Remarks for news conference May 29, 2007 on the release of the Commissioner's 2006 Annual Report

Good afternoon ladies and gentlemen. Thank you for joining me here today.

It is a pleasure to meet with you again to share the highlights of my Annual Report. With me here this afternoon are Ken Anderson, my Assistant Commissioner for Privacy, and Brian Beamish, my Assistant Commissioner for Access. With so much happening in the fields of access and privacy, and the increasing demands on my office, I am extremely thankful to have such talented and dedicated colleagues.

I'm going to begin by reviewing a few of the positive developments of the past year – the accomplishments of the Ontario government. This may come as a surprise to you, given the tone of my press release, but I will explain that shortly.

On the privacy front, the government has eliminated the use of SINs within government, when their use is not specifically required by law. We have been asking for this for many years, and are very pleased to see its use rolled back.

A new enterprise-wide approach to the secure destruction of records has been adopted, applicable to both paper and electronic media. This is highly commendable, especially on the heels of my first order under the *Personal Health Information Protection Act* in 2005, involving the need for secure destruction.

A Chief Information and Privacy Officer has now been appointed, again in response to a recommendation we made in our 2003 Annual Report.

We are all delighted with the appointment of Mark Vale, who has already started developing a number of new programs and initiatives.

The 30-day provincial compliance rate for responding to freedom of information requests has been steadily improving for much of this decade; it dropped to 73.5 per cent in 2006, down from 80.1 per cent in 2005. But the drop in the compliance rate is not what troubles me.

It's the fact that the 30-day compliance rate to FOI requests has been viewed as being enough – as having satisfied the government's responsibilities under the *Acts.* This is a mistake. As we say in our report – it's only part of the story. Meeting legislated compliance rates is only where you begin – it shows that the government is providing responses to FOI requests within the legislated time frame of 30 days. But it says nothing about the quality of those responses – the decisions made regarding whether or not to disclose the information requested.

I now want to shift from looking at a quantitative measure – whether a decision was issued within 30 days of receiving an FOI request – to the quality of those decisions. And the quality

of those decisions needs to improve. The decisions made need to reflect more openness and transparency. They need to let more information out the door.

What troubles me is that, as a government, the bureaucracy needs to do a much better job at following the spirit of the *Acts*. Premier McGuinty identified this point himself in his seminal memorandum of 2004, in which he noted that information requested of government "should be made public unless there is a clear and compelling reason not to do so." This just isn't happening!

The examples I am about to give you will clearly demonstrate that this is still not happening! And I am now referring to the fact that Ontario is a mature jurisdiction. The FOI laws in Ontario have been around for nearly 20 years – the *FIPPA* Act was passed in 1987 – 20 years, ladies and gentlemen. That's a long time – well past the learning stage – surely long enough for the bureaucracy to have gotten acclimatized to the principles of openness and transparency – that information should be released to the public, unless, in the words of the Premier, there is a "clear and compelling reason not to do so," – because it is essentially, the public's information. Let's not forget that. Surely, the time for secrecy and withholding information should have come to an end. Well, I'm sorry to say that, after almost 20 years, it has not. Let me explain.

I know that I have used some strong language in this annual report. I firmly believe that such language is necessary to encourage all elements of the provincial government to be **fully** open and transparent.

Open and Transparent Government

My position is very clear: Saying that you want an open and transparent government isn't enough. You have to do it – take the steps necessary to make it happen, to make it real. *Too many government officials are* **not** *living up to the memorandum that Premier McGuinty issued to his ministers and deputies, three years ago.*

I applauded the Premier at the time for issuing his communiqué and for taking such a strong position in favour of openness and transparency. But it hasn't filtered down the ranks to those making the actual decisions relating to freedom of information. That's the reality that we are facing.

My concern stems from a number of the appeals that my office has received. In some cases, provincial organizations have rejected FOI requests for information that were virtually identical to information in previous appeals that we had ordered released. So let me be clear – we order some information to be released – that sets the benchmark. Virtually the **same** information is requested from another ministry, but it is **not** released. Where is the sense in that? One area where this has occurred is with government contracts. Contracts for services provided should be **routinely** disclosed. But, despite the Premier's words, access to this basic information continues to be denied. Why? Why waste everyone's time and resources?

This office has repeatedly encouraged government institutions **not** to deny access to a record simply because it is **possible** that an exemption may be claimed. There are still too many cases where government institutions are resisting the disclosure of information that should be in the

public domain, through the unnecessary application of such exemptions. – This, despite the Premier's words.

Another example is a refusal by a number of ministries to disclose **bottom-line** information – and here I'm talking about a single figure – the total – related to legal costs expended, despite orders by this office that have found that bottom-line aggregated total is not privileged information. By bottom-line, I mean a single, total figure – the **sum** of the legal fees involved – nothing more. We strongly respect solicitor-client privilege, but we don't feel that disclosing the total amount the government has spent in one area should be concealed.

In addition, some institutions continue to give an overly broad interpretation to sections of the *Acts* that relate to employment and labour relations matters. Remember Bill 7? These provisions are often misapplied to deny access to basic information that should be routinely disclosed.

So, what can be done, besides the Premier issuing another memorandum? I have one idea relating to government tenders – a proposal for the government.

I am urging the Ontario government to post the winning bid for every contract awarded by a provincial government organization on a website, accessible to the public. And – to ensure that the entire process is transparent – I am also recommending that details of the unsuccessful bids, be posted alongside the successful bid. While this may come as a shock to those who are used to the veil of secrecy involved in the old model of public procurement, Ontarians deserve better – they deserve transparency and accountability.

In order to do this, the government would need to adopt a policy *requiring* the disclosure of the **bottom-line** of *all* successful contracts and *all* unsuccessful bids. This policy would be noted in all RFP/tender packages, so all bidders would know up-front, that the details of their bids would be posted publicly. Proprietary trade secrets and business secrets would, of course, continue to be protected. I await the Premier's response to my proposal.

Ensuring the integrity and effectiveness of the procurement process by publicly posting this information to a website would go a long way to increasing government accountability.

And, this would mirror the government's decision announced just yesterday, that information on daycare inspections will be posted on a government website. This was in response to the Toronto Star's lengthy investigation on thousands of daycare incidents. Only after two years of repeated FOI requests, was the Star finally able to obtain the requested records on Ontario's 4,400 licensed daycares, and even then, large parts of the records were blacked out. To quote the Star, "Such secrecy is unconscionable." Two years … it seems like a long time to get this information out – information that will now be routinely posted to a website – as it should be.

Now, let me turn to privacy.

Culture of Privacy

In my Annual Report, I refer to a truly regrettable situation that occurred at an Ontario hospital. I want to drive home the point that having a privacy policy, in and of itself, is not enough: A

culture of privacy must be developed so that everyone handling personal information understands what may or may not be done with that information.

A patient admitted to the Ottawa Hospital made a specific request to ensure that her estranged husband, who worked at that hospital, and his girlfriend, who happened to be a nurse at the hospital, did not become aware of her hospitalization, and that steps be taken to protect her privacy. Much to her dismay, she learned later that this had not occurred – the nurse/girlfriend had repeatedly gained access to her personal information.

Despite having clearly alerted the hospital to the possibility of harm, the harm occurred nonetheless. I'm sure you are wondering, how could this happen? More easily than you think.

Unless privacy policies are interwoven into the fabric of an organization's day-to-day operations, they won't work; full stop. Hospitals – and every other health care provider and government organization – **must** ensure that they not only educate their staff about privacy, but also that privacy becomes embedded into their institutional culture – we call this developing a culture of privacy.

Upholding compliance with Ontario privacy laws is not simply a matter of following the provisions of enacted legislation, but ensuring that the use and disclosure of sensitive personal information is strongly monitored, and access controlled to those who truly need it in the performance of their duties.

Identity

Let me turn to another theme that I explore in my annual report – Identity. There is every reason to believe that identity-related issues will be **the** dominant privacy issue in the coming years. In all sectors of government, in health care and in educational settings, all are undergoing, large-scale IT-enabled transformations in their operations that depend critically on the view of identity adopted and the use of personal identifiers. These institutions are also evaluating how to identify citizens, their stakeholders and their clients. The private sector is facing similar issues.

Personally-identifiable information is a special category of sensitive data that, more than ever, must be treated as both an asset and a liability, and managed in a verifiable manner. The risk of a privacy and security breach looms high when identifiable data are collected and retained in databases, in plain view.

We may not be able to put the information genie back in the bottle, but we can set limits on permissible levels of collection, use and disclosure of personal information, and hold those organizations accountable for actions that impact negatively on the privacy of individuals and the security of our freedoms.

I released our first major paper on this fundamental issue last fall – *The 7 Laws of Identity: The Case for Privacy-Embedded Laws of Identity in the Digital Age* – and the response was very positive. We will continue to monitor this issue very carefully.

AVOIDING ABANDONED RECORDS

I realize that you may not have had time to read every single word in my annual report yet. Please correct me if I'm wrong. But if you made it to the section on *High Profile Privacy Incidents*, you will have read about a health order I issued late in 2006 (HO-003) which dealt with personal health records that had been left behind – abandoned – when a Toronto clinic had closed its doors.

Today, I am following up on that order by releasing new guidelines to avert future records from being abandoned: *How to Avoid Abandoned Records: Guidelines on the Treatment of Personal Health Information in the Event of a Change in Practice* – which may include retirement, selling your business, bankruptcy, or death. Let me stress something here: It is unacceptable – totally unacceptable – for a health information custodian, when closing business premises, to leave behind records containing personal health information. You can't do that – leave your patients' records behind.

These *Guidelines,* which address privacy safeguards and the continuity of records management, outline the responsibilities of health information custodians under the *Personal Health Information Protection Act* and provide best practices to ensure that health records are never abandoned. We have copies available at the table by the entrance for those who do not already have a copy of the *Guidelines.*

COURT OF APPEAL RULING

Before concluding my remarks, I want to briefly comment on a very important ruling that came down this Friday from the Ontario Court of Appeal. The ruling, which rewrites the current law, means that my office will now be able to determine whether the interests of the public outweigh the purpose of the exemption in matters involving law enforcement and solicitor-client privilege. This is called the "public interest override," S.23, and may only be invoked in cases where there is a "compelling public interest," that clearly outweighs the purpose of the exemption. This sets a very high bar to meet.

<u>However</u>, and this is a big however, the public interest override does not apply to all exemptions, meaning that my office cannot even consider invoking it when handling certain types of appeals. But now, we will be able to, especially in the very important area of <u>law enforcement</u>.

As I said, The standard for invoking the public interest override is extremely high – we have used it, on average, less than once a year over the past two decades – under 1% - under half a percent - 0.3% to be exact, that's in only 16 cases out of some 4,800 orders we've issued to date. But it is very important that the determination as to whether the public interest does override an exemption, is made by an independent office, such as ours.

Now, the government could still seek leave from the Supreme Court of Canada, to appeal this decision, a decision made by Ontario's highest court. This, ladies and gentlemen, will be the acid test – and it will reveal how serious the government actually is about openness and transparency.

If the government truly wants the public to be made aware of matters where there is a "compelling public interest," surely they would not object to my office's ability to make such determinations, on behalf of the public – decisions that we have made very guardedly in the past since the test for a matter to be considered a "compelling public interest, that outweighs the purpose of the exemption involved," is indeed very high. Which is why our use of S.23 has been rare – under 1% - 0.3% to under 0.5% to be exact. Accordingly, we urge you to see the wisdom in the Court of Appeal's decision, and respectfully ask the government not to appeal this decision.

We await your response, Mr. Premier!

Let me end by returning to the main themes of my Annual Report. With respect to openness and transparency, the government's performance is just not good enough. After 20 years, the learning curve has been exhausted. With respect to privacy, their performance is better, no question, but there's still room for improvement. In the words of California's Governor, who is visiting our fair city today, I would like the government to "Super-size" privacy. I think that after 20 years, it's time.