Remarks by Commissioner Cavoukian

Access and Privacy Workshop 2008
Ministry of Government Services

ACCESS

Good morning everyone. And thank you Mark, for that very kind introduction.

It's a great pleasure to be back here again, at the Access and Privacy conference. I look forward to this annual event as an opportunity to come together with access and privacy professionals, to review the year behind us, and to talk about the future.

But, as always, let me start by thanking my staff – again and again and … again.

The theme of this year's Access and Privacy conference is "Sharing New Perspectives" and today, I intend to do just that.

This year's theme could not be more timely since I have spent the past year re-examining my own perspectives and crystallizing some ideas that will, hopefully, introduce two new paradigms into our thinking.

I will share my "new perspectives" with you a bit later on – but for now, let me just say that they are "radical" and yet, they're "pragmatic." Curious? I hope so … stay tuned.

Let me lead by talking to you about openness, transparency and access to information.

Some of you may recall my speech at last year's workshop where I was less than flattering. I'm here to tell you that things have changed — a great deal, and for the better.

What a difference a year makes!

Records Number of FOI Requests

For starters, there has been a new record set for the number of FOI requests received in Ontario.

There were 38,584 freedom-of-information (FOI) requests filed across Ontario in 2007 – this is the highest number of requests ever filed, breaking the previous record of 36,739 set in 2006.

While this may make some people a bit nervous, I feel that it is nothing short of another milestone on the road toward a truly open and transparent government.

The people of Ontario have sent us a clear message that they want access to government information, their information – and it is our obligation, our responsibility, to demonstrate that we can and will live up to the principles embedded within FIPPA and MFIPPA.

Response Rate Compliance

Now for the good news, I am very happy to say that since the time my office began emphasizing the importance of response time to access requests, the provincial 30-

day compliance rate in Ontario has climbed dramatically from 42% to more than 80%. Excellent news indeed!

As you know, the 30-day compliance rate measures only one aspect of an institution's freedom of information program. But, in light of the leadership at the helm, I am very optimistic.

MGS

I would like to give my warmest praise to Minister McMeekin and Deputy Minister McKerlie for their leadership in taking action to ensure that the government of Ontario remains committed to Access and Freedom of Information.

Minister McMeekin demonstrated his commitment to openness and transparency in the communiqué he issued earlier this year in March, where he stated that:

> *"This right – access to information – is fundamental to citizen participation in the democratic process and their ability to hold politicians and other public servants accountable. Premier McGuinty embraces this principle and has urged us to ensure information*

requested of government be made public unless there is a clear and compelling reason not to do so."

I could not agree more.

I am greatly encouraged that Minister McMeekin took Premier McGuinty's earlier, seminal memorandum to heart.

Minister McMeekin identified two key principles for public servants to follow in terms of recognizing this fundamental importance of access to information:

- As public servants, you have to consider the citizens' right to know as being foremost, and only apply exemptions after careful consideration;

- In addition, ministries and other government agencies need to look for opportunities to make more information available to the public on government websites – driving information out to the public.

And, if there is any question as to the strength of Minister McMeekin's convictions, I can assure you that the Minister fully understands the importance of

ensuring that access and privacy are taken seriously in the day-to-day business of government activities.

The Minister shared his thoughts with me in my recent correspondence with him and I will share these thoughts with you later on.

I am also pleased to say that, under the leadership of Deputy McKerlie and Mark Vale, significant steps have been taken by the Ministry of Government Services to put the spirit of Minister McMeekin's memorandum into practice and to embed the principle of Access into government decision-making.

Let me touch on a few of these:

- MGS will be implementing a new ***Exercise of Discretion Best Practices*** – that will provide guidance to FOI decision-makers about the factors they need to consider when making decisions regarding releasing records under access to information. The aim of their best practice is to encourage more consistent decision-making and transparency. This document will also include a discussion of the appropriate application of exemptions and key IPC Orders.

- In recognition of the wide variety of organizational structures in government, MGS is also developing another best practices document, this one dealing with the ***Delegations of Authority*** and the various models for delegating decision-making that are available.

- MGS is developing guidance for ministries on the routine disclosure and active dissemination of information to the public, including work that has started with the Ministry of the Environment. This will significantly reduce the number of formal FOI requests received by the government.

- And finally – I've saved the best for last, MGS is developing a strategy to make more information routinely available about the procurement process, including contract awards, vendors, and the total amount of contracts awarded – and make it all publically available! We've been asking for this, and now we'll have it!

Mark Vale

I mentioned Ontario's Chief Information and Privacy Officer, Mark Vale earlier, and I want to recognize the outstanding work that he and his team have been doing with regards to both access and privacy, within the government of Ontario.

You may recall that beginning with my 2003 annual report, I spent consecutive years calling for the appointment of a Chief Privacy Officer for the province of Ontario. I was delighted when I heard that the government was going to create this position and that Mark had been chosen for the job.

Since his appointment, Mark and his office have displayed great enthusiasm in leading the development and implementation of information management strategies that emphasize sound practices, in addition to making access to information and privacy, fundamental business considerations for the province of Ontario.

This is evident in the work that Mark has done with my office such as carrying forward a number of recommendations that we have made to the government of Ontario – All of this has lead to a very productive and close working relationship between our two offices.

I look forward to working with Mark on further initiatives and his outstanding team of professionals. My applause to all of you.

I would now like to move on to several Orders issued by my office over the last year that will give you an idea of what we have been dealing with in regards to the Access side of our work.

If there is a common theme to these orders, it is to reiterate Minister McMeekin's message, and to urge you not to look for reasons NOT to disclose information.

As the Minister directed, and the Premier before him, public servants should not be looking for reasons to prevent access to records, or to hobble our freedom of information system.

In the past, privacy has at times been inappropriately, used as an excuse for refusing to disclose government information. At other times, institutions have relied improperly on exemptions such as the third-party business information exemption. Regardless, it's not necessary – don't search for excuses not to disclose information to the public – just do it. Let me turn to some examples.

McMaster University

This past year has involved some extensive work with our Universities, which as you know, came under the jurisdiction of FIPPA in June of 2006.

The Hamilton Spectator made a request for the employment contract of McMaster University's president.

The request was denied by the University on the grounds that the employment contract was the personal information of the President and its disclosure would constitute an unjustified invasion of his privacy.

The Spectator appealed to my office, and we ordered the employment contract to be released, including the President's salary and benefits.

The order notes that the need for transparency in how taxpayers' dollars are spent and accountability for this spending, outweighed any privacy interest that the President might have.

At the end of the day, the President is paid from public accounts and, as such, the public has a right to scrutinize his employment arrangements.

I want to emphasize that this case was not about forcing access to a particular individual's personal and financial information, it was about ensuring that our

government, funded with the tax dollars of its citizens is open and transparent – especially when it comes to individuals whose salaries are paid for from the public purse.

I am happy to say that McMaster withdrew their initial application for judicial review and disclosed the contract to the Spectator.

But, there's a happy ending here: This case resulted in further disclosures.

Other universities in Ontario have used it as a precedent to releasing their own presidents' contracts, proactively; which is a good example of how the access provisions of the *Act* contribute to greater transparency and accountability for public funds.

I would like to turn to another appeal that my office resolved involving McMaster University.

When FIPPA was amended to include universities, a provision was added to exclude records "respecting or associated with research."

McMaster received a request for information relating to medical clinical trials. Specifically, the requester wanted information about clinical trials that had been halted due to safety concerns, a list of clinical trials in which deaths had occurred and clinical trials involving vulnerable adults. These records themselves included applications to conduct research and reports of events that occurred during the clinical trials. The records had been prepared by the researchers.

In one of the first two orders interpreting the new section, my office found that these records were, in fact, "respecting or associated with research." We upheld the decision of the University that the records were excluded from the *Act*.

In addition to providing guidance on what constitute research records, this appeal should provide a valuable lesson for institutions on conducting an appeal, or rather, "how not to participate in an appeal".

As most of you know, once an appeal is launched, my staff contact the relevant institution and request a copy of the records at issue. This is standard procedure and has been validated by a series of court decisions.

Even if we uphold an exemption not to release the record in question, we have to examine it first in order to satisfy ourselves that the exemption actually applies.

In this case, when we contacted them and asked to look at the records, McMaster took the position that since the records related to research, and were therefore excluded from the Act, they were under no obligation to show them to us. And, in fact, they refused to do so. This was not a smart thing to do.

We obviously disagreed. How could we verify the claim that the records in question actually related to research, if we weren't given the opportunity to examine them? Remember, trust but verify.

My staff made repeated attempts to convince the University to provide copies. In fact, I called the President of the University myself to try and broker a solution. I gave him the benefit of the doubt that, being new to the Act, the University may have been unfamiliar with the Act's provisions, and relevant jurisprudence, such as our right to view the records. These efforts were to no avail.

After each side had filed applications for judicial review, we were eventually able to gain access to the records.

It is interesting to note that, in order to accommodate the University and the large number of responsive records, our Adjudicator working on this file travelled to Hamilton to view a representative sample. In other words, once the University recognized our right to have access to the records, we were more than willing to consider their circumstances and reduce their workload – we didn't make them come to us.

And, ironically, once the University engaged in the access process in good faith, they ultimately received an Order that upheld their position that the records related to research, and were excluded from the Act – win/win, well except for the fact that we had to first order them to produce documents for us, and then undertake a judicial review – an unfortunate and avoidable outcome. A great deal of time, effort and resources were expended unnecessarily, by both the University and my office, to arrive at the final conclusion.

The lesson to be learned from this case, in my view, is that institutions are much better off working cooperatively with us from the start to resolve appeals.
As you will hear in the next section, positive-sum, not zero-sum.

Let me turn to our OLG Orders.

The Ontario Lottery and Gaming Corporation received a request from the CBC for records relating to the validation of two “insider” lottery wins.

These were situations where significant lottery jackpots were won by individuals who had sold lottery tickets at their convenience stores – they were therefore considered “insiders.”

The process put in place by the OLG to investigate and validate these kinds of insider wins had come under great criticism; first in a series of reports on CBC’s “Fifth Estate” and then in a special report released by the Ombudsman.

The scale of insider wins, and the OLG response to them, was clearly a matter of significant public interest.

The OLG refused to disclose the records relating to their investigation of these two particular insider wins, citing the privacy interests of the winners.

We disagreed. My office ordered the records disclosed based on a number of considerations:

- “Insider winners” should have reduced expectations of privacy – given the significance of this issue, they cannot expect the same privacy protections as ordinary members of the public;

- Public confidence in the integrity of the lottery system was critical and would be further enhanced through scrutiny of the insider win process; and

Ultimately, the need for public scrutiny of the insider win validation process outweighed the concerns of the insiders.

This was not the end of the story in terms of our involvement with the OLG and insider win records. To their credit, the OLG has embraced the spirit of our orders and recognized the need to bring greater transparency to the insider win validation process through disclosure. The new CEO and Executive has been a pleasure to work with.

The OLG has now proactively released additional records, in response to further CBC requests. We are also hopeful that a number of outstanding files will now be successfully mediated.

Compassionate Disclosure

Now, let me turn to this last case, which represents why we are all in this business – to serve the people of Ontario.

Many of you will be aware of amendments made to the Acts in 2006 that were designed to allow for greater disclosure to the family members of deceased individuals. Now, family members can receive the personal information of a loved one who has died, where it is desirable for "compassionate reasons".

These amendments addressed a gaping hole, identified by the IPC, which prevented family members from receiving the kind of information they needed in order to understand the circumstances of their loved ones' deaths.

I encouraged institutions to give a broad and liberal interpretation to this new provision. In my view, the provincial Legislature recognized that families of deceased individuals had enhanced access rights.

The first case that my office adjudicated under this new provision involved a mother who was seeking information on her daughter who had died suddenly in the summer of 2005.

Following the death of the appellant's daughter, the Barrie Police conducted an investigation into her death, including carrying out interviews – one of which was with the roommate of the deceased girl.

Following the police investigation, the mother made a request for information related to the investigation. The police granted partial access but denied access to the interview with the deceased's roommate, the death report, and police officers' notes – all of these were denied. Why?

Because the police took the position that disclosure of some of the records would be an invasion of the deceased girl's personal privacy, and, in the case of the roommate's interview, the privacy of the roommate.

On appeal, my office ordered the police to disclose far more information to the mother, including the portions of the interview with the daughter's roommate, that were relevant to understanding the daughter's death.

For surviving family members, “greater knowledge of the circumstances of their loved one’s death is by it very nature compassionate.” Information that is crucial to their understanding of the death of a family member should no longer be withheld, under the guise of protecting the deceased individual’s privacy. Please! Let’s show some compassion!

I also encourage police services to work with family members outside of the formal FOI process to disclose as much information as possible without forcing them to appeal to the IPC.

Emergency Disclosure

I would like to shift the focus now from access and discuss the work my office is doing in the area of privacy. I am going to start with an issue that straddles both access and privacy – disclosure in emergencies and other urgent circumstances.

For the past few years, the word “privacy” has come to be used as the default response for not sharing personal information in critical situations involving life and death decisions (e.g. think Virginia Tech, Carleton University, Dawson College) – this list goes on and on.

However, this is patently false.

Privacy legislation does not prevent the rapid sharing of personal information in emergency or other urgent situations.

Caution and discretion must of course be exercised – in droves, but "privacy" is not a barrier to preventing a tragedy from occurring.

And although this may seem like it's only a privacy-related matter, it also has implications for Access and Freedom of Information. Why? Because my message is:

Do NOT use privacy as a roadblock for withholding information that you should be disclosing. We will be releasing a new Fact Sheet on this topic, with the British Columbia Commissioner, to offer some additional guidance.