

## **Access and Privacy for Ontario Municipalities: Will it Help or Hinder Research?**

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"Public records are public property, owned by the people in the same sense that the citizens own their courthouse or town hall, sidewalks and streets, funds in the treasury. They are held in trust for the citizens by custodians — usually the heads of agencies in which the records have been accumulated... As public property, public records may no more be altered, defaced, mutilated or removed from custody than public funds may be embezzled or misappropriated. Indeed, because records document the conduct of the public's business — including the protection of rights, privileges and property of individual citizens — they constitute a species of public property of a higher value than buildings, equipment and even money, all of which usually can be replaced by the simple resort to additional taxes. *It is the unique value and irreplaceable nature of records that has given them a sanctity uncharacteristic of other kinds of property and that accounts for the emergence of common-law principles and statutory enactments governing their protection.*"<sup>1</sup>

### **Trends**

Pressure for access and privacy legislation has arisen from a number of changing economic, social, and political forces in western democracies, including:<sup>2</sup>

1. The expansion of the public sector following World War II brought about a vast number of new agencies and programs. The classical political science model of ministerial accountability does not reflect the complexity of modern government and intergovernmental relationships. These overlapping political jurisdictions and shared-funding programs resulted in political accountability being diffuse. Access to government decision making and information sources is crucial for informed citizens.

2. Advances in education have created an expanding pool of well-informed citizens who reject traditional administrative paternalism. The well-educated middle class is frequently willing to utilize new rights in the courts or administrative tribunals.
3. Changes in technology relating to acquiring, storing, processing, retrieving, and transmitting information have expanded in the last decade creating for many persons the spectre of an Orwellian society.

Recognizing that common law remedies were insufficient to protect individual rights and freedoms in an information age, western democracies have enacted access and privacy legislation. The first initiatives date from the early 1970s in Europe and similar moves were taken by the United States in 1972 and Canada in 1983. Legislation, passed in Quebec in 1982, was the first provincial act to apply to other levels of government.<sup>3</sup> Using the principle that any organization receiving 51 per cent of its funding from the province should be included, the act affects hospitals, universities, and municipalities.

### **Private Sector Initiatives**

This legislative impetus has been matched in the private sector by *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, 1981* from the Organization for Economic Co-operation and Development (OECD). Canada, along with other member states, has endorsed these guidelines and is encouraging voluntary compliance by the private sector. In the United States, more than 200 companies have adopted the principles of these guidelines and now major Canadian corporations are following the lead of the Royal Bank of Canada in proposing voluntary self-regulation.<sup>4</sup>

Both the legislation and the OECD guidelines represent the concept of stewardship of information fair information practice. They require conformity with the life-cycle of information management - control over the creation, use, storage, and disposal of information, regardless of the media on which it is recorded. A tangible benefit of access and privacy guidelines is the better management of an organization's information resources for corporate purposes. For example, the OECD privacy principles require that:

1. Information on individuals should be kept only when necessary.
2. Information on individuals should be collected only from source.
3. The information should be seen only on a need-to-know basis.
4. The information should be used only for the purpose it was collected.
5. Information not needed for decision making should be destroyed.
6. The information about an individual should be made available to that individual.
7. The individual concerned should be allowed to request changes or additions to the information.
8. The organization should prove that a person has no right of access to the information concerning that person, rather than the individual having to prove their right of access.

### **Ontario's Legislation**

Ontario's 1987 *Freedom of Information and Protection of Privacy Act* came into effect for provincial government departments,

agencies, boards and commissions on 1 January 1988. Although the act is fairly recent, the intention to pass this type of legislation first gained impetus with the Williams Commission on Freedom of Information and Individual Privacy. Its three-volume report, *Public Government for Private People*, was published in 1980.

On 1 January 1991 the 1987 act will be extended to municipalities and local boards. The language of the Bill, however, does not lend itself readily to the municipal environment. For example, a minister of the crown is assigned responsibilities that are not germane to the municipal level; an exemption for cabinet records has no clear equivalent at the municipal level (but records of in-camera council meetings would be the closest match). Similar problems exist for the appeal mechanism and other requirements identified in the Act. These incongruities are to be addressed in the future by appropriate amendments. Regardless of these deficiencies for municipal records, the intent of the legislation identified in section 1 is quite clear and enjoys general support. Section 1 states:

1. The purposes of this Act are,
  - (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
    - (i) information should be available to the public,
    - (ii) necessary exemptions from the right of access should be limited and specific, and
    - (iii) decisions on the disclosure of government information should be reviewed independently of government; and
  - (b) to protect the privacy of individuals

with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

The definition of record is not media dependent - it is information regardless of the storage medium. Also, any record which can be created from a machine-readable record (non-standard reports) may be requested under the act.

For municipalities, the major changes to the act are:

1. The definition of an "institution."

If the institution is the entire municipality, the safeguards against data sharing in the act will be subverted. In large municipalities this would be contrary to the intent of the act.

2. The definition of the "head" of an institution.

Closely linked to the above definition, the designation of the "head" for the purposes of the act is problematic. If the institution is the municipality and the head is the mayor or chairman, such individuals, can be compromised as they have little real authority over agencies, boards, commissions, and municipal corporations. The direct reporting relationship of department heads to council and their responsibilities for all operational matters in their departments suggest that a more diffuse responsibility should be considered.

Other major issues include:

1. Will municipalities be required to produce lists of their classes of records and a compilation of their personal information banks?

The Quebec legislation requires that

personal information banks, not classes of records, be described by municipalities. There has been some resistance to this requirement, with few small municipalities complying. Lacking descriptions of general classes of records, the right of access is rather hollow - one cannot request what one does not know exists.

2. Will the duties of the access and privacy commissioner be extended for municipalities?

Such an extension would reflect the third principle of the act stated in section 1(a)(iii):

decisions on the disclosure of government information should be reviewed independently.

In addition to these major problems in wording and intent, there are numerous small editorial amendments required to adapt the act for the municipal environment.

Benefits of this act for researchers using municipal records are:

1. All municipal records will be open to research except those covered by an exemption. These exemptions are to be interpreted narrowly, to favour opening government records.
2. Requests for information must be satisfied within a specific time. Requested extensions can be appealed to the access and privacy commissioner.
3. All researchers will be accorded the same access privileges.
4. Costs for copies and search time are uniform and controlled by regulation.
5. Municipalities will have to improve their information management practices. Raising the level of concern about their

documentation should ultimately produce a more consistent archival record.

6. Researchers will be able to see active and inactive departmental records, subject to exemptions, not just the archival records.

Major disadvantages of this act for researchers using municipal records are:

1. The definition of personal information does not expire until 30 years after the death of an individual. As the death date may be difficult to establish, some records will be closed by this provision.
2. Pre-existing access rights are preserved by Section 62 except for personal information. Thus, assessment rolls, voters' lists, and property and building related information will no longer be available for research until 30 years after the death of the individual being researched.

### **General Commentary**

Deciding to extend the act to municipalities in 1987 was the result of a coalition between the Conservative Party and the New Democratic Party during a minority government. Initially opposed by the attorney general, Ian Scott, the extension is now generally accepted. Discussions of required changes have been initiated with municipal organizations and other interested parties by the Freedom of Information and Privacy Branch of the Management Board of Cabinet. Draft amending legislation should be tabled by the spring of 1989 to provide sufficient time for municipalities to prepare for implementation after committee hearings and final passage.

Researchers should be concerned about the privacy protection provisions of the act. While Section 21(1)(e) appears to support anonymized research, it is in direct conflict

with Section 62 (supra) and with Section 42(c) regarding disclosure for a purpose consistent with that for which it was obtained. (Assessment data is collected for administering a property tax collection program - not for genealogical or local history research.)

Those whose livelihoods or interests lead them into municipal records should become familiar with this legislation. The act is long and complex because it requires a balance between the competing rights of access and privacy. None the less, it will become both a barrier and a conduit for researchers. Appropriate amendments, such as that proposed by the Ontario Association of Archivists (OAA) in their excellent submission to the Standing Committee hearings on Bill 34, must be developed quickly.

The OAA brief suggested that historical research be defined as an activity that is in the "public interest." Although this purpose would provide a more positive response to research uses of personal information, it is flawed in creating a special category for *historical* research. Such an emphasis, while understandable for archivists, indirectly counters other legitimate research projects which use active and inactive records that are not yet archival. Notwithstanding this oversight, the proposal has obvious merits, and it can be reworded to reflect broader research interests. Urbanists should be prepared to act quickly and effectively when the amending legislation is tabled.

### **Notes**

<sup>1</sup> H. G. Jones, *Local Government Records: An Introduction to their Management, Preservation and Use* (Nashville: American Association for State and Local History, 1980).

<sup>2</sup> For an excellent summary of these trends see M. D. Kirby, "Access to Information and Privacy: the ten information commandments," *Archivaria*, 23 (Winter 1986-87): 4-15.

<sup>3</sup> La loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels was passed by the Parti *Québécois* government in June 1982. Because the law affected a wide range of organizations, most of it did not come into effect for two years. The Quebec law covers approximately 3,500 organizations — 26 government departments; 166 government agencies; statutory boards and crown corporations; 504 educational institutions; 678 institutions in the health and social services sector; and 2,180 local authorities.

<sup>4</sup> A recent all-party report reviewing the federal legislation provides an excellent general overview of the issues, including recommendation 7.7 which suggests extending federal privacy probation laws to include the federally regulated private sector. This suggestion has prompted the Canadian Information Processing Society (CIPS) to develop and advocate voluntary practices in keeping with OECD Guidelines. Canada. House of Commons. Standing Committee on Justice and the Solicitor General. *Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Queen's Printer, 1987).