The Canadian Association of Journalists
L'Association Canadienne des Journalistes

Helen Morrison, Senior Policy Analyst
Office of the Information and Privacy Commissioner for British Columbia
PO Box 9038, Stn. Prov. Govt.
Victoria, BC V8W 9A4

March 10, 2011

Re: Proactive Disclosure

Dear Ms. Morrison,

I am writing on behalf of the Canadian Association of Journalists (CAJ) to offer our feedback on the provincial government's proactive disclosure plans. Specifically, we are concerned about a plan to make public all documents released under access to information at the same time the documents are released to the original requester.

We have serious concerns such a policy will have the unexpected effect of discouraging journalists from making access requests, undermining investigative journalism and ultimately reducing the quality and quantity of information released to the public.

I'd like to make it clear the CAJ supports proactive disclosure. We've been advocating for more routine disclosure of documents, databases, reports and expenses for years. It's a hallmark of our work promoting access to information and open government.

What the BC government is proposing is *not* proactive disclosure. This is not a case of revealing information before any citizen bothers to ask. This is still *reactive* disclosure, because it relies on a formal request and a long, legislated process.

The plan appears to support the goals of open and transparent government but will accomplish the opposite.

Journalists, especially beat reporters and investigative journalists, have traditionally made extensive use of access to information legislation. Reporters are able to research a subject thoroughly and mine experts to determine what documents to ask for. In a sense, those are the most valuable documents, the ones government might be unwilling to release voluntarily but the ones the public is best served by seeing.

We believe making the fruits of that labour available to everyone simultaneously will dramatically diminish the number of requests and stories that flow from those requests, thus making government less accountable, not more. That cuts right to the purpose of the access to information act.

There is also the matter of fairness. Journalists in British Columbia, indeed anyone who files an FOI, are often hit with exorbitant search, copying and processing fees. Or, they spend months negotiating for access, perhaps even appealing to the courts. The requester who pays the fees should get exclusive rights to the documents, at least for a reasonable period of time. Otherwise, there is no incentive to fight for documents that might be in the public's interest. The reason requesters pay fees is because they are assumed to receive a private benefit from the access. If a requester is merely providing an opportunity for an agency to make information available to everyone, then there is no justification for fees being levied on the original requester.

We believe there is a way to accomplish the goal of proactive disclosure while also protecting the "finder's rights" of requesters and the legislation's goal of fostering accountable government. Requesters should have a grace period during which only they will have access to the documents, a period of two weeks or more when the government will not post the documents online.

Thank you for considering this brief submission. Please find enclosed our responses to some of the specific questions you asked.

Yours,

Mary Agnes Welch
President
Canadian Association of Journalists
www.caj.ca
maryagnes.welch@freepress.mb.ca

(Signed copy to follow by fax)

• What, in your view, are the essential elements of a robust proactive disclosure practice?

The first element would be a review of all routinely produced documents and databases to determine which ones could easily be posted online. Admittedly, that's a big job that would take several years to complete, and it would need to be regularly reviewed. But it would reduce the number of access requests in the long run, thus saving the government time and money. Second, the information disclosed must be in a form that's user friendly. That means searchable documents, databases that can be easily downloaded into formats such as Excel and a well-organised way of finding things online. Third, disclosures must be publicised. It's not enough to quietly post documents on a website. The public, journalists and interested parties must know the information is there and that it's regularly updated.

• Are there any particular types of data that should be proactively disclosed?

The list is as long as the thousands of types of records a government produces. Everything from inspection reports, feedback from public consultations, technical reports, minister's agenda books, contracts, funding agreements, MOUs... It could also include cabinet documents after a certain amount of time.

• Are there any particular types of data that should not be proactively disclosed?

We would argue for a broad interpretation of the legislation that errs on the side of the public's right to know. Too often, exemptions such as the "advice to government" clause or third party rights are used as an excuse to deny access when no real harm would come from disclosure. The rules are used as a way to find loopholes to deny access rather than complying with the spirit of the legislation that says citizens have a right to the documents they pay for. The default should be disclosure, except in obvious cases of personal privacy such as an individual's health or financial records.

• In your view, does the proactive disclosure of responses to access requests serve the public interest in access to information?

In part it does. Ideally, once access-to-information staff have determined a document should be public, it ought to become part of routine disclosure. It should be posted online, and documents like it should be posted in the future. For example, if day care inspection records are released to an applicant, a mechanism should be set up so that those records are made routinely available online.

But, as indicated in our cover letter, we believe the practice of releasing documents simultaneously to the requestor and the public would have the opposite effect its proponents say. It would decrease the number of FOI

applications and thus reduce the flow of information through the media to citizens.

- Are there time sensitivities that should be taken into account in publishing responses to access requests? In particular, do you have any concerns with respect to simultaneous disclosure to the applicant and to the public?

  That is our specific concern. The person who made the request, and who may have paid substantial search and copying fees, should have the document for a period of time before it's made public.

- Should public bodies notify others when responses to access requests are made available to the public? What are the time sensitivities?

  Yes. A public list, similar to the old federal CAIRS list, could be used to index all the newly posted documents and alert the public when new documents are posted.

- How should responses be made publicly available? If they are posted on the website are there time sensitivities as to when they are posted and for how long?

  Documents should be posted after the original requester has had time, perhaps two weeks, to read and use the documents first. They should remain posted in perpetuity, forming part of the public record that any member of the public can use.

- Should the names of applicants and/or the identity of applicant types be publicly disclosed?

  Requesters have traditionally had privacy rights and this should continue. This includes protecting a requestor's identity while an FOI works its way through the system. Otherwise, requests from some applicants – journalists, advocacy groups, opposition parties – will get "red flagged." That raises the risk of political interference from ministers. Red flagging has happened in several jurisdictions, including the federal government and is completely at odds with the purpose of FOI legislation.

- What is the public interest in access to information by media?

  The media often acts as the public's proxy, spending time researching an issue, finding sources and asking the questions citizens might ask if they had the time. That includes filing access to information requests to pry documents out of the government that the government would prefer to keep secret. Major stories, from the federal sponsorship scandal to the questionable safety of our food supply to

> eHealth misspending, could not have been done without access to information legislation. Those stories, and hundreds more, are undeniably in the public's interest. As governments invest more and more in communications gatekeepers and muzzle staff, the need for a robust legal process to obtain documents is vital.

- If you are of the view that journalists are disadvantaged by proactive disclosure of responses to access requests, please provide evidence of that.

We rely on our experiences as working reporters and input from CAJ members in British Columbia. Blanket access to requested information will make media managers reluctant to pay the often exorbitant fees to pursue information through an FOI, only to have that same information available to any competitor at the same time. This would have a negative impact on the public's right to know by decreasing the supply of that information to them. Already, the government uses hefty fees as a way to discourage access requests, and it works. At a time of shrinking newsroom budgets, it's difficult to convince an editor to pay hundreds or even thousands of dollars for documents. It would be doubly difficult if the information a news outlet has paid for is made public to everyone simultaneously.