

The public's right to know: Battered and eviscerated

Citizens, non-governmental organizations and journalists face delays and huge fees to get access to our government's information

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Can it really be 18 years since that golden moment in 1992 when an NDP government and its Liberal opposition set aside partisan differences to unanimously pass what would be celebrated as the most advanced freedom of information legislation in Canada?

Yes, it can.

Unfortunately, British Columbia's once vaunted Freedom of Information and Protection of Privacy Act has come to represent not a triumph of transparency but a legacy of betrayed promises, corrupted ideals, cynicism, sophistry and just plain rotten values on the part of the people we elected to govern us.

The NDP began undermining the spirit of the information access law almost before the ink had dried on the statute. The Liberals, who used it to hold government accountable - almost a third of requests filed under the act came from the Liberal benches - then went to extraordinary lengths to thwart the process once they held power and the NDP was back in opposition.

The politicians have been aided and abetted by bureaucrats in the provincial government and its various public and quasi-public agencies and institutions, including universities, which are supposedly bastions of open discourse and the free exchange of knowledge.

[Freedom of Information] has failed," said Darrell Evans, executive

director of the B.C. Freedom of Information and Privacy Association. Since the act's inception he's been tracking the legislation and the evolution in policy its application - or more properly lack of application - represents.

"The culture is gone. It was only during the [NDP premier Mike] Harcourt era that we had a sincere

approach to freedom of information," said Evans.

Perhaps, dismaying as it may be, this is not surprising in a society where information is a currency that bestows power upon whomever best controls, disseminates, spins and massages it. Massive growth in centralized communications bureaucracy is but one indicator that



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governments, with vast databases at their disposal to which citizens are compelled to contribute, have emerged as the greatest information brokers in human history.

If, as former federal information commissioner Robert Marleau once put it, "openness is the oxygen of democracy," then successive governments in this province have been systematically suffocating what they once promised to nurture.

It's been a long, bruising descent from those sunny heights to the dismal swamps of self-interest. Once shining democratic ideals are now routinely trampled in the muck of political hypocrisy and bureaucratic expedience.

Informed citizens

Back when he was still leading the opposition Liberals toward the Promised Land of power, still luminous with his zeal for democracy in the hands of informed citizens, Gordon Campbell wrote a letter to Evans and his organization.

"Government information belongs to the people, not to government," Campbell boldly declared. "This means, among other things, that all citizens must have timely, effective and affordable access to documents which governments make and keep. Governments should facilitate access, not obstruct it."

Remember those terms -timely, effective and affordable.

At the time, Campbell was launching a crusade against the crumbling government of NDP premier Glen Clark, mired in scandal and relentlessly battered by the Liberals for abandoning the bipartisan commitment to open government achieved in 1992.

"Expenditure cuts, the threat of fee increases, and the excessive reliance of [Freedom of Information requests] as the only way of obtaining routine government documents are all evidence of a government which prefers the practice of concealment to the culture of openness," Campbell wrote. "This is unacceptable."

Campbell promised that if elected one of the first things the Liberals would do was enhance the rights and protections the information act

represented, ensuring that adequate resources were available to allow government and its agencies to make timely disclosures.

By 2001, that promise was codified in the Liberals' platform as a commitment to deliver "The most open, accountable and democratic government in Canada."

"The Glen Clark government first started attacking freedom of information; that's when Gordon Campbell wrote this wonderful letter," Evans recalled. "We actually believed it. But in 2001 they actually ripped apart a good part of the freedom of information legislation."

"Party platforms are contracts with the people," United States president Harry Truman once said of his own obligations to the voters. Accept this principle and it is impossible to evade important ethical questions for British Columbians regarding the on-going evisceration of an unequivocal promise by government to make itself transparent and accountable while practicing secrecy and evasion in order to avoid accountability.

Litany of betrayal

Reports from former Freedom of Information and Privacy Commissioner David Loukidelis, from Evans's organization, from legal scholars, from non-governmental organizations, from journalists, from private citizens, even from one of the original architects of that 1992 statute, all provide a long and woeful litany of betrayal.

There are the narrowing interpretations of what's required to be released under the statute, the intimidation of individuals and small organizations by the levying of excessive fees and the ill-concealed, foot-dragging hostility to requests that are routinely deployed to deny rather than enhance citizen access to government-held information.

Robert Botterell, a lawyer specializing in information and privacy issues, was one of those involved in shaping the original statute. He testified on Feb. 2 before a special committee of the legislature struck to review and recommend any changes deemed necessary for the Freedom of Information and Privacy Act.

Botterell reminded the committee that in 1992 The Vancouver Sun had cited

the new statute as the NDP's outstanding achievement, "the best legislation of its kind in Canada." Today, he said, "that promise of openness has been broken in numerous ways."

How, precisely? Botterell enumerated:

First, he pointed out, while the original statute obligated public servants to respond to information requests "without delay" and "openly, accurately and completely" -- meaning in not more than 30 days -- government amended the act to relax deadlines and legalize delays.

This was done, for example, by simply making the calendar day into the working day, which instantly extended a four-week deadline to six weeks.

"Even with these changes," he reminded the committee, "response deadlines were missed 20 per cent of the time for information requests from individuals and businesses and a staggering 50 per cent of the time for media and opposition requests."

It doesn't take a rocket scientist to guess why the bulk of the stonewalling affects media and opposition requests.

"Freedom OF information has been converted to freedom FROM information in this province," Botterell told the committee.

"The real issue is that politicians of all stripes really don't like being called to task or embarrassed. None of us do. I am here today to remind you that embarrassment is not an exemption under the act. I am here today to remind you that administrative convenience is not a legitimate reason to abandon a fundamental democratic right, the public's right to access information," said Botterell.

Government, Botterell acknowledged, has promised to correct the problem of delays in response time but he said that a new barrier to information requests has since been thrown up -- huge fee estimates.

For example, in August, 2009, he said, a media organization requested background correspondence to the government's decision to enter a controversial agreement with the federal government to harmonize and combine the GST and the existing provincial sales tax under a new tax to be called the HST, which it had assured voters was not contemplated during the last election campaign.

Bureaucrats demanded payment of an \$800 fee to process the information request. The media organization applied for a fee waiver as permitted by the act. Five months later there had still been no decision and no information had been released.

"It is inconceivable that it would cost \$800 to locate and process public records on a high-profile issue like the HST," Botterell told the committee. "This information should be at the government's fingertips. We live in an era of Google and iPads, not filing cabinets and typewriters. This information must have been generated and stored on computers.

"Either government records management is in a shambles or the government has something to hide and is doing everything it can to delay responding to this request. Either way the public paid through their taxes to have the HST information prepared and has a right to know what it says."

Politically embarrassing

Other evidence brought to the committee suggests the pervasiveness and magnitude of government's attempt to block the public – and its surrogates in the media and the opposition benches – from access to information that might be politically embarrassing.

A private citizen told the committee that while he was travelling outside B.C., his children had been arrested by child welfare authorities for three weeks following a drunk driving incident involving his former spouse.

But when he sought information pertaining to the circumstances of his children's apprehension, he testified, he discovered it would cost him \$2,500 -- \$2,000 for a lawyer and \$500 for government to locate and copy relevant files.

Then Jenny Kwan, the NDP MLA who is also serving on the special committee, contributed her own anecdote.

"I recently made an FOI request to the ministry of small business for records, documents, related to the ministry's activity in hosting Olympic-related events and activities and the costs associated with it," she said. "I actually got a fee attached to it to the tune of \$10,300."



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Darrell Evans, executive director of the Freedom of Information and Privacy Association, says freedom of information has failed.

She was shocked, Kwan said. It had been her first FOI request as an elected official.

"I can't imagine that an individual in the public realm would be able to pay that kind of money to get what should have been on the public record. We were asked then to narrow the request. I narrowed the request. The fee came back to be the same amount. There was no difference."

A submission to the committee on behalf of The Dogwood Initiative amplified those concerns. The activist organization that's concerned with sustainability issues, cites "partners" including Mountain Equipment Coop, Vancity, the Bullitt Foundation and The Law Foundation of B.C.

Morgan Blakley, a student with the Environmental Law Centre at the University of Victoria who analysed

abuses and failures under the FOI legislation for The Dogwood Initiative, concluded that "Fees appear to be used to stonewall access to information and in at least one case, apparently used to retaliate for an appeal allowed under the Act."

The submission said that when the Sierra Legal Defense Fund was presented with an estimated charge of \$24,000 for information it requested, the environmental non-profit organization turned to the appeal mechanism in the act to ask that the fee be waived.

"In response, the Ministry increased its fee estimate to \$173,000," the Dogwood submission said.

Government agencies that have already created and stored information at the expense of the tax payers are permitted to charge tax payers requesting that information "nearly \$1,000 an hour for mainframe [computer] access," the submission said. "This charge does not include the \$30 per hour charge for creating a program to produce the records stored by government."

Furthermore, the Dogwood submission said that when other governments or other public agencies sought information under the act, about 85 per cent of the requests were dealt with in a timely fashion as set out in the legislation. But when the requests came from opposition political parties, public interest groups or the media, only about half were dealt within the deadline period specified by law.

"It is clear from the data that three groups are being discriminated against and are dealing with a government that operates illegally with almost half their requests," the submission said.

A submission from the B.C. Freedom of Information and Privacy Association went further. It said, there is troubling evidence that the B.C. government tracks requests for information under the act and flags certain types of requests for special treatment. This "special" treatment, the submission noted, meant the requests took longer to process. Thus, more than 57 per cent of requests for information that originated with media were not dealt with within the legal timelines prescribed by the act.

For "interest groups" like Dogwood Initiative and for other political parties, the failure to respond within legally mandated timelines was up to 64 per cent.

"Although this treatment is being dealt to particular groups the government finds troublesome," the submission said, "these findings should be of great concern to the general public. Freedom of information is a right of all citizens and the principle of access to information is critical to the health of our society.

"History has taught us that excessive control of public information leads to political abuses and scandals, as well as deterioration of our public institutions."

Archive is eroding

One of those eroding public institutions is the provincial archive itself, the major repository of historical information – understanding where we came from is essential to knowing where we're going – that's traditionally been easily accessible to ordinary citizens.

Starved for funds and administratively fobbed off as an adjunct to the Royal B.C. Museum, itself morphing into a tourist entertainment vehicle, which is losing money, the archive offers staff assistance – essential for anyone trying to find their way through the labyrinthine finding aids – for only four hours a day and not on Saturdays or Sundays, rendering it inaccessible to most ordinary citizens.

The emaciated travesty that the archive has become under successive governments might be said to symbolize what has been going on for decades with freedom of information legislation.

Last month's newsletter from the same B.C. Freedom of Information and Privacy Association that Campbell once courted with fine promises while he grasped for power put it this way:

"Successive administrations took turns beating up the FOI Act and torturing its users with interminable delays, huge fee assessments, blatant obstructionism, political meddling, and when all else failed, expensive court cases."

But if government is miserly in providing information to its citizens about how it governs, it is increasingly aggressive in accumulating

information about those same citizens for its own secretive purposes.

"The B.C. government is plowing ahead with a massive data-matching program that will centralize control of all the personal information obtained from citizens who receive government services," warned the B.C. Freedom of Information and Privacy Association in a news release on March 26. Called the Integrated Case Management project, the \$180-million project plans to aggregate and share personal information across provincial and federal government ministries will collect data from independent community service organizations under contract to provide government services.

This, says the organization, would "create a database of unprecedented scope and detail about citizen's lives, including their participation in health care, education, family services and every other government service," and government bureaucrats are lobbying for radical changes to the Freedom of Information and Protection of Privacy Act that would permit them to go ahead without having completed a legally prescribed privacy impact assessment.

These are the same bureaucrats in the same government that has recently been criticized by both the provincial auditor-general and the information and privacy commissioner for massive privacy breaches in the management of client records.

The special legislative committee struck to review the act has been sitting in Victoria. It is hearing submissions from citizens, non-government organizations and from the provincial ministries that are asked to provide information to the public and also want greater freedom to gather it. The committee's report and recommendations go to the legislature by the end of May.

But if the government's response is the same as it has been in the past, the whole exercise will have, yet again, been a waste of time for those wanting greater transparency although not necessarily for those who want relaxed rules for data mining and data matching.

Evans points out that although two previous committees have reviewed the

legislation, not one recommendation that would make access easier or less expensive has ever been adopted.

"The whole aspect of government information management has to be depoliticized. There shouldn't be so much politics wrapped up the way government manages and discloses information," Evans told the committee in February.

Some suggestions

Meanwhile, everyone submitting to the review committee came with recommendations. They ranged from the sweeping to the technical.

So here's one more suggestion:

Every shred of information gathered, analysed, held, traded or simply squatted upon by government belongs to the people of British Columbia. And since, to quote president Truman once again, "Secrecy and a free, democratic government don't mix," why not follow the American model and basically make everything available as the default position.

Only in certain narrow and expressly defined circumstances – personal privacy matters, state security issues or criminal investigations, for example – should government information be withheld and even then, the burden of proof and any costs incurred in arguing against disclosure should fall squarely upon government, not the taxpaying citizens who have already paid for it.

But let's leave the last word to Botterell, that early architect of B.C.'s information legislation who has watched it fall into its current dilapidated state.

"The debate about whether openness should take priority over secrecy and political calculus was resolved 18 years ago in 1992," he told the committee. "Your predecessors promised the people of British Columbia the most open government in Canada. I believe it's your committee's important responsibility, as the guardians of that promise, to insist on amendments that will once again make this legislation the most open in Canada."

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