Privacy and Openness: the Conundrum

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First, a purifying act of confession: Though I have changed hats from Privacy Commissioner to Information Commissioner, I remain a privacy advocate. There is no philosophical contradiction in espousing privacy values and the cause of open government. Without an adequate measure of privacy, a society is neither civilized nor free. This belief unites me with everyone in this room, indeed with almost every other Canadian, almost every human culture, all political persuasions, all demographics.

How, then, does one account for the increasing intrusions we tolerate into our premises, persons and records? There is, it turns out, consensus only at the very highest level of generality. We all agree that privacy, like freedom or truth, is a "good thing". Thereafter it's not so simple. How much privacy we should have, and how it should stack up against the public's right to know, or freedom of the press, or effective law enforcement — on these there is no social consensus.

No consensus, but some interesting trends. First — and these are my impressions after four years as Information Commissioner, seven years as Privacy Commissioner and several decades as a print journalist — privacy, more often than not, is seen as something bad people do not deserve, or something which has been forfeited by unacceptable behaviour. From this view, politicians and others feel justified in favouring registers of suspected child abusers; the disclosure of criminal histories to potential employers; the infringement of the sanctity of tax records to chase the proceeds of crime, to locate spouses who don't pay child support, or to catch student loan defaulters. You will notice that the unacceptable can cover a broad spectrum.

Second, privacy is seen as something that good people don't really need because they have nothing to hide. From this view flow such programs as random, mandatory urinalysis tests; roadside police stops, without just cause, to test sobriety; massive cross-matching of government files to catch the potential cheaters and omnipresent surveillance in retail stores and workplaces to deter theft, too many trips to the bathroom or those personal phone calls on the employer's tab. So pervasive is this view and so ingenious the new technologies, my friend and colleague beside me, David Flaherty, has documented the dangers in his sweepingly comprehensive study, *Surveillance Societies.*

My third observation is that personal privacy may be the only individual right not vigorously championed and attentively nourished by the country's media. This uncharacteristic shyness is understandable when one realizes that legislated privacy

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protection poses a threat to the media's self-proclaimed right to report anything which will sell. Forgive my cynicism — but I have seen journalism from the inside and the view, even from the inside of a respected and responsible paper, was not always pretty.

Little wonder that media interests spend a great deal of time and money trying to convince judges and the public that, if democratic society is to survive, almost no limits should be placed on what the media can publish. The media fought privacy protection legislation in Ontario because, under it, the police could no longer give to the media, names of crime and accident victims without consent. The media lost that battle and we have, so far, avoided totalitarianism! Nor has the justice system fallen apart because the reporting ban on the Karla Teale case temporarily muzzles the press.

In my current role as Information Commissioner, I appreciate and applaud the pressure exerted by the media on government to be open. I am as much an openness devotee as I am a privacy advocate. But, I believe those values can be reconciled, and herein lies the thesis I will propound in these remarks. The media's achilles heel is its failure to balance in a responsible way the right to know and the right to privacy.

Now these three prevailing notions — good people don't need privacy, bad people don't deserve privacy and freedom of the press is more important than privacy — do not bode well for the future of privacy; indeed, they make it somewhat of a mockery to speak of the "right" of privacy.

Until now, privacy, as a basic human value, received strong support from an unexpected quarter — government bureaucrats. Indeed, the Privacy Act was the result not of public or political pressure, but of the initiative of the Department of Justice. That fact is hardly recognized in this country. Public servants well understand the need — from several points of view — to protect the confidentiality of files about Canadians which they hold (an understanding not always shared by their political masters).

My impression, I hasten to add, is that one reason they do so is because it gives respectability to their reflexive penchant for secrecy. The most frequently invoked reason for secrecy in the government of Canada over the 11-year life of the access law has been the need to protect either the privacy of persons or the privacy of private companies whose information is in government files. Whatever the motives, the instinctive support from bureaucrats has always given me optimism about the future of the right to privacy.

In equal measure, unfortunately, I am frustrated over the baby steps we haltingly take towards truly open government. We find our private lives increasingly invaded by unchecked solicitations, profiling, target marketing and general snooping by interested groups, businesses and governments. Yet, the average Canadian finds it extremely difficult to hold the powerful in society to account. Even after more than a decade under a freedom of information regime, governing is very much a private affair. Already we have the makings of a society of information Lords and peasants.

In his recent book, *Voltaire's Bastards*,[1] John Ralston Saul argues that the penchant for secrecy is more than an inheritance from the staid old British civil service. It is, he says, a product of our society's worship of rationality. Here are his words:

> *The negative, retentive, constipating refusal to reveal, to act, to cooperate, is the key to rational man. Truth today is not so much fact as fact retained.* [...] *Access-to-information laws amount to little more than legislative manoeuvres that open or close peepholes. They do not change the basic assumptions of a rational society, which are: only through the control of knowledge can a man define his own existence; only by a judicious holding back of what he knows can he prove that he matters.*

That's a rarefied, cynical and even malevolent accounting for the instinct to withhold information. If this instinct is the mark of human rationality, spare us from the irrational!

Whatever its roots, an ingrained fascination with secrets is the hurdle to be overcome in the task of ensuring that public policy and law carefully balance the right to privacy against other important rights. Principle among those rights is the right of individuals to know what their government is up to.

Let me give you a couple of specific examples which show how high this hurdle is. Recently, an individual asked for a list of former M.P.s receiving benefits under the *Members of Parliament Retiring Allowances Act*.[2] That Act states that any former M.P. with at least six years of service qualifies for benefits. The government (in this case, the department of Government Services) refused to disclose the names in order to protect the individuals' privacy. Now, I ask you what bit of private information would disclosure of these names reveal? Anyone can look up the names of past M.P.s and their years of service. No M.P. in this country may secretly represent his or her constituency! Everyone is presumed to know the law states that pension eligibility is six years of service. There is no desire to protect "privacy" at play here; it is, rather, a reflexive resort to secrecy whenever there is even the slimmest of legal racks on which to hang one's hat. Putting privacy on the pedestal in this way simply mocks the public's legitimate desire to know how their money is being spent.

It works the other way, too. In another recent case, a requester asked for the sign-in sheets showing who, in the department of Finance, entered the building outside normal working hours. The department refused to disclose the records, arguing that to do so would constitute an invasion of privacy. Now this response, it seems to me, did show a more careful weighing of legitimate privacy concerns. The public cannot determine from other sources about the precise times when government officials enter and leave government premises. Disclosure of this list could be very invasive. Consider how dangerous disclosure of sign-in sheets would be to a woman who is allowed to work in the building during off hours to make it difficult to be located and attacked by an abusive

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1. J.R. Saul, *Voltaire's Bastards: The Dictatorship of Reason in the West* (Paris: Payot et Rivages, 1993).

2. *Members of Parliament Retiring Allowances Act*, R.S.C. 1985, c. M-5.

spouse. Her privacy concerns are real. On the other hand, the public accountability gains from disclosure are negligible.

Even putting such extreme concerns for safety aside, the legitimate need to keep government accountable through openness does not mean that people who work for government should lose all their privacy rights. At least, that is how I saw it, and called it, in my finding on the complaint filed after the refusal to disclose.

The matter did not end there. The persistent requester asked the Federal Court to review the matter and Mr. Justice Cullen, in his decision to order disclosure of the lists, seemed to have the same achilles heel as the media. Rather than balance access and privacy rights, he put openness on the pedestal. He says:

> *When there is any doubt as to whether information constitutes "personal information" which should or should not be released to members of the public, the benefit of the doubt is to be given to the interpretation which favours disclosure.*[3]

What is my point? It is simply that neither of these siblings — openness and privacy — will survive in good health if the law accords priority to one over the other. In my view, when these two rights come into conflict, privacy should prevail against mere public curiosity. The test for overcoming the privacy interest in favour of public access should be the test which Parliament saw fit to include in subparagraph 8(2)(m)(i) of the *Privacy Act*. It authorizes Ministers to disclose personal information without consent if "the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure".

This test provides the rigorous standard with which privacy and openness can most acceptably be reconciled. And it is precisely on this point that Justice Cullen's decision troubles me the most. His "when in doubt, let it out" approach places the right to privacy in serious jeopardy. The case is under appeal and I have faith that the Federal Court of Appeal will re-establish the equilibrium.

Now this deeply held conviction of mine — that privacy and openness must both be nourished in an enlightened society — has some direct implications, in my thinking, about the issue of whether the right to privacy or to open government should be specifically entrenched as fundamental in the *Canadian Charter of Rights and Freedoms*.[4] I am in a rather lonely position amongst my colleagues when it comes to this issue. During the last constitutional hearings, my successor as Privacy Commissioner urged that the right to privacy should be enshrined in the Charter. My predecessor as Information Commissioner made as one of her last recommendations to Parliament that the right of access to government records be given Charter protection. I happen to disagree with them both.

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3. *Dagg* v. *Minister of Finance* (8 November 1993), T-2662-91 (F.C.T.D.) [unreported] at 8.

4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

I am not a lawyer and so you'll permit me, I hope, the luxury of relying on common sense instead of jurisprudence, though I know those terms are not always mutually exclusive. It seems to me that we want our Charter to concentrate on the big things, the fewer the better. Otherwise, and here, of course, I mean no disrespect to our distinguished judiciary, the open, democratic process by which conflicting interests are weighed and reconciled will be of increasing irrelevance. Unelected and unaccountable government appointees will be forced to govern more and more of our daily life through Charter interpretations.

Old fashioned a notion though it may be, my belief is that, when balancing of goods has to be undertaken, it is most productive if the process be kept political. Then it can be adequately scrutinized and democratically influenced.

No, I am not saying that either value — privacy or openness — is less important than those now enshrined in the Charter. Rather, I am saying that there is as yet nothing close to consensus as to how these values should co-exist with other important rights. Working out those relationships is the proper territory of legislation where there is much more flexibility for change than there would be in the Charter.

Having said that, I also want to praise the sensitivity to privacy shown by the Supreme Court of Canada in its interpretation of the existing Charter rights, especially section 8. It seems to me that the court deserves great credit for its unwavering insistence that Canadians be protected from unwarranted intrusions by the state into their persons, premises, or records. The strength of the court's safeguarding of the section 8 right comes from the court's view that we all have a right to a reasonable expectation of privacy. While invasion of privacy by the state is but one of the concerns of privacy advocates, it is historically the one where abuses can be most devastating.

Despite the absence of an explicit right to privacy in the Charter, I am comfortable with the prominent place privacy has been given in the Supreme Court of Canada's Charter interpretations. When that developing body of jurisprudence is taken together with the privacy laws which control the federal and provincial governments in their dealings with information about us, we are justified in being optimistic. When it comes to protecting privacy from state abuse, we are on very solid ground at least into the next century. That, of course, is not the end of the story. However, it should nevertheless be a source of enormous satisfaction to us all.

The end of the story has to do with the threats to privacy coming from non-governmental sources. A case in point is the random, mandatory urinalysis program established by the Toronto-Dominion Bank. A Human Rights Tribunal recently commented about the bank's testing program as follows:

> *In examining the reasonableness of the method chosen by the employer, this Tribunal finds that the method — namely mandatory urinalysis — is intrusive. As a blanket policy, it does represent a major step in the invasion of the privacy of many individuals in the employment field. This method could only be seen as reasonable in the face of substantial evidence of a serious threat to the Banks other employees and the public, its customers.*

> *Clearly, the evidence is not there to support this. The Bank did not act upon evidence of a problem but upon impressions and some evidence from other sources, much of it from the United States bearing little relevance to the actual circumstances in the Bank.*[5]

Having said all this, the Tribunal dismissed the complaint against the bank's testing program. In its view, neither the Human Rights Act nor the Charter could be relied upon to strike down this unreasonable privacy invasion. The Charter, of course, does not apply to private sector entities. For this reason the real challenge to privacy at the end of the 20th century is how to protect it adequately from invasions by private sector agents.

Consider for a moment how great the opportunities and incentives are for banks, credit card firms, retailers, insurers and employers to collect, use and sell information about their customers without their consent. Except in the province of Quebec, no laws hold private firms to privacy standards of behaviour. Indeed, one must ask whether the regulation of privacy in the private sector is even amenable to legal control.

I have grave doubts that it is, even with squads of privacy police, monitoring compliance with privacy laws and investigating thousands of complaints across the country. My own belief is that pressures of the marketplace will be more effective — certainly more appropriate to our system and the times — than new laws in the books. In the private sector we will get the level of privacy protection we, as citizens, insist upon through our market choices.

I urge some aspiring doctoral student to monitor carefully the Quebec experience. In that province, they have chosen to subject private sector firms to legal standards of good privacy behaviour. Will it produce more privacy protection than the voluntary code approach or the simple dictates of competition? We have the perfect laboratory conditions in the country for a first class evaluation.

I've had the privilege of being paid to champion both the right to privacy and the right to know what government is up to. My conviction is that an enlightened information policy rests squarely on these two pillars. One right cannot be chipped away or one augmented at the expense of the other. The challenge of balancing rights is not new; all democratic societies (and those which aspire to be) face it. But as we embark upon the information superhighway — that already tedious and slippery cliche — there is an unprecedented urgency to the challenge. Many of you in this distinguished audience room are the opinion leaders, policy makers and adjudicators with the responsibility of establishing the right of balance. I wish you all well. Thank you.

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5. *Canadian Civil Liberties Association* v. *Toronto-Dominion Bank* (August 16, 1994) (Human Rights Tribunal) [unreported].