



Information and Privacy  
Commissioner/Ontario  
Commissaire à l'information  
et à la protection de la vie privée/Ontario

**VIA REGULAR AND ELECTRONIC MAIL**

June 10, 2015

Greg Orencsak  
Deputy Minister  
Treasury Board/Secretary of Treasury Board and Management Board of Cabinet  
Whitney Block  
Room 5320  
99 Wellesley Street West  
Toronto, ON M7A 1A1

Dear Deputy Minister Orencsak:

**RE: Draft Open Data Directive**

I am writing to congratulate the Ontario government on the release of the draft Open Data directive as part of its Open Government initiative, which involves three inter-related pillars – Open Data, Open Dialogue and Open Information.

My office is responsible for overseeing Ontario's public sector access and privacy legislation, the *Freedom of Information and Protection of Privacy Act (FIPPA)* and the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*. These statutes provide the people of Ontario with rights of access and privacy protection related to records held by government institutions.

In our 2014 Annual Report, we applauded the Ontario government for advancing Open Dialogue by establishing the Open Government Engagement Team and the Premier for endorsing the team's findings. Government transparency and access to information are vital ingredients for a free and functioning democratic society. Without them, the public cannot participate meaningfully in the democratic process or hold elected officials accountable.

The draft Open Data directive responds to the recommendations of the Open Government Engagement Team by recognizing that government-held data has value and, if made available to the public, has the potential to drive innovation in an information economy. The draft directive is a necessary and significant foundational document for the Open Data pillar of the government's Open Government initiative. It furthers the Ontario government's commitment to make data open by default, limiting access only to safeguard privacy, security and confidentiality.

My office has long stressed the need for proactive disclosure of government information to promote transparency and accountability. I see Open Data as a key component of proactive disclosure. The draft directive codifies the minimum requirements that ministries and provincial



2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Télééc: 416-325-9195  
TTY: 416-325-7539  
[www.ipc.on.ca](http://www.ipc.on.ca)

agencies must meet to implement Open Data. Both the draft directive and the related public consultation on the draft are important steps forward. Consulting with the public in the development of the Open Data directive demonstrates the government's commitment to public engagement – one of the pillars of Open Government.

### **Protection of Privacy**

In 2010, Canada's Access to Information and Privacy Commissioners endorsed Open Government as a means to enhance transparency and accountability, but stressed that when implementing Open Government, including Open Data, governments should give due consideration to privacy, security and confidentiality. Open Data initiatives will not succeed without measures to ensure the protection of these three elements.

I am pleased to see that the lead principle of the draft Open Data directive is that government data should be "open by default unless protected due to legal, privacy, security, confidentiality, commercially-sensitive or other reasons". This principle recognizes that while the priority for ministries and provincial agencies is proactive disclosure of government data, there may be legitimate reasons why some data should not be released or published.

The open by default principle harmonizes with the right of access to information under *FIPPA*, which requires exemptions to that right to be limited and specific. Exemptions to the open by default principle must be limited and specific as well.

One of the exemptions from disclosure in *FIPPA* protects the privacy of individuals by restricting access to their personal information. The legislation also requires that personal information entrusted to the government be appropriately safeguarded.

One way for ministries and provincial agencies to meet their obligations to protect privacy while enhancing openness is to de-identify data containing personal information. Information is de-identified if it does not identify an individual, and it is not reasonably foreseeable in the circumstances that the information could be used, either alone or with other information, to identify an individual.

In her evaluation of the Government of British Columbia's Open Government initiative, that province's Information and Privacy Commissioner concluded that:

... datasets containing personal information must not be published as open data unless the personal information has been de-identified, so that it is no longer personal information. De-identification is critical to protect privacy and to build public confidence in open data programs.<sup>1</sup>

The success of the government's Open Data initiative depends on personal information not being made open by default. Unless the publication of personal information is mandated or permitted

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<sup>1</sup> Office of the Information and Privacy Commissioner for British Columbia, Investigation Report F13-03, *Evaluating the Government of British Columbia's Open Government Initiative*, July 25, 2013, <https://www.oipc.bc.ca/investigation-reports/1553>.



by law, all data containing personal information either must not be released or it must be effectively de-identified.

The world of de-identification is becoming increasingly complex. It is insufficient to assume privacy is protected simply by removing identifiers from datasets. As more data enters the public domain and more powerful tools are developed to analyze datasets, it becomes easier to re-identify individuals. The United States' Open Data policy explicitly recognizes the need to consider publicly available data to determine whether some combination of existing data and the data intended to be publicly released could allow for the identification of an individual.<sup>2</sup>

Technological advancements that enable greater openness also create new challenges for protecting privacy. Technology is making information easier to collect, create, store, share and analyse. Therefore, particular care is required when determining if the release of data poses a threat to privacy, such as when disparate datasets, individually de-identified, could potentially be linked or combined, to re-identify individuals.

Despite the challenges, I think it is important to recognize that privacy should not be viewed as an impediment to Open Data. Privacy protection is an important consideration and one that takes diligence to ensure it is done correctly – but privacy is not a barrier to Open Data. It is possible for ministries and provincial agencies to both fulfil the requirements defined in the draft directive and comply with *FIPPA*'s privacy protections.

**Recommendation:** To facilitate Open Data and the protection of privacy, the Open Data directive should explicitly highlight the importance of privacy protection and state that personal information must not be part of Open Data unless its publication is mandated or permitted by law.

**Recommendation:** The Open Data directive should require published data sets involving de-identified data to be periodically reviewed to ensure that they cannot be used, in combination with other publicly available data sets, to re-identify individuals.

### **Procurement Contracts**

The draft directive requires ministries and provincial agencies, at a minimum, to include in new contracts notice of the government's right to publish procurement data, unless there is a legitimate reason for not releasing the data. I support this requirement – all government organizations should make their requirement to publish contract information clear when engaging a third party.

Notifying prospective suppliers of a right to publish procurement data is a key step toward openness. However, I believe that the government can and should do more in this area. Contracts

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<sup>2</sup> Executive Office of the President, Office of Management and Budget, Project Open Data, M-13-13 — Memorandum for the Heads of Executive Departments and Agencies, *Open Data Policy—Managing Information as an Asset*, May 9, 2013, <https://project-open-data.cio.gov/policy-memo/>.

awarded by ministries and provincial agencies represent significant government spending of taxpayers' money and, therefore, transparency in the procurement process is vital.

The IPC has repeatedly called for all publicly funded contracts to be disclosed routinely and proactively. This disclosure would strengthen openness and accountability around government spending and improve public confidence. It would also reduce the number of freedom of information requests and appeals related to procurement and contracts, and associated resources and costs.

We urge the government to explicitly require ministries and provincial agencies to publish the details of all government contracts unless there are significant and compelling reasons not to. In our 2006 Annual Report, we encouraged the government to make public both the winning bid and unsuccessful bids for every contract awarded by a provincial government organization for public comparison.

The IPC recognizes that given the nature of the information involved, such action may be beyond the scope of the Open Data directive. However, we would like to see the government publicly commit to further opening its procurement process as part of its Open Government efforts.

Our experience with *FIPPA*'s third party information exemption found in section 17 has taught us that the details of contracts between the government and those that partner with it to provide public services should usually be available for public scrutiny. Only in rare cases will disclosure of contract information not be ordered in an access to information appeal. Our experience also has shown that third parties may argue that the financial details of contracts are commercially sensitive – a position that the IPC and the courts have routinely rejected.

The area of open contracting is one that is gaining momentum with members of the international Open Government Partnership. Importantly, Canada's Action Plan on Open Government 2014-16, commits the Government of Canada to providing further access to its contract information. The Action Plan notes that access to information related to public contracts is essential to ensuring accountability for the stewardship of public money. I would like the Ontario government to enhance the openness and transparency of its procurement process as an integral part of its Open Government program.

**Recommendation:** The government should publicly commit to further opening its procurement process (for example, through the timely and proactive disclosure of contracts in a manner that makes them readily accessible).

**Recommendation:** The Open Data directive should limit the scope of the commercially sensitive exception to the open by default principle in order to maximize the amount of procurement-related Open Data (for example, it should be made clear that the financial data of contracts are not commercially sensitive).



## Open Data Engagement

We think the engagement requirements in the draft directive are essential to the fulfillment of Ontario's Open Data initiative. For Open Data to be sustainable and relevant, it is critical to engage the public and stakeholders in identifying and prioritizing the release of data, and to work to raise awareness and data literacy.

With early Open Data initiatives there seems to have been an assumption that simply releasing more data and in more formats would lead to more use. That use would create value and, in turn, foster further openness of government data.

The experience of other jurisdictions has shown that publishing more data does not necessarily meet the public's or stakeholders' needs. In recent years there have been several studies evaluating the social, environmental, political/governance, and economic/commercial impact of Open Data. One American study found that:

... most open data strategies look for 'quick wins' in the first few years, but over time, the available set of data that is easily opened will diminish, reducing the number of open data sets folks are looking to use, which will result in a loss of interest in use, less stories of valuable use, and the virtuous cycle slows.<sup>3</sup>

While initially it may not be possible to precisely predict the ultimate value of data, it is important to release data that is of value and interest to the public, and not just that which is available. The Ontario government has recognized this need in its Open Data voting tool, and now again in the Open Data engagement requirements of the draft directive.

It is essential to engage users, stakeholders and the public to ensure released data is relevant to their needs. To ensure that Open Data achieves the government's stated objective of promoting a culture of openness and collaboration, it will need to monitor, evaluate and adjust Ontario's Open Data catalogue as it continues to grow.

The American study noted above also found that to achieve the benefits of Open Data, it is not enough to focus only on the technical components. To be successful over the long-term, Open Data initiatives must consider the social aspects of information more generally, particularly providing sufficient context for information use by diverse audiences and users. Many, perhaps the majority of the public, do not have the background knowledge and skills needed to interpret and use raw data.

The United States' Open Data policy has a principle that requires Open Data to be described fully so that users:

... have sufficient information to understand their strengths, weaknesses, analytical limitations, security requirements, as well as how to process them. This

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<sup>3</sup> Natalie Helbig, Anthony M. Cresswell, G. Brian Burke, Luis Luna-Reyes, Center for Technology in Government, *The Dynamics of Opening Government Data: A White Paper*, December 2012, p. 21, <http://www.ctg.albany.edu/publications/reports/opendata/opendata.pdf>.

involves the use of robust, granular metadata (i.e., fields or elements that describe data), thorough documentation of data elements, data dictionaries, and, if applicable, additional descriptions of the purpose of the collection, the population of interest, the characteristics of the sample, and the method of data collection.<sup>4</sup>

We think government has an obligation to ensure that when it publishes data, it is made as accessible and understandable as possible to the public. The draft directive reflects a number of requirements to help facilitate this. We also note the inclusion of requirements to engage the public and stakeholders to promote economic, social and policy development, as recommended by the Open Government Engagement Team.

**Recommendation:** The Open Data directive should include a requirement for ministries and provincial agencies to include sufficient descriptions in their data catalogues to enable the data to be both accessible and understandable for public use.

**Recommendation:** The Open Data directive should include a requirement for ministries and provincial agencies to monitor and evaluate compliance with the directive; to publicly report on their progress related to their Open Data initiatives on a regular and ongoing basis; and to identify a point of contact to respond to public inquiries related to Open Data.

### Other Avenues of Openness

I also want to encourage the Ontario government to build on its Open Data activities and to look for other ways to enhance transparency and accountability, including enhanced disclosure under *FIPPA* and proactive disclosure through Open Information, the third pillar of the government's Open Government initiative.

Operating with a presumption of open by default with limited exceptions is needed on all fronts to make more government information available to the public. As noted by Premier Wynne, government data belongs to the people of Ontario and, therefore, should be easier to find, understand and use.

In closing I would like to re-iterate my office's support for the Ontario government's Open Government efforts. The Open Data directive is an important underpinning for ministries and provincial agencies as they move forward. It places clear emphasis on open by default with limited exceptions, and on public engagement.

The challenge for ministries and provincial agencies will be to implement the Open Data directive's requirements in a way that maximizes open by default while protecting privacy, security and confidentiality when necessary, and that is responsive to the public's needs. If my office can assist in this, please let me know.

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<sup>4</sup> Executive Office of the President, *Open Data Policy—Managing Information as an Asset*, May 9, 2013, <https://project-open-data.cio.gov/policy-memo/>.



I look forward to seeing the next steps in the Ontario government's ongoing Open Government initiative.

In the spirit of transparency, we will be posting this letter on our website.

Sincerely,

A handwritten signature in black ink, appearing to read 'B Beamish', written in a cursive style.

Brian Beamish  
Commissioner

cc: Sam Erry  
Assistant Deputy Minister  
Corporate Policy, Agency Governance and Open Government Division  
Treasury Board Secretariat

Brian Fior  
Director (Acting)  
Open Government Office  
Treasury Board Secretariat