

The policy construct of M/FIPPA

A discussion of the policy rationale that informed the drafting of key provisions of the Freedom of Information and Protection of Privacy Act

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October 27, 2009

[Background]

- Why understand the policy basis of M/FIPPA?
 - To properly understand and apply the provisions of the Acts.
 - To make informed decisions.
 - To avoid an overly “legalistic” approach to the Acts, (to move to a policy-centric approach that better serves the objects of the Acts).

[Background]

- Is it necessary to understand the policy basis of M/FIPPA when there is a substantial body of interpretive case law on the Acts?
- Modern rules of statutory interpretation contemplate that a pragmatic approach be taken:
 - Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
 - **Elmer Driedger in *Construction of Statutes* (2nd ed. 1983)**

The “Williams Commission” Report:

- Law Reform Commission established in 1977- 1980, headed by D. Carlton Williams, Chair
- 800 page report exploring the policy dimensions of a potential access to information and privacy statute: “*Public Government for Private People, The Report of the Commission on Freedom of Information and Individual Privacy/ 1980*”
- The policy discussion and the recommendations in the report guided the development of FIPPA and MFIPPA.

Policy Themes of the Williams Commission Report

- Public interest policy arguments in favour of an access to information/privacy statute:
 - **Accountability**
 - Render the government more accountable to the electorate,
 - **Public Participation**
 - Facilitates informed public participation in the formulation of public policy,
 - **Fairness in decision making**
 - The need for fairness in decision making affecting individuals.
 - **Protection of Personal Privacy**

The Policy basis for Exemptions

- There is a critical balance to be achieved between the public interest in access to information and the government need for confidentiality.
- The inherent policy tension in M/FIPPA:
 - Public interest in disclosure vs. public interest in maintaining confidentiality.

[The exemptions]

- Cabinet records
- Advice and Recommendations
- Personal Privacy
- Commercial Information
- Solicitor-Client privileged information

[Cabinet Records]

- Long parliamentary tradition in shielding the decision-making process of Cabinet from public view.
- Disclosure of Cabinet materials would end the tradition of collective ministerial responsibility for policy decisions.
- To encourage the members of Cabinet to engage in frank and vigorous exchanges in Cabinet discussions, and
- Avoids premature disclosure of Cabinet agendas – allows Cabinet to decide when it will publicly address a matter.

[Advice and Recommendations]

- Documents containing advice and recommendations would be written with less candour.
- Public servants may feel a greater reluctance to express critical views or to put forward proposals that might be considered contentious.
- Access to materials would substantially increase public discussion about the personal views of public servants, with a loss of anonymity and perceived neutrality– and diminish the role of Ministers.
- Rejected criteria
 - Would mean that public servants would be more likely to communicate advice orally.
 - Would leave unfair impressions of the abilities of public servants (who are required to create such records in haste).

[Commercial information]

- Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance... all of these activities are undertaken by the government with the intent of serving the public interest.
- Disclosure of business secrets through a government access to information law would be contrary to the public interest for two reasons:
 - First, disclosure of information that was acquired after the outlay of substantial capital investments would preclude other firms from making such investments.
 - Fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements and government requests for information.

[Commercial information]

- Concerns with promising to maintain too much in confidence.
- Concerns that any application of an exemption of third party information should still be subject to balancing, on a case by case basis, with public interest in disclosure.
- Favourite quote from Williams Commission Report:
 - “Some observers have argued that a discretion to uphold confidences still gives too much latitude to public officials to undermine the disclosure policy underlying the freedom of information legislation. We feel that such views offer too pessimistic an assessment of the good faith which public officials would exercise their responsibilities under this type of legislation.”

[Personal privacy]

- “One of the most vexing issues in the design of a freedom of information policy is the establishment of a proper balance between the public interest in access to government information and the public interest in the protection of individual privacy”.
- A “balancing test” must be embodied in a privacy exemption
 - Statute should, to greatest extent possible, identify clearly situations in which there is an undeniably compelling interest in access;
 - Personal information that is regarded as particularly sensitive should be identified in the statute and made the subject of a presumption of confidentiality;
 - For those cases not resolved by explicit provisions, a general balancing test should be stated with indication of the factors to be weighed in an application of the test to a particular document.

[Solicitor-client privilege]

- Williams Commission contemplated solicitor-client privilege as including communication privilege as well as litigation privilege.
- Commission recommended that the exemption end when litigation ends.
- How did we arrive at a place where there is now a permanent exemption for solicitor-client communication and litigation privilege? Where did branch 2 of the exemption come from?
- See Hansard debates on FIPPA when it was reviewed by a committee of the legislature – the intention was to extend the privilege to the relationship between police and prosecutor. Interpreted more broadly.

[Points to Remember]

- There is a policy reason for every provision of M/FIPPA
- Every decision under M/FIPPA should be informed by an assessment of how the decision is consistent with the objectives and policy intentions of the Acts.
- An understanding of the policy objectives of the Act can be assisted by actively searching out IPC Orders, judicial decisions and other documents, such as the Williams Commission Report, that discuss the policy reasons behind provisions of the Acts.