce or possibly eliminate the fee estimate, such as:
· Reducing the time period for which you have requested records, or
· Requesting records from specific staff members or program areas in the Ministry, or
· Requesting specific types of records (e.g. final versus draft, correspondence, briefing notes, reports), or
· Requesting electronic copies of the records.

If you choose to narrow your request, a revised fee estimate may be provided. I will work with you to try to find an efficient and cost effective method in which to provide records. The fee of $ 150 has been calculated as per the attached Fee Summary.

Due to the amount of the estimate, we will require a full payment in the amount of $150.00. Please send a cheque or money order made payable to the Minister of Finance, quote your file number and mail it to:

Attn: Eric Shiplack
Information Access Operations
Ministry of Technology, Innovation and Citizens' Services
PO Box 9569 Stn Prov Govt
Victoria BC V8W 9K1

Appendix 4: Email from Stacey Wilkerson to ELC student Sergio Ortega

From: Wilkerson, Stacey L FLNR:EX
Sent: Tuesday, November 22, 2016 10:15 AM
To: 'sergio@uvic.ca'

Hello Sergio,

Thank you for your interest in the RAR Annual Report. The 2015 and 2016 reports will both be available in the early new year..

A report that encompasses the years of 2010-2013 will be prepared next year as well.

If you have any questions in the meantime, please feel free to contact me directly.

Thank you,

Stacey Wilkerson M.Sc., R.P.Bio.
Riparian Management Coordinator
Resource Stewardship Division
Ministry of Forests, Lands and Natural Resource Operations
(250) 356-9804
Stacey.Wilkerson@gov.bc.ca