Access, Transparency and Democracy: Looking Back, Looking Forward

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Introduction

The primary reason for establishing the Williams Commission was because the government of the day had decided it was time to introduce a statutory scheme to ensure transparency in public administration.

As Carlton Williams stated in his report:

> A public right to government information should be recognized as a fundamental part of democratic government; government secrecy fosters distrust of government on the part of the citizenry.
>
> Increased access to information about the operations of government would increase the ability of members of the public to hold their elected representations accountable for the manner in which they discharge their responsibilities.

Bill 34 carried this important commitment through to law. And section 1 of the legislation made it clear that the government was implementing a fundamental shift in the power relationship regarding government records. The *Freedom of Information and Protection of Privacy Act* was intended to ensure openness through obligations to make decisions that would maximize transparency through disclosure. Citizens could now hold the government to account for its operations by exercising rights of access, and the government was obliged to disclose records unless an exemption applied.

Then-Attorney General Ian Scott made it very clear that the new law was intended to represent a significant shift in the culture of government. When introducing the legislation he stated:

> It is with a sense of historical moment that we today honour our commitment to our fellow citizens to move ahead with legislation as expeditiously as possible by introducing this bill. We do not now and never will accept the proposition that the business of the public is none of the public's business.

He also knew that having an FOI law created political risks, but he was prepared to accept them. He told the Legislature:

> I recognize and have no doubt that at some point in the future information could be made public under this new bill that could embarrass or harm the fortunes of the government of the day. We recognize that possibility; however it is a fact of life and a natural consequence of an open, consultative government. It will achieve the greater good of parliamentary democracy, open administration and thus the good of society as a whole. That potential risk, that potential cost, can and must be borne in the interest of freedom.

Strong words. Ian set the bar very high. And he also introduced legislation that served as the model for access and privacy regimes throughout Canada.

So, as far as the looking back part of the equation is concerned, I think Williams and Scott gave us all a good deal of hope that transparency in government operations would be enhanced through the FOI law.

But how would we measure transparency? How would we know, 15 years later, whether the culture of openness envisioned by Williams and Scott was actually achieved?

Some of you probably attended this spring's Continuing Legal Education session on FOI sponsored by the Ontario Bar Association – which incidentally was the most popular CLE session of the year. If you did, you'd have heard Sid Linden, our first Commissioner, talk about how to measure the success of our FOI regime. He identified a number of measures, some of which dealt directly with transparency.

Andree Delagrave also recently completed her review of the operation of the federal *Access to Information Act*, and tabled an extensive series of recommendations on how it could be improved to better reflect the intent of the law.

Sid and Andree both concluded that the provincial and federal FOI laws are not fundamentally flawed. There are areas that need to be amended or updated to reflect experience and societal progress, but the laws do a pretty good job of reflecting the underlying value of open and transparent government. The main difficulty is a cultural one. Unless there is a culture of transparency within government, the legislation will never work to its optimum potential. My saying this should come as no surprise to you. I've made the point on a number of occasions. But today, I thought I'd focus on a few examples of how we might move the yardsticks.

Responsible Minister

Our legislation identifies the need for a Responsible Minister. There are technical reasons for this – a minister must be accountable to the Legislature for each piece of legislation. But there are other reasons as well. Many years ago, I asked Ian Scott why the concept of a Responsible Minister was built into the law. He said, quite simply, that if there was no internal political champion for the law, the government's instinct for self-protection would overwhelm the underlying purpose of the law when push came to shove on the highly sensitive files.

I don't know what takes place behind the closed doors of government, and I acknowledge that our Responsible Minister and his staff no doubt go to battle for FOI. However, since Ian made his forceful public comments about the importance of FOI back in 1985, I can't think of another instance where a minister of government, in any political party, was prepared to take a strong public stand in support of the value of FOI. Sid addressed this in his speech where he identified the need for "political leaders [who] would follow in the footsteps of Ian Scott and speak loudly and proudly about the importance of the law and its function within the accountability framework of government." Without this commitment, it becomes very difficult for FOI to receive the attention within government that it deserves. And with that goes resources.

Let me give you a concrete example.

Responsibilities for training and education are divided between the Responsible Minister and the Commissioner: we deal with public education, and MBS handles the training needs of staff working in the FOI area. As part of our public education mandate, I lead a team from the IPC to four or five Ontario communities each year as part of our *Reaching Out To Ontario* program. Our focus is on public education and media awareness, but we also use it as an opportunity to meet with local FOI co-ordinators. Invariably, what we hear from them are complaints about the lack of training and support available for municipal co-ordinators. MBS simply does not have the resources to meet the demand. But the demand is real. A couple of weeks ago at our most recent *Reaching Out* session – in Sault Ste. Marie – we had 80 registrants for our co-ordinators session, including many people from local area offices of provincial institutions. We provide a basic primer on FOI, but it really is an inadequate attempt to address a serious problem.

Exercise of discretion

The law makes it clear that the availability of exemptions does not need to interfere with the underlying purpose of enhanced transparency. Past disclosure practices can continue and discretion is available to decision makers to disclose records even if they qualify for exemption. Again, I acknowledge that we only deal with the relatively small number of requests that result in an appeal, and institutions may routinely release exempt records that we wouldn't necessarily know about. However, on appeal, we find that discretionary decision making in this context has not become second nature. In the vast majority of cases, institutions that can claim an exemption do, and our mediators have a tough job convincing institutions that information can and should be disclosed in the spirit of the *Act*, particularly when dealing with exemptions that aren't harms based. More alarming, there are even instances where government organizations try to push the scope of an exemption beyond the stated legislative intent.

Here's an example.

When the provincial *Act* was moving through the legislative approval process, the government identified a possible concern regarding the solicitor-client exemption claim. Some had argued that common-law solicitor-client privilege might not extend to Crown counsel providing legal advice to institutional clients. The government moved to address this legitimate concern, since, from a policy perspective, no one ever intended to deny solicitor-client confidentiality protections for public sector lawyers providing advice to their internal clients. Ian Scott stated at that time:

> As I said the other day, this [the added portions of section 19] is just to expand the coverage designed to ensure protection for solicitor-client material to Crown counsel, who according to how you view the law, may or may not have a client and therefore may or may not have, technically, the benefit of solicitor-client privilege. I would have not thought the issue was contentious.

> The use of the words, "for use in giving legal advice or in contemplation of or for use in litigation" really adds nothing because they would be within our understanding of what a solicitor-client privilege is anyway.

Clearly, section 19 was never intended to enable government lawyers to assert a privilege that is more expansive or durable than that which is available at common law to other solicitor-client relationships. Yet that is what the Ministry of the Attorney General has been arguing. In fact, we are in the Court of Appeal this morning thrashing out this very point. And the Attorney General may well be successful, since it may all come down to a technical interpretation of the wording of section 19. But why are we even talking about this? Surely, in the spirit and intent of the law, the Attorney General should exercise discretion in not even raising the argument, instead of aggressively pursuing a position just because they can.

Routine disclosure

Routine disclosure of information is one area that has received significant attention since the *Acts* came into force. We've worked with MBS and other institutions over the years to promote the concept of RD/AD, and there are a number of Best Practices on our Web site that describe how individual institutions have successfully implemented RD/AD principles into their business practices.

Where we haven't necessarily done as good a job in maximizing the potential of RD/AD is in the area of electronic records. The Ministry of the Environment, which has had its compliance-related difficulties over the years, has now accepted that e-RD/AD represents one of its best opportunities for improving the way it provides information to the public. Routine disclosure as well as narrower FOI-related issues are addressed during the design of new technology and, although it will take them time to re-engineer all of its business practices, I'm confident that MOE's approach will be successful. But why should an individual ministry have to take responsibility for this issue? Wouldn't it be better for MBS to seize the issue corporately?

Management Board was quite successful in developing privacy principles for institutions to follow in the design of new computer systems and, as I understand it, no significant new technology purchases can proceed without addressing these principles through a privacy impact assessment. That's great. But wouldn't it make sense to extend this same reasoning to access? Wouldn't your jobs as co-ordinators be made easier if new technology were designed in a way that would facilitate routine disclosure of information, or at least make it easier for you to use technology to efficiently locate records when dealing with access requests? Wouldn't members of the public be better served if they could routinely access records electronically, or at least have access to an electronic index of record holdings that would help identify what records would meet their needs?

I put this idea to MBS last December, and I think it's fair to say that it has been a tough sell. If there is a better way of addressing this need, then I'm all ears, but this is an area begging for corporate leadership.

Democratic Charter

I'd like to close my remarks by challenging a commonly voiced view from within government. That is that transparency presents political risks, and that holding to secrecy even in the face of criticism for being too closed is better than exposing the government to criticism that might flow from disclosing information.

Some would argue that this is flawed thinking. Graham White, a professor of political science at the University of Toronto, is one of them. Graham argues that democracy is declining in Ontario. He argues that, although governments of all stripes have no problem endorsing the principle of healthy democratic institutions, these principles must be refined into concrete measures against which the press and the public can judge the government. And most importantly, Professor White thinks that to do so would pay political dividends at the ballot box. He thinks that if political parties would be prepared to campaign on the promise that they would operate in a more open, transparent, responsive and deliberative manner, this would not only make them more accountable once elected, but would also make them more electable.

I agree. I think the public has a strong appetite for the revitalization of democratic institutions. I also think that transparency in public administration, as reflected in both robust FOI laws and attitudes of openness among government officials, would represent a key component of this revitalization process.

At the end of the day, I don't think I can improve on what Ian Scott said about the importance of transparency way back in 1985 when he introduced our law:

> When there is true openness in government, we will have a society that is trustful of its government, not fearful of it. We will have a society that is enlightened by information and able to make thoughtful choices as to the future shape of society.

Thank you.