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Canadian Focus: In the year since Canada and Abroad was last published, Prince Edward Island has joined the access and privacy club, passing a freedom of information and protection of privacy law and naming Karen Rose as the first Information and Privacy Commissioner. . . Nova Scotia's Tory government has substantially raised the fees associated with its Freedom of Information and Protection of Privacy Act. Cost of making an application has risen from $5 to $25, search time now costs $15 per half hour, and an appeal, which had been free, now costs $25. The opposition NDP has been on the receiving end of the increases, racking up $2,665 in search time for seven requests, including a cost estimate of $1,000 for travel expenses for four senior officials in the premier's office. Review Officer Darce Fardy told the premier's office that it "could substantially reduce the estimate" and it has now claimed it will cost only $500. . . Ann Cavoukian, Ontario's Information and Privacy Commissioner, has expressed her disappointment with the government's decision not to introduce private sector privacy legislation this session. She noted that "the absence of provincial privacy legislation will deter the adoption of new information technology in [the health] sector. Inconsistent health privacy rules will pose a barrier to initiatives such as the integrated delivery of health care services, primary care reform and the advancement of electronic health records, and will unnecessarily confuse the public. There remains a pressing need to introduce much-needed protections in this essential area of our society." She closed by observing that "[the] Government has lost a unique opportunity to provide the leadership vital to Ontario. Our need for privacy, in all aspects of our lives, will only increase as we move forward in this new century."

Recommendations for ATIA Reform Seem to be on Hold

Last October the Information Commissioner issued a special report critical of the recommendations of the government's access task force. The Information Commissioner explained in some detail why many of the task force's proposals benefited no one but government institutions, while others were too timid or wrong-headed. He then turned to his own recommendations, including quite detailed plans to

overhaul the exclusion for Cabinet confidences and a number of other exemptions. With the addition of Information Commissioner John Reid's recommendations, the federal government probably has more ideas about changing the Access to Information Act currently on the table in one form or another than it has ever had at one time. But despite this buffet of recommendations, it appears highly likely that neither the Chretien government nor Parliament will do anything. Reid is the highest government official who has recommended changes. The access task force was made up of staff from a several agencies, including the Department of Justice and Treasury Board, the two main government players, but no one at the ministerial level has embraced the changes. The current situation seems much like a replay of the Parliamentary Standing Committee's review of the Access to Information Act and the Privacy Act in 1987. At that time, the Committee made a number of substantive recommendations, the government replied in essence that it disagreed with the Committee's findings, and nothing happened.

The likelihood that all this work will go for naught cuts both ways. The Information Commissioner, joined by many critics inside and outside the government, will be content if the task force's recommendations are forgotten. But, while neither side may not yet have offered a perfect solution to the various problems of the Access Act, the sheer quantity of thought that has gone into this process ought to yield something with the potential of evolving into an acceptable solution to some of the problems. The Access to Information Act is a first-generation statute that has been eclipsed by many of its provincial counterparts. It is a statute that does not need discarding, but does need fixing and it is unfortunate that both sides have been this engaged without being able to reach a meeting of the minds on at least some of its shortcomings.

Reid's report surveys the recommendations on both sides. He ticks off the proposals made by the access task force, grouping them in pro-disclosure and anti-disclosure categories. Those favoring openness include a reduction in the Cabinet confidences exclusion from 20 to 15 years, a reduction in the advice and recommendations exemption from a comparable 20 years to 15 years, limiting the period of protection for five years for rejected plans (or those not approved) relating to personnel management and administration, and broadening the public interest override concerning third-party information to include the public interest in consumer protection. However, for Reid, the negatives far outweigh the positives. The recommendations that would make access more difficult include excluding public servants' notes; exempting advice or recommendations made by contractors; excluding notes, analyses or draft decisions prepared by members of quasi-judicial bodies; excluding notes, analyses or draft decisions prepared by persons in judicial or quasi-judicial positions in the military justice system; excluding records seized by the government in the course of a criminal investigation; excluding records obtained by government in a civil proceeding under an implied promise of confidentiality; exempting critical infrastructure information provided by the private sector; exempting draft internal audit reports and related audit working papers; and excluding the disclosure of policy options presented to Cabinet after a decision is made, opting instead for a blanket 15 year exclusion for all Cabinet confidences. "Why, one must ask, did the Task Force choose to call for so many new exclusions rather than exemptions?" Reid's explanation: "This approach is intended to limit the powers of the Information Commissioner and the Federal Court to conduct independent reviews of decisions to invoke exclusions."

One of the highlights of the task force's report had been the recommendation that institutions not presently covered be brought under the Act if the government appoints a majority of the institution's board members, if the government provides all the organization's funding through appropriations, the government owns a controlling interest, or the organization performs functions in an area of federal jurisdiction with respect to health and safety, the environment or economic security. Reid sharply criticized what he called the task force's conservative approach, noting that in 1986 the Parliamentary Committee had recommended the

inclusion of Crown corporations. He indicated that, to make matters worse, the task force recommended that inclusion of new institutions under the Act be left to the discretion of Cabinet. He pointed out that "this is a recipe for continued anomaly, discrimination and favouritism in decisions about what institutions are or are not covered by the Act. This approach is entirely out of step with other jurisdictions."

The task force also recommended changes to the fee schedule, based, according to Reid, on unsubstantiated folklore about rampant abuses. Reid noted that among the recommendations made by the task force on this issue are a requirement that requests specify a certain subject or record; that institutions, with the permission of the Information Commissioner, be allowed to refuse to respond to a request that is frivolous or vexatious; that institutions be allowed to aggregate similar requests from an individual or organization into a single request for fee purposes; that the application fee for a request be raised from $5 to $10; and that requesters be categorized into three groups – general, commercial, and large volume – for fee purposes. This is a scheme similar to what now exists in the U.S. and would allow agencies to charge a general requester a $10 application fee, an increased hourly rate for search and preparation time beyond the free five hours, and an increase in reproduction costs. A commercial requester would be charged a $10 application fee, all search and preparation time at increased rates, and all review time. Large volume requests, defined as those expected to exceed $10,000, would be charged a $10 application fee and all costs directly attributed to processing the request. While the report has some pluses for requesters – right of access to anyone in the world, right to request format of choice, fee waiver criteria set out in policy, and right to request a review of a fee denial to the Federal Court – Reid observed that "even these 'user-friendly' recommendations are tentative, incomplete and grudging."

Reid recommends a number of specific changes, including a sweeping adjustment to most of the exemptions, but he broadly focuses on changing the Cabinet confidences exclusion into an exemption subject to independent review that is far less onerous than what currently exists; establishing criteria for inclusion of institutions under the Act and requiring any institution that meets those criteria to be included in the schedule of covered institutions; clarifying the status of records kept in minister's offices; abolishing Section 24, which allows agencies to withhold records based on provisions in other statutes; adding incentives and penalties for failure to meet deadlines; and providing a legislatively defined mandate for access coordinators. Reid also agrees that a frivolous and vexatious standard similar to those in Ontario and British Columbia's statutes should be added. He noted that "better to face this issue head on than to penalize all requesters through the fee system. To avoid the real risk that this provision could be used by departments as a delaying tactic, when the Commissioner reviews a complaint that a department refused access on that basis, the Commissioner's ruling should be binding and final."

What is missing from these recommendations, and what many outsiders see as the single most important change based on experience, is the need for the Information Commissioner to have order-making powers similar to his provincial counterparts. Although provincial institutions may chafe at orders issued by provincial commissioners, there is a sense of resignation that the commissioner's order is the last word except in rare circumstances where the parties end up in court. But experience in the federal system has shown that institutions are unwilling, often for political reasons, to accept the recommendations of the Information Commissioner and, in the most egregious cases, actively work to undermine him. The Information Commissioner can then only go to court, a lengthy process that doesn't always provide a favorable result. More and more, institutions have been emboldened to take the Information Commissioner to court, effectively tying his investigations up for months more.

The Information Commissioner has been recommending changes to the Act for years and none of his recommendations have ever been adopted. Any realistic chance to amend the Act can only come if the sitting government decides to move forward. Although the Chretien government previously indicated it would work to amend both the Access Act and the Privacy Act, it has never followed through. At present, it looks like it has no intention to address any of the current recommendations.

The Provinces…

Ontario

Assistant Commissioner Tom Mitchinson has ruled that there is a compelling public interest in disclosure of certain records concerning nuclear safety. At the same time, he decided that other records containing technical analyses or information pertaining to MOX fuel should not be disclosed because the harm from disclosure outweighed the public interest. In his third order dealing with these records, both Ontario Hydro and the federal Department of Justice argued that the events of Sept. 11, 2001, had increased the risk from disclosure. But Mitchinson noted that "openness in government is an important principle, and fanciful or alarmist connections to terrorism are not a sufficient basis to find a public interest in non-disclosure of records that would otherwise meet the requirements of the first part of the [public interest] test." In applying the standard to the various categories of records, he pointed out that "Category II records contain information relating to nuclear safety, and consist of information and analysis that raise a strong public interest in disclosure. As stated earlier in this order, unless I was persuaded that there was a public interest in non-disclosure of this type of information sufficient to bring the public interest in disclosure below the threshold of 'compelling,' I would find that there was a compelling public interest in disclosing this type of information." Mitchinson found that the public interest in disclosure of these records outweighed the exemption protecting information received in confidence from another government or institution and the exemption protecting information whose disclosure could prejudice the competitive position or interfere with the contractual or negotiation position of a person, group of persons, or an organization. (Final Order No. PO-2072-F, Office of the Information and Privacy Commissioner/Ontario, Nov. 22, 2002)

Adjudicator Sherry Liang has ruled that section 9(1) of the municipal Act, which protects information provided in confidence by the Government of Ontario or another provincial or territorial government, can be claimed independently and need not rely on an exemption in the provincial Act as well. Liang noted that a line of previous IPC orders had found that a municipal agency must show that the information would be protected under the provincial Act as well. She then indicated that ""to the extent that there is also a suggestion in these cases that there is a direct link between the application of an exemption under the provincial Act, and the application of section 9(1) under the municipal Act, I have some reservations about such an approach. In my view, the applicability of an exemption under the provincial Act is not necessary and may not even be sufficient to the application of section 9(1)(d) of the municipal Act." She added that "a finding that the information would have been exempt had it remained in the hands of the provincial institution does not necessarily lead directly to a finding that the same information is exempt in the hands of a municipal institution. Likewise, a finding that certain information would *not* have been exempt in the hands of the provincial institution does not dictate a conclusion that the information is not exempt in the hands of the municipal institution." Instead, she relied on another line of orders adopting a fact-based approach that "essentially looked for evidence as to the nature of the confidentiality understanding surrounding the provision of the information." She observed that "although it may be helpful to determine whether information would have been exempt in the hands of the sending institution (such as through the application of the solicitor-client privilege), it is not a necessary path to take in order to reach a conclusion on the applicability of section 9(1) of

the Act." Applying the standard to the records, she found that the information had been provided by Crown counsel to the Toronto police in confidence. (Order No. MO-1581, Office of the Information and Privacy Commissioner/Ontario, Oct. 23, 2002)

Senior Adjudicator David Goodis has ruled that the Niagara Regional Police Services Board must reconsider its decision to charge an insurance company $2,500 for an accident reconstruction report rather than provide the raw data. The police argued that the report was publicly available and that the cost was determined by a by-law similar to those in other jurisdictions. Goodis admitted that the police had established that there was regularized system of access to traffic reconstruction records and that the fee schedule was spelled out in detail in the by-law. The insurer argued that the cost of the report bore no relation to the actual cost of reproduction, but Goodis pointed out that "once it is established that the records are 'publicly available,' the exemption applies, and this office is not in a position to inquire into whether (as the BC Commissioner put it) the alternative fee structure 'includes a profit element or only covers the seller's costs of production and sale.'" However, Goodis indicated that a recent decision by the Connecticut Supreme Court recognized that fee schedules could be set so high as to be contrary to the principle of public access, thus creating an absurd result. Goodis agreed with British Columbia Information and Privacy Commissioner David Loukidelis that the question to be resolved was whether the institution had appropriately exercised its discretion. Goodis suggested that such an exercise should include the reasons for seeking the records, whether the requester is an individual or organization, and whether the records already exist or would have to be created to respond to the request. He concluded that "the Police provided representations on the balance of convenience factors. . . While I see no apparent error on the face of those representations, it is not clear to me whether the Police have taken into account all of the relevant circumstances of this case. . ." (Order No. MO-1573, Office of the Information and Privacy Commissioner/Ontario, Sept. 24, 2002)

Adjudicator Sherry Liang has ruled that the Regional Municipality of Peel properly transferred a number of records to the Town of Caledon for processing. The case involved requests to both Peel and Caledon for the same kinds of records pertaining to development plans for the area. The requests were made by counsel to the Association of Aggregate Producers of Ontario for use in a hearing before the Ontario Municipal Board. Peel divided responsive records into three categories and transferred one entire category to Caledon for processing, telling the requester that the Town had a greater interest in the records than did the Region. Liang initially noted that a "greater interest" could be established if the record was created for or produced in the institution, or if it was the original recipient of the record. She noted that "I find that a number of the records at issue meet the requirement of [the transfer provision] that they be produced 'in or for' the Town. Where the records were created by others, I accept the Region's general submission that it received the records secondarily from the Town, except where this is contradicted by the record itself." However, because the Region had claimed the transfer provision so late in the process, Liang felt she needed to further explore the Region's reasons for the transfer. Liang concluded that "I am satisfied that the Town has a greater interest in the transferred records. . . I find that although the delay between the date of the request and the first transfer decision is excusable, there are no good reasons for the delay in making the last two transfer decisions. I also find that because of the unique circumstances before me, in particular, the simultaneous and identical request to the Town and the consequent likely identity of the transferred records with the records already before the Town for its decision, there is no meaningful prejudice to the appellant by reason of the late transfers." Liang also concluded that the Region had waived its exemption claims on records that it had allowed the attorney to review earlier. She noted that "I appreciate that the Region may have had worthy intentions in following the process that it did. It has submitted that it was seeking a reasonable and administratively feasible process for dealing with a broad request. I approve of the intentions; however, the manner in which they were carried out was flawed. A certain measure of informality between institutions and requesters in working through requests

is to be encouraged. Informal discussions will often serve to narrow, focus or clarify requests, particularly when they appear very broad at first glance. There is a point, however, where informality ends and the provisions of the law must govern. While the Act does not preclude informal discussions between institutions and requesters during the course of the institution's decision-making, I find that it does not allow for the type of practice represented in this case. It is not consistent with the spirit or the terms of the Act for an institution to grant a 'quick peek' sort of access, subject to its final decision." (Order No. MO-1494, Office of the Information and Privacy Commissioner/Ontario, Dec. 21, 2001)

Assistant Commissioner Tom Mitchinson has ruled that a memo from the Director of Crown Operations in the Toronto Region to the Attorney General concerning court delays is not legal advice protected by solicitor-client privilege, but that parts of the memo do contain recommendations protected by the exception for advice and recommendations. Mitchinson noted that "not all advice provided by management staff in the various Divisions of the Ministry of the Attorney General is necessarily or inherently legal advice protected by solicitor-client privilege. One must look to the nature of the advice itself, and distinguish between legal advice that warrants specific treatment in accordance with the common law requirements of solicitor-client privilege, and operational advice that should be considered under section 13(1) of the Act in the same manner that similar types of advice is handled in other institutions." He then pointed out that "any advice contained in the memorandum from the Director of Crown Operations to the Attorney General was operational and not legal in nature. The subject matter of the memorandum is trial delays, and the summary, analysis, explanations, advice and recommendations provided by the Director deal directly with this operational issue." But Mitchinson agreed that parts of the memorandum were protected as advice and recommendations. "Although I do not accept that the memorandum contains legal advice, I do accept that these portions of [the memo] consist of or would reveal suggested courses of action put forward by the Director of Crown Operations as the manager of the Toronto Region, which would be accepted or rejected by the Attorney General during the deliberative process of addressing trial delays." (Order No. PO-1994, Office of the Information and Privacy Commissioner/Ontario, Feb. 28, 2002)

Senior Adjudicator David Goodis has ruled that the Ministry of the Attorney General cannot apply the solicitor-client privilege to records of the Children's Lawyer for Ontario sent to outside counsel in relation to that office's representation of the requester. The requester was injured in a school bus accident when she was 10 years old. She collected accident benefits from her mother's insurer, but the insurer eventually decided to terminate benefits and asked to have her take a neuropsychological examination. The OCL represented the requester and opposed the examination. The requester asked for all OCL's records pertaining to herself. The institution identified about 3,700 responsive records and withheld about 1,000 pages under the solicitor-client privilege and the advice and recommendations exemption. The OCL claimed the privilege was between itself and outside counsel, but Goodis disagreed. He noted that "the appellant, not the OCL, is the party to both civil proceedings, and it is her rights and/or obligations, not the OCL's, that are to be determined by the court." He added that "while the OCL has control over procedural decisions made in the litigation, these decisions must be made strictly in the appellant's interest, which conflicts with the OCL's view that it is the client." He observed that "the relationship between the OCL and its outside counsel is properly characterized as one of agent-principal, rather than solicitor-client." Goodis indicated that "it is not reasonable for the OCL to expect that communications between it and its counsel in the ordinary course of the litigation would remain confidential as against the appellant, the individual for whom they are acting." Noting the "unusual circumstances" of the case, Goodis also dismissed the claim that the advice and recommendation exemption was applicable. He pointed out that "this exemption is designed to protect communications only within the context of the government making decisions and formulating policy *as a government*, not in its specialized role as an advocate representing the private interests of an individual in proceedings before a court. Here, any advice being given and any decisions being made are for the benefit of the child, not the OCL as a government

agency or the public at large." (Order No. PO-2006, Office of the Information and Privacy Commissioner/Ontario, April 19, 2002)

Assistant Commissioner Tom Mitchinson has ruled that the suggested definition of "advice" in the advice and recommendations exemption put forth by the Ministry of Northern Development and Mines is too broad. Mitchinson noted that "the Ministry's position that 'advice' should be broadly defined to include 'information, notification, cautions, or views where these relate to a government decision-making process' flies in the face of a long line of jurisprudence from this office defining the term 'advice and recommendations' that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law." Mitchinson further explained that "the format of a particular record, while frequently helpful in determining whether it contains 'advice' for the purposes of section 13(1), is not determinative of the issue. Rather, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain 'mere information' and what, if any, contain information that actually 'advises' the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing 'mere information,' then section 13(1) applies." (Order No. PO-2028, Office of the Information and Privacy Commissioner/Ontario, June 28, 2002)

Alberta

Adjudicator Dave Bell has ruled that Alberta Environment properly responded to a request concerning an investigation of a specific property. The applicant, who lived near the property, felt the agency had taken too much time in its investigation and that, based on the length of time elapsed without any indication of what was being done, the residents had a right to some kind of closure. Bell first agreed with the agency that it had law enforcement functions and that an administrative investigation qualified for protection under the law enforcement exemption. He then accepted the agency's claim that disclosure could harm the investigation. Bell noted that "it has showed a causal relationship between the disclosure and the harm alleged; the harm would constitute damage to the investigation; and the likelihood of harm is genuine and quite conceivable." Bell agreed that the agency had properly exercised its discretion in applying the law enforcement exemption. He added that "if it were any comfort to the Applicant, I would consider carefully whether to allow a public body to apply this exemption to the records of an investigation that was long dead. The evidence shows that this investigation is ongoing. Perhaps ironically, disclosure of the remaining records would likely undermine the protective efforts of both the Public Body and the Applicant." Noting that the agency had disclosed 960 pages, Bell dismissed the applicant's claim that disclosure of the remaining records was in the public interest. He pointed out that "I do not agree with the Applicant that disclosure of the third party personal information to him in the circumstances would promote the protection of the environment; in fact, it could have the opposite effect." (Order No. F2002-024, Office of the Information and Privacy Commissioner, Province of Alberta, Jan. 14)

Adjudicator Dave Bell has ruled that Alberta Sustainable Resource Development may disclose information about hunting allocations because they concern a license, permit or other similar discretionary benefit given for a commercial activity. Bell first found that responsive records in the possession of the Alberta Professional Outfitters Society were subject to the Freedom of Information and Protection of Privacy Act. He noted that "the Crown owns those records. As there is statutory control of those records in the Crown, as represented by the Minister of the Public Body who is the head of the Public Body, I find that those records are under the control of the Public Body." Although APOS actually granted the allocations, Bell

found it did so as a delegate of the public body. After thoroughly examining the nature of allocations, Bell concluded that "the responsive information in the records is information about a licence, permit or other discretionary benefit (namely, the allocations and the transfer of allocations) relating to a commercial activity, that a public body granted to the Third Parties and other third parties. Consequently, it would not be an unreasonable invasion to disclose the Third Parties' names and other third parties' names (whether printed names or signatures), as well as the nature of the licence, permit or other similar discretionary benefit." Bell considered the business information exemption, but found that the records would not disclose commercial or financial information of a third party, nor were they provided to the public body in confidence. (Order No. F2002-011, Office of the Information and Privacy Commissioner, Province of Alberta, Dec. 16, 2002)

Adjudicator Dave Bell has ruled that Alberta Children's Services can waive a requester's $25 application fee, but found in this case that the applicant had not shown that she was entitled to a waiver. Children's Services relied on language in the Freedom of Information and Protection of Privacy Regulation indicating that an applicant was "required to pay" the $25 application fee. Bell noted that "it is the Public Body's position that the interpretation of 'is required to pay' prevents the Public Body from waiving the initial fee. I disagree with this narrow interpretation." Instead, Bell pointed out that the statute allowed the head of a public body to excuse an applicant from paying "all or part of a fee." He observed that "in my view 'all or part of a fee' includes the initial fee for general information. Therefore, I conclude that when section 93 [previously section 87] is read together with sections 9 and 10 of the Regulation, the head of a public body has the discretion to waive the initial fee for general information if the provisions of section 93(4) are present." Having reached that conclusion, Bell went on to note that "the Applicant did not provide sufficient evidence nor did I see sufficient evidence on the face of the record to support a finding of public interest, particularly when the evidence is that the Public Body intends to release the final report." (Order No. F2002-028, Office of the Information and Privacy Commissioner, Province of Alberta, Dec. 19, 2002)

Adjudicator Dave Bell has ruled that notes made while checking the references supplied by a City of Calgary employee when applying for a position in another department are protected as information gathered to assess the employee's suitability for the job. Bell noted that the City had submitted an affidavit indicating that "the discussion with the Third Party occurred as a result of the Applicant's application for the position. If the Applicant had not applied for the position, the Third Party would not have been contacted to provide a reference check." Bell observed that "it is apparent from the text of the record that the reference check was made for the purpose of determining the Applicant's suitability for a new position and was not as a result of a performance review in her current employment position." Noting that the exemption was discretionary and that the public body had to show that it had exercised its discretion in refusing to disclose the information, Bell indicated that "the Public Body released fifteen pages of records to the Applicant, most of which had little or no severing. Therefore, I am satisfied that the Public Body has properly exercised its discretion." (Order No. F2002-008, Office of the Information and Privacy Commissioner, Province of Alberta, Dec. 20)

Investigator John Ennis has found that Alberta Research Council's collection of educational and work experience from its employees to be posted on the Council's intranet for use by authorized staff in presenting proposals for projects does not violate the Freedom of Information and Protection of Privacy Act. Ennis found that the collection was in line with the authority of s. 33, which allows a public body to collect information if it relates directly to an operating program or activity of the public body. Ennis noted that "so long as the system is confined to employment skills and qualifications, ARCI can easily show a direct relationship to its operating program. Presuming that the operating program is being evaluated by how well opportunities are being maximized, the test for necessity of [this program's] measures can be met in the case of every employee if in fact every employee is being considered for the task assignments that derive from application of the program. If an employee were in a category that was shunned by users of the system, then the necessity justification

breaks down. There is no evidence of such a category in this case." Observing that a public body could disclose information for a purpose consistent with the purpose for which it was collected, Ennis pointed out that "while the dispersal of employee qualifications data beyond the boundaries of a traditional human resources management office is no doubt uncomfortable for some employees, there is in that development a sense of distributed responsibility for advising on effective staff deployment, a legitimate approach to maximizing productivity in a complex research environment." Ennis concluded that ARCI might consider an "opt-out" provision in its system for employees in fixed post positions or in situations making participation in the system impracticable." (Investigation Report No. 2212, Office of the Information and Privacy Commissioner, Province of Alberta, Jan. 10)

Investigator Marilyn Mun has found that the Alberta Gaming and Liquor Commission has the authority to collect extensive amounts of personal information as part of its application for granting a licence/registration. Mun noted that "a background check, by its nature, involves the collection of information. The purpose of the application package is to collect information to enable AGLC to decide whether or not to grant a licence/registration. This is consistent with section 9 which states that a background check is conducted 'to enable the Commission to determine the eligibility of an applicant, licensee or a registrant . . .Section 9 also says the background check may include 'but is not limited' to an inquiry or investigation of an individual's honesty, and integrity, financial history and competence. Section 9.1 says AGLC may conduct 'any background check' that it considers necessary or appropriate. Therefore, I find that the personal information collected from the application package falls under the 'background check' authorized under section 9 and section 9.1 of the *Gaming and Liquor Regulation*." (Investigation Report No. F2002-IR-008, Office of the Information and Privacy Commissioner, Province of Alberta, Jan. 7)

Information and Privacy Commissioner Frank Work has issued his first annual report as Commissioner. Noting how the world of privacy has been affected by the terrorist attacks of Sept. 11, 2001, he pointed out that privacy is "an indication of respect for and trust of other human beings, a trust that has been shaken by terrorist attacks and crime. Technology and our quest for security militate strongly against privacy. However, despite our desire for ever greater security, according to Statistics Canada, the rate of violent crime has decreased every year since 1997. We must not allow our desire for a risk free world to drive us to turn our society into a prison." The Ministry of Government Services, one of whose jobs is to track government performance under the Freedom of Information and Protection of Privacy Act, has also published its annual report. That report indicates that provincial public bodies received 2,201 requests. Records were released in whole or in part in 35 percent of requests, while no records were found in 45 percent of the requests. Local bodies received 553 requests. Records were released in whole or in part 69 percent of the time, while no records were found in only 4 percent of requests.

British Columbia

Information and Privacy Commissioner David Loukidelis has ruled that an applicant cannot circumvent the finding of a previous order that her request to Simon Fraser University was an abuse of process by having her daughter request the same records. Loukidelis had earlier excused the university from responding to the original request for information concerning a harassment complaint filed by the original applicant. Simon Fraser then received a request from the daughter, including a waiver of her mother's privacy rights. The university told the daughter that she could have a severed copy of the three-page record as if she were a third party, but if she wanted total access to her mother's personal information, the university believed that would violate the previous order. Loukidelis noted that "SFU's contention that it is entitled to refuse to process access requests that it considers to be an abuse of process goes too far." But he pointed out that in his previous order "I decided that, in fairness, the original applicant should be held to the previous mediated outcome of her

original request. The same applies here. The applicant's request, to the extent it is based on the original applicant's consent, is an attempt to subvert [the previous order], which authorized SFU to disregard the original applicant's attempt to revisit her original access request." He added that "I consider it appropriate to apply the abuse of process principle in [the previous order] and therefore am not prepared to interfere with what SFU has done here. I consider it is appropriate to treat the applicant's access request as if she is at arm's length from the situation and as if the original applicant had not consented in writing to disclosure of her personal information to the applicant." Based on an assessment of the request as coming from a third party, Loukidelis agreed with the university's decisions to withhold personal information and advice and recommendations. (Order No. 02-57, Office of the Information and Privacy Commissioner, Province of British Columbia, Nov. 29, 2002)

Information and Privacy Commissioner David Loukidelis has ruled that the British Columbia Assessment Authority failed to explain adequately why certain documents appeared to be missing from its response concerning GST inclusion in assessments of real property for property tax purposes. Noting that the agency took five months to respond to the request, Loukidelis pointed out that "the BCAA has not provided any concrete evidence that its first response was, despite the two later disclosures, a complete response." He added that "at least some of [the gaps in documents alleged by the requester] are a reasonable basis for concluding that pages are missing from the BCAA's responses. Other alleged inconsistencies may or may not indicate that records are missing. Although the BCAA made submissions on the completeness of its response, it did not address any of the applicant's specific allegations about incompleteness." (Order No. 02-58, Office of the Information and Privacy Commissioner, Province of British Columbia, Dec. 10, 2002)

Adjudicator Michael Skinner has found that the Ministry of Children and Family Development has not shown that records pertaining to the requester and her child, who was no longer in the requester's legal custody, had been provided to the requester, even though records had been provided to her legal counsel on at least three occasions. Although the Ministry argued that it had previously disclosed the records, Skinner noted that "while I do not question the fact that previous disclosures occurred, the affidavit does not provide details of the previous disclosures. It is simply said that legal counsel told the analyst that counsel had 'disclosed records,' without identifying what records were disclosed. The lack of detail is important, since, s. 64 of the [Child, Family and Community Services Act] simply requires the disclosure of a party's 'intended evidence' where that party is requesting an order from a court in a proceeding brought under the CFCSA. The records thus produced may or may not be fully equivalent to what the applicant is now seeking – down to the level of severing of information within records – but without further evidence of what was produced, I am not prepared to treat such disclosures as effectively satisfying the request for access that is in issue here." Skinner added that "the problem, again, is that the public body has not established that the records disclosed to counsel are the same as the records sought here. Nor, in light of the conditions placed on disclosure to counsel, has the public body established that disclosure to her counsel can properly be treated as disclosure to the applicant." Noting that there was abundant evidence that the requester "has a proven history of confronting and harassing individuals who do not agree with her or who oppose her in any way," Skinner agreed that the Ministry could redact the personal information of third parties from the records. (Order No. 02-59, Office of the Information and Privacy Commissioner, Province of British Columbia, Dec. 17, 2002)

Nova Scotia

Review Officer Darce Fardy has recommended that the Executive Council disclose some portions of its agendas since they do no reflect the "substance of deliberations." He noted that "I agree that cabinet secrecy is an 'important exception to broad disclosure.' I also agree with the definition of 'advice' submitted by the Executive Council but I remain unconvinced that the agendas contain 'advice' as defined." He indicated that

some of the recommendations in the agendas reflected the substance of deliberations and were properly withheld, but he pointed out that "while I respect public bodies' sensitivity toward cabinet documents, they should be careful, in line with the purposes of the Act, not to throw a blanket exemption over all information that goes before or is prepared for cabinet." (Report No. FI-02-81, Review Officer, Province of Nova Scotia, Dec. 13, 2002)

Review Officer Darce Fardy has recommended that the Department of Community Services disclose certain records to an applicant pertaining to the applicant's request. He found that the solicitor-client privilege did not apply to a memo, pointing out that "in order for this to apply there must be an existing or contemplated relationship between a client and a solicitor. I conclude that there is no basis for a claim of either 'contemplated litigation privilege' or 'legal professional privilege' on this memorandum." He appended a note concerning the behavior of the applicant, observing that "in the past I have advised the applicant that he is abusing this legislation by filing countless applications over the past few years for his own personal information. . . Departments and the Review Officer are spending an inordinate amount of time on his applications and appeals. In other jurisdictions, the access legislation allows a public body to dismiss 'frivolous and vexatious' applications. The Nova Scotia Act contains no such provision in the expectation that the Act will be used responsibly. The great majority of applications meet that expectation." (Report No. FI-02-102, Review Officer, Province of Nova Scotia, Dec. 19, 2002)

Review Officer Darce Fardy has found that the Town of New Glasgow failed to respond to an application within the statutory time limits. Chiding the Town for its failure to respond, Fardy noted that "it is obvious that the Town, which, from its submissions has some experience dealing with Applications under this Act, was aware it was not meeting its obligations. The Review Officer should not be put in the position where he has to continually prompt a public body to respond to an Application." The Town complained about the frivolous nature of the application. Fardy sympathized with the Town's position, observing that "after reviewing the extensive representations provided by the Town in this matter, I have sympathy for the Town's frustration. However, as much as the Applicant's actions seem to trivialize the access to information process in the Act, even in jurisdictions where there is a frivolous and vexatious clause, the public body is still obligated to respond to the Applicant." (Report No. FI-02-97(M), Review Officer, Province of Nova Scotia, Dec. 13, 2002)

Review Officer Darce Fardy has recommended the Human Rights Commission disclose a memo containing third party information about the applicant. While he found the memo contained information about the third party's employment history which had been properly redacted, it also contained opinions about the applicant. Telling the Commission to release that information, Fardy noted that "these opinions are not the personal information of the third party but the personal information of the Applicant." (Report No. FI-02-98, Review Officer, Province of Nova Scotia, Jan. 17)

The Federal Courts…

In the last several months, the Supreme Court of Canada has seen an unusual flurry of access and privacy decisions – two procedural interpretations of the Privacy Act and its interaction with other federal statutes, and an interpretation of Quebec's Access to Information Act, which is likely to have an impact on the application of other provincial access laws as well.

In a 5-4 split, the Supreme Court of Canada has ruled that Quebec's Commission d'acces a l'information properly concluded that s. 34 of An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information creates a blanket exemption for any information produced for a member of the National Assembly. Reporter Rod Macdonell asked the financial resources management branch of the National Assembly for records outlining the office budgets of Assembly members. While the administrative records of the National Assembly are subject to the Act, records prepared for individual members are exempt unless the member consents to disclosure. The financial resources management branch denied the request, saying that, although the records were created for institutional bookkeeping purposes they were also produced "for" individual members. The Access Commission agreed that, once the records were shown to be produced "for" individual members, they were exempt and no further analysis was required. The case then went up through the Quebec courts, with the trial level court finding the Commission's decision unreasonable, while the appellate level court upheld the Commission's ruling in a split decision. From there, it was taken up by the Supreme Court. The majority rejected the idea that the Commission had failed to consider the broader purposes of the act. The majority noted that "this limited right of access demonstrates the legislature's intention of protecting the free exercise of the parliamentary function from inappropriate and arbitrary pressure, by giving the Member responsibility for the decision not to disclose, in relation both to the National Assembly and to the public, and by defining a sphere of confidentiality in the Member's work. The legislature has made a choice, by distinguishing what is open to public access without restriction from what is subject to the consent of the Member." The majority added that "the wording of s. 34 makes no distinction between documents that are purely administrative and documents that are associated with the decision-making process. That section requires that a person seeking access obtain the consent of the Member concerned for all of the documents covered by that section. It is written in precise terms: it is concerned only with whether the document is from the office of a Member of the National Assembly or was produced for that Member by the services of the National Assembly. The *Access Act* applies to those documents, but only on the conditions stated." The majority also rejected the claim that, if the National Assembly was a public body, then its component parts – the Members – must also be public bodies. The majority indicated that "the staff of the National Assembly belong to the public service, unlike the staff of a Member. A Member is not the National Assembly, just as a member of the board of directors of a company is not the company." The dissent insisted that the Commission erred in failing to consider the broad disclosure principles of the Act. "The effect of the Commissioner's interpretation is that the legislature enacted an incoherent statute, giving generous access to government information on one hand, and denying access, even in respect of matters relating to the day-to-day management of public funds by the legislative body, composed of the Members, on the other." The dissent added that "when s. 34 protects documents, it is for a specific purpose: the independence of a Member in performing his or her duties. Moreover, ss. 3 and 9 clearly state that the purpose of the *Access Act* is to allow public access to a portion of the documents kept by public bodies, including the National Assembly." The dissent found the distinction between a Member's staff and that of the National Assembly to be somewhat artificial. The dissent noted that "the fact that a Member has staff working exclusively for him or her facilitates the Member's work but says nothing about the Member's obligations of transparency under the *Access Act*." (*Roderick Macdonell v. Attorney General of Quebec and National Assembly and Commission d'acces a l'information, etal.*, No. 28092, Supreme Court of Canada, Nov. 1, 2002)

The Supreme Court has ruled that, since the Office of the Commissioner of Official Languages is subject to the Privacy Act, he must provide sufficient evidence to support his claim that disclosure of a witness statement taken during an investigation of a complaint filed by Robert Lavigne would be injurious to his ability to conduct investigations. The Court admitted that it was important for the Commissioner of Official Languages to conduct investigations in confidence so that witnesses would be forthcoming, but emphasized that he had to substantiate why the statement should not be disclosed to the subject-individual under the

Privacy Act. The Commissioner argued that disclosure of statements would be injurious to the investigatory process generally, but the court noted that "the Commissioner's decision must be based on real grounds that are connected to the specific case in issue. The evidence filed by the appellant shows that the Commissioner's decision not to disclose the personal information requested was based on the fact that [the witness] had not consented to disclosure, and does not establish what risk of injury to the Commissioner's investigations the latter might cause. If [the witness] had given permission, the Commissioner would have disclosed the information." The court rejected the Privacy Commissioner's claim that an investigator in his office should be able to make the decision as to whether disclosure would be injurious. The court noted that "the Director of Investigations in the Office of the Privacy Commissioner is not necessarily the person most suited to determining the best way for investigations to be conducted by the Commissioner of Official Languages." (*Commissioner of Official Languages v. Robert Lavigne*, No. 28188, Supreme Court of Canada, June 20, 2002)

The Supreme Court has ruled that provisions of the Privacy Act that make it mandatory for a court to hold an *in camera* hearing when an agency denies access to personal information based on a claim that disclosure could be injurious to foreign relations or national security conflict with the Charter of Rights and Freedoms. The court first noted that s. 51(2)(a) of the Privacy Act "mandates that the court hear the judicial review application or an appeal therefrom *in camera*." Clayton Ruby asked for personal information from the Canadian Security Intelligence Service in 1988; CSIS declined to either confirm or deny the existence of the records and Ruby took the case to court. The Supreme Court upheld the government's right to provide *ex parte* submissions to the lower courts. The Court noted that "accepting that it is appropriate for the government to refuse to disclose information when there is a legitimate exemption and accepting that it is not inappropriate for the government, when claiming an exemption, to refuse to confirm or deny the existence of information, it can only follow that the government must have the capacity to proceed *ex parte*." Following this conclusion, the Court indicated that *ex parte* and *in camera* submissions did not violate the level of procedural fairness required by s. 7 of the Charter. The Court observed that, in practice, the government and the courts only closed portions of such hearings involving the government's *in camera* submissions. The Court pointed out, however, that "contrary to the apparent practice referred to by the Solicitor General, the statute does not limit the *in camera* requirement to only those parts of a hearing that involve the merits of an exemption. It is not open to the parties, even on consent, to bypass the mandatory *in camera* requirements of s. 51. Nor is it open to a judge to conduct a hearing in open court in direct contradiction to the requirements of the statute, regardless of the proposal put forth by the parties. Unless the mandatory requirement is found to be unconstitutional and the section is 'read down' as a constitutional remedy, it cannot otherwise be interpreted to bypass its mandatory nature." The Court added that "the existence of this judicial practice makes clear, though, that the requirement that the entire hearing of a s. 41 application or appeal therefrom be heard *in camera*, as is required by s. 51(2)(a), is too stringent. The practice endorsed by the Solicitor General and courts alike demonstrates that the section is overbroad in closing the court to the public even where no concern exists to justify such a departure from the general principle of open courts." The Court concluded that "the appropriate remedy is therefore to read down s. 51(2)(a) so that it applies only to the *ex parte* submissions mandated by s. 51(3). A reviewing court retains the discretion, pursuant to s. 46, to conduct the remainder of the hearing or any portion thereof, either in public, or *in camera*, or *in camera* and *ex parte*." (*Clayton Charles Ruby v. Solicitor General of Canada*, No. 28029, Supreme Court of Canada, Nov. 21, 2002)

Privacy News…

Monitoring Privacy Implications of Canadian Databases Becomes Full-Time Job

The Sept. 11 attacks have spurred an accelerated trend towards the use of massive databases containing personal information. Canadian privacy professionals have been kept busy recently trying to keep abreast of this burgeoning crop of databases and to assess their privacy implications. While a clear lesson of Sept. 11 was the lack of coordinated use of data, the head-long rush of governments to amass or mine such databases has made it more necessary than ever for privacy commissioners to keep close tabs on the potential abusive aspects of the collection and use of such information.

Customs officials have announced a database of all travelers entering Canada. The database initially was intended to capture data on air travelers, but in October was expanded to take in passengers arriving by ship, train or bus. Privacy Commissioner George Radwanski has complained loudly about the database, expressing his concerns that the data could be used for other purposes, like tax probes. In a letter to Customs Minister Elinor Caplan, the provincial commissioners noted that "the database is overly broad and unnecessarily targets innocent Canadians for surveillance. The public interest in combating terrorism cannot be used as an excuse to expand the powers of the police, or other agencies of the state, for other purposes." And Radwanski said in an interview: "It is totally unacceptable for the government to use Sept. 11 as a cover, a Trojan horse, to be used for purposes other than terrorism."

The commissioners have also been united in their opposition to "lawful access" proposals that would allow Canadian law enforcement agencies to conduct surveillance on Internet and other electronic communications. In a letter sent to several Ministers, Radwanski noted that "the interception and monitoring of private communications is a highly intrusive activity that strikes at the heart of the right to privacy. If Canadians can no longer feel secure that their web surfing and their electronic communications are in fact private, this will mark a grave, needless and unjustifiable deterioration of privacy rights in our country." Many provincial commissioners questioned the need for such a policy, including British Columbia Information and Privacy Commissioner David Loukidelis. In a letter to the Ministers, Loukidelis indicated that "it is striking that the consultation document offers no evidence to support any suggestion that law enforcement or national security activities have been, or could reasonably be expected to be, impaired because existing laws respecting interception or search and seizure are inadequate given present technologies or trends in communication technologies or information flows. In the absence of any persuasive case, based on concrete evidence, that existing Canadian law is inadequate, I question the need for new laws. I am deeply concerned that – bearing in mind that the lawful access proposals are in various respects rather vague at this stage – the proposals weaken existing legal protections for privacy in Canada without a clear and compelling justification."

Yet another database that has caught Radwanski's eye is the Firearms Interest Police database, managed by the RCMP, but dependent on data entries from police across the country. Radwanski recently wrote to Alliance MP Garry Breitkreuz, explaining that he had no power under the Privacy Act to order the Justice Department to revise the database. He noted that "the problem, as I see it, is that the responsibility for data quality is dispersed among the 900 law enforcement and firearms program contributors across the country. This situation has left the control of data quality to each individual police agency and has contributed to inconsistencies in entries among various agencies."

Looming on the horizon are the implications for data collection contained in recent proposals by Roy Romanow, who has been studying ways in which the Canadian healthcare system could be revised. In an

interview, Radwanski noted that "what he recommends would appear to be the end of health privacy as we know it." He added that "having all health information in some giant database is quite simply terrifying."

Canada's web of privacy laws is considerably more potent than what exists in the United States, where many of the same kinds of problems are cropping up, also driven by concerns about terrorism. But even these heightened protections may well give way to the preoccupation with terrorism that seems to have affected Canada as well as the United States.