

2011 FOIP Conference

Farewell

By

Frank Work, QC

Information and Privacy Commissioner for Alberta

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Introduction by

Marilyn Mun

Assistant Commissioner

*Hello, my name is Marilyn Mun and I am the Assistant Commissioner with the Office of the Information and Privacy Commissioner in Alberta. I have the honour of introducing Commissioner Frank Work.*

*However, instead of reading his biography which is printed in your program, I asked staff in our Office what we want you to know about our boss. So on behalf of the Office, I would like to introduce our boss Frank Work in the words of his staff:*

*First of all, he is approachable. As one staff member said:*

*When I started with OIPC, I always referred to him as "the Commissioner". He politely asked me not to refer to him in that manner. Then I referred to him as "Mr. Work". He again requested*

*that I refrain from that title – he said when he heard “Mr. Work”, he always thought his father was standing behind him. So it was just “Frank”. I must admit I greatly admired that from an individual in his position. Titles are not important to him. And that made him more approachable and down to earth for me.*

*Second, he is a compassionate person who listens to us when life throws a curveball (and we have had curveballs in our lives over the years!).*

*He also has an uncanny ability to zero in on the essence of an issue – to go to the heart of the matter. He is passionate about access and privacy and is current on leading edge matters. With so much on his mind, he can be prone to “popcorn thoughts”– this is where he will start talking about one thing which will then lead him somewhere else which will then go a completely different direction. Sometimes it can be a challenge to keep up with him.*

*During the Calgary Stampede, a reporter once described Frank as the “Clint Eastwood of Privacy”. We think this description is fitting – he is strong, not afraid to take a stand, says it like it is – and for those public bodies, custodians and organizations who fail to encrypt or password protect personal information on laptops and other mobile devices, he is fully capable of saying those 5 magic words – go ahead, make my day!*

In 1991 I became Parliamentary Counsel to the Legislative Assembly of Alberta. In 1993 I was asked to provide legal advice to the new Ethics Commissioner, Bob Clark. In 1995, Bob Clark asked me to come and work for him in establishing the Office of the Information and Privacy Commissioner of Alberta. We found furniture, mostly surplus, bought inexpensive posters for the walls and started hiring staff. I had, and have a great relationship with Bob: he was the concept guy and I was the lawyer. Neither of us were managers so our management philosophy was simple: hire good people and get out of their way. The corollary was that the Office is bigger than the Commissioner and people who do the work should get credit. About a week ago I saw Jillian Vincent and Rachel Hayward, the next generation, speaking for the Office on TV. I was very proud.

So, Tom Thackeray, Marilyn Mun, Val Kupsch, Frank Borsato John Ennis and Catherine Taylor among others signed on. Later, Dave Bell and Dan Cameron. I have to say at this point that, FOIP must sometimes feel like the eldest and sometimes neglected child. There may be some truth to that but it is not because they do not deserve recognition. Maybe it is because, as the eldest, you just expect them to succeed. But FOIP is the foundation of the office. It is what we were originally put here to do.

It was pretty exciting and it was pretty simple in 1995. Email was a new thing. Microsoft released Windows 95. The DVD became available as did Hotmail, Netscape and Microsoft Explorer. A fast computer was a 486 processor with 8 Mb Ram and a 420 Mb hard drive. OJ Simpson was found not guilty. There was war in former Yugoslavia. Forrest Gump was best picture. Sheryl Crow's "All I Wanna Do" got a Grammy.

We connected with other access and privacy Commissioners across Canada. There was an annual meeting jokingly called “The Summit”. In addition to Bob Clark there was David Flaherty from BC, John Grace, Federal - Access, Bruce Phillips, Federal – Privacy, Tom Wright, Ontario Access and Privacy and his Assistant Commissioner, an enthusiastic Ann Cavoukian. There were great stories and great egos. You need an ego to do this kind of job. It protects you. Unfortunately, sometimes our egos overtake us.

Order 96-001 held that the Department of Justice was required by section 11 of the Maintenance Enforcement Act and section 5 of the Freedom of Information and Protection of Privacy Act to refuse an individual access to a file in their custody. It was six pages long.

The Office put on conference in 1998 at the Shaw Conference Centre. We weren’t great at conferences. Charles Hitschfield ran it for us a few years and in 2003 the University of Alberta took it over.

The story has been told too many times and this, then, is the last one. Alec Campbell and I used to smoke in the alley behind his and my offices. We had talked about the need to start developing an academic base for access and privacy in Alberta. He asked if I thought OIPC would come up with money to launch a program at the University of Alberta. I talked to the Commissioner and it happened in 2000. That small effort on my part is one of the things I am most proud of in my time at OIPC. That and what the IAPP has become. This is the kind of thing that will outlive any of us and will bear fruit exponentially greater than the initial investment.

In 1997, the Health Information Protection Act, was introduced. It was groundbreaking legislation in many ways. It was very controversial. The Bill was tabled and a non-partisan review committee was struck to review it. The Commissioner appointed me to that Committee. We decided we would support the Bill, with recommendations because we believed that the our health care system needed the information in the ways permitted by the Bill in order to improve Albertan's health and help sustain the health care system. In 1999, Bill 40, the Health Information Act was passed by the Legislative Assembly. It came into force in 2000. The HIA then created an information arena. Into that arena were allowed health care providers, "custodians" who were allowed to collect, use and disclose personal health information pretty much without patient's consent or knowledge. In exchange, custodians had to take into consideration a patient's wishes when collecting health information. This opened the door for "masking". Also in exchange, the system would log users who viewed health information and a patient could see that log. We fought hard for those logs. There were times when, for cost considerations, they were on the block.

Looking back, I think this removal of consent was tremendously significant historically. Consent was the foundation of the CSA privacy principles which underlay PIPEDA. It was one of the first times consent was legally done away with as a consideration for the collection, use and disclosure of information, provided the information was used within accepted parameters. It was described as "theft" in some quarters. It was taken as given that the HIA could not possible be seen as substantially similar to PIPEDA. Now the notion of "reasonable use", use within parameters but without consent, is embodied in the Personal Information Protection Acts.

The other thing which was significant in the Health Information Act was the provision requiring a privacy impact assessment when developing new information systems. While I cannot claim exclusive credit for this section of the HIA, I am going to just go ahead and, together with Tom Thackeray, claim credit for the idea of applying the idea of environmental impact assessments to privacy, at least in Alberta. This has meant that the development of wellnet and now Netcare have been quite well-documented through a series of privacy impact assessments. I believe it has also meant that electronic health records in Alberta, while not fail proof, have been developed with that due diligence. I think it also means that many health care providers have a better than average awareness of privacy and security issues.

Bob Clark left as Commissioner and on May 7, 2002, the Legislative Assembly resolved to appoint me Commissioner. I was one of 82 applicants.

Context. In 2002 the USA invaded Afghanistan. Alicia Keys and U2 won Grammys. The Lord of the Ring; the Two Towers and Harry Potter and the Chamber of Secrets were in the theatres. The Homeland Security Act became law in the United States; the Anti Terrorism Act was passed in Canada the year before. Privacy would never be the same as security didn't just trump privacy: it crushed it. To this day we see the legacy of 9/11 – "lawful access" to Canadians online identities, naked machines in airports, "safer communities", "safer cities", safer this and that, despite the fact that we are safer without any of the surveillance and information sharing that comes with the demands of a frightened population. We are a very nervous society to this day.

Perhaps privacy would have gone through significant changes anyway: younger generations are, to me, surprisingly blasé about who they share their information with and how much. Mark Zuckerberg (Facebook) wants a future where there are no secrets. So does Julian Assange (Wikileaks). A US Congressman have recently been trying to oblige by sending pictures of himself in his underwear to other people. In that case it was too much information. But there is no doubt that the events of 9/11 pushed the security piece to the top of our collective agenda.

We got noticed by the Courts in 2003 and life has never been the same. It was a case called Alberta (Attorney General) v. Krushell (2003 ABQB 252). The Court found we had interpreted our jurisdiction incorrectly. What was more significant was that the Court said that the Commissioner's Office was not an expert tribunal, deserving of judicial deference. This was a big deal because, if you were an expert tribunal, the theory was that you would get deference to your decision-making. Then, the standard of reasonableness would be applied so that, even if the court did not agree with your decision, as long as it was reasonable, it would stand. I guess we just needed more practice because in 2004, in a case called Shields v. Information and Privacy Commissioner of Alberta (2004 ABQB 353), the Court found that the decision at hand was so close to the centre of our expertise that the standard of review should be deferential. The Court applied the reasonableness standard. Yay!

Our relationship with the Courts in Alberta has been stormy. I suppose we have won as many as we have lost but we have lost some big ones. We have lost some that we should not have. In 2009 in the Lycka case, the Court found that a doctor could use patient information to solicit contributions from patients, despite the wording of the Health Information Act. In the first

Alberta Teacher's Association case (2010 ABCA 26), the Court held, 2-1, that if we went over the 90 day limit for completing an inquiry, we lost jurisdiction. That has been appealed to the Supreme Court of Canada.

The second Alberta Teacher's Association case (2011 ABQB 19) went much better. The Court upheld the OIPC's procedures, including the procedure for screening complaints when deciding whether the complaints will go to inquiry. Matters not dealt with by the Commissioner in the first instance are not to be dealt with on judicial review. The Court further held that mandamus does not go so far as to direct how a statutory function is to be exercised, and cannot be used to demand changes to, or remove decisions from, the Commissioner's website. Finally, the Court actually seems to have gone against certain precedents in terms of the degree of standing afforded the Commissioner in a judicial review. Again in 2011, the Court of Appeal upheld our interpretation of section 4 of FOIP (2011 ABCA 36). Things looked good.

But wait. In Leon's Furniture (2011 ABCA 94), The Court of Appeal narrowed the definition of personal information under PIPA, to exclude information that is related to an object or property, such as a license plate number and (obiter) a VIN and a street address. A retailer's collection of an individual's driver's license number to prevent fraud is reasonable. The only bright spot was that we had full standing before the Court, in light of our role under PIPA.

Although it is hard to get excited about a store writing down a driver's license number, this has serious implications for similar numbers, like your internet address, for example. We have applied for leave to appeal to the Supreme Court of Canada.

We have had a couple of other oddities recently year, Edmonton Police Commission (2011 ABQB 291) allowing us to order public bodies to notify third parties and Calgary Police Service (2010 ABQB 82), which did some different things with the reasonable standard, to wit, the amount of disclosure of police disciplinary actions under the Police Act is enough and the use of FOIP to provide additional public scrutiny under section 17 is unreasonable.

I have been outspoken about the Courts when I felt it was needed. I do not do it just because I lose a case. Really. I have been told that it is unseemly or unfair to criticize the Courts. I have even been told they will remember me. This I absolutely refuse to believe: I have gotten lots of criticism and harsher words from disgruntled parties who appear before me and I am still able to give them a perfectly fair hearing. I expect the Courts do the same. The fact is that, in the Information Age, no one is beyond accountability. While it is true that you cannot please everybody, you will get to hear from just about everybody.

The Office was growing slowly but steadily. Very few of us ever get the resources we think we need to do these jobs. But we were never starved and our budget was never cut. We got such a solid core of admin talent: Pam, Audrey, Cindy, Val, Donna and later – Shanaz and Sheila in Calgary. Workloads increased. Corinne Berger was Inquiries Clerk. We lost her but Mary Golab was there. We reformed Intake and Shantel, Cheryl and Anima undertook the challenge of dealing directly and first with our clients. Wayne became Communications for us.

There were other people over the years that contributed to the development and evolution of the office. Roseanne, Steven, Ian, Michelle, Eileen, Matt, Cindee, Medley and Jolanta all were part of the tapestry at certain times. I hope I haven't forgotten to name anyone.

I digress. Back to the timeline. In 2003, Alberta and BC passed their Personal Information Protection Acts. In so doing, they joined Quebec and Canada as the only jurisdictions in Canada with comprehensive private sector privacy laws. It took a lot of work to get this done. Tom Thackeray, by this time at Service Alberta, deserves a lot of the credit. Gary Dickson, now Commissioner in Saskatchewan did a powerful job of selling this to the private sector in Calgary.

2003. Lord of the rings: Return of the King, Charlie's Angels and the matrix were in the theatres. In February the Space Shuttle Columbia disintegrated upon its re-entry, killing all 7 astronauts. In March, the United States invaded Iraq. Someday by Nickleback, Crazy in Love by Beyonce and White Flag by Dido were on the radio.

With the PIPA law in place, I decided that it should be administered out of a Calgary office.

There were a lot of reasons for this. One was that I wanted to both get the attention of and access to the business community in Calgary which is second in size to that in Toronto. Another was that an office in Calgary opened up a new talent pool for our office. A third was that a separate office would be able to go its own way to some extent, not being bound by what we had done in Edmonton and we would all be richer for it. It was a bit of a tough sell.

Elizabeth Denham became the Director of the Calgary office. I could not have chosen a better salesperson. Liz and her people (Linda Sasaki, Jill Clayton, Preeti Adophia, Anima Kotowski, Jill Taylor) worked tirelessly to lobby, reassure and pacify businesses about the new law, getting them to buy in. It was a really good group. David Loukidelis was Commissioner in BC. We got along really well and, together with Privacy Commissioner of Canada Jennifer Stoddart, enjoyed a period of unprecedented goodwill and cooperation with respect to private sector matters. A

lot of harmonization issues were decided with a 3 party phone call. We signed a tri-party Memorandum of Understanding which committed the three jurisdictions to cooperate and harmonize for the benefit of businesses across Canada. We were able to entice Quebec to the table but they were not willing to sign on.

OIPC Alberta did a joint investigation of a massive data loss by the TJX group of companies in the US. It was exhausting for both offices but it was an important event in terms of not only the outcome, but also the experience in dealing with such a massive loss and dealing with each other.

In 2005, Leroy Brower became Team Lead for HIA and later Director HIA. I would have later made Leroy an Assistant Commissioner in a heartbeat if I thought our small office could have 3 Assistant Commissioners. As it was, Leroy did an amazing job with HIA until he got his opportunity as Assistant Commissioner in Liz Denham's BC office just this year. See, karma works.

In 2007, Marylin Mun became Assistant Commissioner. There is probably no more conscientious person on the planet.

A word about bench strength. You may discern that my theme here is that it is all about the people. We have been so lucky. When Liz left, Jill was there. When Jill left, Linda was there. Hopefully Jillian and Carmen will be there too. When Leroy left HIA, Brian Hamilton was there and, heaven forbid, if Brian left there is Leahann and Rachel. In FOIP, we hired Veronica and most recently Elaine and Amanda.

Again I digress. Back to 2007. All good things must end. In 2007 Liz told me she wanted to rewrite the policy and procedures manual for the Office (not really). I said I thought she should give Jennifer Stoddart, Privacy Commissioner Canada, a call. Within months Liz was an Assistant Privacy Commissioner in Ottawa and I was spared a policy review. She is now IPC in British Columbia. And, yes, I am taking credit: it is my speech. Jill Clayton succeeded Liz as Director.

2009. Susan Boyle sang I Dreamed a Dream. Alison Krause and Robert Plant won a Grammy for Raising Sand. Avatar and Harry Potter and the Half Blood Prince were in the theatres. Israel invaded the Gaza Strip. There was flu in Mexico a major earthquake in Italy Iran was rocked by protests after Ahmadinejad was re-elected.

In 2009, following a legislative review of PIPA, amendments were made to PIPA. I am particularly proud of two. First, we asked for and got the ability to share information and enter into agreements with other with other Commissioners. This is important because privacy laws must function nationally, even internationally. Second, Alberta became the first jurisdiction in Canada to adopt mandatory breach notification. During the review, I specifically asked the Committee to recommend requiring organizations to report losses of information to the Commissioner and to give the Commissioner the power to decide whether or not there should be notification to affected persons. We knew it was very risky: we were in effect, setting ourselves up as insurers. If we decided there was no real risk of significant harm and therefore no need to notify, and people did get harmed, we would wear the horns. But we believed that having the Commissioner do it would make for more uniform reporting, more consistent application of the standard (RROSH) and better notification where notification was required.

Furthermore, people would be spared a steady stream of spam-like notices for minor losses.

We are now processing about 8 reports a month. I note, with satisfaction, that some European countries are now talking about requiring similar notification.

In 2009, the Health Information Act was amended following a review beginning in 2008. In my submission to the Standing Committee on Health, I was primarily concerned about the repeal of the section 58 which was the provision which required custodians to consider the wishes of patients respecting their health information. The amendments would have removed any option for the custodian to exercise to give effect to those wishes. Together with the Alberta Medical Association, we were able to persuade the Government to table and review the Bill. It was amended to address our concerns.

So over 16 years a lot has changed from one statute and a handful of employees we have gone to 3 statutes and almost 40 employees. We administer 3 laws and are one of 4 jurisdictions to have a private sector privacy statute and the only province to have mandatory breach notification. We have overseen the development of Netcare, the Alberta electronic health record from a few disparate electronic records to a province wide record with upwards of 30,000 users. We went from one person, me, writing orders, to two persons, me and Sharon Ashmore, to a fine adjudication group of Christina Gauk, Theresa Cunningham, Wade Riordan Raaflaub, Lisa , Sandra Burghardt, Keri Ridley, Betty Ann Harvey and Tamara Abram.

Its been such rewarding job. Not always a picnic. I remember the tightness in my stomach before a presentation to a Legislative Committee or a media interview. I remember the anxiety when I had to confront Government, police or some other authority over an issue. I remember

the solid feeling of satisfaction following briefing meetings when my colleagues would report on the all the things, we/they things they were involved in. I remember the pride I felt when I watched or read my colleagues, especially the newer and younger of them do a media piece on an investigation report. I remember the exhilaration when something went well: a successful negotiation, a good decision from a Court, word from a client, actually thanking us for what we did. I also remember the moments of anxiety, the sleepless nights wondering if I had guessed right, if I had done the right thing.

It is a privilege to serve ones fellow citizens. It is a rare privilege to serve doing something one strongly believes in. It is rarer still to be able to serve with colleagues of one's own choosing. I have had the privilege of working with outstanding people. In addition to the present complement of the Office, perhaps you remember John Ennis, Jo-ann Blais, Boris Zvonkovic, Richard Marks, Tim Chander, Doris Tan, Suzanne Fredericks, Corinne Berger, Jose Ambrosio, Luis xxxx, Darlene Hampshire, Noela Inions, Suzanne Voirot, to name a few.

I am wondering about my legacy. I helped build an office. Implement some good laws. Made some good decisions (and a couple of bad ones). Defended some of them in Court. Took in a lot of privacy impact assessments. Commented on a lot of Bills. Hired a lot of good people. Had some good parties. Sent a lot of good people out into the world to do good (or wreak havoc): Tom Thackeray, Liz Denham, Jill Clayton, Leroy Brower, Nelson Mandala, Barack Obama. Okay maybe I didn't mentor all of them.

I spoke out as loud as I could for things I believe in. I probably got too angry at times and I maybe could have dialled the passion down a notch. A extra filter might have been good at

times. In the end, any legacy is about people. How you treated them. If you were fair and decent. And honest. I hope I was, mostly. Like the people in this room. I know so many of you and I know how decent and honest you are. I do not remember the last conversation we had or whether we agreed on interpretation or not but I remember the quality of the person. I hope you will remember me the same way.

I spoke out for access and for privacy and I have a couple of parting thoughts on those ideals. Notions of privacy and how to protect it are going to have to change with the speed of technology in order to remain relevant. There is no privacy as we knew it in 1995. Access is changing too but I think for the better. In the same way as technology is blowing away the walls that used to define privacy, it is blowing away the barriers to the movement of information. Every politician should be conscious of the next possible Wikileaks hovering just over their shoulder. Wikileaks and open data and open government hold more promise for transparency or accountability than any of the freedom of information laws that have been passed to date. As voters we must demand transparency and get angry when it is not there and we not excuse failure to deliver it as another empty campaign promise that no one really expected to be kept.

So what now? I am pretty sure I won't be getting much consulting work from the Government of Alberta. An appointment to the bench is probably not imminent. No one else is beating down my door yet. Well, WalMart did call but I would have to come up to their dress code, even as a greeter. I think the best place for me would be an academic setting where I could study, write, maybe teach. I am sure that I will not be able to restrain myself from commenting

on things, if asked. Maybe even if not asked. The years will go by quickly now and I would like to use whatever knowledge I have while it is still relevant.

So. That's it. Any questions? Really. Last chance.