



**Office of the Information and
Privacy Commissioner of Saskatchewan**

Competing Demands and Divided Loyalties: Survival Strategies for the Harried FOIP Coordinator

Presentation by R. Gary Dickson, Q.C.
Access and Privacy 2009 Conference, -- June 11, 2009

INTRODUCTION

Good morning,

One of the wonderful things about this annual Edmonton conference is the diversity of roles and offices represented by all of you. Typically there will be provincial FOIP Coordinators, local public body FOIP coordinators, federal ATIP coordinators, health privacy officers, corporate privacy officers. But wherever you work and whatever your job title, you are all at risk of becoming, at some point, what commentators describe as “the meat in the sandwich”. Some of you may have already had that experience.

What does that mean?? Well in one of his early Annual Reports, former Information Commissioner of Canada John Reid observed that “*The Coordinator operates under considerable pressure from applicants and the oversight office, as well as from their co-workers and senior officials.*” (Annual Report 1987)

I recognize it is certainly no fun and indeed very stressful when you as the FOIP coordinator have to contend on one side with applicants, the Information and Privacy Commissioner and perhaps your own ethical perspective and on the other side with your superiors in your own organization who may be highly motivated to frustrate or deny the access request for improper reasons. At such times your job suddenly becomes a lonely, stressful experience with no easy solution. Do you want to advance the cause of transparent government? Do you just want to advance in your career? Some choice!

In my experience the vast majority of FOIP coordinators take their role seriously and genuinely want to do the right thing. I regret that I don't know any way we can inoculate you or to protect you from that experience just described, as much as I'd like to be able to do that. My intention however is to offer some suggestions to help you deal with that challenge if and when it confronts you. Some of you may have had this experience and might be willing to discuss the strategies that worked for you.

How big a problem is this? A major difficulty with ensuring full compliance with statutory requirements is that so much of the process occurs hidden from public view. Requesters cannot see what is being done within an institution, and the Information Commissioner also lacks the resources to track institutional behaviour closely. For example, in Saskatchewan our OIPC oversees approximately 3000 bodies with only 4 investigators. In practice, that means that it is the FOIP coordinator who plays the key role in ensuring that the rules of the game are followed. But even if FOIP Coordinators are likely to have the best sense of what is happening within their particular organization they are usually very reluctant to discuss internal problems they encounter in any forum outside of their own organization. Yet at the same time, it is difficult for academics and commentators to develop an accurate picture of what is happening across an entire government in any of our jurisdictions.

There have been some attempts to get a handle on this problem. Only a few years after the law's adoption, a Treasury Board Secretariat survey found that many ATIP coordinators felt significant cross-pressures between their obligations under the law and career considerations within their department. More recent studies show that these cross-pressures continue to operate. Professor Alisdair Roberts has documented the challenges encountered by access coordinators. He has observed that in 2002, an internal task force appointed to review the ATIA reported that it had a "number of very frank discussions" in which coordinators "talked about the stress involved in dealing with sensitive files and difficult requests." Some coordinators "deplored a perceived lack of accountability for compliance with the Act in some program areas and perceived lack of commitment to the spirit of the Act by some managers at all levels, including senior management."

What do you do when you are in that position? What can you do?

In the next 15 or 20 minutes I want to discuss that “considerable pressure” to quote John Reid. Then I will offer some suggestions for Big Solutions. I also have some suggestions for Small Solutions. Before I conclude I want to leave you with information about some resources on this question and then create the opportunity for you to ask questions or share your thoughts.

It seems to me that we can classify access requests for purposes of this session into 3 different categories.

(1) Routine Access Requests

Dr. Roberts asserts that “Every year, thousands of requests are filed which serve important public purposes; promoting better understanding of policy-making within government; and promoting a business environment that is regarded as stable and transparent.”

Most access requests don’t involve Cabinet decisions, stealth activity by a government department or unethical behaviour by public officials. Most access requests are for records that are not particularly controversial. For these kinds of requests, and that would be most requests, the FOIP Act or ATIA works reasonably well.

Of course, it is not uncommon to discover actions or inaction on the part of public bodies that an oversight office may be critical of. We find however in Saskatchewan that the more common reason for non-compliance with FOIP whether it is a deficient response to a request or a deemed refusal is perhaps no designated FOIP Coordinator, OR a largely untrained FOIP Coordinator OR confusion about the requirements for the response to a request. Nothing particularly sinister and although these reasons for non-compliance are disappointing and warrant remedial action, those reasons are typically unrelated to the nature of the record sought or the identity of the applicant. These cases are usually resolved quickly and simply.

(2) Requests that trigger mild resistance

Not usually a high level decision to contest a request but nonetheless, perhaps because of some negative past experience with the applicant or because the request will require a lot of time and work to complete, some folks in a Ministry are reluctant to expedite or do anything to facilitate processing the request. The nature of the record and the identity of the applicant may be a minor consideration. Usually these can be resolved by mediation after our office has commenced a formal review if not earlier.

(3) Requests for ‘Sensitive’ Information that trigger a vigorous, antagonistic response.

In this category the nature of the request and the identity of the applicant are major and perhaps even paramount considerations.

This is what I want to focus primarily on. This is where a high level decision is made, perhaps at the Executive Council level or the communications branch level, to resist the request in every possible way. Not just reliance on mandatory or discretionary exemptions but deliberate delays, taking an uncooperative attitude at the review stage, and just no genuine interest in achieving a mediated resolution. This is the case where you see a political response or at least a political intervention that is quite separate and apart from asserting legitimate exemptions or exclusions.

What can the FOIP or ATIA coordinator do in response to each of those 3 classes of reviews? (called “inquiries” in jurisdictions with Commissioners who can issue binding orders)?

My focus this morning is exclusively on the role and work of the FOIP or ATIP Coordinator. It has been said that “Access to Information Coordinators are the lynchpin of the access to information regime.” In my experience that statement is accurate.

THE CHALLENGE AND THE PROBLEM

Let's consider exactly what the challenge is for you as a FOIP Coordinator. I am considering this in the context of the third class of requests i.e. requests for sensitive information that trigger a vigorous, antagonistic response.

To do so consider what is perhaps the best documented example in Canada of the FOIP Coordinator as the meat in the sandwich.

You will recall that when Justice Gomery produced his fact finding Report into the federal Sponsorship Program in late 2005, 'access to information' featured prominently in that Report. His commission spawned that fact finding Report plus the 3 volumes of Research Papers, and then the 2nd Report in Feb. 2006 dealing with Recommendations for Change. Those materials cover a lot of ground. Such a fascinating story with so many different features.

If you look at Volume 1, Annex A you will there find an index of names that is 6 pages long. Included on that list are many of the most important, powerful people in our nation, at least as of that time. The list includes the names of cabinet Ministers, Deputy Ministers, and CEOs of large organizations. Tucked away in the middle of that long list is one name with one of the shortest titles. Not a name most of us had ever heard before. The name – it was *Anita Lloyd* and all that the index offers by way of description is 5 words – *access to information official, PWGSC*. (The initials stand for Public Works Government Services Canada.)

Ms Lloyd would not likely have been described as an important or powerful person since she didn't head a large government institution or national organization. Yet, the record is clear that she arguably played one of the most pivotal roles in the events described in the Gomery Commission hearings and final report.

Her role stemmed from a January 2000 access to information request under ATIA. The requester was Globe and Mail reporter, Daniel Leblanc. His request was to PWGSC and it was for “*all records detailing the sponsorship budget within Public Works, since the 1994-95 fiscal year*”. *The records would include, without being limited to the events that received federal money such as festivals, hot air balloons and the airing of commercials.*”

When the allegedly ‘responsive record’ had been assembled and provided to Ms. Lloyd she “did not feel it responded adequately to the request, particularly with respect to the budget for sponsorships. She says that she was asked by [a senior official within PWGSS] to interpret the request restrictively and not to seek its clarification by contacting the applicant. Ms. Lloyd was reluctant on an ethical basis to comply with this direction. She was so disturbed by what was patently an attempt to improperly limit the Government’s response to the ATI request that she consulted her own lawyer on three different occasions to be sure of her legal position.” As Gomery found, “In the end, the information requested was furnished to Mr. Leblanc to his satisfaction, although processing the request took far longer than normal.”

Are there some lessons from Ms. Lloyd’s experience and from her courageous conduct for the rest of us? I think there are.

Perhaps the most important lesson is the vital importance of the ATIP or FOIP Coordinator.

POLITICAL INTERFERENCE

Political interference seems to arise where the applicants are viewed by public bodies as adversaries. When there are problems they may be fuelled by adversarialism.

Consider the example of Charles Guite as exposed in the Sponsorship hearings:

When Charles Guite testified before Justice Gomery, he stated that “We kept minimum information on file”.

He went on to say:

There was a discussion around the table during the referendum year, 1994-95, when I worked very closely with the FPRO and the Privacy Council.... We sat around the table as a committee and made the decision that the less we have on file, the better. The reason for that was in case somebody made an access to information request. I think as I said back in 2002, a good general doesn't give his plans of attack to the opposition.

Where the applicant is seen by senior officials in the public body as the enemy and that responding to an access request is to be viewed in the context of a war with applicants who are viewed as ‘the bad guys’, we shouldn’t be surprised by a hostile reaction to the applicant.

I think the experience in all of our jurisdictions is that the problems most often arise because of (1) the political sensitivity of some record and (2) the type of applicant.

There does tend to be a presumption of sensitivity for requests filed by journalists and Opposition MLAs.

Professor Al Roberts has suggested that “government officials and non-governmental actors become more adept in developing strategies that exploit or blunt the opportunities created by the law.” “... evidence suggests that federal institutions have developed techniques for managing politically sensitive requests which now undercut basic principles of ATIA.”

Professor Roberts offers several examples:

(1) Weekly inventory of requests in Citizenship and Immigration Canada prepared for review by ministerial and communications staff. Especially problematic requests were “amberlighted”, a designation which triggered the production of a communications strategy and final review by ministerial staff.

(2) In the PCO, problematic access requests were designated as Red files. In his review of access requests to the PCO in Oct. 2003, about 1/3 of its cases had been tagged as red files, the majority of these were requests by journalists and political parties.

The Gomery report clearly dealt with a case involving political interference directly related to the perceived political sensitivity of the records and information in question.

When Anita Lloyd testified before Justice Gomery she stated that “We lost control ...of the process once Communications had it in their process.”

Attempts were made by PWGSC officials “...to persuade ATIA staff that Mr. Leblanc’s request should be interpreted restrictively or, later, that ATIA staff should attempt to lead Mr. Leblanc into accepting a narrower definition of his ATIA request that would exclude especially sensitive information about the Sponsorship Program. Senior officials were attempting, as Anita Lloyd said, to “manage the issue,” but these efforts struck Ms. Lloyd and other ATIA staff as unethical. “There were quite a few meetings on this,” said Ms. Lloyd, who as I noted before, consulted a lawyer for advice on how to respond to the internal pressures. Ms. Lloyd called the circumstances “unprecedented in her years in ATIA administration”.

There are different ways that political interference is manifest

It usually involves special procedures for sensitive requests – a kind of ‘hidden law’ for certain category 3 requests.

(1) Disclosure of Identities

The ATIA/FOIP regimes are supposed to respect “the rule of equal treatment; a presumption that requests for information will be treated similarly, without regard to the profession of the requester or the purpose for which the information is sought”.

It is not unusual for ATIP offices to face pressure to reveal the identity of individuals or groups filing sensitive requests.

(2) Problems in Record-Keeping

Prof. Roberts observed in the Sponsorship Inquiry that there were two problems in this regard:

(a) No Record

The first is the decision not to record potentially controversial information at all. I read you the damning quote from Charles Guite a moment ago.

(b) Creating of Dummy Records

Later Prof. Roberts observed that the PWGSC official developed another tactic to deal with ATIA requests. A set of expenditure guidelines were drafted with the expectation that they would be released to requesters and encourage an impression of bureaucratic regularity within the Program. The guidelines did not have operational significance; rather, they had “cosmetic values and purposes”.

(3) Destruction or Manipulation of Public Records

We have also seen the very serious problem of destruction or manipulation of government records in an effort to subvert disclosure requirements. Professor Roberts observed that this practice appears to be less common but not unknown.

National Defence officials found by the 1997 Commission of Inquiry into Deployment of Canadian Forces to Somalia had altered and attempted to destroy documents relating to misconduct of our forces in that country, documents which had been sought by journalists under ATIA. In 1998 Parliament amended the ATIA to make it an offence for officials to destroy, falsify or conceal a record, or make a false record in an effort to deny a right of access under the ATIA.

BIG SOLUTIONS

These are principally to address the category 3 requests but also may be relevant in dealing with category 1 or 2 requests.

By ‘Big’ I am referring to solutions that require legislative change or ringing declarations from elected leaders or major changes from current practices of government. Many of these come from the second Gomery Report the one issued Feb. 1, 2006 called *Restoring Accountability – Recommendations*. Regrettably, this second Report was largely ignored at the time since Mr. Harper had come up with his plan for the *Accountability Act* which had the effect of stealing the thunder from Mr. Gomery’s thorough and thoughtful advice. It also had the effect of bleeding off the media coverage.

In Justice Gomery’s 2nd Report, he stated that “...the Commission notes with alarm the numerous complaints about the Government’s “oral culture” as well as the “damage control” on access to information where requests concern Cabinet Ministers, ostensibly because the information might be used to hurt the Minister publicly. Ministerial staff members, the Commission was told, feel tension between disclosing information and their loyalty to the Minister. Countless individuals reported that senior officials, both political and administrative, find various ways to deny providing information to the public.”

In Gomery's second report he described his recommendations as having the following intent: "to better equip public servants to withstand pressures to "bend the rules" and to ensure that in cases where someone does attempt to circumvent the regulations, sufficient safeguards are in place to identify the culprit and to sanction any wrongdoing."

Now some specific big solutions:

1) A Statutory Provision for FOIP Coordinators

One step, first recommended by the Commons Standing Committee on Justice in 1987, would be to give the role of ATIA Coordinator explicit recognition in the ATIA itself. This recommendation has been endorsed more recently by the Information Commissioner. The aim of this proposal is not to make the Coordinator an advocate of the requester's interests; rather it would be a formal recognition of the Coordinator's responsibility "to respect the letter and purpose of this Act, and to discharge this duty fairly and impartially."

This would confer a stature and legitimacy to this key office and bolster its credibility within executive government. The hope is that this step may also assist in providing FOIP Coordinators with a modest degree of autonomy in their work.

In his second report where Justice Gomery made a number of recommendations specifically with respect to Transparency and Better Management these included:

He endorsed a clause which specifies that "...each head, deputy head and access to information coordinator must ensure that to the extent reasonably possible, that the rights and obligations set out in [ATIA] are respected and discharged by the institution. It is particularly important to emphasize the obligations of access to information coordinators in order to ensure their authority within every government institution."

(2) Professional Certification of FOIP Coordinators

I am interested in our FOIP Coordinators in Saskatchewan acquiring more clout and credibility within their own Ministries and agencies. My office has been actively encouraging FOIP Coordinators to enrol in the IAAP Course at the U. of A. I am very encouraged that some Saskatchewan government institutions, local authorities and health information trustees are supporting their access and privacy coordinators undertaking the IAAP program. This is a very positive development and one we are hoping will expand quickly. I fully support the work of CAPA in promoting professional recognition by means of certification. Again, it enhances the FOIP Coordinator's credibility in their respective public bodies.

(3) Open Direction from Premier or Prime Minister

When Bill Clinton was President he instructed his Attorney-General Janet Reno to write an open letter to each of the cabinet members emphasizing the importance of transparency in the operations of President Clinton's government.

Premier McGuinty did something similar in his first term.

President Obama went much further and issued several Executive Orders on his first day on the job that require disclosure of records as the default approach to access to information.

I have not yet been successful in persuading either the former Saskatchewan Premier or the current one to issue such an open letter to all cabinet ministers. But I am still hopeful.

In Alberta, it was very helpful when Premier Klein did the introduction on a training video when Alberta was rolling out FOIP in 1995. Government employees do pay attention to those messages from the Premier.

In my 2006-2007 Annual Report, I called on the Premier of Saskatchewan to expand the usual 3 objectives in each letter of appointment to Deputy Ministers by adding a fourth objective and that would be ensuring the requirements of FOIP are met. I thought since DM's performance bonuses and increments are tied to the stated performance measures, this could do wonders for our overall FOIP compliance.

(4) Protect the Identity of Applicants

In 2001, the Information Commissioner recommended a statutory amendment that would affirm the obligation of ATIP staff to maintain the confidentiality of the names of requesters. I think that would be helpful. I'm not aware of any provincial FOIP Act that addresses this issue explicitly. I suggest this is long overdue.

(5) Explicit Duty to Assist

Justice Gomery in his second Report specifically recommended that there be an amendment of the ATIA to place a good-faith obligation on government institutions to make a reasonable effort to assist information seekers, and to respond openly, accurately and completely and without unreasonable delay.

Already a feature of more modern FOIP laws in Alberta, British Columbia, Manitoba, Nova Scotia, Newfoundland and Labrador, Ontario and Prince Edward Island but does not exist in federal ATIA or in provinces with older FOIP legislation like Saskatchewan. We have seen this kind of provision does make a difference in HIPA in Saskatchewan. In Saskatchewan we have determined through our various Reports that to achieve the purpose of our FOIP Act, there must be an implied duty to assist that requires any government institution to respond to the applicant openly, accurately and completely.

Professor Roberts has suggested that although federal ATIA coordinators recognize this principle in practice, statutory language might help to bolster the position of coordinators in cases where they face inappropriate pressure from other parts of their institution.

(6) Making the Treatment of Sensitive Requests More Transparent

Professor Roberts, in discussing sensitive requests, has suggested pragmatically that the practice is so entrenched that rather than shouting into the wind to demand it end perhaps an effective remedy may be to require more transparency about any special internal process for such requests.

In other words, it should be standard procedure for each institution to publish its internal procedures for handling requests, including any procedures for special treatment of sensitive requests, on its website. These procedures should be complete in documenting the considerations in play.

(7) Pay More Attention to Recruitment and Retention of FOIP Coordinators/ATIP Coordinators

2002 Access to Information Task Force reported: “The government is facing a looming crisis in the recruitment and retention of these skilled individuals.”

I take, as part of my responsibility, the need to communicate to heads of the bodies that my IPC oversees, the importance of FOIP Coordinators. That necessitates training, continuity, stability and compensation that fairly reflects the requisite core knowledge and special skills of any FOIP Coordinator.

SMALL SOLUTIONS

Small not in terms of importance but rather solutions that you can work on without legislative change, or major policy statements from the Premier or Minister. These may have more impact on the processing of Class 1 and Class 2 access requests where there are no political considerations influencing and distorting the access process. Your problem is likely to be with (1) political staff in the Minister's office and (2) communications staff, either in the Ministry or Executive Council. These folks typically wouldn't be exposed to the FOIP training that is done throughout government.

You should consider offering to provide detailed FOIP information to these two groups in your own organization. This may help sensitize them to the importance of FOIP and the way it works in practice. This involves developing relationships with those two groups so that there can be positive collaboration instead of a divisive contest when that Category 3 request comes in the door.

How do you acquire influence within your organization?

Consider what you can offer your DM or CEO. You can show that person that being FOIP Coordinator is certainly much more than responding to access requests or privacy complaints. My advice to a new FOIP Coordinator is to undertake a bit of an audit of the kinds of information, particularly personal information that is collected, used and disclosed. Understand the business information flow and decision making process in your organization. I learned a long time ago, that if you are dealing with a Ministry for the first time and are trying to get information or perhaps finding who you need to contact to achieve some outcome, start with the FOIP Coordinator. If they are good, if they are experienced, they may be the most knowledgeable people in the organization. That is because the nature of their work means they must have a good understanding of all of the business units, really all of the moving parts within that organization. That breadth of knowledge of your organization will be appreciated and valued by the leadership in your organization.

Focus on ways that you advance routine disclosure – active dissemination practices to anticipate public demand for information about your organization and its activities and to minimize the need for formal access requests as much as possible.

Develop in-service training materials for current staff and orientation materials for new hires. Become part of that training process that will already exist in any organization.

If you have many business units or many different regional offices in your organization consider creating an access and privacy committee to assist you in your work with representatives from those business units or outlying offices.

Advertise your office and your services through Intranet sites and other departmental communication media.

Consider joining an industry-wide group of FOIP Coordinators or even FOIP Coordinators working in different areas but in your own community. No one will better understand the challenges you are facing and can offer better solutions to those challenges than your colleagues.

A terrific example of unleashed imagination is offered by Saskatchewan Health's privacy team that recently made April 'privacy & security month' in their Ministry. This included a host of activities including Privacy and Security Jeopardy, the issue of PS bucks to participants, a hotdog sale, fun contests, posters, and presentations to approximately 295 during the month. This project created a major awareness raising impact.

Producing booklets, advisory material, checklists for FOIP compliance will enhance your value and relevance to your organization and help earn credibility.

Make yourself too valuable to the leaders in your organization to ignore.

RESOURCES

In Alberta, the role of FOIP Coordinator is generally well supported by Alberta Government Services. There is useful information both on the Alberta Information and Privacy Commissioner website (www.oipc.ab.ca) and the Alberta Government Services FOIP website (<http://foip.alberta.ca>).

From Ontario, the *Basic Tool Kit for New Co-ordinators* at www.ipc.on.ca is very useful. This is supplemented by the *Backgrounder for Senior Managers and FOIP Coordinators – Raising the Profile of Access and Privacy in your Institution* as well as *Backgrounder for Senior Managers on the ‘Role of FOIP Coordinators Re: Access to Information*;

In Saskatchewan, our office puts on a series of what we describe as our ‘Brown Bag Luncheon Workshops’. One popular topic is HOW TO SURVIVE AND EVEN HAVE FUN AS THE FOIP/HIPA COORDINATOR. The slide deck is available at our website, www.oipc.sk.ca under the *Resources* tab.

CONCLUSION

Just to wrap this up, please remember that you are the access and privacy professional, that you will know more about the law and best practices than anybody else in your organization, you have the opportunity to be a leader in your organization. Don’t get discouraged, don’t get burned out, don’t ever think that what you are doing just isn’t important.

Of all the elements of an access and privacy regime, the most critical element is you. Every single Information and Privacy Commissioner in Canada will tell you how vital is your office and your work. If there is something that your jurisdiction’s oversight office can do to assist you, just call us. We are counting on you, we want to support you and together we can empower citizens.