



Information and Privacy
Commissioner of Ontario

Commissaire à l'information et à la
protection de la vie privée de l'Ontario

OPEN LETTER

October 15, 2019

The Hon. Lisa M. Thompson
Minister
Ministry of Government and Consumer Services
College Park, 5th Floor
777 Bay Street
Toronto, ON M7A 2J3

Dear Minister Thompson:

Re: Government of Ontario's *Creating Economic Benefits* Discussion Paper

We read with interest the government's *Creating Economic Benefits* discussion paper exploring current issues and challenges in the data economy, and highlighting the importance and benefits of better access to government data. [Appendix A](#) contains our comments on the discussion paper.

Access to government data can fuel innovation and research, and is key to the success of the data economy. However, other societal benefits also come with access to government data and information.

To support the government's data strategy objectives, we make some recommendations on how the government can do more to facilitate access to both government data and information while protecting the privacy of Ontarians. We also recommend that the government broaden its open contracting focus to include publishing information about the results of procurement processes – that is, making contracts publicly available.

We look forward to working with the government as the details of its data strategy are developed. As with our comments on the government's first discussion paper, we are posting this letter and attachment on our website.

Sincerely,

Brian Beamish
Commissioner



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

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

Tel/Tél: (416) 326-3333
1 (800) 387-0073
Fax/Télé: (416) 325-9195
TTY/ATS: (416) 325-7539
Web: www.ipc.on.ca

cc: Dominic Roszak, Director of Operations, Stakeholder Relations and Appointments,
Ministry of Government and Consumer Services

Hillary Hartley, Chief Digital and Data Officer

John Roberts, Chief Privacy Officer and Archivist of Ontario, Ministry of Government
and Consumer Services

Appendix A

IPC Comments on the Ontario Government's *Creating Economic Benefits Discussion Paper*

ENHANCING ACCESS TO GOVERNMENT DATA AND INFORMATION¹

Broaden Scope of Data Strategy's Access Goal

Providing access to government data and information can foster entrepreneurship, innovation, and new economic activities, including the creation of new services and products in both the public and private sectors. As a supporter of an open by default approach to government data and information, the IPC commends the government for its goal to increase the amount of data available to business, and to identify the government data assets that can best support economic growth. However, as the province moves forward with its data strategy, economic benefits must not be the only priority or driver for openness.

The IPC recommends the government carefully consider the benefits of enhancing access to both government data and information for all Ontarians, and not just for businesses. The broader societal benefits of access to timely, relevant, and comprehensive government data and information include:

- strengthening democracy and promoting integrity by making government more transparent and accountable for its decisions, actions and spending
- giving the public a greater voice in what government does, and fostering government decisions and action that further the interests of all, not just a few
- empowering the public and enabling them to make more informed choices and decisions to improve their well-being
- advancing a more efficient and effective government
- enabling academic research and scientific discovery

There are also benefits for government such as reduced costs and other resources involved in processing freedom of information requests, as discussed further below.

Protection of Privacy

The message from the Minister of Government and Consumer Services states that the government wants to better understand how it can “support businesses to unlock the commercial value of data, while ensuring that individuals’ privacy is protected.” We agree that privacy should be at the

¹ To provide a consistent frame of reference for review and comment, the IPC used the definitions for data, information, open data, and open by default from the Government of Ontario’s *Open Data Directive*, <https://www.ontario.ca/page/ontarios-open-data-directive>.

forefront of the data strategy. As noted in the government's first discussion paper, privacy is essential to fostering public trust and confidence in the data-driven practices of both public and private sector organizations.

The *Creating Economic Benefits* discussion paper notes that many organizations are "looking into developing their own governance practices in a time of heightened public awareness of data privacy and security." The paper also speaks to new guidelines, standards and best practices to help businesses protect data and comply with Ontario's international data-related obligations.

No details are provided, so it is not clear how these objectives will be achieved. It is also unclear what public and private sector privacy measures are contemplated by the government. In the absence of further details, it is not possible to provide specific comments.

However, at a minimum, any guidelines, standards and best practices must supplement, not supplant, Ontario's existing legislative privacy requirements. They must also include measures that ensure effective and independent oversight, and hold government and private sector organizations accountable for their information practices.

Open Data

As stated in the discussion paper, open data can be a key driver of economic growth and business innovation. The paper also acknowledges that Ontario already has a robust open data program that could be adapted to support a more value-focused approach to data sharing.

The IPC supports the government's efforts to release data to the public without charge, under the Open Government Licence – Ontario. That licence effectively balances public access and protection of privacy, and other information rights.

It permits users to copy, modify, publish, translate, adapt, distribute or otherwise use the information (including data) in any medium, mode or format for any lawful purpose. It also defines a few important exceptions. For example, the licence does not grant users any right to use personal information,² information or records not accessible under *FIPPA*, or information subject to other intellectual property rights (such as patents, trademarks and official marks).³

² The *Freedom of Information and Protection of Privacy Act* and *Municipal Freedom of Information and Protection of Privacy Act* define personal information as recorded information about an identifiable individual, excluding information that identifies someone in their business capacity.

³ Government of Ontario, *Open Data Directive*, Appendix A – Open Government Licence – Ontario, <https://www.ontario.ca/page/ontarios-open-data-directive#section-8>.

Health-related Data

On the subject of sharing data, the discussion paper states: “Given that Ontario has a wealth of data in digital health assets, clinical and administrative health data can also be considered as a high-value dataset that may present various opportunities for Ontario.”

It is important to distinguish between the high value of health-related data in terms of utilizing it to foster innovation and research, and its high monetary value (that is, health-related data as a commodity to be sold as a source of revenue for the government). The specific scope of what the government may be contemplating is not clear from the discussion paper.

The IPC is fully aware of the high economic value of health-related data. We are also aware that various organizations already sell health-related data (for example, the Canadian Institute for Health Information and Cancer Care Ontario).

In 2016, we made a submission to Ed Clark, Chair of the Advisory Council on Government Assets and Business Advisor to the Premier. He assessed the value of Ontario’s digital health program, including how it could stimulate economic growth. In our submission, we outlined the challenges of de-identification necessary when personal health information is publicly released, and the potential unintended consequences of monetizing electronic health records.⁴

Given the sensitivity of personal health information and the risks of re-identification, we recommend the government consult with us prior to taking further action to share health-related data. In particular, we would like to understand specifically what type of data (such as facts, figures and statistics, aggregated information, or de-identified information at the individual level) may be shared, the level of public transparency, types of controls and oversight, and the limits that will be imposed on use and disclosure.

We also would like to know if monetization of health-related data is being considered. While the IPC supports the government’s efforts to enhance access to appropriately de-identified health-related data to expand and innovate health products and services, we have grave concerns about the monetization of this data. Potentially, it raises a variety of ethical and privacy issues that must be fully explored before the government proceeds.

⁴ IPC, *Submission of the Information and Privacy Commissioner* to Ed Clark, Chair of the Advisory Council on Government Assets and Business Advisor to the Premier, 2016, https://files.ontario.ca/7_information_and_privacy_commissioner_of_ontario.pdf.

Data Monetization

The discussion paper mentions data monetization in the context of Facebook and “techlash,” but does not address the issue more broadly. Should the province consider data monetization of any government-held personal information as part of its data strategy, we recommend it hold province-wide public consultations on this specific issue. Ontarians may have concerns about the monetization of their personal information by public sector organizations, and their views should be considered carefully.

Key questions the government will need to answer include:

- Does the public support the government selling their data, particularly health-related data?
- Are there types of data and information that should never be monetized because of a compelling public interest?
- In what circumstances would the government use a for-profit model instead of cost recovery?
- Could monetizing data prejudice or negatively impact rights (including access and privacy), freedoms and legitimate interests of the public and data subjects?

Should the government proceed further with data monetization, it will need to strike an appropriate balance between potentially competing goals. For example, realizing economic gains and enhancing public services, while protecting privacy and preserving its commitment to open government.

Open Information

Open Information is the proactive release or disclosure of information about government programs, services and operations. It differs from open data as it generally involves more than just facts or raw data. It may involve work products such as memos, briefing notes, and policy papers that contain analyses, evaluations, opinions and other subjective information.

The IPC recommends the government consider three measures to enhance the scope and amount of government information proactively made available to business and the public:

- review and enhance existing policy and legal requirements for proactive disclosure
- develop a publication scheme
- require proactive disclosure of certain completed freedom of information requests

Proactive disclosure of government information has many benefits. It is an effective and efficient way to make government information available to all Ontarians. It can also help reduce the time, costs and effort associated with access requests under *FIPPA* and *MFIPPA* for both the requester and public organizations. This was the City of Toronto’s experience – there was a 50 percent drop

in access requests after implementing its proactive disclosure scheme.⁵

Many provincial statutes and municipal by-laws require the publication of defined information. For example, the *Public Sector Salary Disclosure Act* requires the public disclosure of salary and benefits paid to public sector employees paid \$100,000 or more in a year.

FIPPA and *MFIPPA* also require proactive disclosure of certain records. These proactive disclosure requirements are designed to facilitate the public's right of access under the legislation and, more generally, the transparency of government operations. They help the public understand the functions and responsibilities of government organizations and the records they hold.

Publication scheme

A publication scheme requires proactive disclosure, on a routine basis, of certain broad classes of information. It can help ensure that critical information related to the government's mandate and functions is made publicly available on a timely basis. In many international and Canadian jurisdictions, publication schemes are defined in freedom of information laws.

This is the case in Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*, which requires public bodies to adapt the publication scheme template created by the Office of the Information and Privacy Commissioner.⁶ Other jurisdictions' publication schemes define more detail about the records to be proactively disclosed. For example, the United Kingdom's *Freedom of Information Act* requires each public authority to have a publication scheme approved by the Information Commissioner's office (ICO), and to proactively publish the information covered by that scheme.

The ICO's model publication scheme defines seven classes of records that public organizations should publish (for example, "What we spend and how we spend it" relates to financial information about projected and actual income and expenditure, tendering, procurement and contracts).⁷

Proactive disclosure of completed access requests

To create efficiencies for government and requesters, and to enhance access to government information, the IPC also recommends the province take steps to proactively disclose the results of general records access requests (that is, requests for records that do not include personal information). In 2018, the public organizations covered by *FIPPA* and *MFIPPA* received 31,921 general records requests and 34,286 in 2017. There is no reason why general records disclosed for these requests should not be available to all Ontarians.

⁵ City of Toronto CIO Dave Wallace testified before the Parliamentary ATI, Ethics and Privacy Committee on February 2, 2011, as cited in British Columbia Freedom of Information and Privacy Association, *Proactive and reactive disclosure of government-held information in British Columbia*, March 9, 2011, https://fipa.bc.ca/library/Reports_and_Submissions/FIPA_response-OIPC_Consultation_on_Proactive_Release-March_9_2011.pdf, pp. 1, 4.

⁶ Newfoundland and Labrador Office of the Information and Privacy Commissioner, *Publication Scheme Template*, <https://www.oipc.nl.ca/pdfs/PublicationScheme.pdf>.

⁷ United Kingdom Information Commissioner's Office, *Model Publication Scheme*, <https://ico.org.uk/media/for-organisations/documents/1153/model-publication-scheme.pdf>.

Other Canadian governments, at all three levels, have proactive disclosure schemes for access requests. Some publish summaries of completed requests (for example, the federal government and City of Toronto),⁸ while others post copies of redacted decision letters and responsive records (for example, British Columbia and Newfoundland and Labrador).⁹

The IPC recommends the government examine the merits of requiring proactive disclosure of PDF copies of redacted decision letters and responsive records for general records access requests. No personal or other exempted information should be published.

If it proceeds, a suitable delay for publication should be defined (such as, no publication until 72 hours after response sent electronically and five days if mailed). A publication delay recognizes that requesters expend time, effort and money to obtain records, and addresses concerns raised in other jurisdictions about simultaneous disclosure.¹⁰

Proactively disclosing the results of defined types of access requests maximizes utility for users and government. It eliminates the need to make and process additional access requests for documents previously released, thereby increasing efficiencies and decreasing processing costs.

Establishing a publication scheme and requiring the proactive disclosure of completed general records access requests, supports the data strategy's objective of fostering innovation and economic growth through enhanced access to government data and information.

OPEN CONTRACTING

The discussion paper defines open contracting as “the practice of publishing and using open, accessible, and timely information on government contracting to engage citizens and businesses in identifying and fixing problems.”¹¹ [emphasis added] However, the focus of the paper and its questions is singularly on improving access to data about available procurement opportunities.

The IPC supports streamlining public procurement processes; however, there also is a need to take steps to ensure the outcomes are more transparent. As part of its efforts to innovate procurement, we recommend the province expand its access objective to include both data and information, and to publish information about the contracts, and not just procurement opportunities.

⁸ Government of Canada, *Completed Access to Information Requests*, <https://open.canada.ca/en/search/ati>, and City of Toronto, *Freedom of Information Requests Summary*, <https://open.toronto.ca/dataset/freedom-of-information-requests-summary/>.

⁹ Government of British Columbia, *Search for Information Releases (FOI Requests)*, <https://www2.gov.bc.ca/gov/search?id=4BAD1D13C68243D1960FECBBF7B8B091&q=FOI>, and Government of Newfoundland and Labrador, *Completed Access to Information Requests*, <https://atipp-search.gov.nl.ca/>.

¹⁰ For example, Office of the Information and Privacy Commissioner for British Columbia, Investigation Report F11-02, Investigation into the Simultaneous Disclosure Practice of BC Ferries, May 16, 2011, <https://www.oipc.bc.ca/investigation-reports/1243>.

¹¹ Open Government Partnership, *Open Government Global Report: Open Contracting*, 2019, https://www.opengovpartnership.org/wp-content/uploads/2019/05/Global-Report_Open-Contract.pdf, as cited in Government of Ontario, *Discussion Paper 2: Creating Economic Benefits*, <https://engage.ontario.ca/en/content/discussion-paper-2-creating-economic-benefits>.

For over a decade, the IPC has called for greater transparency in the procurement process. For example, 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.

As noted in our *Open Contracting: Proactive Disclosure of Procurement Reports paper*, the public is interested in understanding how government resources are used. To gain this awareness, the public must be informed about the procurement process, including how contracts are awarded, what has been contracted for, how the successful bidders were chosen, what the various costs of the contract are, and who is responsible for the decision-making relating to the contract.¹²

Publication of procurement and contract information, while protecting sensitive third-party information, would support the government's objective of getting more information about procurement into the hands of business. It will also strengthen clarity and accountability around government spending, while providing tangible benefits to the government. For example, publication can significantly reduce the number of freedom of information requests and appeals related to procurement and contracts, and their associated resources and costs.

Every year, public sector organizations receive numerous access requests related to procurement, many of which come to the IPC on appeal. We consistently order the disclosure of contractual information on appeal, and the courts consistently uphold our orders. There are no legal impediments in Ontario's access and privacy laws to designing an open procurement process.

As the province knows, jurisdictions around the world have adopted, or are working towards, the Open Contracting Data Standard (OCDS) to increase the transparency of their procurement processes. The United Kingdom became the first G7 country to commit to the OCDS for contracts administered by a central purchasing authority.¹³

The OCDS defines key documents and data to publish at each stage of a contracting process. It sets out three levels of disclosure, with the intermediate and advanced levels requiring publication of contract documents among other detailed information.¹⁴

In addition, numerous American states publish procurement and contract documents.¹⁵ For example, Florida has an easily searchable database of contracts awarded by state and includes full amounts and details (deliverables, payments and audit results), as well as PDFs of both the procurement and award contract documents.¹⁶ New York and California also publish contract documents.¹⁷

¹² IPC, *Open Contracting: Proactive Disclosure of Procurement Records*, September 2015, <https://www.ipc.on.ca/wp-content/uploads/Resources/open-contracting.pdf>, p. 1.

¹³ Gov.UK, *Open Contracting*, <https://www.gov.uk/government/publications/open-contracting>.

¹⁴ Open Contracting Data Standard, *Implementation Guidance*, "What to publish," <https://standard.open-contracting.org/latest/en/implementation/levels/>.

¹⁵ Society for Institutional & Organizational Economics, *Online Databases of Contracts with US State Governments*, <https://www.sioe.org/online-databases-contracts-us-state-governments>.

¹⁶ Florida Accountability Contract Tracking System, <https://facts.fldfs.com/Search/ContractSearch.aspx>.

¹⁷ Office of General Services, State of New York, <https://online.ogs.ny.gov/Purchase/Search/default.asp>, and Cal eProcure (California), <https://www.caleprocure.ca.gov/pages/LPASearch/lpa-search.aspx>.

In a February 2019 letter to the then Minister of Government and Consumer Services, we drew the government's attention to a comprehensive, multi-jurisdictional study of procurement practices by the Open Contracting Partnership (OCP). For countries that do not have an open by default approach to procurement records, the OCP identified the most common reasons given for not disclosing contracting documents.

One of those reasons is that disclosing contracting information costs too much money and leads to costly appeals and more contract re-negotiations, causing further delays and costs. The OCP's study showed this conclusion was incorrect. In particular, it found:

- Reactive disclosure is more expensive than systematic, proactive disclosure
 - with the right infrastructure, managing records and disclosing information can be an automated, low cost process
 - disclosing contracting information leads to substantial public savings and other benefits
- Disclosing contracting information does not decrease competition
 - in fact, it leads to an increase in the average number of bidders per tender
 - it also results in a decrease in bid prices, not an increase

Overall, the OCP identified that there was growing evidence that transparency and openness around procurement can help improve the competitiveness, integrity and efficiency of the contracting process.¹⁸

As the government modernizes its procurement process, the IPC strongly recommends adopting an open by default approach to procurement and contract information and records.

PRIORITIZING ARTIFICIAL INTELLIGENCE

According to the discussion paper, the government is in the early stages of scoping an AI strategy that focuses on talent development and re-skilling, consumer protection, public and private sector adoption, transparency and accountability, and the ethical usage of AI. Formal work on this strategy will begin after the government releases its data strategy.

The IPC is pleased the government plans to develop a comprehensive AI strategy and recommends it consult with us, as well as the Law Commission of Ontario and the Ontario Human Rights Commission when defining the scope and implementation requirements.

AI supports and relies on the data-driven practices that maximize the amount of information about individuals to identify and track them, and to predict their behaviour.¹⁹ There are inherent privacy

¹⁸ Open Contracting Partnership, *Mythbusting Confidentiality in Public Contracting*, 2018, <http://mythbusting.open-contracting.org/>.

¹⁹ Privacy International, *Profiling and Automated Decision Making: Is Artificial Intelligence Violating Your Right to Privacy?*, December 5, 2018, <https://privacyinternational.org/blog/2537/profiling-and-automated-decision-making-artificial-intelligence-violating-your-right>.

and other human rights related risks with these technologies. We would welcome the opportunity to work closely with the government to develop an effective framework to ensure that these risks are mitigated appropriately.