AIMS Commentary

Atlantic Institute for Market Studies

Mother May I?
The trials and the truths of Nova Scotia's FOI/POP legislation

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Commentary based on remarks to the Right to Know Forum,
University of King's College
27 September 2006

Perhaps the title of the legislation in Nova Scotia dealing with access to information should be shortened from "Freedom of Information and Protection of Privacy" to simply "Protection of Information."

Simply put, the way the act is applied in no way reflects the laudable goals which gave birth to the legislation in the first instance. Instead of making information more readily accessible, using the Act can be likened to an expensive game of "Mother may I?"

The reasons are quite simple. First, because using the FOIPOP legislation in Nova Scotia is very much like a game of 'Mother May I?'. If you don't ask the right person, in exactly the right way, for precisely the right thing – you get nowhere.

Second, one needs to focus on the word "MAY" and my conclusion that, at least in this province and for this purpose, "MAY" has come to be defined as "MUST". While the Act stipulates that government and government actors MAY withhold certain information, the literal truth on the ground is that these provisions are being read by the keepers of the gate as that they MUST withhold that information. But more on that later.

First, a word on how the Atlantic Institute for Market Studies (AIMS) came to be exposed to freedom of information legislation. AIMS is an independent voice on public policy. Our role is to inform and expand the public and private debate on issues that matter to people. Our work routinely brings us into contact with the ATIP and FOIPOP rules. We have worked with, or depending on your perspective, you might even say against, federal and provincial departments, crown agencies, school boards, hospitals and municipalities.

Serious public policy research requires open and honest reporting by government. That is why this discussion, and the Nova Scotia FOIPOP Act and its application, are so important to us. And the purpose of that Act bears repeating again – the Act is intended to "ensure that public bodies are FULLY accountable to the public" In my experience it is the word "fully"

that has been lost in translation between the drafting of the legislation and the application of the legislation. Rather than being a bridge to an engaged and informed public, FOIPOP has become a battleground almost exclusively limited to the media, those with a specific beef against the government, and the government agencies.

Accountability is now delivered in the form of "gotcha" applications intended to deliver a juicy headline or to demonstrate bias or unfairness in government. As a result, government agencies have responded as anyone would respond in that situation – with a bunker mentality. The less they know the better – they being you and me. It is for that reason that you hear stories like the one about a senior government official who loves blackberries, because blackberries are "not foipopable"[1]. Or you get a response to a request for a record where a public servant tells you with a straight face that "we don't have that record" when the day before, or the day after, their minister is quoted in the media discussing it. What they mean is "we don't have that record in the form described in your application". Regrettably, and all too often, what they don't say is "but we do have this alternative record, or we have that information in this alternative form." The Act isn't about "nice neat packages" it is about access to information promptly, simply and fairly.

To see how that ideal is far from being realized let's consider the word "MAY". The Act says the head of a public body MAY require an applicant to pay fees for locating, preparing, shipping and copying a record. I was told by a FOIPOP coordinator at a rural school board that the act REQUIRED them to collect fees. He was shocked to learn that it did not – and they did, eventually, waive all fees for that application. The Act says that a public body MAY require the fees to be paid up front. In many cases that is now considered as "MUST pay up front". Yet another barrier to the average citizen who might not necessarily have that $300 sitting in a sock drawer. Or, in several instances involving AIMS, $20,000 or more in a sock drawer.

Other agencies have a policy that fees MUST cover the costs of producing a record, even in the face of opinions from the Review Officer that the public interest OUTWEIGHS the principal of cost recovery. In fact, as I am sure you all know, at least one agency is almost eager to go to court to challenge that idea. [2]

The Act says a public body MAY refuse to disclose information that is, or will soon be, available to the public. So, the answer to many requests is: "that is on our website". Have you visited a government website lately looking for a specific document? Needles in haystacks are easier to find. Where is the principal of FULL accountability in that instance? If the document is online, how hard is it for the person who posted it to forward the applicant the link, if not the document itself?

The Act says a public body MAY extend the time for responding to a request for information. Of all the applications AIMS has EVER filed, only ONE, has not been immediately met with such an extension. And I have yet to meet any other regular FOIPOP applicant who has not routinely met a similar fate.

The Act says a public body MAY refuse to disclose information if that disclosure could reasonably be expected to harm intergovernmental relations. That section is inevitably read as MUST refuse.

In fact, the Act says a public body MAY refuse to disclose information for a whole host of reasons:

- To protect trade secrets of the public body
- If it could reasonably endanger public health and safety
- If it could place at risk the conservation and protection of heritage sites or the protection of endangered species
- If it could harm or interfere with law enforcement
- If it pertains to advice or recommendations to a public body or minister

[1] I am assured by the government that Blackberry messages are "foipopable" by the way. The point to this story is that the bureaucrat in question thought they were not, and so reserved that medium for more controversial advice and information.

[2] The Halifax Regional School Board refused to place the public's right to know ahead of the principal of cost recovery even in the face of a decision by the Review Officer urging them to consider the public interest first.

- If it could reasonably expose the author or someone quoted in the record to civil liability

ALL of these MAYS are, more often than not, read as MUST. Even, in some cases, by the Review Officer. Before you counter with the argument that surely that was the intent of those sections, to exclude that information from public scrutiny, consider that not every MAY is read as a MUST. The Act says a public body MAY waive any fees if it is fair to do so or if it is in the public interest to do so. Anyone care to guess how many times we have seen that MAY voluntarily read as MUST?

Consider also that after all those MAYS comes a series of SHALLS. A Public Body SHALL refuse to disclose personal information that is an unreasonable invasion of a third party's privacy. A Public Body SHALL refuse to disclose trade secrets of a third party. A Public Body SHALL NOT refuse to release the results of a product or environmental testing done for them.

In other words, the ACT itself specifies that SHALL and MAY are not the same. Yet we all continue to treat those MAYS as if they were SHALLS, and until we stop, the Act will never be as it was intended to be and the public will continue to be frustrated and public servants continue to be on the defensive. But I want to end on a more positive note because all is not yet lost in Nova Scotia. We have several agencies in NS that have adopted, if not absolute, then very generous general access policies.

For instance, I have heard from several Department of Education officials over the years that their policy is that if it is covered under FOIPOP, and they have it, you can have it. Also, in Nova Scotia we continue to have a fairly broad application of the FOIPOP Act to government and quasi-government entities. As an example, it applies to universities, hospitals, municipalities and school boards. If you asked anyone what the key services are that are delivered by government, I would challenge you to find someone who would not have schools and hospitals on their list. In Nova Scotia, these agencies are covered under FOIPOP and many are working to get better at it – that is not necessarily the case elsewhere.

In Manitoba, for example, school boards are explicitly excluded from their act – why? Some argue it is to avoid the release of standardized testing data since the tests are administered, marked and collected at that level – and kept at that level. The provincial department, covered by the act, is apparently never given the data. Some hospitals and health agencies make similar claims or go to amazing lengths to avoid clear access to data. The federal government itself routinely creates notionally "arms length" agencies. One of the benefits of such agencies is that they are not subject to their ATIP act.

The message for Nova Scotia is simple. We started well. Our legislation is broad, essentially fair and basically reasonable. Raising the fees for applications and reviews slowed us down. Despite that, the Act is still having significant impacts across the province, but we are at a crossroads.

The selection of our next Review Officer is just one of the many critical decision points that government officials and public servants at all levels face - in the cabinet room, board room, and at the service kiosk. And they will face those choices in the coming months, not years, and their actions have had and will continue to have a profound impact on what FOIPOP means here in Nova Scotia.

It really boils down to two options; is the FOIPOP Act going to be turned into a solid wall against the prying eyes of the public, or into the avenue of openness it was intended to be?

Mother, May I chose option two please?

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