BC CLA BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

FIPA BC FREEDOM OF INFORMATION AND PRIVACY ASSOCIATION

BY EMAIL

Information and Privacy Commissioner of British Columbia
PO Box 9038, Stn Prov Govt
Victoria BC V8W 9A4

February 13, 2014

Dear Commissioner Denham:

Re: Adding Police Chiefs' Associations to FIPPA Schedule 2

We are writing on behalf of the British Columbia Civil Liberties Association (BCCLA) and the B.C. Freedom of Information and Privacy Association (BC FIPA) in response to your letter of December 6, 2013 regarding the possibility of recommending the government add the BC Association of Chiefs of Police (BCACP) and the BC Association of Municipal Chiefs of Police (BCAMCP) as public bodies to Schedule 2 of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).

We support this move for the following reasons. Some are particular to these two organizations, but we have also attempted to provide some more general considerations that could be used in future situations where the listing of an organization under Schedule 2 may be advisable.

Ambiguous situation of these organizations has caused confusion

The two organizations which are the subject of this consultation have in the past characterized themselves in two completely different ways, depending on circumstances.

There was also some question as to whether these associations had actually incorporated and thereby acquired corporate personality. We understand that this ambiguity has since been resolved.

When a request was made to the police forces of the heads of these organizations for records related to the BCACP and BCAMCP under FIPPA, those public bodies initially responded that they did not have custody or control of those records as they belonged to the two named organizations, not the police force.

In response to a complaint filed under the *Lobbyist Registration Act*, representatives of the two organizations claimed that the chiefs were acting as part of their duties as employees of a municipal government, and therefore not within the definition of lobbyists.

This contradiction was ultimately resolved by the municipal police forces in question agreeing that they did have custody of records for the purpose of FIPPA and released some records. (ORL Investigation report 13-02, paras 25-27)

http://www.lobbyistsregistrar.bc.ca/images/pdfs/orl_investigationreport_13-02_final.pdf

Associations admit they and their members are carrying out governmental functions

The Office of the Registrar for Lobbyists conducted an investigation into the conduct of these two organizations last year (13-02) after a complaint had been made about these organizations carrying out lobbying without being registered.

The Acting Deputy Registrar held that there had been no violation of the LRA, as the members of the two associations communicate with public office holders in their capacities as "employees of a local government authority."

The BCACP president stated that no member of the association received remuneration for their activities, and that they were required, as part of their contract of employment, to take part in professional associations such as the BCACP. (ORL Investigation report 13-02, paras 15-16)

The BCAMCP submissions were similar.

http://www.lobbyistsregistrar.bc.ca/images/pdfs/orl_investigationreport_13-02_final.pdf

The Deputy Registrar found that when the chiefs took part in these organizations' activities, and that they did not cease to act as police chiefs. In addition, he found that if they were acting collectively to speak on issues important to them, that collective action did not change the fundamental nature of their action as local government employees.

This may be an arguable position, and the Deputy Registrar indicated that he could have found differently if he had been presented with evidence of action that the organizations "had taken on a life of their own" and were engaged in lobbying outside the area of policing. (ORL Investigation report 13-02, para 27)

Regardless of any deficiencies in procedure or evidence in this investigation, the bottom line is that the two organizations characterize their essential nature as an adjunct to government.

Purposes of the Freedom of Information and Protection of Privacy Act

Those purposes are set out in s. 2 of the Act, and include making public bodies more accountable to the public by giving the public a right of access to records.

It accomplishes that by providing a right of access to "any record in the custody or under the control of the public body" in section 4 of the Act.

In order to achieve these purposes and realize the right of access, a government entity must fall within the definition of "public body" set out in Schedule 1 of the Act. That definition reads as follows:

> **"public body"** means
>
> (a) a ministry of the government of British Columbia,
>
> (b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, or
>
> (c) a local public body

In the case of these two organizations, they would have to specifically be added to Schedule 2 in order to be covered.

The alternative, which you set out in your letter of December 6, 2013, is to continue with the present situation, which involves requests to a series of different police forces each of which may have custody or control of various records, depending on the role played by that force's chief. As you note, this would not be administratively sound, nor would it provide British Columbians with access to records related to what are very important issues.

Analogous situation to government bodies in Charter cases

An analogy can be drawn between the decision to add an organization to Schedule 2 of the *Act* and the circumstances courts can find themselves in when having to determine whether or not an organization should be subject to the *Charter of Rights and Freedoms*.

One of the considerations is anti-avoidance, which is reducing the possibility of government bodies attempting to avoid their constitutional responsibilities by creating new subsidiary bodies, or investing existing bodies with government powers or responsibilities.

In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, La Forest J. set out the rationale for the broad coverage of the *Charter* as follows (at para. 48):

> Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are — as a simple matter of fact — governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. (emphasis added)

In the FOI context similar considerations apply. Given the quasi-constitutional status of FIPPA, it would be perverse to allow governments to create bodies where records and information would move 'off book'.

In *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component* 2009 SCC 31, the Court had to determine whether or not Translink, the public transport body in the Lower Mainland, was subject to the Charter. At issue was the constitutionality of its refusal of advertising related to encouraging participation by young voters (Rock the Vote).

In a unanimous decision, Deschamps J., writing for the court, found that Translink was subject to the Charter.

In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (at para 44), La Forest J. set out the two principles for determining whether or not s, 32 of the Charter applies.

First is whether the entity is itself "government". This involves determining if the entity can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). If it is found to fall within this category, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private".

Second, an entity could fall under the *Charter* with respect to a particular activity that can be described as 'governmental'. If the activity is truly "governmental" in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

In the case of *FIPPA*, the second part of this test if covered by the statute itself in s.3(1)(k)as a negative. The subsection states that the *Act* does not apply to "a record of a

service provider that is not related to the provision of services for a public body." This means records related to the provision of services for a public body are covered.

We will not deal with the limitations of this wording, except to note that it appears to provide a version of the second part of the test set out in *Eldridge*.

In the case of the two organizations in question here, they would appear to be covered by the first part of the test. This is set out in your letter, and in the reasons in LRC Order 13-02.

Conclusion

Based on both practical and juridical reasons, it is our view that both these organizations should be included in Schedule 2 of the *Freedom of Information and Protection of Privacy Act*.

If you have any questions or require any additional information, please feel free to contact us directly.

Yours truly,

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