

**Presentation made to
Canadian Club (Saskatoon)
February 20, 2008**

(Check against presentation)

**BUILDING OPEN AND TRANSPARENT GOVERNMENT IN
SASKATCHEWAN**

INTRODUCTION

Good afternoon,

Imagine you have just learned that information about you apparently has resulted in disqualification from participating in a provincial government program. Despite numerous calls and letters to the relevant Ministry, you cannot get your hands on the information causing the problem; or

Imagine that you have just learned that a coal mine is likely to be constructed 500 metres upwind of your summer cabin. Your efforts to obtain information about the environmental study that you know has been undertaken have been stymied; or

Perhaps you have no intention of going to the trouble of making an access to information request but do want to ensure that the trustees of your grandchild's school division board follow Ministry of Education policies and are not basing decisions on school closures on incorrect information.

In the first two examples, access to information may be the tool that you need to get the information that is important to you. In the third example, the simple

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knowledge that the school division board must operate transparently may provide you with the comfort you want.

In the next 30 minutes, I intend to look at four things:

- Why should access to information matter to you;
- Explain briefly how these laws work;
- Identify some significant progress that has been made over the last four years; and
- Outline some changes that my office thinks are important and overdue.

I will make an assumption that each of us want, indeed expect, that our government whether federal, provincial or local is accountable to us as citizens -- a fundamental proposition in a democratic nation. After all, those bodies are spending our hard-earned tax dollars. They are managing our resources and providing us with important services that we and our families require. Over the last 25 years in Canada we have learned that one of the best ways of making our public bodies accountable to us, the people, is through promoting greater transparency in their operations.

The Supreme Court of Canada has declared that *“The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry. Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable.”*

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The Supreme Court has also emphasized that this kind of law codifies basic democratic rights of citizens and is therefore “quasi-constitutional”. It is paramount to most other laws.

John Reid, the former Information Commissioner of Canada, declared that when Parliament gave individuals a legal right to demand access to government held records, it constituted an *“unprecedented shift of power from the state to the citizenry.”*

This is not a feature unique to our nation. Today, the people of 65 countries have laws that provide mechanisms for them to request and obtain information from their respective governments.

We all recognize that there are lots of ways of getting information from public bodies. The most obvious is simply asking for it. My focus is much narrower this afternoon. I am speaking about our ability to require public bodies to share information with you, even when they are reluctant or unwilling to do so.

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AT THE FEDERAL LEVEL

In 1983, the federal *Access to Information Act* was passed by Parliament. It set out a procedure whereby citizens can request access to records in the possession or control of federal government institutions. Dissatisfied citizens have a right of appeal to the Information Commissioner of Canada – currently Mr. Robert Marleau. The Commissioner is an independent officer of Parliament appointed for a seven year term.

This law was the model for provincial laws that followed over the next 24 years. A substantial body of case law by the Federal Court Trial Division and Court of Appeal and the Supreme Court of Canada has fleshed out and interpreted ATIA.

**FREEDOM OF INFORMATION & PROTECTION OF PRIVACY ACT
(FOIP)**

We were no slouches in following the federal lead. In fact, Saskatchewan became the very first province in western Canada to enact a comprehensive access and privacy law in 1992.

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The background is that Roy Romanow was the Justice Minister and he commissioned former Chief Justice E.M. Culliton to write a report on whether Saskatchewan should adopt an access and privacy law. When Chief Justice Culliton delivered his report to Justice Minister Gary Lane he was sceptical about the need for a new privacy law but he certainly recommended a freedom of information law.

FOIP is really two statutes in one: (1) access to information and (2) protection of privacy. Dual themes: (1) public information must be available to citizens, and (2) personal information of citizens needs to be protected.

Our highest court in Saskatchewan, the Court of Appeal had this to say about the law:

“The Act’s basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”

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HOW DOES THE RIGHT OF ACCESS WORK?

You need only download, complete and submit a Request for Access and send it or deliver it to the public body. Your reasons for making the request are irrelevant and do not need to be disclosed to the public body.

That triggers a 30 calendar day time limit. There are limited circumstances which allow an extension for an additional 30 days. An access request can be transferred to a more appropriate public body within 15 days and then the 30 days runs from that point.

The public body must respond to the applicant within 30 days by doing one of the following:

- (a) Transfer the request to a more appropriate public body, or
- (b) Notify the applicant that they will get access;
- (c) Notify the applicant that access is denied and set out the reasons; and a
- (d) Couple of other circumstances that are fairly rare.

The reasons why a public body can deny access are limited and specific:

- (a) Mandatory exemptions:
 - 1. Records from other governments.
 - 2. Cabinet confidences (advice to cabinet).
 - 3. Third party information (may be trade secrets, commercial or labour relations information supplied in confidence).
 - 4. Personal information of other than the applicant.

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If a mandatory exemption applies, the public body shall not release the records:

(b) Discretionary exemptions:

1. Information injurious to intergovernmental relations or national defence.
2. Law enforcement and investigations.
3. Advice from officials.
4. Interfere or injure economic and other interests.
5. Testing procedures, tests and audits.
6. Danger to the safety or physical or mental health of an individual.
7. Solicitor-client privilege.

You will note that there is no exemption for information that may be embarrassing to a body or to a government or to individuals in those organizations.

Fees: There is no application fee under FOIP. There is a \$20 application fee under *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The first two hours of searching for responsive records and preparing the record for disclosure are free under FOIP. After two hours, the applicant can be charged a fee of \$30/hour. Under LA FOIP there is only one hour of free time after which the \$30/hour fee can be charged. There is a very narrow waiver provision if the applicant is impecunious and disclosure would be in the public interest.

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ROLE OF OIPC

If you are not satisfied with the response from the public body you can ask me to review the public body's decision. Like the federal Information Commissioner, I am appointed by the Legislative Assembly, am an independent officer of the Assembly and therefore report only to the Assembly. I have very broad powers that include taking evidence under oath and getting access to any record including cabinet documents, solicitor-client privileged material.

Through mediation, we achieve an informal resolution of more than 80% of the requests for review. In those cases where there is no informal resolution we proceed to publish a full-text report on our website, www.oipc.sk.ca. In the interests of accountability we always name the public body. To protect the privacy of the applicant, we do not disclose his or her identity. In those reports we set out findings and our recommendations. Unlike the Commissioners in British Columbia, Ontario, Prince Edward Island and Alberta, I have no order-making power. I have to rely on persuasion.

In most cases, our recommendations are accepted in full or at least in part. If our recommendations are not accepted, the aggrieved applicant may apply to the Court of Queen's Bench for an order. This happened about eight times in the first eleven years of FOIP. It has not happened in the four plus years that I have been Commissioner although I understand that such an application has recently been taken to court. Under our law, I have no standing before the court, so I am not party to such an appeal.

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**SO HOW IS SASKATCHEWAN DOING IN ACHIEVING A CULTURE OF
TRANSPARENCY**

My answer is mixed. Considerable progress has certainly been made in Saskatchewan.

Two years ago, Saskatchewan Justice, created an Access and Privacy Branch within that department to promote awareness and undertake training throughout executive government. Some new materials, now available on the Saskatchewan Justice website, including an online training module for general knowledge about privacy and access. Additional advisory materials have been prepared and distributed to government institutions. Several meetings are now held each year for FOIP Coordinators in executive government.

More recently, Saskatchewan Justice held a number of FOIP workshops around the province specifically focusing on local authorities, such as regional health authorities, colleges, universities, municipalities and school divisions.

Increasingly, public bodies in Saskatchewan are starting to task one individual with the responsibility as FOIP Coordinator. This job involves providing advice to the Deputy Minister or CEO on access and privacy compliance, doing staff training and in-service training, developing forms, procedures, handling access requests and dealing with our office informally and then formally in the case of reviews. One of the best examples of an effective FOIP Coordinator office is the creation of the access and privacy unit within Saskatoon Health Region. The experience in

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other provinces is that a FOIP Coordinator is a vital cog in an efficient information management regime. The role benefits the business purposes of that organization as well as ensuring compliance with FOIP.

We held a significant Access and Privacy conference last spring in Regina with support from Saskatchewan Justice and a number of local authorities.

OIPC EFFORTS

In the first three years of our office with a full-time Commissioner we have also worked hard to build capacity and awareness.

Our office produces an e-newsletter, the Saskatchewan FOIP FOLIO. More than 46 issues are archived on our website, www.oipc.sk.ca. The FOIP FOLIO reports on the work of our office, interesting and useful best practices and developments both within and outside of Saskatchewan but always through a Saskatchewan filter. Incidentally, if you wish to subscribe the price is right - no cost and all we need is your email address.

We have produced approximately 28 full-text reports that our office issued following an access review or privacy investigation. It certainly takes much longer to write these reports for publication but we concluded there is significant educational value to doing so and publishing them on our website.

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Speaking of our website, www.oipc.sk.ca, we have found this to be an effective way of communicating a lot of information about FOIP, our processes and recommendations. In addition to archived issues of our e-newsletter, and our reports, you will find on the website a number of brochures, pamphlets, our Annual Reports and other information that we hope is useful to citizens trying to navigate our maze of access and privacy laws.

In case any of you are wondering, folks do appear to have an appetite for information about access and privacy laws. Last year -- 2007 -- we had 253,560 hits on our website or 72,979 visits where someone spent some time looking at different pages on our website (an average of 199 visits per day).

In the 2006-2007 fiscal year we had 2168 inquiries to our office for advice and information on access and privacy. We had almost reached that level after the first nine months of 2007-2008. We define an inquiry as a call requesting information about our office, our mandate, our process or one of the laws that we oversee and that we can respond to with less than one hour of research.

An important element of our mandate is education about our office and the laws we oversee. This has involved more than 500 education presentations in more than 30 Saskatchewan communities over the last four years.

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Yet in spite of all of these efforts by the Access and Privacy Branch and our office, Saskatchewan still does not have a mature or robust FOIP regime throughout our public sector. By regime, I mean more than just the statute. “Regime” also captures organization, policies, procedures and training of staff in public bodies. I suggested in a recent Annual Report that if our FOIP Act was new legislation, say four or five years old, we could pronounce ourselves well-satisfied with what has been achieved in promoting its aims. FOIP, however, is not new legislation. It is now almost 16 years old.

Yet, we are still far from where we need to be to enjoy a culture of transparent government.

When FOIP was proclaimed in 1992, I understand that there was some training done but very little in terms of training materials, written policies and procedures. There were certainly some lawyers in Justice who figured out what FOIP required but knowledge was lacking among most working in the public service, either provincial or local government levels. That does not appear to have changed very much before 2003. That was the year the Assembly acted on recommendations from past Information and Privacy Commissioners (IPC) and decided to hire a full-time IPC and provide resources to meet what is a very broad mandate.

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An important part of my mandate is to provide advice to the Legislative Assembly on access and privacy matters. To that end, in my Annual Report 2004-2005, I included a section labelled **Privacy and Access, A Saskatchewan Roadmap for Action**. This set out a number of what I recommended as high-priority actions:

- 1) Renew the government culture of openness;
- 2) Conduct a review of the FOIP and LA FOIP Acts;
- 3) Integrate the FOIP and LA FOIP Acts into a single law; and
- 4) Build capacity in administering FOIP, LA FOIP and HIPA (*The Health Information Protection Act*).

I'll skip the two that relate exclusively to privacy concerns.

In each of the two later Reports I have revisited this list of actions and reminded Executive Government of the value realized by raising the bar-raising our game.

1) Renew culture of openness

I have recommended that the Premier send an open letter to each of his Ministers stressing the importance attached to open and transparent government and advising them that they should apply a presumption of disclosure when making access decisions. This is particularly important for those discretionary exemptions where it is up to the Minister of each department or CEO of other bodies as to whether they will release or refuse. This kind of powerful signal achieved a clear message to those working in the Clinton cabinet, in the provinces of Ontario, British Columbia and Alberta.

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I have also recommended that in the letter of appointment of a Deputy Minister that used to identify perhaps three objectives against which their performance would be measured and any bonuses considered, the Premier could and should add a fourth criteria, the extent to which their department discharges its transparency and privacy obligations under FOIP.

2) Updating our FOIP and LA FOIP laws.

They represent a model that is now more than 30 years old. They were developed long before the advent of widespread shared government services, one-window service, powerful computer search engines and email. Interestingly all of the other western provinces that followed us in enacting access legislation, incorporated newer features – the product of early experience with such a law. Our law is now looking quite dated and increasingly inadequate to deal with the issues and challenges of 2008 and beyond. For example, municipal police services are not included in either statute. No offence to wilfully alter, destroy or conceal any record to evade an access request. Maximum fine is \$1,000.

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3) Consolidate FOIP and LA FOIP

We currently have 7 different access and privacy laws that bite in Saskatchewan -- three federal and four provincial. LA FOIP is almost identical to FOIP except for a small number of different provisions and fact it applies to municipalities, school divisions, regional health authorities, libraries, colleges and universities. There are therefore two separate sets of forms, confusion among members of the public and even employees in local authorities. Saskatchewan Justice is required to submit to the Assembly an annual report that documents access activities involving provincial government institutions. There is nothing comparable for local authorities. Until very recently, LA FOIP has largely been orphaned by our provincial government.

In all other jurisdictions, except for Ontario, there is a single FOIP Act that applies to all public bodies, provincial and local. I have urged the government to consolidate FOIP and LA FOIP into a single law.

4) Build capacity in administering the Act

I have mentioned the Access and Privacy Branch earlier but it is still a small office with an awful lot of work to do. We have never produced in Saskatchewan a manual or handbook to assist public sector workers figure out, with the aid of checklists, decision trees and specimen forms, what they need to do to ensure their organization is compliant. Work has started on this but it is proceeding slowly and the need for such a resource grows.

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In my 2005-2006 Annual Report I observed that:

- FOIP Coordinators that are so busy with their other job responsibilities that they cannot devote the requisite time and energy to the access and privacy file;
- Diffused and fragmented distribution of the responsibilities of a FOIP Coordinator cause time delays, inconsistency, and considerable inefficiency in managing the access and privacy file;
- It appears that some FOIP Coordinators are not receiving adequate support from their supervisors; and
- Doing a good job of providing citizens with access to public records may be seen as more career-limiting than career-enhancing.

In that same 2005-2006 Annual Report I addressed a question of inadequate resources by offering a two-fold response.

1. If an organization is severely limited in resources that may well constitute the most powerful reason for ensuring that carefully attention is paid to considering the most efficient way of managing access and privacy responsibilities. For example, if resources are severely limited, how can it make sense to have eleven different individuals in five different departments involved in deciding what to do with a single access request?

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2. The Legislative Assembly Service enacted these laws and spelled out what would be required to comply with them. Surely after fourteen years of devoting relatively little attention and the most minimal resources to access to information procedures, there has to now be a fair evaluation by Deputy Ministers and CEOs of what additional resources may be required to ensure full compliance. At the very least, there needs to be a reasonable plan that details what changes still need to be made within a public organization and what a reasonable time schedule would be to achieve full compliance.

In terms of the OIPC, we developed a number of years ago a rolling three year Business Plan. We send it to MLAs and publish this on our website and invite public input and feedback.

This has been revised twice to reflect changes in resources and in demands on our office.

The latest iteration of the Business Plan sets out 5 core businesses, 12 specific goals for our office and 56 key performance measures over the term of the business plan. In our Annual Report we assess whether those key performance measures have been exceeded, achieved, partially achieved or not yet achieved. One of our goals is to ensure that in 80% of our formal reviews of access decisions, a decision is rendered within 5 months. We think that is a reasonable time to ask a citizen or public body to wait for us to complete our work.

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In fact, our backlog of some 168 reviews and investigations means that some files are now 3 years old and not yet resolved. In our revised Business Plan we have laid out our plans on how we may be able to clear up the backlog and achieve that goal of a 5 month turn-around.

CONCLUSION

We have been encouraged by the efforts made by the province particularly in the last three years to raise the bar in terms of statutory compliance. I am optimistic that continued collaboration, consultation and co-operation between our office, the provincial government and local authorities can move us much further along the path.

But, in the end, it comes down to each of you. Large public sector organizations may prefer less transparency. It may be more convenient, provide them with more freedom from scrutiny, may be less embarrassing that way. We will achieve robust transparency in all of our public organizations only when it becomes apparent that citizens will accept nothing less.

THANK YOU.