



SASKATCHEWAN INFORMATION AND PRIVACY COMMISSIONER

THE VALUE OF OPEN GOVERNMENT

**Presentation delivered to:
The Institute of Public Administration in Canada 2010 Seminar
November 5, 2010**

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In next 20 minutes or so, my plan is to:

- Explore what we mean by open government;
- Highlight the role of access and privacy laws in promoting open government;
- Touch on public expectations; and
- Where do we go from here?

OPEN GOVERNMENT

Section 8 of the Charter gives us a right to vote at least every five years for the men and women we send to our Legislative Assembly or to the Parliament of Canada. BUT how meaningful can that vote be if we cannot as citizens readily find out what our governments have done in the four or so years since the last election?

Every province and territory, including Saskatchewan, has a freedom of information and protection of privacy law (FOIP). These are essentially two laws in one. Since access to information and privacy are just two sides of the same coin, each of these laws has two major themes:

- public information must be accessible; and
- personal information must be protected.

At the federal level, we have two separate laws – the *Access to Information Act* and the federal *Privacy Act*. Both came into force in 1983.

Why were these laws developed in Canada? Government produced a Green Paper that offered three reasons:

- Effective accountability – the public's judgment of choices taken by government – depends on knowing the information and options available to decision-makers;
- Government documents often contain information vital to the effective participation of citizens and organizations in government decision-making; and
- Government has become the single most important storehouse of information about our province; information that is developed at public expense so should be publicly available wherever possible.

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According to our Supreme Court, these laws have a special status, they are quasi-constitutional. In the event of conflict they are generally paramount to other laws. Just a couple of months ago, the Supreme Court in the *Criminal Lawyers Association* decision from Ontario went further and stated that when access is necessary for the meaningful exercise of free expression on matters of public or political interest it is prima facie constitutionally protected.

These laws should be thought of as kind of a back up or last resort. Public bodies have lots of ways of sharing information and records. Public bodies can respond to phone calls, letters and emails. Government can respond in the Assembly to written questions and motions for return. They can provide information to the public through published Business Plans, Annual Reports and their website or webpage.

Always important to recognize that providing the information to the public by means of responding to a FOIP request is the most cumbersome, most expensive and most time-intensive process imaginable. But often times no better route is available to the citizen who seeks information.

Most Saskatchewan residents will not likely go to the trouble of filling out the form and submitting a request for access to a government institution or local authority or even their local health information trustee. But our 27 years of experience in Canada with public sector access and privacy laws proves that access to information regimes are a critically important way of promoting transparency and accountability of the governors to the governed. When decision makers in our public sector, whether it is cabinet ministers, school trustees or municipal councilors, meet to make important decisions, they know that via FOIP, the public is looking over their shoulder.

Let me just quickly address a common misconception. It is sometimes thought that citizens don't use these laws - that they are used almost exclusively by the media and by opposition MLAs. Although there may have been some truth to that in the first 11 years of FOIP, it is certainly no longer the case. We know from studies in other provinces that usually about 40% of access requests come from businesses and about 50% come from individuals - businesses looking for contracting opportunities, and a sense of where the province is going in terms of economic development - Individuals for a variety of reasons personal to them.

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It could be a farm family that is concerned with plans for an intensive livestock operation that is proposed for a site upwind and upstream of their farm. It could be the parents of a school age child who are concerned about rumours that their child's school will close next year. Or increasingly, it may be a citizen who wants to see what personal information a public body has about them and to correct errors if necessary. Imagine if you have been denied a student loan for the second year and are concerned that the agency making that decision may have incorrect information about you.

PUBLIC EXPECTATIONS

My crew in the Office of the Information and Privacy Commissioner (OIPC) are pretty committed and enthusiastic to making our FOIP regime work better but *does anyone else in Saskatchewan even care about this stuff?* Perhaps even some of you in this room may be asking yourself that question.

Let's consider the evidence. Consider the recent experience of our office and that of the Access and Privacy Branch within Saskatchewan Justice. In its last Annual Report, the Access and Privacy Branch reported a substantial increase in activity in executive government in terms of access requests. Requests for general information up 14% over previous year and requests for personal information rose 77%. Although nobody is officially tracking it, we are advised by folks in local government that they are also seeing significant increases in access requests.

As for our OIPC oversight office, last fiscal year we received more than 3600 phone calls and emails from Saskatchewan residents about access and privacy. That is a 17% increase over previous year. If you look at the latest Annual Report from the federal Privacy Commissioner, that Saskatchewan statistic is about 1/3 as many as the Privacy Commissioner for Canada received. That number for inquiries is also substantially higher than the number for inquiries to the Alberta Commissioner in respect of the laws which we have in common.

Our new case files are up 62% over the previous year. A case file would be either a breach of privacy complaint investigation or a review of a public body's decision to deny an applicant access to certain records.

Our website, populated with tools to explain the laws and to assist the public and public bodies, had more than 550,000 hits last year. That appears to be substantially higher than many other oversight offices including those in provinces with larger populations.

The Value of Open Government

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Files where we provide detailed advice to public bodies at their request to proactively assess proposed programs and legislation for statutory compliance and best practices increased last year by 19% to 82.

Not only do Saskatchewan residents care about access and privacy, they appear to have a bigger appetite for this stuff than Canadians in many other jurisdictions.

CONSIDER OUR SASKATCHEWAN ACCESS & PRIVACY REGIME

The access and privacy regime is much more than just the law. The regime includes the Access and Privacy Branch. The Director, Duane Mombourquette, and his team have responsibility for creating tools and training to assist public sector employees administer the law. The regime includes the oversight agency, OIPC. The regime also includes two kinds of leadership.

One kind of leadership needs to come from our top officials - our Premier and Ministers, CEO's, Mayor's, Directors of School Divisions and so on. Speaking of leadership, I hope everyone has seen the September 1, 2010 message from Premier Wall to all government employees. Let me quote part of that letter available on the Justice website:

...

There are laws that protect information: The Freedom of Information and Protection of Privacy Act and The Health Information Protection Act. Together, they provide privacy rules and establish a right of access to records in government.

However, I am mindful of the fact that our real strength lies not in the laws themselves but in the people in government who work with this information each day to deliver our programs and services. Privacy is in our hands. Accountability is ours.

I applaud everyone who continues to work hard to ensure our compliance with these important laws and I would like to take this time to encourage everyone in government to continue efforts to ensure we protect the privacy of our citizens while supporting the legislated right of access to government records.

It is hard to exaggerate the importance of this kind of message.

The Value of Open Government

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The second kind of leadership involves operational level leadership within the public sector organization. Our oversight office oversees more than 3,000 organizations in a very large province. My three investigators can at very best play a very limited role in ensuring FOIP compliance. The bulk of the work must be done by Access and Privacy Coordinators or FOIP Coordinators in each of those organizations. One of my most important roles is to find ways to support, encourage and assist those FOIP Coordinators in all public sector organizations.

We have opened more than 1090 case files in last seven years. We have closed 810 of those case files by working with FOIP coordinators and using mediation and informal techniques to achieve informal resolution. In only about 6% of those closed files was it necessary for us to issue a formal Report with our findings and recommendations. That is a tribute to those FOIP coordinators who have brought a sense of fairness, an understanding of transparency as an important value and who then have worked hard to find compromise between that public body and the applicants.

But those FOIP coordinators too often become the 'meat in the sandwich'. Sandwiched between doing what the law and the spirit of open government require and sometimes conflicting instructions from the senior people in their organization. Those FOIP Coordinators need the support of their Deputy Minister's or CEOs for what can become a tough and lonely assignment.

Those FOIP Coordinators can be a terrific resource to leaders in public sector organizations. In jurisdictions with more mature FOIP regimes, the FOIP Coordinator has a number of roles. Rather than waiting, like the old Maytag repairman, for an access request to come in the door, FOIP Coordinators develop and deliver training programs for new hires and inservice programs for everyone else. They assist in the development of forms, tools and resources for staff as well as providing advice to the Deputy Minister and/or the CEO on access and privacy best practices when new programs are being developed. In fact processing access requests usually takes a relatively small portion of the FOIP Coordinators time. They are usually champions for improved information management that assists the business interests of the organization and its overall efficiency.

I can tell you the story of a senior veteran employee in a large Ministry in another province. When FOIP came into force, she could see no benefit to her Ministry and just a lot of extra work. After several years as FOIP Coordinator, she became a strong champion of FOIP. Why? Well her Ministry didn't have a great record management program prior to FOIP. But they quickly learned that to respond to requests efficiently and quickly they need to be able to locate record quickly, to retrieve them quickly and that led to a major overhaul and reform of their records management system. She now

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tells anyone who will listen that what FOIP did was to create some external discipline to substantially improve the record management practices of her Ministry and that led to big benefits for not only managing FOIP but also big benefits for the business objectives of that Ministry.

WHERE DO WE GO FROM HERE?

More than 80 countries around the world now have an FOI law. In fact the World Bank and the International Monetary Fund (IMF) make it a condition of providing assistance and support.

Interestingly, twenty years ago, Canada was a leader in access. Groups from all over the world came to Canada to study how our laws worked, the role of independent oversight by Information and Privacy Commissioners, our network of FOIP coordinators in public bodies, etc. But our laws, with notable exceptions, are increasingly seen as stale, outdated and less effective to address the information age.

Now I have described our 1992 law which has never been updated as an Edsel. The federal Privacy Commissioner when she was here at conference in Regina in September described the federal law, never changed or updated in 27 years, as a Model T. Some Canadian provinces now have second and third generation laws that are better suited to the way information is collected, used and disclosed in 2010. But the reason why the world is no longer much interested in the way Canadians manage access and privacy is just that we are no longer leaders. We have been lapped and our efforts have been eclipsed by jurisdictions that have recognized how different the world is today than it was 27 years ago when it comes to technology and people's expectations.

In Mexico, you can make an access request electronically and you get the documents you seek in digital form and you don't have to wait 30 days to get it. Also, there are promising new developments in other nations that move from a PULL system to a PUSH system. In other words, the 'Open Government' movement is about not waiting for the public to submit access requests. 'Open Government' is about making records and information available electronically proactively.

There have been huge efforts in US federal government and more recently in Canadian cities like Toronto, Vancouver and Edmonton to create separate websites and populate those sites with all kinds of records that can be easily and quickly accessed and downloaded. These kind of initiatives make our current system of requiring people to

The Value of Open Government

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find and fill out a prescribed form, send it in by snail mail, wait 30 days to hopefully receive a bundle of hard copy documents seem a little quaint and perhaps a bit anemic.

The Value of Open government =

- 1) Greater transparency contributes to more accountability to the citizen;
- 2) Make for a better informed electorate;
- 3) Contributes to participation in the democratic process;
- 4) Contributes to modest rebalancing of power between citizens and their government
- 5) Respects Charter protected freedom of expression;
- 6) Promotes more care, frugality and integrity in public comportment by our leaders;
- 7) More certainty that deviations from accepted norms of public behavior will be exposed;
- 8) Reinforces and builds public confidence in their public institutions;
- 9) Imposes necessary discipline to improve record management.