Companions to democracy

BY DULCIE MCCALLUM

The right to request public information from government is a right that belongs to everyone. In this article, the province's Freedom of Information and Protection of Privacy Review Officer introduces the twin concepts of the "duty to assist" and the "duty to accommodate" and explains why they serve as companions to democracy.

This magazine, called "a little companion to democracy," is the ideal place to begin a discussion about providing equal access to information – personal and public – to all Nova Scotians and to state my case that at the present time everyone in Nova Scotia may not enjoy equal access to information under law.

Nova Scotia's Freedom of Information and Protection of Privacy Act (FOIPOP) has been touted as one of the most progressive, clear and comprehensive examples of access-to-information legislation in Canada. Courts have consistently recognized this in decisions that consider the Act. In large part, this is due to the clarity with which the Legislative Assembly has articulated the purpose of the law. The legislation intends, by its clearly stated purpose, to grant each person in Nova Scotia the right to access all information held by public bodies, referred to as "records". Public bodies include all levels of government and school boards, universities, health authorities and local government. The information may pertain to a myriad of matters: highway maintenance, gaming, agricultural land, fishing licenses, ATV-use, mussel farming, library expansions, broadband expansion, tourism and so on. It also includes access to one's own personal information. Access to information is subject only to specific and limited exemptions provided for in the statute.

But can it truly be said to be a right that everyone living in Nova Scotia enjoys? Do many people not even know that they have the right of access? And if a person is unaware, does the right to access hold any meaning?

What do we mean when we say "everyone"? Nova Scotia's Human Rights Act provides protection against discrimination in the provision of all services and facilities customarily available to the public. Access to information, upon request, is a public service, which government is obliged to provide. In addition, the Canadian Charter of Rights and Freedoms guarantees the right to equality of all people, stating: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability [s.15 (1)]".

Wrapped up in the discrimination prohibition and the right to equality is the duty to accommodate. In providing a public service, government is required to accommodate for difference to the point of undue hardship. This means, for example, a public body cannot deny access to a person who relies on a wheelchair to get into a building where a service is provided. All public bodies are subject to the Human Rights Act. If they wish to be exempted from its requirements, they must show that to provide access to a public service or facility would be cost-prohibitive or, in other words, would impose an undue hardship on them if they were to provide accommodation for the particular needs of the individual or group. Additionally, under the Charter, every person is entitled to enjoy the equal benefit before and under the law.

We turn now to consider how this right to equality – to be free from discrimination – and

the duty to accommodate should be interpreted in relation to right-to-access-information legislation. This legislation imposes on public bodies a duty to assist, obliging the head of a public body to "make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely. [s. 7(1)]"

This is a very important provision for all people in Nova Scotia. Essentially, it means that when a person approaches a government department and makes a request for information, the person responsible for processing the request must comply with the duty to assist. The duty means the public official *"shall make every reasonable effort to assist"*. This duty is important, because many people who are aware of the right to access may not fully understand all the details about how an access request is processed and/or the meaning of the provisions in the governing statute. Members of the public are entitled to assistance.

Equally important, the statute imposes a duty to assist when it uses the word *shall*. This wording makes it patently clear to those working within government that the onus rests upon them to make the right of access meaningful for all citizens, residents, immigrants and people doing business in Nova Scotia.

How has this duty to assist been interpreted to date?

> The standards expected in searching for records have been described in many cases. A public body must undertake such search efforts as a fair and rational person would find to be acceptable in the circumstances. This does not impose a standard of perfection, but a public body's search must be thorough and comprehensive.[1]

Reviews and decisions made under access-to-information legislation have also said it means the following. Public bodies must contact applicants to discuss their applications, in a timely manner without delay. The FOIPOP administrator (that is, the person responsible for processing the request) should develop a working relationship with the applicant to define the nature and scope of the application. Public bodies must make an adequate search for all records relevant to the access request, called "responsive" records. These include not just a summary of the record, but the source documents from which the summary was prepared. It also means: making alternatives available when the record requested is unavailable, often due to poor record keeping; when a "transfer" is going to be made, making sure the other public body has the record; referring the applicant to another public body that has the record and explaining where the information is located. If the record does not exist, an explanation must be provided as to why the record does not exist. Information given to an applicant regarding a referral or request for a review must be accurate. If access is refused, the administrator must explain to the individual the reasons why, rather than simply quoting the sections of the statute that permit a refusal. Also, the duty to assist must be carried out in a manner that is open, accurate and complete.

But does it mean more than that? It is the premise of this article that the constitutional-equality imperative and the human rights anti-discrimination protection must be *read into* the duty to assist. In other words, it is implicit in the duty to assist to make a reasonable effort to assist *all* members of the public who are trying to access information. And that in order for the effort of the FOIPOP administrator to meet the test of "reasonable" [and to be constitutional], it must incorporate the duty to make provision for members of the public with unique needs: the duty to accommodate.

Where a person makes a request and the responsive record is inaccessible to the *particular applicant, because of their unique needs or differences,* what does the duty to assist require? While the statutory duty uses the words "reasonable effort to assist", can the word "reasonable" be used to argue that access should only be granted to the majority of people, excluding those with unique or different needs? Alternatively, shouldn't "reasonable" be read to include a sense of diversity reflective of our communities – differences in abilities, language, age, place of origin, culture and so on?

Some may say this is special treatment for a few people – that it is a waste of taxpayers' money. Others may argue it is asking too much of government and that it is tantamount to forcing the creation of a record. Of course, this is not about getting government to make a record or compile information. It *is* about providing existing information in alternative formats and thus providing real equality to all persons, guaranteed by the Charter, acknowledging that equality does not mean "same" treatment. It is about having equal access to information already held by government, in a format or manner that provides the person with meaningful and appropriate and, therefore, equal access.

The duty to accommodate as the test has been questioned as to sufficiency or adequacy to truly deal with systemic inequality.

> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the

1. BC Order 03-33, at Para. 11.

> disclosures of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated".
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> Accommodation, conceived this way, appears to be rooted in the formal mode of equality. As a formula, different treatment for "different" people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness.[2]

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But in the context of access to information process, marrying these two duties is an important first step. When the access-to-information duty to assist is coupled with the constitutional/human rights duty to accommodate, what might that look like in particular circumstances?

Where a request is made by a person who is blind, for example, is it reasonable to have the record scanned and provided to the applicant electronically? The technology of a Braille reader is simple and cheap. The record is simply saved electronically and can be downloaded onto the Braille reader and "read" immediately by the applicant.

Where an applicant's first language is not English and their application for access is for personal information, can they receive the assistance of an interpreter? Section 21(b) of the Act allows that "A public body may disclose personal information if … the individual the information is about has identified the information and consented in writing to its disclosure." The regulations state that this may be done. Is this adequate or appropriate for someone who cannot read or write? If the personal information is inaccurate, can it be corrected with assistance?

When an applicant is illiterate or marginally literate, can an agent or a person whom they trust assist them in making their request for information? Must any summary of a record that is provided be put into plain language for people with limited language skills?

When an applicant requests information contained on a disk or videotape, can they expect that the audio portion of the record will be transcribed for them?

Where an applicant is poor and without resources, should the fees for processing the access request for a record be waived?

When a person is unable to use their hand/s to use the designated form for their application, or is illiterate and unable to write, can the person apply verbally and expect the requisite form to be completed for them?

These are just a few possible examples. It is important for government at all levels throughout the province to appreciate their role in ensuring equal access for everyone and to gain an appreciation of what accommodation might look like in particular situations. Gaining access to information, participating in discussions and debates and thereby enjoying the guaranteed purpose under the freedom of information and protection of privacy legislation – this is just the first step towards ensuring real equality for all Nova Scotians and to achieve the goal of participatory democracy.

2. Shelagh Day and Gwen Brodsky. "The duty to accommodate: Who will benefit?" *Canadian Bar Review*, 75 (1996), 433.