

# ***Access to Information***

## ***What Is It and Why Does It Matter?***

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**Right to Know Week 2013**

**Whitehorse Chamber of Commerce Speech, September 25, 2013**

### **Opening Remarks**

Good morning and thank you for allowing me to talk to you today about the importance of access to information laws.

This week is Right to Know Week in Canada.

The purpose of Right to Know Week is to raise awareness about citizens' right to access information held by public bodies – governments generally – and promote freedom of information as a fundamental democratic right and a vehicle to support good governance.

Each year on September 28 Right to Know Day is officially celebrated in over 40 nations worldwide.

Canada and other nations have chosen to make it a week long affair to allow for greater awareness.

Today I want to share with you some background on access to information laws and provide you with the current state of these laws.

I will also share with you the significance of these laws to citizens and businesses and why these laws must be preserved.

### **Background to Access to Information Laws**

Access to information laws have been part of Canada's legal landscape for over 25 years with the first law, the *Federal Access to Information Act*, passed in 1986.

In the early 1990s, Provinces and Territories enacted their own laws.

Yukon passed the *Access to Information and Protection of Privacy Act* in 1995.

Access to information laws were developed by governments to facilitate a citizen's right of access to information held by public bodies as a vehicle to promote democracy and accountability.

Fundamentally, these laws were developed to provide citizens with access to government information in order to evaluate the decisions made by government.

Information obtained through access to information regimes can be used by citizens to decide whether government is fulfilling its mandate in a responsible, accountable fashion.

Citizens can use the information learned from access to information processes come election day.

### **Overview of Yukon's Access to Information Law**

Yukon's *Access to Information and Protection of Privacy Act*, which I will refer to as "the ATIPP Act", does two things:

- it provides a right to individuals to access records held by public bodies, which includes government, and
- it requires that public bodies follow rules regarding the collection, use and disclosure of personal information about individuals.

Under the ATIPP Act, an individual may request access to any information held by public bodies and public bodies are required to provide access to the information unless an exception applies.

The ATIPP Act sets out 11 exceptions to the right of access.

Most of these are discretionary exceptions, meaning that a public body is not required to withhold the information subject to an exception.

Rather, it must make a decision, upon receiving a request for access, whether to release the information or records.

There are nine discretionary exceptions under the ATIPP Act.

A public body must decide whether to disclose the information to the person requesting access to it when the record contains:

- policy advice, recommendations or draft regulations,
- legal advice,
- information that is harmful to the financial or economic interests of the public body,
- information that is harmful to:
  - law enforcement,
  - a complaint or investigation involving harassment,

- intergovernmental relations or negotiations,
- the conservation of heritage sites, and
- individual or public safety, and
- information that will be published within 90 days.

There are also three mandatory exceptions under the ATIPP Act.

A mandatory exception requires a public body to refuse to disclose information containing:

- a confidence of the Executive Council or its committees, or
- that is harmful to personal privacy or the business interests of a third party.

The ATIPP Act identifies that upon receiving a request for access to information, a public body must:

- assist applicants and respond openly and accurately to a request,
- respond within 30 days, or 60 days if it extends the time,
- each response must identify:
  - whether the applicant is entitled to the records,
  - how access will be provided,
  - the reasons for refusing access,
  - the provision of the Act relied upon to refuse access, and
  - information about who to contact with questions.

### **Use of Access to Information Laws**

Use of access to information laws has changed since these laws first came into effect.

The primary uses of the laws were political in nature with most requests coming from members of the opposition and the media.

As citizens became aware of these laws and their rights, citizens began using access to information laws for their own ends.

Today, many of the users of access to information laws are individuals or businesses seeking information relating to administrative activities that immediately affects them.<sup>1</sup>

Individuals tend to use these laws to seek information about decisions to deny benefits while businesses are seeking information about adverse regulatory or procurement decisions.

These new uses and benefits associated with the use expand the reasons why access to information laws are important, which now include:

- they discourage arbitrary state action and protect the basic right to due process and equal protection of the law,
- they control corruption through access to information about procurement processes and successful bids by using this information to hold public bodies accountable for these practices, and
- they enable citizens the ability to evaluate decisions made about conferring or withholding benefits or about whether policy decisions that directly affect individuals are made using sound analysis.

### **Government's Response**

The new demands placed on public bodies by the increasing use of access to information laws has strained the resources public bodies have in place to manage access to information requests.

Public bodies often cite that they are unable to meet the timelines associated with access requests citing lack of resources as the reason.

The result is that many public bodies are not meeting timelines specified under the laws which cause significant delays for applicants in receiving the information requested.

Responding in a timely way to an access to information request is vital to the ability of the access system to function properly<sup>2</sup>.

It has been noted that delay is a classical way of effectively denying requests<sup>3</sup>.

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<sup>1</sup> Access to Government Information: An Overview of Issues, Roberts, A., Public Management, Electronic journal, Issue No. 2, October 22, 2003.

<sup>2</sup> *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, Centre for Law and Democracy, September 2012, p.10.

<sup>3</sup> *Ibid.*

Use of these Acts by media and political parties has also increased significantly over the years adding increased pressures on public bodies in terms of their ability to meet response times and requirements.

More and more, news stories indicate that “information was obtained under access to information laws” which provides the basis for a news story.

Increased use of these laws has had a significant effect on the accountability of public bodies, shedding light on some questionable practices that public bodies across Canada have had to account for.

I am sure you have all heard the news about our Senators’ inappropriate spending. Information that shed light on these improper expenditures was acquired through access to information requests.

Because of access to information laws, citizens became aware of these improper expenditures by Senators, which, according to news reports, amount to hundreds of thousands of dollars of taxpayer money.

You have to wonder if we would have ever found out were it not for access to information laws.

In response to the pressures on public bodies due to access to information laws, public bodies have reacted both positively and negatively.

In British Columbia, the Information and Privacy Commissioner conducted an investigation into BC Government’s record keeping practices after receiving several complaints that the Premier’s office would return requests for access to information stamped “no records available”.

During her investigation, the Information and Privacy Commissioner found that 45% of requests for access to information to the Premier’s office came back stamped this way.

This led the Information and Privacy Commissioner to conclude that BC Government is engaging in the practice of “oral government” as an attempt to avoid having to release sensitive government information under access to information laws.<sup>4</sup>

The practice of oral government is not a problem unique to BC, as jurisdictions across Canada are experiencing similar issues.

The movement toward oral government has prompted Information and Privacy Commissioners across Canada to call for legislators to take action against this practice.

In some jurisdictions in Canada there have been allegations that government officials are using personal email accounts and cell phones to conduct government business to avoid having to disclose these records under access to information laws.

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<sup>4</sup> Canada’s oral government culture, Gary Mason, Globe and Mail (Mar. 08 2013)

Unfortunately for these officials, and fortunately for us citizens, the information stored in these personal accounts and devices is most likely subject to access to information laws where the official is engaged in government business when using them.

More drastic measures have also been taken by public bodies to avoid having to release information.

Some governments have taken to amending access to information laws or enacting new laws that are paramount to the access to information laws, both with the purpose of creating additional exceptions to the right of access to information.

As an example, the *Canadian Access to Information Act* is overruled by 60 pieces of legislation, Alberta's 38 and Saskatchewan's 26.<sup>5</sup> In Yukon there are 16 laws that create additional exceptions to the right of access to information.

The Newfoundland *Access to Information and Protection of Privacy Act* was recently amended by expanding what information can be exempted under an access request for cabinet records and by including a provision that allows public bodies to exempt information found by them to be frivolous, systematic or repetitive.

These amendments have been called "the biggest step backward in access in Canada's recent memory."<sup>6</sup>

Access laws that are overruled by a patchwork of legislation will not be of much use.<sup>7</sup>

Actions taken by public bodies in response to increasing pressures has not been all bad. Some public bodies have really stepped up and taken positive steps towards demonstrating accountability for access to information.

More and more we are seeing public bodies move toward a model of accountability and transparency.

This means they are making a concerted effort to make information more accessible to the public without the need to use access to information laws to access information – this is a really positive move that is supported by Information and Privacy Commissioners across the Country!

For example:

The Government of Alberta is doing many positive things to promote accountability and transparency.

On April 23, 2012, the Premier of Alberta appointed an Associate Minister of Accountability, Transparency and Transformation.

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<sup>5</sup> *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, Centre for Law and Democracy, September 2012, p.14.

<sup>6</sup> Newfoundland passes Bill 29 to amend Access to Information legislation, Belinda Atzner, June 15, 2012.

<sup>7</sup> *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, Centre for Law and Democracy, September 2012, p.14.

The mandate of this Associate Minister is to support actions to strengthen accountability and transparency, specifically by reviewing Alberta's *Freedom of Information and Protection of Privacy Act* and making recommendations for amendments.

The Associate Minister is also responsible for developing transparency legislation.

In carrying out his duties, Associate Minister Scott is expected to review best practices in other jurisdictions as a means to make the Government of Alberta a leader in accountability and transparency.

Government of Alberta has also created the Alberta Open Data Portal which it describes as "a single access point for publicly available raw data collected by the Government"<sup>8</sup>.

Government of Alberta posts the expenses of all its Government officials on its website in a searchable database as a measure to promote proper spending by Government officials<sup>9</sup>.

Government of Alberta in collaboration with the Government of Canada also developed an Oil Sands Information Portal as a measure to be more accountable and to minimize the number of access to information requests it had to process each year which were in the thousands<sup>10</sup>.

The City of Nanaimo, several years ago, created an open data catalogue where certain types of information are accessible online, including bid opportunities, building permit applications, business licences, and development applications<sup>11</sup>.

Vancouver Police Department, also several years ago, began publishing on its website information released in response to an access to information request<sup>12</sup>.

Recently, the Yukon Government, Department of Highways and Public Works introduced an enhanced procurement regime. One of the purposes identified for this new regime is to promote transparency with respect to its procurement practices.

Some governments have spoken publicly about the need to promote transparent government and are taking steps towards this model.

### **Centre for Law and Democracy Study**

A recent study published in September 2012 by the Centre for Law and Democracy indicated that there are severe problems with access to information frameworks across Canada.<sup>13</sup>

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<sup>8</sup> Alberta Government website: <http://data.alberta.ca/>

<sup>9</sup> Alberta Government website: [http://www.servicealberta.gov.ab.ca/minister\\_expenses/Reports.cfm?path=sa](http://www.servicealberta.gov.ab.ca/minister_expenses/Reports.cfm?path=sa)

<sup>10</sup> Alberta Government website: <http://environment.alberta.ca/apps/osip/>

<sup>11</sup> City of Nanaimo website: <http://data.nanaimo.ca/>

<sup>12</sup> Vancouver Police Department website: <http://vancouver.ca/police/organization/public-affairs/freedom-of-information.html>

The top three problems identified with Canada's access to information laws in the study are:

- limits on the scope in terms of public authorities,
- procedural weaknesses, and
- overly broad regimes of exceptions.<sup>14</sup>

Each jurisdiction in Canada, including the Yukon, were analysed in seven categories and were scored using predetermined criteria for assessing the strength of an access to information regime as compared to those found in other countries.

1. Right of Access:

Yukon scored among the highest at 4 out of 6 for including a clear presumption in favour of disclosure in the ATIPP Act and for including that the role of access is to foster accountability in public bodies.

All jurisdictions lost points for the right of access being less than a constitutional, free standing right.

2. Scope:

Yukon scored medium at 18 out of 30 due to the exclusions of the offices of the Legislative Assembly from the ATIPP Act.

Most jurisdictions in Canada were noted to have similar exclusions.

3. Requesting access procedures:

Yukon scored among the highest at 21 out of 30 due to the ATIPP Act having clear access procedures set out in the ATIPP Act.

All jurisdictions lost points in this category for not meeting legislated timeframes for response and for charging exorbitant fees.

The report identifies that delays in responding and the charging of exorbitant fees effectively denies access to information.

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<sup>13</sup> *Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions*, Centre for Law and Democracy, September 2012, p.1.

<sup>14</sup> *Ibid.*

These two areas were identified as “in need of urgent reform since they undercut the entire functionality of Canada’s access system and impact Canadians in every jurisdiction”<sup>15</sup>.

4. Exceptions and Refusals:

Yukon scored medium at 16 out of 20 due to is the long list of exceptions under the ATIPP Act.

All jurisdictions lost points for the inclusion of the exception for government deliberations, which the report identifies as overly broad in all Canadian jurisdictions, and the exception for awarding of government contracts, which the report indicates should always be disclosed in the interests of preventing corruption and promoting competition.

5. Appeals:

Yukon scored near the bottom of the pack at 21 out of 30 in this category.

Although the ATIPP Act provides authority for an independent oversight body, being the Information and Privacy Commissioner, Yukon lost points because the Information and Privacy Commissioner’s power is limited to the power to recommend which, as noted in the report, “severely curtails the power of the Information and Privacy Commissioner to ensure compliance with the law”<sup>16</sup>.

6. Sanctions and Protections:

Yukon scored near the bottom of the pack in this category as well at 4 out of 6.

It gained points for having broader sanctions than some other jurisdictions but lost points for not penalizing anyone who undermines the right to information.

Lack of whistleblower protection was also cited as a shortcoming in all jurisdictions in Canada.

7. Promotional Measures:

Yukon scored low in this category at 6 out of 16. However, most jurisdictions in Canada scored low here as well with the highest score at 10, 9 then 6.

The report notes that Canadian jurisdictions performed poorly in this category for the lack of any

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<sup>15</sup> *Ibid.*, p.12.

<sup>16</sup> *Ibid.*, p.17.

requirements to take positive action to promote and entrench the right to information, creating conditions where a culture of openness can flourish.

The Report identified that several things need to occur to strengthen Canada's access to information laws:

1. The right to information should be a fully recognized right under the Constitution of Canada.
2. Under each law:
  - a. the right of access should be extended to everyone,
  - b. all requests for access should be responded to as soon as possible and limited to only one extension of up to 30 days,
  - c. fees for requesting access to information should be eliminated and fees charged for providing records should be limited only to cost recovery, exclusive of employee time,
  - d. exceptions should be limited to harms based exceptions and subject to a broad public interest override,
  - e. exemptions protecting public interests should have an expiry date of 20 years,
  - f. information commissioners should be granted order making power,
  - g. sanctions should apply to anyone who wilfully undermines the right to information,
  - h. whistle blower protections should be expanded to include public disclosures,
  - i. public bodies should be required to provide appropriate training, establish an effective records management system and publish registers of all documents they hold,
  - j. information commissioners should be mandated to promote the right to information and educate the public about their rights, and
  - k. public bodies should be required to report to the information commissioner annually on activities undertaken to meet the obligations under the law.
3. All paramountcy clauses should be removed from other laws and replaced with a provision that states where a conflict arises between the law and an access to information law, the access to information law prevails.

Overall, the Report concludes that Canada's access to information regime ranked significantly lower than other parts of the world including Serbia, India and Slovenia with the highest ranking, BC, coming in at only 55%.

These results demonstrate that Canada's access to information regime needs a significant amount of work to provide Canadians a similar right of access to citizens in other countries.

With respect to Yukon's ATIPP Act, while it measures up to some extent in a few categories, the results of the study identify that Yukon's ATIPP Act requires several amendments to improve Yukoners' right of access to information held by public bodies.

The results of this study, the important uses of these Acts by Canadians, and the negative responses by public bodies to these laws should be a clear message to Canadians that we need to pay close attention to what public bodies are doing in terms of meeting their accountability under these laws.

We need to pay even closer attention to any amendments to these laws or paramountcies created to ensure that these laws aren't amended or overridden to the point that our right of access to information becomes so watered down as to become non-existent.

As Yukon's Information and Privacy Commissioner, I can assure you I will be working diligently over the next five years to engage Yukon Government and other public bodies on these issues in order to preserve and strengthen these fundamentally important rights for Yukoners.

### **Access to Information and Business**

As business leaders, I strongly encourage you to pay close attention to changes made to access to information laws given that any expansion to the exceptions to disclosure, statutory paramountcies that reduce access to information and a failure by government to properly manage these processes may negatively impact on your business.

Not only is it important for business leaders to have access to information as a means to support decision making on election day, many businesses rely on access to information laws to gain access to information where engagement with a public body negatively impacts their business.

It is common to see access requests from businesses in the areas of procurement, the granting of permits and the sale of or acquiring of land as an example of uses by business.

Here in the Yukon, Government is a major source of revenue for businesses.

As a result, decisions made by Yukon Government that impact your business should be of great concern to you.

If access to information laws didn't exist, you have to wonder what kind of information you'd have access to.

Businesses need access to information held by public bodies to properly manage their business.

When something goes wrong, a business needs to have access to information in order to determine what occurred so that decisions can be made about next steps.

Having access to information about the policies of public bodies and direction is vital to making strategic business planning decisions.

A business can use access to information laws to:

- learn about policy directions and decisions that may impact your business,
- learn more about procedures used in managing access to information requests as a means to improve your success rate when navigating these procedures, and
- evaluate decisions made by public bodies to ensure the public body is acting responsibly, fairly and lawfully in making decisions or use of procedures that may impact your business.

A business that uses access to information laws strategically will be position to make key decisions about the direction of the business and will be able to provide feedback prior to the implementation of any changes which may negatively impact the business.

Access to information laws are also important to businesses in another respect.

Businesses that enter into contracts with public bodies, such as Yukon Government, may be required to disclose sensitive business information as part of entering into the contract that may be subject to an access request.

As I mentioned, under the ATIPP Act a public body must not disclose sensitive business information to an applicant where all of the conditions set out in the Act are met.

Sensitive business information includes trade secrets or commercial, financial, labour relations, scientific or technical information of a third party.

If all of the conditions are not met, the exception does not apply and the public body must disclose the information to the applicant given that the applicant has a right of access to the public body's records unless an exception applies.

It is important for a business to know how these protections operate and are managed by public bodies that acquire your sensitive business information as part of doing business with you.

Businesses should ask public bodies how they manage these processes and what steps need to occur up front before a business discloses its sensitive business information to the public body.

Without access to information laws like the ATIPP Act, the rights afforded to a business to access information in the custody or control of public bodies would not exist, nor would the protections for sensitive business information.

As well, the ability to hold a government accountable, other than on election-day, would be non-existent.

## Conclusion

After over 20 years of being in effect, access to information laws in Canada, which should be broadening to provide greater access to information rights similar to those enjoyed by other countries in the world, are threatened with greater exclusions and paramountcies.

Public bodies, who should be well entrenched in an open, transparent, access to information culture after 20 years of experience with these laws, are stagnant in their access to information programs, are cutting back on resources, and in some cases are actively taking steps to avoid having to disclose information under these laws.

The result is that Canadians are getting less, not more, access to information and the process to gain this access is fraught with challenges.

In order to preserve the spirit and intent of these laws and the rights afforded to us under them, we need to be vigilant in our message to government that access to information rights matters to us and any movement towards reducing these rights won't be tolerated.

Over the coming years during my five year mandate, I will be reaching out to public bodies and asking that they evaluate their access to information programs to identify areas of weakness and to develop a strategy to address these gaps.

My hope is that through these efforts, access to information requests will be processed more efficiently and effectively and that Yukoners will have access to information from public bodies in a timely manner and with properly applied exceptions.

I will also be engaging public bodies in a discussion about ways to expand access to information through the development of publicly accessible information portals to enable Yukoners to access information without having to use the ATIPP Act.

I ask that you as citizens and business leaders think about what role you could play in preserving these laws and our rights under them and discuss your thoughts with Yukon Government or my office.

I welcome any opportunity to discuss these issues with you.

I greatly appreciate you taking the time out of your very busy day to hear my thoughts on access to information.

I hope that you leave here today more informed about access to information laws and that this information was beneficial to you.

I look forward to hearing from you and to getting to know you in the coming years.

Thank you.