

ONTARIO'S FREEDOM OF INFORMATION & PRIVACY ACT UP AND RUNNING

Ontario's Freedom of Information and Protection of Privacy Act has now been fully operational for one year. John Eichmanis, the Ontario Information and Privacy Commissioner's Senior Policy Advisor, sees signs of success and is cautiously optimistic.

The Act gives citizens a right to obtain access to government records and their own personal information, which fundamentally alters the way the government must deal with the massive volume of information in its possession. However, this right is not absolute, and the Act contains specific exemptions to the general right of access. Exemptions cover categories of records such as Cabinet documents, law enforcement records, other people's personal information, and sensitive commercial information. The role of Commissioner, Sidney Linden, is to review and determine whether the basis for the government's refusal to disclose a record is correct in law and consistent with the principles set out in the Act. If the Commissioner agrees with the government's interpretation, he upholds the decision to deny access; if not, he orders the government to release the record.

The Exemptions

All freedom of information schemes acknowledge that the release of certain types of information would result in a degree of harm which outweighs any benefit derived from the public's right of access. Exemptions such as the ones included in the Ontario Act also exist in other jurisdictions, including the United States, Sweden, Australia, and Canadian federal legislation. To illustrate this point, take the example of the exemption covering personal information. The Act provides that, as a general rule, personal information about one individual should not be disclosed to anyone other than the person it concerns. Why? Because the legislators in passing the Act recognized that people who supply personal information in confidence to their government are entitled to expect that the information will be treated confidentially.

Access Requests and Appeals

When citizens want access to a government record, they make an initial request to the government agency which has custody of the record. If access is refused, the Act provides a right to appeal against the government's decision to the Information and Privacy Commissioner.

When an appeal is received, the Commissioner assigns a member of his staff, known as an Appeals Officer, to meet with the appropriate government officials and the appellant to try and mediate a settlement. Generally, settlement attempts have been successful when the government is prepared to release more information and the requester is prepared to accept less. However, some appeals have been resolved by simply clarifying or explaining the terms of the Act. In the first year of operation, half the completed cases were settled through mediation: 95 out of the 198.

Enquiries and Binding Orders

When mediation is not totally successful, the case proceeds to an enquiry. Experience in the first year has shown that many appeals involve

only a small portion of a much larger record, most of which has already been released to the appellant by the government. However, the one or two paragraphs under dispute may contain precisely the information the requester wants. During the enquiry stage, the remaining issues are refined and a report is prepared by the Appeals Officer outlining the matters still in dispute. This report is sent to all parties to ensure there are no misunderstandings. The Commissioner reviews the records and asks the parties to make written submissions. If a new issue emerges following distribution of the Appeals Officer's Report, the parties are made aware of the details and given an opportunity to make further submissions. The Commissioner may, and generally does, conduct his own research, and considers the results of this investigation together with the submissions received from the parties before issuing an order disposing of the appeal. This order is binding on all the parties, including the government.

The Commissioner's power to make a binding order is significant. Apart from the province of Quebec, most other Information and Privacy Commissioners perform an Ombudsman-like function; they recommend that the government take a particular action, but they cannot force compliance with their recommendations. In order to reach a final determination in these other systems, citizens must turn to the court system, an expensive and often time-consuming process. To illustrate this point, in the Canadian federal system, the courts have been called upon to decide fewer cases in almost 6 years of operation than the Ontario Commissioner has disposed of in the first year of his mandate.

It is much too early to decide which type of freedom of information scheme will best serve the public's right of access to government records. The Ontario Commissioner's power to make a binding order distinguishes the Ontario system from the federal one, and imposes a high degree of responsibility on the Commissioner. He must be scrupulously fair and even-handed in the disposition of appeals, and the quasi-judicial nature of the role requires that he give due consideration to the Act's exemptions and uphold them where they apply. In some cases, because the Act encompasses both access to information and the protection of privacy, the Commissioner must conduct appeals fairly, giving all parties an opportunity to comment before making his decision.

Signs of Success

After one year of operation, preliminary statistics indicate that approximately 4,700 requests for information were filed with the various government ministries and agencies covered by the Act. The majority of them (56%) were answered by providing the requesters with 100% of the information they sought, while 77% received all or part of what they requested. Further, 80% of all requests were completed within 30 days. A total of 350 cases were appealed to the Commissioner's Office in the first year, representing a ratio of approximately 1 appeal for every 13 requests. Of these 350 appeals, 198 or 57% were resolved during 1988. Considering the unavoidable preoccupation every new organization must have with renting office space, hiring staff, designing systems, developing procedures and getting organized, it is fair to say that the Commissioner's Office is off to a good start.

With the author's permission, this is an edited version of his report in the Ontario Commissioner's Spring 1989 newsletter.