Office of the Information and
Privacy Commissioner of Alberta

Becoming a Leader in Access and Privacy

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Sunshine Summit 2013: Who's defending your right to know?
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Let me begin my comments today by saying good afternoon and thank you to the event organizers—the Privacy and Access Council of Canada, and Sharon Polsky in particular—and more generally, to all the speakers and participants today. It looks like a great agenda, and I appreciate the opportunity to contribute to the discussion.

I was fortunate to be a keynote speaker at last year's Sunshine Summit. In preparing my comments for today, I thought it would be helpful to go back and look at what I said to you a year ago.

At the time, I spoke about feeling optimistic. I said I was "happy to see the resurgence of interest in access to information and the advances being made at the municipal, provincial and national levels to increase accountability and transparency."

I referred to the September 2010, Federal/Provincial/Territorial Commissioners' resolution on open government, and the interest and excitement it generated in the regulatory community at the time. At a national level, I mentioned the September 2011 international Open Government Partnership—or OGP—of which Canada had just become a member.

At a provincial level, I spoke with cautious optimism of the Alberta Premier's appointment of an Associate Minister of Accountability, Transparency and Transformation and the—at the time—brand new government expense disclosure policy which mandated proactive disclosure, on a bi-monthly basis, of the travel and hospitality expenses of cabinet ministers and their senior staff, senior officials, Deputy Ministers and Executive Managers in the Alberta Public Service. The first reports were posted online in December 2012.

About the review of the FOIP Act, I said, "we don't know the full scope of the FOIP review, nor how or if it will take into account recommendations for amending the law resulting from the 2010 all-party Legislative Assembly committee review; but I support any efforts to review the legislation with the intention of enhancing openness, accountability and transparency."

That was a year ago. Where are we today?

Well, it's been a busy year for access to information in Alberta.

The Alberta Government launched its Open Data Portal in May 2013 – I heard more about this at a Right to Know Week event I hosted yesterday. The portal contained about 280 data sets with new data to be added on an ongoing basis.

We are nearing the 1-year anniversary of the provincial government's proactive expense disclosure policy and my office will soon be gearing up to review implementation of that policy.

The review of Alberta's *Freedom of Information and Protection of Privacy Act* was launched in June 2013 and invited submissions focusing on the following four areas:

1. making the FOIP Act clear and user-friendly;
2. open government and the FOIP Act;
3. sharing personal information to provide programs and services; and
4. addressing technological innovation.

As you may be aware, my office made two submissions to the review: the first was titled, "Becoming a Leader in Access and Privacy." This submission addressed each of the main objectives of the Review, and set out ideas, suggestions, and recommendations to help Alberta become a leading example to other jurisdictions in access and privacy legislation. Our second submission was titled "Making the FOIP Act Clear, User-Friendly and Practical" and made a number of recommendations that were more technical in nature.

I thought that I would focus my time today reviewing some of the key recommendations included in my Office's first submission, as I believe these ideas, suggestions, and recommendations have the most potential to effect transformative change to Alberta's access to information regime.

Making the FOIP Act Clear and User-friendly

With respect to the first area for discussion, making the FOIP Act clear and user-friendly, I wanted to recognize in my submission that the FOIP Act has, in some respects, become an unwieldy beast. We are fortunate here in Alberta that our access to information legislation has been reviewed and updated previously—the alternative looks like the federal situation, where access to information legislation has not been substantively reviewed in 30 years and is, by many accounts, hopelessly out of date.

The downside in Alberta, however, of regular reviews is that the legislation has been added to and changed in a piece-meal fashion. I don't know about you, but my read of the legislation is that it is complex, hard to follow, and overly technical. The law could benefit from a plain language rewrite.

In addition, any review of access to information legislation should, of course, start with the scope of the Act—I would note that Alberta's poor showing in last year's Centre for Law and Democracy review of access to information legislation in Canada faulted Alberta because of the number of exclusions in the Act, that is, the entities that are not covered by the legislation. There have been many discussions in jurisdictions across Canada as to whether or not various entities should be subject to access to information legislation—political parties for example, or MLAs. I did not go so far in my office's submission to suggest that certain entities should be covered—although I reserve the right to do so in the future. I would suggest, however, that a principled approach might be in order. That is, consider that any publicly funded entities should be subject to the legislation, and start from there.

Hand in hand with reviewing the exclusions set out in the Act should be a review of the exceptions to access. I'll be clear: exceptions to access are important. Not everything should be released, at least not right away. At the very least, however, existing exceptions should be reviewed to ensure they are necessary, to ensure they incorporate a harms test whenever appropriate, and to impose reasonable time limitations. Exceptions to access should be as narrow and limited as possible.

With respect to fees for access to information, I have said and continue to say that fees should not be a barrier to access. I am not in favor of raising fees. However, I am in favor of fee schedules that are easy to understand and implement, and fees that are appropriate and not a barrier to access.

In general, with respect to making the Act more user-friendly and clear, I believe much more work could be done to provide educational and instructive materials for both the public and stakeholders. Access to information should not be complex, however, I fear it has become that. Resources to interpret the Act, make sense of it, answer common questions, and share interpretations are fundamental to successful implementation of access to information.

Finally, although not identified as a specific objective of this FOIP Review, I understand that many of the consultation sessions solicited feedback on the concept of "splitting the Act." To be honest, I don't know exactly what this would entail; I don't know the business objective of such a suggestion, nor the problem that this would be the solution to. I fear that "splitting the Act" would mean stakeholders and requestors would now have to navigate two laws instead of one; that inconsistencies in interpretation might arise; that such an initiative would introduce inefficiencies and complexity. I recommended that "before making any decision or recommendation to separate the two parts of the Act, it [would be] important to clearly identify the objective that is to be achieved and how separating the Act would achieve it. A thorough cost-benefit analysis should also be undertaken."

Open Government

With respect to open government initiatives, I made a number of recommendations to the FOIP Review, few of which will be a surprise to those of you in this room. Many jurisdictions have gone down this road before us, and have set something of a standard. It seems to me that at the very least, the FOIP Act should:

- require public bodies to identify categories of records that will be made publicly available without requiring formal access requests, and requiring public bodies to make these records available.

- Establish minimum standards for proactive disclosure to provide guidance to public bodies and consistency to the public. Minimum standards could include:
    - specifying in legislation certain categories of records that public bodies must make available, such as expenses, contracts over a certain dollar value, audit reports, etc.; and
    - requiring public bodies to establish publication schemes that identify classes of records that will be made available, methods by which the information will be made accessible, fees (if any) that may be charged, and how the public body will make the publication scheme available to the public. Consider requiring public bodies to submit publication schemes to my Office (or alternatively, a government ministry) for review and comment.

- Consider amending the FOIP Act to include a duty for public bodies to publish responses to general access requests. Develop minimum standards to ensure consistency and that information that could potentially be harmful is not released.

- Require public bodies to complete and submit access impact assessments to my Office for certain initiatives, schemes, or programs such as information sharing initiatives, data matching initiatives. I confess, this is a particular favorite of mine. Few jurisdictions, if any, have such a legal—or even policy—requirement. But in today's world, as we move toward increasingly sophisticated and complex information systems, it is imperative that we design these things with access in mind.

- And finally, as I have said many, many times: it is impossible to do access and privacy right without giving due respect and attention to the importance of records and information management. It is imperative to ensure the appropriate statutory and policy framework for records and information management is in place to support transparency, accountability and compliance with the FOIP Act. This could include amending the FOIP Act to require that public bodies:

    - create such records as are reasonably necessary to document their decisions, actions, advice, recommendations and deliberations; and
    - ensure that all records are covered in records retention and disposition schedules.

Sharing personal information to provide programs and services

With respect to the third area for discussion—making it easier for public bodies to share information so they can provide programs and services more effectively—I confess that in some ways this goal raises some red flags for me. Let me begin, however, by saying that I am not opposed to information sharing. I understand that information sharing is vital to providing programs and services to citizens; one of my personal pet peeves is hearing yet another media story about some horrific event that could have been prevented, and at the same time hearing that "privacy laws prevented me from telling anyone about this."

Let's be clear: access and privacy laws allow for information sharing in almost every circumstance where you might think it is required. Alberta's three access and privacy laws—the FOIP Act, HIA, and PIPA—recognize that information can and should be shared in some circumstances. Each law sets out the circumstances in which personal and health information may be disclosed, either with or without consent. Section 40(1) of the FOIP Act, for example, lists 37 circumstances in which personal information may be disclosed. In addition, other laws occasionally override the FOIP Act (referred to as "paramountcies") or otherwise authorize information sharing.

Despite these provisions in the FOIP Act and other laws, I frequently hear that information is not shared because workers do not understand or are fearful of contravening privacy laws. While I understand this may be a problem, the appropriate solution likely involves education and training, as opposed to legislative amendments.

Doing away with existing provisions that require the exercise of discretion before information is shared, or that reduce consent requirements—and therefore individual control over information sharing, or that authorize indirect collection of personal information, thereby diminishing transparency—are not exercises that should be undertaken without serious consideration.

At their very core, privacy laws are about providing individuals with control over how their personal information is collected, used, and disclosed. The exercise of access and privacy rights fundamentally depends on transparency – it is impossible to complain about the collection of your personal information if you don't know it has been collected; similarly, it is impossible to access your personal information if you don't know which entities hold it.

Authorizing information sharing for broad purposes that are open to interpretation, and difficult to anticipate secondary uses, leads to confusion and complaints. Sharing more information than is necessary increases the potential risk of harm in the event of a privacy breach. Even more significantly harmful is sharing information with other entities—such as some non-profit service providers in Alberta—that are not subject to any access and privacy legislation.

Finally, I am concerned that amendments to the FOIP Act, intended to facilitate information sharing between entities subject to that Act but also, potentially to the *Health Information Act* and/or the *Personal Information Protection Act*, could introduce new tests, inconsistencies, and confusion, ultimately undermining existing access and privacy laws and increasing stakeholders' reluctance to share information.

Given these potential risks—and ultimately recognizing that governments across Canada and even internationally, much less here in the province of Alberta, are moving in the direction of increased information sharing—I am concerned that, at the very least, increased controls be put in place to ensure we do not completely toss privacy interests aside.

To this end, I made a number of recommendations in my submission to the FOIP Review:

- First, proposed information sharing initiatives must be thoroughly reviewed and assessed for access and privacy implications before implementation to determine whether or not they are required. This includes ensuring that any legislative amendments are harmonized among the FOIP Act, HIA, and PIPA to avoid introducing inconsistencies.

- Dedicate resources to education, training, and resource materials.

- Include a requirement in the FOIP Act that all cross-sectoral information sharing initiatives be registered with my Office or a designated government ministry. The registry listing could document the nature of the information sharing initiative, names of participating stakeholders, and contact information of an officer/employee who can answer questions about the collection, use, disclosure, retention, security, or destruction of personal/health information. The registry should be regularly updated and easily accessible to the public.

- Legislative schemes authorizing information sharing without consent must ensure that all participants are subject to Alberta's information and privacy laws.

- Include a requirement in the FOIP Act that public bodies must conduct and submit privacy impact assessments to my Office for information sharing initiatives that involve data matching and for any cross-sectoral initiatives.

- Stakeholders participating in cross-sectoral information sharing initiatives should be required to record disclosures, including disclosures via information systems. Disclosure logs should include:

    - the name of the person/service provider to whom the information was disclosed;
    - the date and purpose of the disclosure; and
    - a description of the information disclosed.

- Legislation should ensure that individuals who are the subject of the information sharing have an express right to ask for access to and a copy of the disclosure notes. Individuals should also have a right to ask me for a review in relation to their requests.

Addressing technological innovation

The fourth area of discussion was addressing technological innovation and its effect on information access and privacy.

There is no arguing with the transformative effect ubiquitous technology is having on all aspects of our society, and access and privacy is no exception—in fact, access and privacy are profoundly affected by technological innovations. See sophisticated and complex information systems, challenges posed for law enforcement in fighting online crimes, the portability of media devices and the vast amount of personal information that can be stored on them, GPS and biometrics, cloud computing and Google Glass. The implications of technology are only increasing.

Given this environment, I made two suggestions to the FOIP Review process.

First, I recommended mandatory privacy impact assessments and access impact assessments in certain circumstances, such as for data-matching initiatives or information sharing initiatives.

Under the HIA, health custodians are required to submit PIAs to my Office for review and comment before implementing new systems that affect health information. My Office sees benefits from the mandatory PIA requirement under HIA: we have a current and updated provincial perspective of initiatives involving health information, and PIAs are helpful in assisting custodians to comply with their obligations under HIA. A PIA is a useful tool for identifying potential privacy risks and how these risks could be mitigated. In addition, as already noted above, I support the concept of mandatory AIAs for certain initiatives.

There is currently no corresponding requirement under the FOIP Act for public bodies to submit PIAs to my Office. Some public bodies choose to do so, but many do not. This is a problem, particularly for information sharing initiatives.

I also recommended that the legislation include mandatory breach reporting and notification provisions. Under Alberta's private sector privacy law (PIPA), organizations must report a breach of personal information to my Office where they determine there is a real risk of significant harm to an individual as a result of the loss or unauthorized access or disclosure of personal information. I have the power to require an organization to notify affected individuals. Like private sector businesses, governments have the ability to collect an enormous amount of personal information about individuals and to analyze that information through technology in ways never previously contemplated. When enormous amounts of information are collected, the possible harm in the event of a breach is correspondingly increased.

Additionally, the sharing of personal information across sectoral boundaries, and in some cases, across provincial and national borders, increases the risk of potential privacy breaches. Notification allows an individual whose personal information has been compromised to take measures to protect themselves against such risks as identity theft and fraud. The extension of the mandatory breach notification to the public sector will strengthen the protection of privacy legislation in Alberta.

Finally, though not a specific goal the FOIP review requested comment on, in my submission I made a plea for adequate resourcing to support implementation of the legislation.

Regardless of any amendments introduced or how strong the legislative framework may be, it is not worth anything if resources are not available to give effect to statements committing to access to information. It is impossible to respond to access requests within legislative timelines if there are no FOIP advisors to process the responses; it is impossible to design secure, privacy-protective, accessible information systems if there are no dollars and no man-power dedicated to preparing privacy and/or access impact assessments. It is too easy to default to cost-effective and politically palatable solutions if there are not strong voices to say otherwise. Regardless of any changes to the legislation, without a strong culture of access and privacy, championed by senior leaders and implemented by adequately resourced, dedicated, and competent staff, the future of access and privacy in Alberta would be bleak.

Thank you once again for the opportunity to be here today to provide some comments.