Big Brother Gets Into the Information-selling Business

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Orwell's big nightmare in 1984, as we all know, was that advances in communication technology would enable the government to gather information on all of us, thus abolishing personal privacy. Of course, ability of government to gather information on its citizens is still a concern, but at least one that we have all been aware of for a long time. Another consequence of the computer revolution, one not anticipated in 1984, is that the new technology potentially makes us more able to get information from and about the government.

In the US, for example, Newt Gingrich is pushing to have Capitol Hill put on-line, allowing computer users to gain access to pending legislation through a new information system named "Thomas" - after Thomas Jefferson. Time magazine predicted in a recent special issue on the Internet, "Virtual Washington would be a wired, cyberspacial capital in which U.S. representatives and Senators could participate from their states or districts, while citizens, too, would have any information, debate or proceedings at their fingertips."

In Ontario, the civil service hopes to capitalize on this increased demand for government information, and turn it into cash.

In May, 1994, the Management Board of Cabinet of the Ontario government issued a Directive called "Managing Access to Government Data: Tradeable Data". The Directive asserts that the government "has copyright in government data" and as such this data is a government "asset" which "may be sold to generate revenue." The Directive purports to lay down "mandatory requirements for providing access to tradeable data" and to "encourage ministries to make tradeable data available for commercial use, where appropriate, to stimulate industry in Ontario and increase non-tax revenues to the Ontario Government."

Not everyone agrees the government should sell information to its own citizens as a revenue-raising measure. Think of the stink when the government tried to assert that it had crown copyright in judicial decisions and was entitled to make money out of them as though they were hit records.

Ontario's Information and Privacy Commissioner Tom Wright recently expressed grave doubts about the Directive at a conference in March on the legal implications of the Internet. The Directive, said Wright, "could basically 'gut' the freedom of information legislation as we know it in Ontario" by creating classes of information "haves and have-nots". I spoke at a Canadian Institute conference on intellectual property and the public sector in early April to similar effect.

Commissioner Wright did not go so far as to say it is never okay for the government to sell information: "Most lawyers," said Wright, would "accept the government's right to charge a fee for access to value-added information -- information it has repackaged or processed in some way."

Maybe, but the crown-copyright-in-judicial-decisions dust-up seems to cast some doubt on this. There seem to be churlish cheapskates out there who believe the government exists only to serve the taxpayers, and who angrily deny it is entitled to "sell" to taxpayers what in fact belongs to them already.

But these are mere philosophical musings. The immediate point is that the Directive seems to take some serious liberties with both the law of freedom of information and the law of copyright.

The following passages convey some of the flavour of the Directive, which together with the Executive and Manager's Guides distributed with it, is over fifty pages long: "Even when legally permissible, releasing tradeable data is at the discretion of the deputy head [i.e. the chief bureaucrat]"; "Prior to releasing data for commercial purposes, ministries must review its intended use. Data may be released only if such intended use is not inconsistent with legislation and policy"; "The price of any individual licence should be at a price the market will bear. This could be full cost plus a premium for data with high market value." In other words, bureaucrats will decide, applying their infinite wisdom, who gets access to what and at what cost, all with a view to pulling in the bucks if possible.

The Directive seems at times to fly in the face of the Freedom of Information and Protection of Privacy Act (FIPPA). That statute sets out at section 10(1) that "every person has a right [italics added] of access to a record [i.e. any information or document in the government's hands] unless the record ... falls within one of [the eleven sections of the act which set out the exemptions, dealing with such matters as personal privacy]."

The onus is on the government to show why something should not be disclosed. As well, the regulations under FIPPA specifically limit the amounts that can be charged for records that are released. Essentially, the government can charge little more than its disbursements: 20 cents a page for photocopies, $7.50 for each fifteen minutes spent searching records for information, after the first two hours (which are free), and so on. The legislation permits the government to waive the fees, but not to increase them. It doesn't entitle the government to ask what the information will be used for.

And what of the assertion in the Directive that the government has copyright in all "government data"?

My experience has been that the most commercially valuable government information is lists - of, say, applications for something, environmental hazards, people or businesses in a defined category, and so on - in other words, information that will often be contained in computerized databases.

There can indeed be copyright in such a database. "Compilations", which include "a work resulting from the selection or arrangement of data", can attract copyright by virtue of recent amendments to the Copyright Act. The caselaw indictes directories, lists of names and so on may be considered literary works by virtue of the fact that their creation involved the "sweat of the brow" of the compiler. It is also true that downloading or printing out all or a portion of a database which is the subject of copyright may be an infringement.

But does all "government data" attract copyright? Surely not. Not all raw data in the government's files will be an "original literary work". Can the government be said to expend sweat of its brow creating a compilation merely because a statute requires people to file out some government form and file it? And even if copyright can be asserted, should it be? Is the government the copyright-owner, or merely a custodian or trustee?

At the end of the Directive come two impressive pages of acknowledgments, in which all those many people who had input into it are thanked. There was an "Advisory Committee" and a "Working Group". Many other helpful people, apparently not on the Committee or in the Group, are also thanked. In all, dozens of people are mentioned.

I examined this list, curious to see how many people outside the government were consulted in the preparation of the Directive - a "mandatory" edict which could have a fundamental effect on the ability of the provinces' citizens to access government databases and information in future years. Guess how many non-civil servants were listed?

None.