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Spirit and Intent: Universities and Freedom of Information and Protection of Privacy - the B.C. Case *

by Ian Forsyth, Simon Fraser University Archives

Introduction

When looking at the number of access and privacy schemes created across Canada over the past twenty years, the different scope of their provisions and the organizations to which they apply is striking. Timing explains some of this. Legislation from the 70's and early 80's responded to more modest public expectations of openness and accountability that focused on federal or provincial government organizations. These laws, limited as they seem today, blazed the trail along which followed more comprehensive access and privacy legal codes.

With more complex government processes and public policy issues, the proliferation of information based products and services in today's economy, the increasing emphasis on knowledge and life-long learning for people in the work force, the widespread use of personal information, and the impact of rapid changes in data-communications technology; the public has become more interested, better informed, and concerned with their information rights. They want more accountable and responsive public bodies. Consequently, there is increasing demand for access to more information collected with public funds, and, at the same time, growing apprehension over the uncontrolled collection and use of personal data without adequate measures to protect personal privacy. Public opinion polls confirm these circumstances and, I believe, so too does the trend in freedom of information and protection of privacy statutes that apply to a much broader public sector. The last three access and privacy laws proclaimed in Canadian provinces all expanded their coverage to include local public bodies.

Eleven out of twelve provinces and territories have some form of access or privacy legislation on the books (Prince Edward Island alone has none). In six provinces and territories (Newfoundland & Labrador, New Brunswick, Nova Scotia, Manitoba, Yukon and Northwest Territories) the laws do not cover local public bodies, including colleges and universities. Ontario's law includes colleges and school boards but universities are subject to voluntary compliance. In British Columbia and the remaining three provinces (Alberta, Saskatchewan and Quebec), universities are amongst the broader local public sector that must comply with provincial access and privacy law.

This creates an interesting dichotomy amongst post-secondary education institutions across Canada. These different legal models provide a contrast with which to compare their development and application to universities.

Like most legislation, the development of B.C.'s law included a public consultation stage. By examining how B.C. universities responded to the draft bill, what legislative changes the government made to accommodate universities, and what affect the Act has had on university operations, I explore two issues:

* Do the laws apply differently to universities in B.C. and Ontario due to real and substantive differences in their policy positions?; and

* Are the needs of post-secondary education institutions so unique that they require special treatment within the regular access and privacy framework?

Comparative Analysis - B.C. Universities Make Their Case

B.C.'s four universities responded jointly during the public consultation stage. On the surface it appeared there were some key differences setting them apart from their Ontario counterparts. In their submission, the universities stated they fully supported the principles underlying, and the general thrust of, the B.C. Freedom of Information and Protection of Privacy Act. Unlike Ontario, there was no attempt to avoid compulsory compliance with the Act, no request for a special deal, and no explicit argument that to do otherwise would threaten the economic welfare and academic mission of universities. B.C. universities asked only:

* that the Act be interpreted or, if needed, amended to remove some uncertainties in how the Act would apply to a university; and

* that specific changes be made where the Act "would be contrary to the best interests of a university, its teaching, research and service."

This sounds reasonable. B.C.'s universities believed some sixteen changes to the Act were necessary or desirable. The changes fell into four categories:

* first, expand the Act's exclusions so that it would not apply to certain university records;

* second, broaden exceptions to the right of access giving the university more discretion to withhold information;

* next, suspend some key privacy rules in order to continue a number of established personal data collection and disclosure practices; and

* finally, allow an extended implementation time.

The Government Response

MLA Barry Jones prepared the report summarizing the public consultation stage. The title page of the report captures well the B.C. Government's response -- The Extension of Citizens' Information and Privacy Rights to all Public Bodies in British Columbia. Despite the many submissions by local public bodies stressing their uniqueness and expressing apprehension and reservations, the government held that the overall objective is to serve the broad public interest. The report conveys the political goal to emphasize the rights of the individual over a very broadly defined public sector, to promote a greater level of involvement, produce greater understanding, and make public bodies more open to their publics.

Addressing the specific problems that universities had with the access and privacy standards, the government responded only to those concerns that had no equivalent within the provincial public service.

Exclusions

The universities had requested three exclusions. First, faculty control over teaching and research materials. Second, as centers for research, universities enter into joint ventures with outside organizations, thus some records do not belong to them. Finally, because they are autonomous organizations with the power to make their own rules, universities believed records they created through their various adjudicative functions should fall within the Act's existing ambit of quasi-judicial procedures, thereby exempting them from the Act. They only persuaded the government that faculty research and lecture notes warranted special treatment. The government concluded that information about the nature of the research and related public funding should be public, but that the goal of public accountability is not furthered by providing access to research materials and lecture notes. The legislature amended the Act, therefore, to exclude faculty records containing research materials and lecture notes.

Exceptions

Universities sought several changes to the Act's exceptions, including the discretion not to disclose confidential assessments to the faculty, staff or students they are about; to withhold research information that could harm academic interests not protected by the existing financial, economic, or business interests exception; to deny access to the Board of Governors' deliberations and its committees thereby giving their records the same protection as that enjoyed by their equivalent government bodies; and to expand the criteria for disregarding access requests.

The government changes to exceptions were guided by the original spirit and intent of the legislation: first, to strike an appropriate balance between the needs of the institution and the rights of the individual, and second, to keep exceptions to the right of access limited and specific. Such was their balancing act when considering the issue of confidential assessments.

Public bodies said they needed candid, frank assessments, but universities acknowledged in their own submission "that those about whom decisions are made should see the material on which that decision is based." Despite this, they had asked for the discretion to withhold such assessments. The government's solution was to protect the identity of the individual providing a confidential assessment, while maintaining the Act's existing requirement to provide the personal information about the applicant, or at least a summary of it. This would strike a fair balance between the right of the individual to know what a person said about her or him and the institution's need for candor.

Turning to research data, the government decided it was not the intent of the law to enable an individual to obtain access to another's research.

Therefore, research data contained in the records of public bodies was added as an exception to disclosure where it could deprive an individual of priority of publication.

The government found it unnecessary to extend the exception of confidential deliberations to universities because, as the latter themselves pointed out, "...much of which a university...could not disclose or might refuse to disclose...falls under [other] exceptions in the Act."

When it came to nuisance requests, the government's reaction was that the existing provision fairly balanced the need to eliminate unreasonable requests and the need to avoid placing unreasonable limits on the public's right of access. They were willing to wait and see if experience demonstrated otherwise.

Privacy Protection

When considering the Act's new, high standards of privacy protection, B.C. universities asked that they be excused from practicing direct collection of personal information in a few key respects. They argued that indirect collection was necessary when considering prospective employee appointments and student recruitment because often they must widen the range of applications to further the academic, employment equity and other interests of a university. Similarly, the inability to collect personal information about past, present and prospective donors indirectly from third party sources would unduly restrict fund-raising activities, and, in any event, they did not consider its collection an undue invasion of personal privacy.

The universities asked that the Act clarify the circumstances in which they could collect personal information indirectly for honors and awards by specifying honorary degrees, scholarships, prizes and bursaries. The universities sought to clarify that the term "law enforcement" would include their own internal investigations and inquiries, thereby allowing them to collect personal information without the consent of an individual. They also lobbied that it was desirable to continue disclosing personal data about applicants, students and graduates to other educational institutions, student and alumni organizations. Last, they sought to shorten the minimum retention period for personal information used to make decisions affecting an individual. In the case of these proposals, universities stated that to require otherwise would unduly restrain or restrict their operations.

The government took its firmest line when it came to privacy protection, rejecting all but one of the changes requested by universities. It agreed that allowing indirect collection of personal information to determine suitability for an honorary degree, scholarship, prize or bursary is a reasonable amendment. All other changes to allow collection, use or disclosure without consent were dismissed. As for clarifying the meaning of several terms to provide for greater certainty of interpretation, the government ultimately resolved these minor issues through policy under the Act.

Implementation

The government was willing to provide an appropriate transition period. However, it found universities' suggestion of a two year delay after proclamation excessive since, in September 1992, it had advised local public bodies to begin planning for implementation. The government staggered development of the Act, first, to allow time for consultation at the local level, and second, to allow for a longer transition period enabling local public bodies to prepare for the legislation in an orderly and timely fashion. In addition, the provincial government committed to provide transitional support to local public bodies by adapting the information and reference tools already developed for provincial government bodies. For these reasons, it determined that one year after the revised Act passed the legislature was an adequate period in which to prepare for implementation.

The Impact on B.C.'s Universities

What has the impact been on B.C.'s universities when they did not get all the changes they wanted? Fewer changes have had no adverse impact on the ability of universities to operate effectively. There has been no threat to their academic mission of teaching, research, scholarship and service; no undermining of their economic welfare. True, they are experiencing some difficulties in changing established business practices or creating new ones to ensure compliance with modern information and privacy standards; but it is a temporary condition that is ultimately reaping advantages. The benefits are a better quality of information and decisions, improved management and control of information resources, economy, efficiency, more transparent and effective administration, and increased public confidence and trust in the universities' stewardship of personal data.

More difficult to overcome than processes, however, is the traditional corporate culture of the university environment. Reflecting its medieval beginnings, the institutions pride themselves on being autonomous, collegial, self-governing communities of scholars that spurn bureaucracy and professional administration. Yet their strength is their very weakness. It has bred an organizational culture amongst some faculty who do not accept change to long-held views and values, especially when required by an authority outside the university. They view this challenge to a traditional style of self-governance as interference, particularly when this requires putting in place a professional bureaucracy. At best, these circumstances foster an attitude of resistance, and at worst, a reactionary defiance. The greatest challenge, therefore, is turning that opposition into acceptance by increasing awareness, educating and training people, and thereby demonstrating the benefits of such change.

Conclusions

What conclusions can we draw from the different experiences in Ontario and British Columbia?

First, the reason the laws apply differently to universities in B.C. and Ontario is not due to real and substantive differences between their policy positions. On the surface one would think their positions should be very different because the former are subject to mandatory and the other voluntary compliance. However, on closer examination the underlying cause for this difference is for reasons other than their policy positions. The changes that universities in both provinces said they required to accommodate their needs are strikingly similar. The real difference lies elsewhere in the political environment. Ontario universities got what they wanted because they convinced the government of the day that their needs were unique and that they did indeed require special treatment. Thus, voluntary compliance was permitted with the promise to develop guidelines consistent with the Act. This effectively gave Ontario's universities the discretion to define what information and privacy rights and responsibilities they would apply to themselves. By contrast, the political philosophy in B.C. was to level the playing field, to put more power back in the hands of citizens and re-democratize government's public policy process. Introducing a set of information and privacy principles was the means to strengthen individual democratic rights, restore the balance between citizens and government, and provide open, accountable governance. Within this political context the question for B.C.'s universities was never one of voluntary versus mandatory compliance. There never was any question that the law would cover local public bodies, only what legislative option would be used to achieve this goal.

This raises the question whether the post-secondary education sector indeed has unique needs that require special treatment. On the basis of the very limited changes the B.C. government was willing to make for universities, they did not accept that their circumstances were unique. Why?

The government decided for reasons of flexibility, consistency and efficiency that the best legislative option was simply to amend the existing legislation. In the end, it did not accept the argument that each local public body was so unique that its specific needs could not be accommodated under the Act -- that it required special treatment. It concluded instead that, despite the different sizes and complexities of local public bodies, the Act was flexible enough to accommodate all organizations because they share one similarity -- they all hold two kinds of information: general information and personal information. The government recognized that information is the tie that binds all organizations together within the access and privacy framework. It further recognized that while differences exist between various public sector bodies, it is essential that those differences, rather than be accentuated, be accommodated by consistent and equal information and privacy standards. Moreover, similar information should be available from all public bodies and access and privacy rights should be constant between public bodies.

Finally, they considered the practical point of administrative efficiencies. A detailed review revealed that the majority of information and privacy issues are common to public bodies. Only a minority of issues were truly unique to local public bodies with no parallel at the provincial government level. An assessment of these specific issues further determined that they could be addressed without departing from the standard of openness and privacy protection in the existing law. The conclusion was, therefore, that the existing Act, with amendments, would be adequate to deal effectively with the few unique information and privacy issues affecting all local public bodies. So, unlike Ontario's universities, whose premise is that special treatment is necessary to accommodate their unique needs, the B.C. government concluded otherwise. With practical experience, I believe B.C.'s universities will conclude the same.

It remains to see whether voluntary compliance satisfactorily emulates the legislative framework. Comparing the experiences of Ontario and B.C. to date, I am not convinced voluntary compliance is necessary or better. Looking at Ontario universities' guidelines, they have, in my opinion, subverted the spirit and intent of access and privacy rights by reserving for themselves considerable latitude in the application of access exceptions and privacy standards. A number of exceptions and privacy protection measures, rather than being specific and limited, are vague and broad. In the end, the fundamental difference between the B.C. and Ontario experiences may be that the rights of the individual and the university are more equal and balanced in one province than in the other.

** This article is an abbreviated version of a paper delivered at the 1996 Association of Canadian Archivists Conference. Garron Wells, University of Toronto Archivist, presented a paper describing the Ontario case and Jim Lewis from the Archives of Ontario provided a commentary. Ian Forsyth is the University Archivist at Simon Fraser University.*

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