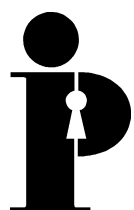


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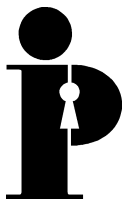
**The Impact of 9/11
on Access to Information
in North America**

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Commissioner
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Introduction

In both the United States and Canada, the public's right to access information held by public authorities is statutorily entrenched in most jurisdictions. However, the terrorist attacks of September 11, 2001 in New York City have induced governments to review their access-to-information laws and policies, and the types of information they make routinely available to the public, particularly on government websites. The challenge facing government officials is to balance the public's right to access information with the need to protect society against terrorist attacks.

United States

In the aftermath of 9/11, both federal and state governments in the U.S. made a series of hasty decisions to remove information from websites and other locations (e.g., libraries), with virtually no public input or debate. For example, the Nuclear Regulatory Commission shut down its website at the request of the Department of Defense. The Superintendent of Documents for the Government Printing Office directed federal depository libraries to destroy copies of a U.S. Geological Survey CD-ROM on water resources. At the state level, New Jersey removed information about private-sector storage of chemicals from its website.

Both the Congress and state legislatures are also reviewing their freedom-of-information laws. At least 30 bills have been introduced in Congress that would reduce public access to federal government records. Hundreds of bills have been introduced in state legislatures that would exempt additional government records from public access.

Public officials are also using policy instruments to restrict public access to government records. On October 12, 2001, federal Attorney General John Ashcroft issued a memorandum to all federal departments and agencies on the *Freedom of Information Act* (FOIA). His memorandum supercedes a 1993 pro-disclosure memorandum issued by then-Attorney General Janet Reno. While professing a commitment to “full compliance” with the FOIA, the bulk of the Ashcroft memorandum emphasizes the withholding of records and assures departments and agencies that the Department of Justice will defend their decisions unless they lack a sound legal basis.

On January 17, 2002, James Kallstrom, New York Director of the Office of Public Security, and James Natoli, Director of the Office of State Operations, issued a confidential memorandum to all agency heads and commissioners that directs that sensitive information be removed from state government websites. The memorandum also orders senior civil servants to exempt sensitive information from public release and to review all freedom-of-information requests for sensitive information over the last year.

Access-to-information advocates in the U.S. have questioned whether federal and state governments are genuinely acting in the public interest or are taking advantage of 9/11 to promote secrecy and minimize public scrutiny of government. In March 2002, the Reporters Committee for Freedom of the Press released a report (*Homefront Confidential* at <www.rcfp.org/homefrontconfidential/>) that accuses public officials of embarking on an unprecedented “path of secrecy.” OMB Watch, a non-profit organization that promotes government transparency, is maintaining a list of all information removed from government websites since 9/11 at <www.ombwatch.org/article/articleview/213/1/104/>

Canada

In Canada, the federal, provincial, territorial and municipal governments have not acted as aggressively as their U.S. counterparts in cutting off access to information that was routinely available to the public before 9/11. However, at least two governments have taken steps to tighten their access-to-information laws:

The Federal *Anti-Terrorism Act*

The federal government's *Anti-Terrorism Act*, which came into force on December 24, 2001, gives the federal justice minister sweeping powers to withhold government-held information. Under the Act, the Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information "in connection with a proceeding" for the purpose of protecting information received in confidence from a foreign entity or for the purpose of protecting national defence or national security. When the Senate was considering the proposed legislation, the federal Information Commissioner criticized the bill as an attack on the independence of his office because it would give the Attorney General the power to halt any investigation being conducted by the Commissioner.

Alberta's Proposed Security Legislation

On May 14, 2002, the Alberta government announced that it will be introducing a security bill in the fall session of the legislature that aims "to prevent or reduce the threat of terrorist activity and enhance the province's ability to respond to emergency situations." Bill 31, the *Security Management Statutes Amendment Act*, will amend 17 Alberta laws. Some of the amendments will enhance the ability of public bodies to withhold "sensitive information" from public disclosure:

- The *Alberta Energy and Utilities Board Act* will be amended to protect sensitive information regarding security infrastructure and emergency plans that private companies share with government or the Alberta Energy and Utilities Board.
- In order to facilitate the exchange of classified intelligence information between the provincial and federal governments, the *Disaster Services Act* will be amended to exempt from the *Freedom of Information and Protection of Privacy Act* any sensitive information provided for the purpose of preparing or administering Alberta's crisis management plan.
- The *Freedom of Information and Protection of Privacy Act* will be amended to enhance the ability of public bodies to withhold sensitive information if the government determines that disclosure may compromise security. These amendments would include any record supplied by the Canadian Security Intelligence Service.

Removing Information from Websites

At least one government agency has recommended that organizations in both the public and private sectors consider removing sensitive information from their websites. The federal Office of Critical Infrastructure Protection and Emergency Preparedness (OC�PEP) recently issued two notices that urge owners and operators of power plants, water-treatment facilities and other vital infrastructure, to review all information that they make publicly available:

- On January 17, 2002, the OC�PEP issued an advisory on *Potential Threats Arising from Website Information Gathering*. The advisory urges critical infrastructure owners and operators to report any “suspicious accesses” to municipal, utility and other public websites, and to review the security implications of posting sensitive information on the Internet.
- On May 31, 2002, the OC�PEP issued a notice on *Securing Publicly Available Information*. It states that people with malicious intent will often use open sources, such as the Internet, media and libraries, to help plan an attack on a target. It urges critical infrastructure owners and operators to ask themselves a series of key questions before deciding whether sensitive information should be made publicly available. (e.g., Could someone use the information to target personnel, facilities or operations? Does the information increase the attractiveness of a target?)

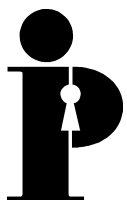
Access to Information Policies

Some government departments and public officials in Canada have changed their access-to-information policies since 9/11:

- The City of Toronto, which is covered by Ontario’s *Municipal Freedom of Information and Protection of Privacy Act*, is restricting access to building plans. These documents, which were routinely available to the public for viewing before 9/11, may now only be accessed with the written consent of the building owner. In addition, an individual who wants to view building plans must file a formal freedom-of-information request.
- The federal Department of Transport is refusing to release the results of airport security screening tests. Before 9/11, similar records were routinely released to the media under the *Access to Information Act* and, on at least one occasion, informally.
- Senior officials in the Privy Council Office are reviewing federal access-to-information requests for sensitive security information. According to a federal government spokesperson, this new layer of review is to ensure that such information is not “unwittingly released.”

Issues for Discussion

- Are governments in the U.S. and Canada striking the right balance as they attempt to address the access-to-information implications of 9/11?
- Are you aware of any government directives or FOI policy memoranda in your jurisdiction that direct public servants to withhold information that was routinely available to the public before 9/11?
- What strategies have you found to be successful in ensuring that governments strike the appropriate balance between transparency and security?
- Is removing information from government websites effective?
- Is there a need to set up a website in Canada, similar to the OMB Watch site in the U.S., that monitors the impact of 9/11 on access to information?



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