

Local Government Perspectives on the *Freedom of Information and Protection of Privacy Act*

Submission to the Ministry of Citizens' Services

Union of BC Municipalities

June 2018

Background

The Union of British Columbia Municipalities (UBCM) represents 100% of the local governments in BC, as well as eight First Nations members, and has advocated for policy and programs that support its membership's needs since 1905.

In April 2018, the Ministry of Citizens' Services asked that UBCM provide local government input to inform the Province of BC's review of the *Freedom of Information and Protection of Privacy Act* (FOIPPA), and related issues regarding information access and privacy protection. With 198 members, UBCM represents a significant portion of adherents to the Act. As such, we value the opportunity to engage in meaningful dialogue regarding potential FOIPPA amendments and their impact on BC's local governments.

In order to provide current and comprehensive feedback, in May 2018 UBCM surveyed local government Corporate Officers (and designated Freedom of Information practitioners) to better understand current application of the Act and associated challenges, as well as potential impacts of FOIPPA reforms on local government operations. The data from this survey, as well as interviews conducted with local government senior staff, provide the basis for this report.

UBCM Information Access and Privacy Protection Survey

112 local governments participated in the UBCM survey, representing just over 58% of local governments in British Columbia. Respondents represented communities with a wide range of populations, with 42% of responses representing communities with a population <5000, 37% representing 5000-50,000, and 21% representing >50,000.

The survey solicited feedback in the following eight areas:

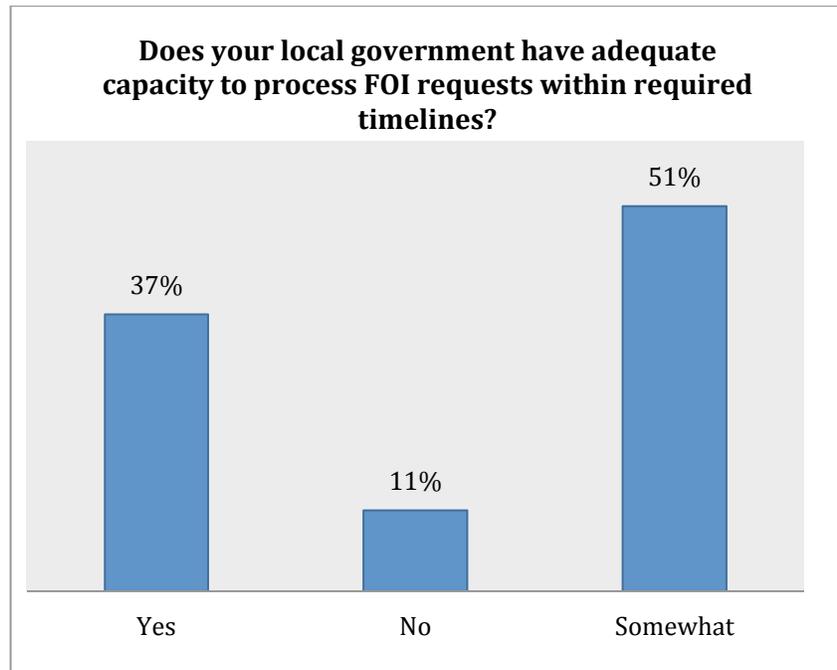
- **Timelines and Capacity**
- **Proactive Disclosure and Open Data**
- **Duty to Document and Transparency**
- **Costs and Fees**
- **Compliance and Deterrents**
- **Access and Storage of Information**
- **Mandatory Breach Notifications**
- **Local Government Engagement Processes**

Survey questions were designed with reference to the following sources:

- UBCM Policy
- Archived public engagement questions on engage.gov.bc.ca/infoaccess
- The report and recommendations of the Special Committee of the Legislative Assembly that Reviewed the *Freedom of Information and Privacy Protection Act*
- Submissions provided to the Special Committee by the Local Government Management Association (LGMA) and other local government representatives

Local Government Perspectives Regarding FOIPPA

Timelines and Capacity



In order to appropriately contextualize the survey analysis below, serious consideration must be given to local government capacity and resource challenges. Local governments are often subject to significant external cost drivers due to decisions made by other orders of government. Although there are opportunities for improvement within FOIPPA that may increase transparency, expedite access to information, and improve privacy protections, local governments often report significant challenges meeting current requirements within the Act, in the absence of additional legislative requirements or amendments. Local government capacity and resource strains are central themes in the feedback that follows, and warrant significant consideration prior to FOIPPA reform.

As is mentioned above, survey respondents represent communities that vary in size from small rural communities to large urban municipalities. The data and perspectives provided regarding capacity to process FOI within current required timelines exemplify this wide range, as well as the varying complexity of requests made.

Of the local governments who indicated having adequate time to process FOI requests, only 22% were from cities with a population greater than 50,000. Administrations in areas with a population of 50,000 or less made up 78% of the “yes” answers. The number of permanent staff a local government employs seems to matter in this context, with 37% of those that indicated adequate capacity from local governments with 100 or more employees. Local governments with high staff numbers have an easier time

processing requests, while governments with staff numbers fewer than 20 have more difficulty processing requests.

A comment made by respondents across populations is requests are generally processed within required timelines and capacity constraints; however where there are surges in requests due to development or an election period for instance, or an unexpected string of complex or frivolous requests, communities small and large can struggle to process requests as required.

Several respondents indicated that they currently receive very few FOI requests per year, and assuming this level is maintained, timelines are manageable. However many others indicated that the burden of processing FOI requests at current levels, as well as enforcing privacy measures fell to a single staff member who due to limited resources, manages "off the side of her desk". Where requests are complex (as many stated they increasingly are), current timelines become a significant challenge.

An additional difficulty, particularly for local governments with fewer staff, is managing timelines during peak and holiday seasons, and additional flexibility within the legislation to accommodate peak periods would be welcome in this regard. One respondent indicated that past extension requests due to staff workload and absences have been denied by the Office of the Information and Privacy Commissioner for BC (OIPC).

Many communities are also challenged due to current records management practices. Due in part to resource challenges, not all organizations currently have robust records and information management systems, and with increasing numbers of records, struggle to complete searches within required timelines.

Should the 30 working day timeframe be reduced to fewer days, or 30 calendar days, as was recommended by the Special Committee of the Legislative Assembly that reviewed the *Freedom of Information and Protection of Privacy Act*, many local governments would be likely to increase their non-compliance rates. This is particularly relevant for governments representing greater than 50,000 constituents, which already have a difficult time processing requests within required timelines.

Proactive Disclosure and Open Data

On the engage.gov.bc.ca engagement website, BC requested feedback regarding what kinds of information should be open and accessible to the public **without** a formal FOI request. Survey respondents were asked for feedback regarding open government, including proactive disclosure and local government ability to generate open data.

A common theme in our survey responses was that local governments constantly endeavour to provide open and transparent information, and in some cases have statutory requirements to do so. There was also a clear recognition of the efficiency of establishing open government practices in reducing the burden of FOI requests.

Respondents indicated that their communities had established robust systems and procedures that act as best practices for communities across the province and country.

However, resources to design and implement these types of systems elude many resource-strained local governments. And many others are in the process of transitioning to systems that foster greater transparency. Any legislated requirements to proactively disclose information or ensure open data could represent additional hardship. The decision to pursue transparency measures should remain within local context and jurisdiction.

Although legislative measures may be challenging, several respondents indicated a keen interest in ongoing training, best practices, and guidance documents that address the constantly evolving environment and technology, and help local governments pursue transparency while ensuring privacy and security. This could also assist in creating consistency across local governments related to the information made routinely available to the public.

There were also respondents that emphasized the purpose of formal FOI requests, which ensure thorough record keeping and provide clear process and expectations for the public, and the need to retain this process alongside open data initiatives.

Duty to Document and Transparency

The Special Committee recommended that the Act include a “duty to document”, applicable to local governments. Local governments were asked to comment on the implementation of a duty to document, as applied both to local governments and provincial agencies.

Respondents indicated continued commitment to transparency and the principles that validate the addition of a duty to document provision in FOIPPA. These include the crucial need for accountability, and to make the rationale behind decision-making public. Respondents indicated a need for a clear definition of such a duty before comment, and recommended the inclusion of a “reasonable” clause if a provision were to be included.

The majority of those that commented indicated uneasiness regarding a legislated duty to document, which has the potential to be costly and arduous. One respondent emphasized that with local governments, there is no “one-size-fits-all” approach to record creation and management or transparency practices that can or should be applied. And again, many respondents indicated that a legislated duty to document and associated training and enforcement would be a significant resource challenge.

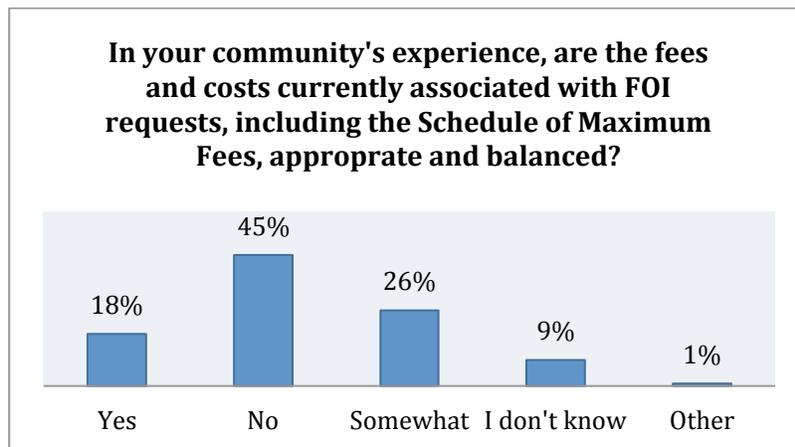
In the provincial government context, survey respondents pointed to a resource and capacity disparity that makes it more feasible for provincial ministries to comply with duty to document requirements. It was also mentioned that should local governments be

compelled to undertake transparency measures, the provincial government must be required to undertake equivalent actions.

Respondents also emphasized the direct and ongoing contact community members often have with local government representatives, and the ease with which information can be requested from this order of government. This may be in opposition to provincial agencies, which the public may see as less accessible. In addition, the type and quantity of information local governments manage compared to that of the provincial government are vastly divergent. The addition of a blanket duty to document provision in FOIPPA applicable to all public bodies may not be an appropriate.

There may be opportunities to implement policy or other measures to reinforce the importance of record creation in local government settings; however, in order to identify such opportunities, fulsome local government engagement is required. There is also substantial reason to recognize the significant diversity of bodies governed by FOIPPA and the impracticality of legislating a universal duty to document.

Costs and Fees



Fees and costs were an area of high response and comment on the survey. Many respondents commented that fees do not come close to covering the costs associated with FOI requests. This perspective is supported by UBCM policy, specifically resolution *2008:B25 Cost Recovery for Processing Freedom of Information Requests*¹, which requests that the Province consider amending the Freedom of Information and Protection of Privacy Act to provide for the option for recovery of actual request processing costs. However there was also recognition of the duty of all orders of government to make information available to members of the public, and that cost should never be a deterrent to obtaining information.

¹ Full text of 2008:B25 Cost Recovery for Processing Freedom of Information Requests can be accessed at: <http://www.ubcm.ca/resolutions/ResolutionDetail.aspx?id=3359&index=0&year=2008&no=b25&resTitle=&sons=&res=&prov=&fed=&other=&conv=&exec=&comm=&sortCol=year&sortDir=asc>

There are areas of the legislation that should be considered for amendment with regard to fees. One such area is the Schedule of Maximum Fees. First, the types of technology utilized to produce and distribute records must be updated. This should include consideration of the cost of large-scale printing, for instance in the case of building plans.

Local governments also indicated that the hourly fee that may be charged is not adequate due to the level of staffing often required to fulfill requests. Senior management and legal advice are often required to complete complex FOI requests, and a \$30/hr. fee cap is insufficient to recoup even a portion of costs.

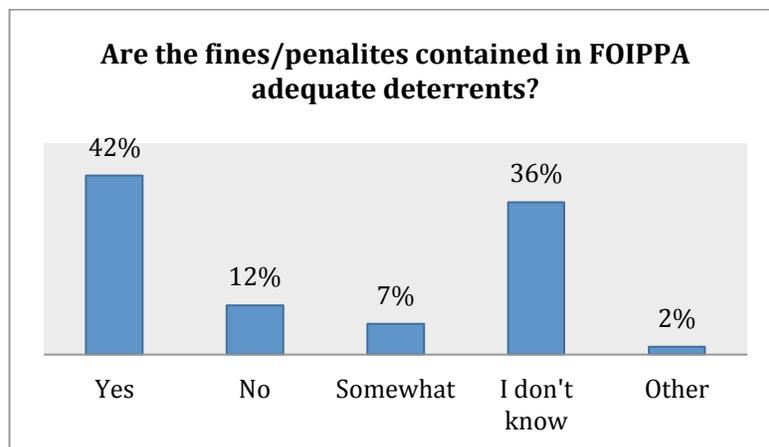
Respondents also indicated concern with the categories that cannot be charged for under the legislation. Specifically, respondents indicated that the Act should allow public bodies to charge applicants for severing records. In many cases, records are obtained within a reasonable period, but require significant hours to sever personal information.

Several respondents also indicated a need to reduce the number of hours that are exempt from fees. Under the legislation, organizations cannot charge for the first three hours spent locating and retrieving a record. However respondents indicated that this “free fee period” enables nuisance and frivolous requests.

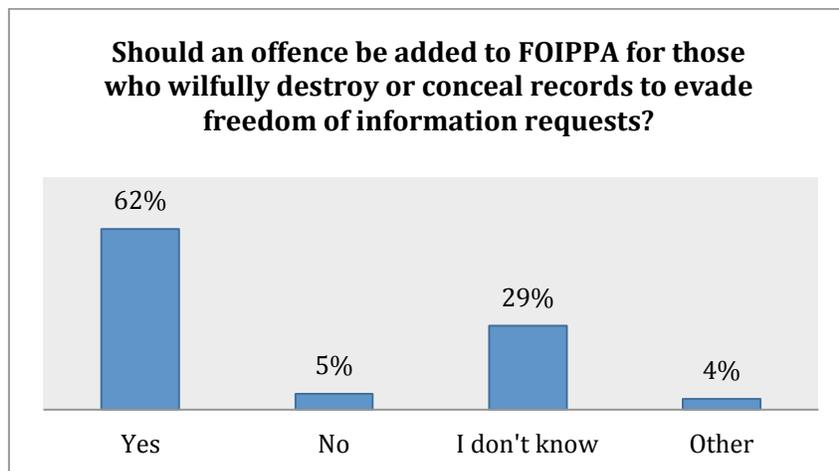
Concern was also expressed regarding significant time spent gathering information to estimate fees, only to have the applicant drop the request. A reduced number of free hours, or indeed enabling a nominal initial application fee, may encourage members of the public to make thoughtful requests or narrow their search in advance. Ability to waive these fees could still apply where appropriate under the Act.

BC may also wish to consider a tiered FOI fee schedule, based on complexity (e.g. 1-20 pages, 20-100 pages, 100-500 pages, with a per page fee after a set number), which could function to encourage concise and thoughtful requests.

Compliance and Deterrents



The Special Committee recommended increasing fines and penalties currently included in FOIPPA, and adding an offence for those who willfully destroy or conceal records to evade freedom of information requests. A large portion of respondents (42%) found current fines and penalties adequate. However one third of respondents did not know, with smaller local governments making up the majority of those with a knowledge gap regarding the efficacy of FOIPPA compliance measures.



The majority of respondents indicated that FOIPPA should stand firmly against wilful evasion or concealment of records. However it is necessary to clearly distinguish between wilful evasion, and an overabundance of caution taken with regard to private information, especially in the case of smaller local governments that do not employ FOI specialists. This is in particular recognition of the complex digital environment in which local government staff members attempt to navigate vast quantities of transitory and corporate records.

For clarity, compliance should also be considered and balanced alongside established records management requirements, and in accordance with established record retention procedures, including record destruction.

Access and Storage of Information

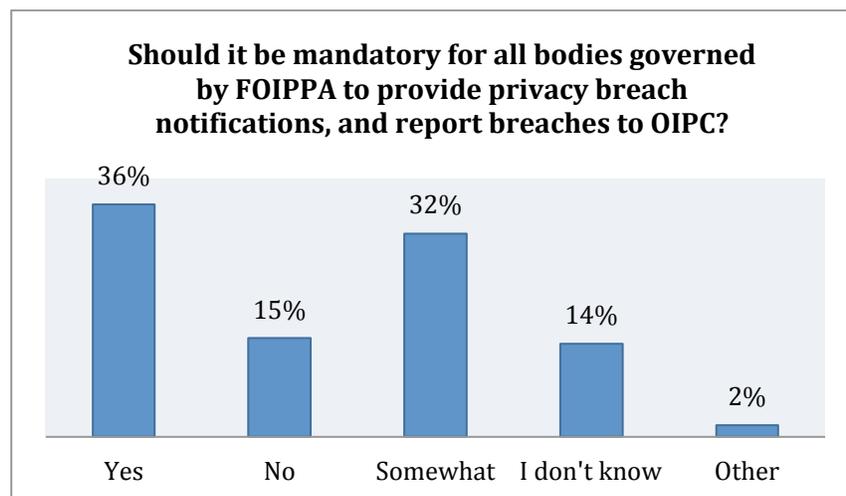
Respondents were asked to provide feedback and concerns related to the way local governments (elected officials and staff) access and store private information. Several themes emerged in the responses, including discussion of FOIPPA’s data sovereignty provisions, which require that a public body ensure that personal information in its custody or under its control is stored and accessed only in Canada. In its report, the Special Committee of the Legislative Assembly that Reviewed the *Freedom of Information and Privacy Protection Act* recommended the retention of FOIPPA’s data sovereignty requirement. As major software companies continue to turn toward cloud-based data storage solutions, the requirement to store data within Canada can become difficult for local governments to interpret and navigate. Some respondents questioned

giving preference to a provider based on server location rather than demonstrated security and privacy protection measures.

Several respondents referenced challenges related to access and/or storage of local government records on external or personal devices. The use of personal email addresses for the purpose of conducting local government business was also recognized as a challenge to manage. This is a complex area, particularly monitoring compliance among elected officials, who may not have as robust an understanding of FOIPPA privacy requirements and often work outside of local government offices.

Respondents recognized the vital importance of adequate and ongoing training of both staff and elected officials in order to ensure privacy protection. To this end, there were several requests for additional guidance, resources, tools and training. Respondents also raised the idea of a Provincial grant program directed at the development and implementation of records management policies and secure electronic records management systems.

Mandatory Breach Notifications

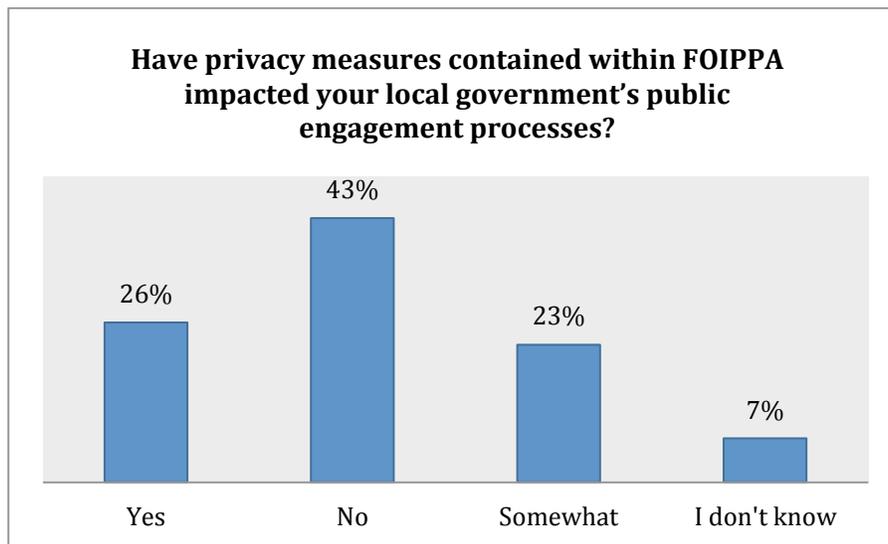


As the Province of BC's engage.gov.bc.ca engagement website states, there is currently no legal requirement for public bodies (other than the Province of BC) covered by FOIPPA to report incidents to the OIPC or notify affected individuals in the event of a privacy breach.

Although not required under FOIPPA, local governments are keenly interested in ensuring transparency, have established procedures in the event of privacy breaches, and do utilize the OIPC where appropriate. Consequently, some of the respondents that did not support mandatory notifications may be reacting to the establishment of a legislative requirement where practices and procedures are already in force.

The type of information that tends to be stored by local governments, and the range in what could be considered a privacy breach may also have lead some respondents to answer the question with “somewhat”. While a low-risk breach can likely be rectified without notification to the OIPC, a significant leak of personal information would warrant notification to affected parties and the OIPC. A levelled approach to breach notification may avoid unnecessarily arduous and costly processes, and may be a more appropriate avenue for consideration.

Local Government Engagement Processes



Recent interpretations of FOIPPA and its duty sovereignty provisions suggest that a local government’s ability to request identifying information (e.g. name, address) may be limited during public meetings that are broadcast online. This issue is encapsulated in the following resolution, endorsed at the 2018 Association of Vancouver Island and Coastal Communities (AVICC) AGM, and under consideration by the UBCM membership in September 2018:

Broadcasting Personal Information without Consent

Powell River RD

Whereas a presentation by Bradley Weldon from the Office of the Information and Privacy Commissioner (OIPC) was given at the annual CEO/CAO Forum on March 20, 2018 and dealt with application of the Freedom of Information and Protection of Privacy Act (FOIPPA) regarding a public body disclosing personal information inside or outside of Canada through broadcasting transmissions without the person’s consent in the context of public hearings/meetings and webcasting;

And Whereas the only operational solutions suggested were arduous and seemingly against all tenets of open and transparent public meetings and the advice given was to seek amendments to current legislation authorizing disclosure on the internet:

Therefore be it resolved that the Association of Vancouver Island and Coastal Communities (AVICC) request the Province of British Columbia to explore the need for amendments to the Freedom of Information and Protection of Privacy Act (FOIPPA) regarding the potential export of video personal information inside or outside of Canada.

Several local governments have expressed that they have undertaken measures to attempt to comply with FOIPPA in the “grey area” at the intersection of privacy and disclosure, where FOIPPA requirements to protect personal information seem to clash with other statutory requirements. This includes conducting Privacy Impact Assessments, and handling issues of privacy during public engagement and input sessions on a case-by-case basis. Based on survey data, FOIPPA has had a greater impact on public engagement process for larger cities, with 48% of respondents representing populations over 50,000 answering “yes”.

Concerns were also raised with regard to the significant resources required to redact personal information provided to Council in public agenda packages. Respondents indicated that it would be helpful for FOIPPA to provide clarity on this issue by stating that where there is a statutory requirement to disclose information, there is no need for redaction.

Key Messages

Timelines and Capacity

FOIPPA timelines and capacity are currently a significant challenge for some segments of the UBCM membership, including those with lower staff-to-population ratios, and large municipalities. Increasingly complex requests, and significant time spent severing records exacerbates this capacity and timeline strain. If timelines were reduced, there is a probability of higher non-compliance within these segments.

Proactive Disclosure and Open Data

Open and transparent government is very important to BC local governments. However additional statutory requirements that mandate open data or proactive disclosure could become a significant resource strain. Ongoing training, best practices, and guidance documents that address the constantly evolving environment and technology, could assist local governments in their goal to pursue transparency while ensuring privacy and security.

Duty to Document and Transparency

Respondents indicated continued commitment to transparency and the principles that validate the addition of a duty to document provision in FOIPPA, including the crucial need to understand the rationale behind decision-making. But given the diversity of public bodies that adhere to FOIPPA, the addition of a universal duty to document provision may not be appropriate. Additional consultation with local governments and consideration of alternate policy measures would be useful.

Costs and Fees

Local governments recognize that all orders of government have a duty to make information available to members of the public, and that cost should never be a deterrent to obtaining information. With this said, FOIPPA's Schedule of Maximum Fees should be amended to reflect current costs, salaries, and technological advances. Fee exemptions such as initial "free hours" and record severing should also be reconsidered to better balance costs, and disincentivize nuisance and frivolous requests.

Compliance and Deterrents

FOIPPA should stand firmly against wilful evasion or concealment of records. It should also take care to clearly distinguish between wilful evasion, and an overabundance of caution taken with regard to private information, especially in the case of smaller local governments that do not employ FOI specialists. Compliance should also be considered and balanced alongside established records management requirements, and in accordance with established record retention procedures.

Access and Storage of Information

The requirement to store data within Canada can be a challenge for local governments to interpret and navigate. Further dialogue regarding the relative risks and benefits of giving preference to a provider based on server location, rather than demonstrated security and privacy protection, would be useful. Access and storage of information across external and personal devices can also be a challenge. Ongoing training, guidance, and resources are needed—but are difficult for communities with limited resources. Additional support, such as a Provincial records management grant program, may assist local governments' development and implementation of records management policies and secure electronic records management systems.

Mandatory Breach Notifications

Although not required under FOIPPA, local governments have established procedures in the event of privacy breaches, and do utilize the OIPC where appropriate. In addition the nature of the information and risk of harm are not equivalent for all public bodies. A levelled approach to breach notification may avoid unnecessarily arduous and costly processes, and may be a more appropriate avenue for consideration.

Local Government Engagement Processes

Local governments have expressed that they have undertaken measures to attempt to comply with FOIPPA in the "grey area" at the intersection of privacy and disclosure, where FOIPPA requirements to protect personal information seem to clash with other statutory requirements. Clarity within the legislation is requested to balance the need for privacy with best practices for open and transparent public meetings.

Concluding Remarks

We would like to thank the Ministry of Citizens' Services for the opportunity to provide local government perspectives and areas of interest to inform BC's review of the *Freedom of Information and Protection of Privacy Act*.

This submission has endeavoured to provide a snapshot of current local government perspectives on FOIPPA, and open a dialogue with BC regarding future amendments. In the spirit of transparency, we hope that the Province will report out on what it has heard during its consultation process, and next steps for improving information access and privacy protection across BC. UBCM welcomes the opportunity to work cooperatively on these, and other legislative or policy amendments, that impact local governments.

Inquires regarding this submission may be directed to Gary MacIsaac, UBCM Executive Director, at gmacisaac@ubcm.ca or (604) 270-8226 Ext. 105.