The Difficulty in Establishing Privacy Rights in the Face of Public Policy from Nowhere

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Executive Summary

This paper examines two enactments of public policy in practice, the Saskatchewan Automobile Injury Appeal Commission’s (AIAC) posting of sensitive personal information on the Internet and the government (Saskatchewan and Alberta) sale of personal motor vehicle registration (MVR) information. The continued existence of these practices is counter-intuitive, given the volume and variety of privacy legislation passed in the last two decades. The paper argues that these policies are the products of gaps between legislative intention and subsequent action taken by non-accountable entities.

Through examining the arguments and actions sustaining these specific public policies, as well as the limited conception of privacy embedded in legislation, this paper arrives at three essential conclusions. First, that privacy legislation does not possess the substance that its title implies. At best, privacy legislation places minimal restrictions on the use of personal data. While there are opportunities to strengthen privacy protection, through legislation, a culture of respect for citizen privacy is also needed. Second, neither the actions of the AIAC nor those selling MVR data can trace explicit authorization for these practices to legislation. Both policies have been created by non-accountable entities; administrators with respect to the AIAC and most recently the judiciary with respect to MVR information. These are essentially public policies from nowhere, where actions are taken without corresponding accountability and responsibility. Third, Legislatures, where one expects accountability and responsibility to reside, have been able to resist involvement in these issues due, in part, to the absence of public pressure. The paper argues that the lack of pressure from the public is the product of the way the issues are framed by “experts”, the noise of expert-speak, media indifference and public policy emerging from nowhere. These elements combine to make the issues appear mysterious and disconnected. Through tracing the connections that link actual actions taken to create and sustain these public policies, this paper seeks to reduce the mystery and create a space for public involvement.
Overview

This paper examines the interaction of privacy and public policy in two specific examples in Saskatchewan and Alberta, in order to understand how, in each case, privacy is trumped in the face of other policy interests. The outcome of these cases is counter-intuitive given the apparent importance of privacy as evidenced by the passage of privacy legislation governing federal and provincial governments, municipalities and other public bodies, health information and the private sector, all within the last few decades.

The focus of this paper is on practice both with respect to privacy and public policy. Public policy in practice is viewed simply as policy that directly interacts with the public. One might intuitively assume that public policy is the direct product of formally passed legislation and related regulations. At this theoretical level there is a direct link between organizational action and political intention and there is little concern. If the public disagrees with policy in action, it has the practical ability to directly link responsibility back to the legislative body and hold it accountable. Yet, legislation tends to be very general and until it is acted upon, through the creation of regulations and actions taken to put regulations into practice, it has little direct interaction with the public. It is at the agency level that legislation and regulations are interpreted and policies and procedures are devised and enacted. It is this enactment that the public encounters in practice and the potential exists for gaps between intention and practice.

The theoretical perspective framing this paper argues that some degree of drift between intention and action is inevitable and it is argued that careful attention to public policy in action can provide insight into gaps between action and intention.

Methodology: Actor Network Theory

Actor-Network Theory (ANT) is a methodological lens employed to understand how, through actions taken, a subject of interest comes to take the form that it possesses in practice. ANT starts from the premise that the particular shape, meaning, and manifestation of the subject of interest could have been otherwise, but is not. The question then becomes, “How did it come to take this particular shape?”

ANT is very much focussed on the lived-world rather than the theoretical world. Reality is produced through the actions of local actors, acting on local interests and understandings, whose actions interact with others to produce something larger, networks effects or outcomes. There are two consequences that fall from this understanding of reality. First, network effects or outcomes are often unintended as all action is taken for local understandings and reasons. The “macro” consequence, the network effect or outcome, is the sum product of loosely aligned micro action for local reasons, rather than an orchestrated macro effort for a single purpose (Latour 1986, p. 29). Second, one cannot explain outcomes through macro explanations and appeals to unifying ideas or concepts that explain or guide all action. Actors self-enlist and align with others around an idea or program based on local understandings and for local reasons. Ideas put forward by any single actor must permit drift and translation of their meaning in order for others to enlist, to produce networks of action (Latour 1991). Thus, there is no single unifying idea or concepts guiding networks; networks are the consequence of local understanding and action, not the cause.

Controversy plays a key role in ANT investigations. Controversy indicates the existence of competing ideas, struggling to achieve dominance. Actors, their actions, their understandings and interactions are visible when they attempt to shape the resolution of a controversy (Latour 1987). Over time, if one side becomes more successful than competing alternatives, the controversy fades from view. Black boxes start to form around the successful
ideas (Latour 1988, p. 169). Black boxes are the product of closed controversies where, over time, all the previously competing ideas and arguments are sealed in a figurative black box, leaving only the resolution visible (Latour 1987, 1988).

As a practical example of the theoretical points articulated to this point, one can easily imagine a time where the capital of Saskatchewan may have been a contested idea with alternate possibilities. The story of how Regina came to be the capital is not generally known, but it is safe to argue that those aligned around Regina becoming the capital were acting for different reasons; there was no single motivation underlying all action. Any controversies around the selection of Regina as the capital have long since disappeared from view sealed away in the black box of Regina as the capital city.

ANT also cautions against the imposition of divides. The micro-macro divide has already been discussed; the macro is a consequence of micro action and it is the appearance of a macro that requires explanation and is not itself an explanation (Latour 1991). This caution also applies to the imposition of time divides (past and present), geographic divides (near and distant) and theoretically imposed divides (modern and post-modern). Divides sever continuities, forces that continue to influence events (Latour 1986). With respect to time, the past has shaped and is embedded in the present. Separating the past from the present obscures the threads that connect and hence limits our understanding of the present. Similarly, geographic divides sever influences of the distant on the near, making the source of ideas and actions mysterious. Theoretically imposed divides have the same consequence, making this or that factor relevant while dismissing others, thus predefining parameters of research undertaken, severing threads and limiting understanding and potential explanations.

ANT seeks to explain how life works, in practice. ANT does tell us what to find or what is relevant in a research situation (Latour 1999a, p. 21). The goal is to identify actual actors and trace the connections and ties that bind action.

One final element of ANT is relevant to this research and that is the notion and role of spokespersons. Spokespersons, like all actors, are local actors. They speak for a network of loosely aligned actors and are entirely dependent on the appearance of that alignment and the support of the network (Latour 1987). Should network alignment and support falter, the spokesperson's isolation is very apparent. To recognize a spokesperson as anything else is to grant that individual more substance than is possessed in reality. ANT’s understanding and use of this term draws attention to and highlights the precarious position of the spokesperson.

The overriding methodological principle of ANT is to “follow the actors” and they are most visible and identifiable at moments of controversy (Latour 1999b, p.128). Actors are those who act or cause others to act and could be other people, techniques, policies, or objects such as an information system that limits or forces action. Actors are identified and traced to discover the networks of influence and varied understandings that are brought to bear on controversies. These identified networks must be followed and the relationships understood.

ANT seeks to stay as close to lived life as the researcher possibly can.

“... ANT does not tell anyone the shape that is to be drawn - circles or cubes or lines - but only how to go about systematically recording the world-building abilities of the sites to be documented and registered” (Latour 1999a, p. 21).

The focus of ANT is in the world-builders themselves, actors in action.

One final note on ANT, with respect to politics generally. Bruno Latour, one of the principal developers of ANT, fears that politics at the elected parliamentary level is losing its influence in the face of fact makers and experts. He suggests that facts and techniques, as created, referenced and interpreted by experts focused on very narrow areas of expertise, tend to crowd out the opportunity for debate in the political arena. In the din of active expertise
and techniques, facts become “… at once completely mute and so talkative that, as the saying
goes, ‘they speak for themselves’ - thus providing the political advantage of shutting down
human babble with a voice from nowhere that renders political speech forever empty” (Latour
1999c, p. 140).

I share this concern and it forms the basis for and rationale of research to date, where
observed outcomes are troublesome given the range of possible alternatives, yet are justified
in a cloak of logic that appears able to escape questioning. This appearance requires
explanation. In the face of apparent belief in the importance of privacy, as evidenced by the
volume of related legislation passed in the last few decades, it is puzzling that privacy is often
trumped in practice. This puzzlement forms the basis of this research.

Background

With this theoretical framing in mind, this paper examines two local instances in which
privacy and public policy have interacted to produce enough controversy to become visible.
Controversy is important as it permits the issues to rise to the surface and it brings out the
players and spokespersons on a controversy, as positions are defended and staked. Thus,
controversy creates at least a limited opportunity to identify relevant players and their actions
and rationales for action.

The first case involves the Automobile Injury Appeal Commission (AIAC) of
Saskatchewan and the decision by its senior management body to post its decisions on the
Internet. The AIAC is the appeal body for the government run Saskatchewan Government
Insurance (SGI) Corporation. AIAC decisions, posted on the AIAC website, are accessible to
anyone around the world with a browser and an Internet connection. The appellant’s full
name appears on the first page of each decision. Within the body of a decision there may be
a wealth of personal information including the appellant’s income, physical and mental
health, family structure, educational background and other personal information. The
posting of such extensive personal information on the public Internet is counter-intuitive
given the apparent importance of privacy.

The second case deals with the sale of motor vehicle registration (MVR) information
by the provinces of Saskatchewan and Alberta. Individuals are required by law to register their
motor vehicles and provide personal information when doing so. The respective governments
have a long history of selling MVR information: Alberta through Alberta Registries and
Saskatchewan through SGI. Prior research has been conducted in this area in Alberta, and the
evidence is overwhelming that there is no legislative authority for selling this information.
But Appeal Court judges in Saskatchewan have ordered SGI to continue selling it, in the face
of the apparent importance of privacy.

In both cases, the act of balancing privacy against public policy in action has tipped
the scale employed heavily in favour of these policies. This is practical accomplishment, the
product of actions taken, which requires explanation. The structure of this paper is as follows.
First, the two cases dealing with public policy in practice and the use of personal information
will be introduced and analysed. This will be followed by an examination of privacy in
practice, as the practical counter-weight to these two public policies. A discussion will follow
and concluding comments will be offered.
Case 1: Automobile Injury Appeal Commission

AIAC - Background
The Saskatchewan provincial government created the AIAC to serve as the appeal body for Saskatchewan Government Insurance (SGI). When an injury or damage results from an automobile accident, a claim is made to SGI. SGI investigates, makes a decision on the claim and the injured party is informed of that decision. Should the injured party disagree with the decision they have the right to appeal to the decision-maker’s supervisor. If this does not resolve the matter, the injured party has the right to appeal the SGI decision to the AIAC. This type of arrangement is not uncommon. For example, the Appeals Commission for the Alberta Workers’ Compensation Board is an independent appeal body for the Alberta Workers’ Compensation Board.

In hearing an appeal, the AIAC gathers information from the appellant, SGI, and any other sources that it deems necessary in order to properly hear all matters that have bearing on the appeal. This includes information about the accident, the nature of the injuries sustained, information on the appellant’s prior physical and mental condition, their current condition and treatments (including pharmaceutical information), the type of work the appellant does and is capable of doing, the appellant’s income prior to the injuries and the impact of the injury on future earning potential. Incidental information might include the living arrangements of the appellant to determine additional support requirements, as well as the education attained by the appellant to determine their income expectancy prior to the accident. Any extenuating circumstances that might have a bearing on the appeal are also brought forward, such as issues involving alcohol as it relates to treatment and employability. The hearing panel conducts a hearing in person or based on written evidence and submissions, assesses the collected evidence with respect to the legislation governing SGI and the AIAC, and arrives at a decision on the appellant’s claim. The appellant, the appellant’s representative (if there is one), and any third parties that might be affected by the decision, including SGI, are advised of the decision. This is fairly standard practice for such appeal bodies.

Where the AIAC practice differs from standard practice is in what happens to decisions once they have been distributed to the affected parties. The executive management group of the AIAC has decided to post the decisions, in their entirety, on the AIAC website. These decisions are accessible to anyone with an Internet browser and connection. On the first page of these decisions is the full name of the appellant. This information may include any or all of the information previously listed, as well as assessments of any competing versions of events or interpretation of fact.

AIAC - Emergence of a Controversy
The AIAC’s practise of posting its decisions online were brought to the attention of the Office of the Information and Privacy Commissioner (OIPC) in the form of a complaint in 2004. Complaints are a form of controversy, disagreements over actions taken. The OIPC undertook an investigation compelling the AIAC to explain and defend its actions.

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\[^{1}\]This sort of decision is made at the highest level of the organization, perhaps with advice from an executive committee. Official AIAC correspondence suggests that the “Commission” decided to post this information on the Internet. In terms of action, that is misleading. The “Commission” does not make decisions, people do and most of the people working within the Commission (clerks, secretaries, IT personnel, hearing chairs and panel members and others) do not make these sorts of policy decisions. This is an example where the statements of a spokesperson create the impression of more substance than is actually there.
The issue as identified in the OIPC’s 2005 investigative report evolves around the disclosure of personal information through publication (Office of the Information and Privacy Commissioner of Saskatchewan 2005a, p. 6, 22, 27, 28). There is no dispute over the collection of personal information in order to hold a hearing or the use of the same information in assessing the merits of an appeal and coming to a decision.

The essence of the argument put forward by the spokesperson for the AIAC is that, “The Commission has concluded that it is authorized under its own legislation (AIAA and PIBR) and under the exemptions in HIPA and FOIPP to publish its decisions on its website” (Office of the Information and Privacy Commissioner of Saskatchewan 2005a, p. 3).2 The AIAC spokesperson also argues that, “We believe that in doing so [publishing decisions on its web site], we serve our public better by providing information of assistance in presenting their claims” (Office of the Information and Privacy Commissioner of Saskatchewan 2005a, p. 4). The “public” in this case must refer to future claimants and their representatives who can review past decisions in order to better prepare their own. Throughout the report the spokesperson for the AIAC likens the AIAC to a court and argues that court decisions are open to the public and therefore AIAC decisions should be the same way (Office of the Information and Privacy Commissioner of Saskatchewan 2005a, p. 4).

The OIPC concludes in its findings that the AIAC has no exemptions under FOIPP legislation and only limited section specific exemptions under HIPA. Other sections of HIPA still apply and, in this light, the AIAC is in violation of both Acts. Further, the OIPC report argues that the legislation governing the AIAC (AIAA and PIBR)3 is silent on posting decisions on the Internet so that there is no actual authorization. In addition, the OIPC report challenges the AIAC spokesperson’s characterization of the AIAC as a court rather than an administrative tribunal and further argues that the courts and those reporting court decisions exercise discretion over what is actually made publicly available and that, in general, courts themselves are wrestling with this issue of openness in the face of new technology. Finally, the OIPC report argues that a good deal of the privacy issues could be dealt with through removing individual names from the published decisions.

There the matter sits. The OIPC, as an ombudsman, acted on a complaint and investigated the matter. It issued a report that concluded that:

- the AIAC was not required to post its decisions on the Internet;
- its actions violate the FOIPP Act;
- identifying information should be masked from its decisions;
- the AIAC should take actions required of it under the HIPA Act; and,
- the AIAC should report on actions taken in this regard back to the OIPC within 90 days.

The publicly available response by the AIAC to the OIPC report is contained in the OIPC’s annual report. “The Chair advised that the Commission declined to cease publication of its decisions as rendered in their original form on its website and on www.canlii.org [a website reporting case resolutions]” (Office of the Information and Privacy Commissioner of Saskatchewan 2005b, p. 41).

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2 HIPA is the Health Information Protection Act and FOIPP is the Freedom of Information and Protection of Privacy Act. HIPA covers health information specifically while FOIPP governs personal information possessed by all public bodies.

3 Automobile Accident Insurance Act (Chapter A-35, of the Revised Statutes of Saskatchewan 1978), and The Personal Injuries Benefits Regulations (Chapter A-35 Reg. 3, effective January 1, 1995).
As the OIPC is an ombudsperson, the office can conduct an investigation but can only make recommendations. The OIPC does not have the authority to order organizations to comply with recommendations nor take the organizations to court. Thus, in a dispute involving the OIPC, the other party is free to adopt or not adopt OIPC recommendations, as it sees fit.

**AIAC - Analysis of Events**

With respect to the source of this public policy in practice, it is clear that the policy enacted was not defined by the Legislature. There is no explicit authority in the legislation for publishing decisions or making the decisions otherwise available to the public. The decision to post full decisions, in this level of detail, on the Internet was made by the senior management group of the AIAC.

Despite the OIPC’s report, this issue did not set off alarm bells for the government, opposition members, or the media. As actors, both the AIAC and the OIPC acted and there was no immediate reaction. In fact, the issue was ignored for almost two months. The OIPC issued its report in late January 2005. On March 17, 2005, Mr. Don Morgan, an opposition member, raised the issue in the Legislature after receiving a complaint from a constituent. He questioned the Minister of Justice, who is responsible for the AIAC, about the AIAC’s practice and the issues raised in the OIPC’s report. The Minister responded by saying that the Minister would not interfere with the independence of the AIAC.

“The office of the Attorney General does not micromanage, politically direct the commissions. It does not direct the prosecutors in that way, Mr. Speaker. It doesn’t direct the Human Rights Commission. It doesn’t direct the Legal Aid Commission. It does not direct the appeals commission for automobile injuries, Mr. Speaker. And as long as this government is in charge, it will not be providing that political direction and interference” (Saskatchewan Legislature 2005a).

The next day, when the Minister of Justice was asked if he would direct the commission to cease publishing such personally identifiable information, he reiterated his remarks of the previous day:

“Mr. Speaker, I will not stand here today and direct the Privacy Commission what to say. I will not stand here and direct the Human Rights Commission what to do. I will not stand here and direct the Legal Aid Commission what to do. And I will not stand here and direct an appeals commission that deals with the appeals of people’s injuries, appeals from a Crown Corporation, Mr. Speaker, and tell that commission what to do. No I will not Mr. Speaker” (Saskatchewan Legislature 2005b).

The Minister, by refusing to be enlisted into the dispute, absented himself from the issue. His argument for non-interference with matters under review or appeal was not the issue raised by the OIPC and Mr. Morgan. The issue was the administrative decision by the senior management group of the AIAC to post these decisions, without masking identities, on the Internet. The matter was never raised in the Legislature again and the Minister successfully resisted enrolment into the dispute.

On March 18, 2005, a brief article appeared in the *Regina Leader-Post* describing the incident in the Legislature (Rhodes 2005). The article pointed out that the commission has been posting decisions in this form since November 2003. The Chair of the commission
reiterated arguments cited in the OIPC’s report. The Minister of Justice again successfully used the independence argument, “I do not think that the people of Saskatchewan… would want us to interfere with the way the commission governs itself” (Rhodes 2005). The media did not challenge this argument. This is where the matter sits today. If you wish to exercise the right to appeal an SGI decision, you must also agree to bare your lives to the entire world. The role of the media as an actor in this instance deserves comment, as this was the only time the issue appeared. Other events quickly garnered the media’s attention. The provincial budget was tabled the following week and this became the media’s focus of attention. The media then moved onto issues surrounding the Catholic Papacy (the Pope was ill prior to his death on April 2, 2005 and his successor was not announced until April 20, 2005), the Gomery Inquiry revelations in Quebec, and the Michael Jackson trial. This local issue, the baring of the lives of Saskatchewan citizens through the posting of detailed personal information of SGI appellants on the Internet, fell off of the media and the public radar.

Through discussions with media employees on the issue, they both (public radio and television) came back with effectively the same response. “This is an interesting story, but we need a victim on the other side of the microphone or camera.” That is, if an appellant came forward, there would be a story. Interestingly, both members of the media came to the conclusion that appellants could be located and approached through the information provided in the posted decisions. At the same time, both individuals felt that it would be a violation of appellant privacy to approach them this way. The logic is interesting. There is a potential story about a massive exposure of very sensitive personal information, but approaching these individuals through the information that has been made publicly available would violate their privacy. According to the public policy created by the senior management of the AIAC, appellants are not entitled to privacy but no one, including the author, wants to actively violate it.5

In terms of actors and networks, a member of the public laid a complaint with the OIPC and the OIPC conducted an investigation. Around the actions of the complainant and the OIPC there was a brief enlistment, months later, by an opposition member, prompted to action by a constituent. Through the actions of the constituent and the opposition member, the media briefly enlisted. Within two days, these latter actors abandoned their involvement in the issue. On the other side of the controversy, the senior management group of the AIAC took action in 2003. That action was challenged in 2005 with the actions of the complainant and the OIPC and briefly joined by an opposition member and the media, but that alignment did not last. The AIAC claimed to speak for its “public” and aligned itself with courts generally. The Minister of Justice refused enrolment in the controversy altogether and the policy created by the senior management group of the AIAC is continuing public policy. Lack of action by the Minister, the media, or anyone else in the Legislature is, in effect, a network of non-opposition to the actions and claimed alignment of the senior management group of the AIAC. This leaves the OIPC and the AIAC alone in opposition and the legislation governing the OIPC and its ombudsperson status limit the OIPC’s ability to act further. With respect to the AIAC appellants, all available avenues have been followed. One registered a complaint with the OIPC and another with the opposition MLA. With the failure of others to align and remain aligned around these complaints, these two individuals remain local and isolated and AIAC created public policy remains in effect.

4The role of the media in fostering public debate, or failing to, warrants further research. What kind of actor is the media, in practice, on privacy and public policy issues? What kind of actor can it be? Are there gaps between its actuality, its potential and its belief in itself? These questions are potential future research questions, beyond the scope of this paper.

5The author wrote a letter to the editor on the subject and the letter was published. In retrospect all the letter did was to inform others of the opportunity to probe into the lives of people who have appealed SGI decisions.
Case 2: SGI/Alberta Registries and the MVR - Background

A newspaper article appeared in the Regina Leader-Post on February 13, 2004, stating that SGI would not follow Alberta’s lead in cutting off Imperial Parking’s (Impark) access to MVR data. An SGI spokesperson was cited, “We are legally obligated” to provide drivers’ names and addresses to collection agencies employed by private parking lot companies (Woods 2004). Alberta had decided to deny Impark access to MVR data. This article was followed, the next day, by a Regina Leader-Post editorial advocating following Alberta’s example (Editorial 2004). While the issue of the sale of MVR data in Alberta was brought to public attention through the actions of Impark’s collection agency, the Leader-Post editorial raised the more fundamental issue:

“It is not Impark’s practices alone that prompt us to call for the province to end SGI’s practice of providing companies with drivers’ names and addresses. We do not believe that the government should share [sell] personal information it has collected with any commercial venture. There is something fundamentally wrong with the government sharing [selling] information that it only has because provincial law requires that it be provided” (Editorial 2004).

This denial of access to MVR data by Impark in Alberta lasted only eighteen months. A year and a half later, an editorial in the Calgary Herald chastised the Alberta OIPC for permitting Impark to regain access to MVR data:

“It is bad enough that the province is violating the privacy of thousands of Albertans by selling Impark access to driver registration data, but the fact the government raked in $16 million last year by selling the information as well to 3,400 other groups is unconscionable and intolerable” (Editorial 2005).

Saskatchewan sells MVR data to Impark as well. We do not know, through any kind of independent investigation, who else SGI might be selling it to. Interestingly, 3,400 groups buy this data in Alberta but it is unlikely that these groups were ever publicly named. Even if we had evidence from such an investigation in Saskatchewan, the essence of the issue as articulated in the Calgary editorial, echoing the sentiments of the earlier Regina editorial, still remains:

“Albertans have no choice but to register with the government in order to drive. When they surrender their personal information to the province, they do it with the implicit understanding that in exchange, their privacy will be respected. That trust has been unforgivably broken” (Editorial 2005).

Yet, SGI argues that, “We are legally obligated” to sell this information. If this is true, someone has established a public policy. Who and on what basis?

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6In February 2004 Impark’s collection agency made automated telephone calls to hundreds of Albertans between midnight and 5 AM.

7It is not clear why the editorial writer chose the words “share” and “sharing”. This information is provided in exchange for money and therefore “sell” and “selling” are more accurate. This is more explicit in the Calgary Herald editorial that follows.

8The Regina Leader Post editorial extolling Alberta’s restrictions was written in February 2004. The Calgary Herald editorial criticising the Alberta OIPC for sanctioning the sale of MVR data to Impark was written in August 2005.
**SGI/Alberta Registries and the MVR - Emergence of a Controversy**

The February 14, 2004 editorial in the *Regina Leader-Post* points to two 1993 Saskatchewan Court of Appeals decisions as SGI’s justification for selling MVR data (Editorial 2004). Both cases involved SGI’s refusal to provide access to MVR data on the grounds that new privacy legislation prevented SGI from releasing personal information. General Motors Acceptance Corporation (GMAC) launched one case over SGI’s refusal to provide address information. GMAC had loaned money to an individual, secured by a lien on the vehicle. The person stopped making payments and GMAC was trying to locate the vehicle. The second case involved a collection agency working on Impark’s behalf. The OIPC and lower court decisions had sided against SGI. SGI brought the cases to the appeal level.

**SGI/Alberta Registries and the MVR - Analysis of Events**

With respect to the GMAC ruling, the judges decided that SGI must provide the information, but a review of the logic employed is problematic on four levels. First, the judges employed a “public access” argument; that the Freedom of Information and Protection of Privacy Act (FOIPP) did not apply to information previously available to the public. This argument is problematic in that MVR information is not actually available to the public; the man-on-the-street cannot access this data. This “public access argument” rests on an interesting definition of the meaning of public.

Second, the judges redefined the intentions underlying the *FOIPP Act*. The judges argued,

> “The FOIA was proclaimed in force effective April 1, 1992. It was enacted to facilitate public access to government documents. It is broadly conceived and like similar legislation in other jurisdictions, it seeks to permit access to official information shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from reluctant or unwilling officials.”

One potential reason for the confusion is that there is no such act as FOIA, provincially. The actual act, *The Freedom of Information and Protection of Privacy Act*, is a combined act written to provide access to government information while protecting the privacy of individuals whose personal data may be contained in government documents. This was very clear in the development of federal legislation in 1982, on which Saskatchewan and other provincial legislation is based. Through the late 1970s there were a number of pieces of federal legislation proposed on access to government information, during the Trudeau-Clark-Trudeau governments. The debate and discussion on access to information bills raised concerns about the privacy of citizens (Bennett 1990, p. 559). The essential issue was how to protect citizen information that might be contained within requested government records. That challenge was addressed by incorporating privacy legislation into access to government information legislation. The acts, privacy and access, are separate pieces of legislation federally, but they were written, debated and passed together as one bill in an attempt to strike a balance between access to government information and the protection of citizen information contained in government

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*Federal legislation was the first FOIPP type act in Canada, linking access to government information and the protection of privacy. This legislation was enacted in 1983 and provincial jurisdictions passed similar legislation in subsequent years. The Saskatchewan act was enacted in 1992.*
documents (Gillis, 1987, p. 125). Legislation was produced granting access to government information as the standard with limited specified exceptions for denying access, but with the clear proviso that “personal privacy would be paramount” (Gillis 1987, p. 126). Saskatchewan legislation is based on federal legislation, but is one piece of legislation enabling access while protecting citizen privacy.

The third problematic area of the decision of the judges is the argument that the information being disclosed does not offend any expectation of privacy. However, if people provide information for one purpose and are not informed that it will be used for other purposes, it is not clear how the judges could reach this conclusion. If there is no expectation that the information is going to be sold, then there is reasonable expectation that it will only be used for the purposes for which it was provided, to register automobiles.

Finally, the judges argued that the information being disclosed was not personal information. Rather, the information sought was about the vehicle that GMAC had a lien on. While there is a certain logic to that argument and GMAC must be able to exercise its right to re-possess a vehicle if the borrower reneges on their obligation, the information provided is no less personal. In arriving at that conclusion the judges addressed the specific sections of the FOIPP Act under which SGI had refused to release the information, 24 (1) (b) and (k). Section 24 (1) defines personal information as

\begin{enumerate}
  \item 24(1)(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
  \item 24(1)(k) the name of the individual where:
    \begin{enumerate}
      \item it appears with other personal information that relates to the individual; or
      \item the disclosure of the name itself would reveal personal information about the individual.
    \end{enumerate}
\end{enumerate}

The judges found that name and address information was not personal information by these definitions. It is not at all clear why SGI limited its justification to these specific sections as Section 24(1)(e) is much more specific to the case:

\begin{enumerate}
  \item 24(1)(e) the home or business address, home or business telephone number or fingerprints of the individual.
\end{enumerate}

The judges in their written decision speak only to sections (b) and (k) and do not extend the discussion or appear to consider section (e).

The second of the two appeal cases involved City Collection collecting fines levied by Impark on the owners of vehicles who had used Impark controlled parking facilities, without rendering the appropriate payment. SGI had again refused City Collection access to the names and addresses of the vehicle owners with the argument that the new FOIPP Act prevented the release of personal information. In this case, the judges argued again that this was not personal information and added the argument that a section of FOIPP related to permits and licenses declared such information to be public. It is unfortunate that the

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11 It appears, from the arguments put forward by Impark and City Collections, that paying appropriate fees for parking is a serious problem in Saskatchewan with SGI providing City Collection Company Limited and Imperial Parking Limited approximately 45,000 names and addresses between April 1990 and February 1992, a twenty-three month period.

12 Section 24(2)(e). Section 24(2) defines what is not defined as personal information and 24(2) states, “details of a license, permit or other similar discretionary benefit granted to an individual by a government institution”.

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Saskatchewan FOIPP Act has not been reviewed since it was first passed in 1990-1991. A review of the Alberta FOIPP Act, three years after it was in force, entailed a discussion around a similarly worded section. It was determined that the section dealt with commercial and non-commercial permits (such as bear hunting permits), and not motor vehicle licences (Alberta Legislature 1998a; Alberta Legislature 1999).

Both cases (GMAC and City Collections and Impark) also appealed to section 4 of the FOIPP Act, which preserves existing rights.

Section 4
This Act:
(a) complements and does not replace existing procedures for access to government information or records;
(b) does not in any way limit access to the type of government information or records that is normally available to the public;
(c) does not limit the information otherwise available by law to a party to litigation;
(d) does not affect the power of any court or tribunal to compel a witness to testify or to compel the production of documents;
(e) does not prohibit the transfer, storage or destruction of any record in accordance with any other Act or any regulation;
(f) does not prevent access to a registry operated by a government institution where access to the registry is normally allowed to the public.
(1990-91, c.F-22.01, s.4).

The relevant sections are (b) and (f). Both of these sections create exemptions from the FOIPP Act for records “normally available/allowed to the public”. Two questions arise from these arguments. First, by what right is MVR data normally available? If not through a right created by legislation, where did it come from? Second, the appeal to the public access argument raises questions about the meaning of “public”, since the man-on-the-street cannot access these records. The question arises, how is “public” defined? Together these questions require an historical understanding of the source of these rights and strange definition of the word public.

The Distant Past: On “Rights” and the “Public”

On the Question of Rights
Research on the history of the registration of motor vehicles and the sale of MVR data, by the government of Alberta covering the period 1906 through 2000, is reported in depth elsewhere (Bonner 2002). A brief synopsis is necessary in order to understand the basis of existing practices and the notion of “rights” and “public access”.

Evidence of the sale of MVR data has been traced back to 1925, captured in a 1928 cash reconciliation for Saskatchewan Motor License Branch, as shown in Figure 1, Appendix 2. The upper left-hand corner of the reconciliation shows that, in the first four months of 1928, Wiggins Systems Limited (Wiggins) purchased 50,383 licenses for $0.075 each, or $377.87. According to the lower center portion of the reconciliation, a total of $1,067.28 was received from Wiggins in the fiscal year 1927-1928. No such cash reconciliations have been discovered for Alberta, but other pieces of the historical sale of this information have been
found in the Saskatchewan and Alberta provincial archives, as well as the Companies Registry in Manitoba.

It is known for certain that Wiggins received copies of every MVR slip from Alberta, Saskatchewan and Manitoba, and did so until 1957, when it ran into financial difficulties and eventual bankruptcy.

“While the firm is not bankrupt, it was insolvent and that there had been a continuous loss in operations during the previous ten months. Mr. Wiggins explained that this loss for the past ten months had been primarily caused by the loss of volume due to the automotive trades taking their direct mail contract from him to an agency operating from Eastern Canada” (Canadian Credit Men’s Trust Association Limited 1958).

Whatever else Wiggins might have been doing with this information, the sale of this information for marketing purposes was clear, both in the above statement as well as in a document found in the Saskatchewan Archives, reproduced in Figure 2, Appendix 3. This document is a mailing list dated January 23, 1951 and contains a list, organized by license number, of names, addresses, vehicle make, vehicle style, vehicle serial number and year of every passenger vehicle in Regina. A separate listing exists for commercial vehicles.

While the origins of the sale of MVR data date back to the mid-1920s, the first legislative authorization for selling it was in 1962, when Alberta Regulation 417/62 made direct reference to the sale of bulk MVR data to R.L. Polk of Canada (Polk). This legislative change emerged from concern expressed within the department of the Ministry of Highways about the absence of legislative authority to sell MVR data. Strong suggestions were put forward to the Minister to alter the legislation to formally legitimatize the sale of MVR data; however, this was never done. A poor, second choice recommendation was to legitimatize the sale of MVR data through changes to regulations - this was done.

The regulations were again changed in 1967 (Alberta Regulation 453/67) to permit O.E. McIntyre Limited, a direct mail marketing company out of Montreal, to purchase bulk MVR data for marketing purposes. The introduction of the modern computer enabled the sale of multiple digital copies of the same MVR data, which had previously been tied to individual paper registration slips. The Minister of Highways expressed it this way, “With the use of a magnetic tape and the computer, it was possible to make this information available to anyone” (Taylor 1968). The deal with O. E. McIntyre was never consummated as O. E. McIntyre decided to wait until reaching agreement with other provinces and circumstances changed, including the rise of privacy as a public concern in the 1970s.

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13Research informants suggested that all western provinces sold MVR data to Wiggins, but no firm evidence has been found to verify that this was the case in British Columbia.
14The mailing list cover page suggests that this is a list for the city of Regina, but Yorkton, Indian Head, Biggar, Ormiston and others are also in the list.
15Alberta regulations are the ones traced, as the Gazette in Saskatchewan, which records changes to regulations, is not indexed prior to the early 1960s.
16A change to the legislation would have to go through the Legislature and become public and subject to debate. Changes to regulations are treated as orders-in-council and are passed by the government itself, without legislative debate.
17The changes were made to accommodate the sale to O.E. McIntyre, but the wording permitted sale to anyone.
18Wiggins and Polk purchased a copy of each physical registration slip and then hired people to manually sort and organize the information gleaned from slips into useful information.
19McIntyre wanted computer tapes and was waiting for all provinces to computerize the vehicle registration process. Manitoba, Quebec and Alberta had computerized motor vehicle registration and were considering selling the computer tapes to McIntyre (Griffith 1967). Ontario was one of the last provinces to computerize vehicle registration, in the early 1970s, and by that time governments were discontinuing the bulk sale of MVR data.
An incident in 1972 revealed that, during 1971, MVR data was used by Polk to make 1,916,057 mailings in Alberta based on MVR records. Polk made mailings on behalf of automobile manufacturers; the War Amputees Association Key Tag program and slightly more than 700,000 mailings were made for identifiable advertising and marketing companies. Polk also prepared mailings for Reader’s Digest, Mil Mac Publications, MacLean Hunter, Ogilvy and Mather (American Express), Simpson Sears, Sovereign Seat of Cornwall, Ontario, numerous automobile dealers and oil and gas companies (Heil 1972). This discovery led to restrictions being placed on Polk’s use of MVR data, in Alberta and subsequently other provinces, and eventually personal information was deleted from bulk data.

While it appeared that a practice that had never had legislative authorization was being curtailed and eliminated in the 1970s, the introduction of the modern computer, and in particular databases, made it possible for the government to access and use this data for other purposes. This possibility was acted upon and the government began to sell access to this data through search accounts. By 1978 there were 1,000 search accounts in existence with multiple thousands of search account holder employees having access to this database. The largest accounts included bank branches, finance companies, collection agencies, insurance companies, car dealerships, investigation companies (such as Hooper Holmes Bureau Inc.), department stores, a tracing company and others whose names do not indicate their type of business (Solicitor General’s Department 1979a). Within a few short years questions about the propriety of the government selling MVR data and control over search accounts arose within the government.

“Officials of the department have spied defects in the practice of imparting information to whomever requests it merely upon payment of the fee proscribed by section 6(h) of the regulations issued under the Motor Vehicle Administration Act. There is room for dispute whether this should be a function of the Motor Vehicle Division (Solicitor General’s Department 1979b, 9. 4).”

Nothing was done at the time and the practice continues in some form today. A 1998 Privacy Audit conducted on the MVR by the OIPC and the Auditor General of Alberta revealed, in general terms, the types of bodies buying MVR data in Alberta. Alberta Registries, the government department responsible for the MVR, discloses personal information to “public bodies, municipalities, federal government bodies, hospitals, post-secondary institutes, parking companies, and private sector businesses” (Office of the Information and Privacy Commissioner and the Auditor General Alberta 1998, p. 23). Private sector Alberta Registry agents sell personal information to law firms, private investigators, collection agencies, small businesses, private parking companies, etc” (Office of the Information and Privacy Commissioner and the Auditor General Alberta 1998, p. 22). This is as specific as the report gets. Years later, in 2005, it appears that there are 3,400 groups purchasing this information, although once again no specific information is provided (Calgary Herald, Editorial Opinion, 2005).

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20Polk prepared mailings for others. That is, organizations requested that their mailings be sent to people possessing certain characteristics. Polk would take those mailings (letters and envelopes), cull through their lists for individuals possessing those characteristics and put names and address on the envelopes. Thus, Polk’s name never appeared on the envelopes and the organizations did not get access to Polk’s lists. This is the case with credit bureaus today.
In this review of the past we see that through actions that were never publicly debated, MVR data has been sold for decades. It is has never been a legislative right. It existed as a practice for four decades before regulations were belatedly created to make mention of it. It has never been authorised by legislation or debated in the Legislature. It is a public policy from nowhere that has been a source of uncertainty within government. This uncertainty is not reflected in the judicial arguments and conclusions. The decision by the judges’ mandates grants legitimacy to a practice that the practice has never possessed, a practice that has for decades wrestled with its own illegitimacy.

On the Meaning of “Public Access”
The final point to be raised in this historical review concerns public access to the database. The term “public” appears repeatedly in the court decisions referred to earlier. But the public does not have access to MVR data. The history of public access to MVR data, where the public refers to the man-on-the-street, also has its origins in the distant past. In the 1960s it was still possible for an individual to get the name and address of a vehicle owner simply by presenting a license plate number and paying a fee. By the late 1960s and early 1970s there were concerns raised about the use of MVR data, that this information could be used in ways that might lead to the harm of an individual, leaving the government open to legal action (Harle 1982). Access to MVR data by the “public”, in terms of the man-on-the street, was phased out and eventually terminated in the 1980s. As it stands the public can be accessed through MVR data, but the public cannot access it.

Case Commentary
MVR information has been sold over the course of 80 years and the original rationale for starting the practice is unknown. The origins of the practice are sealed away in a black box, its origins long lost from view, leaving only the practice itself. Multiple actors have been involved in sustaining the practice over the last nine decades. Wiggins for reasons unknown, acquired access to this information in the 1920s and over the next four decades created a network of actors around the use of MVR data, from people sorting and compiling information from paper registration slips to organizations purchasing mailing lists or employing Wiggins to handle marketing campaigns. Polk took over in the 1960s and created its own network around the data. O.E. McIntyre attempted to do the same thing, but the winds of change worked against it. Instead of the practice of selling MVR data disappearing in these winds of change, with the use of the computer the province created a network around the sale of MVR data that continues to exist in some unknown form today. All the while, legislation never authorized the sale of MVR data and uncertainty has been expressed about the propriety of government selling information (within the government, in occasional letters from citizens and in periodic newspaper editorials and articles). The practice itself has unknown origins in terms of purpose, yet has survived for eighty years. This despite the fact that the actors and networks involved in buying and using it have all changed as have the individual actors within government involved in selling it and the legislators that have, through abdication or lack of knowledge, permitted it to continue. The only constant is that the government has been the creator of contracts with others to buy the information and the collector of revenue related to its sale. The obvious superficial explanation is that money has been the motivating factor through the decades. Yet, in the 1960s the revenue amounted to no more than $8,000 per year, which might have paid a mid-level employee's salary and benefits for a year. This is, relatively speaking, a small amount of money and is a limited explanation. The only explanation that suffices is that the practice has become an unexamined
black box that has survived due to general secrecy about the practice, ever-changing actors with time-sensitive justifications that go unchallenged, and that the meagre benefits have not been offset by any practical cost in terms of opposition.

This past is the basis of and is embedded in current practices. The actions of the Appeal Court in 1993, in insisting that SGI must sell the information, hard-coded a public policy that has never seen the light of public discussion and has never been publicly justified. For the most part, the public does not know that this information is being sold and there is a great deal of secrecy around the practice itself and who has access to MVR data. According to the Calgary editorial cited previously, 3,400 groups have access to MVR data in Alberta, although they are not named. If this number is accurate, the actual number of people having access to the data is in the multiple thousands, as numerous employees within each group will have access to the account. Even this amount of limited information is not available within Saskatchewan.

It is this lack of knowledge that makes it all the more dangerous. Civil servants are aware of the potential danger to individuals through the sale of MVR data, but in one discovered instance of this awareness the proposed solution defied logic. During the 1997-1998 Alberta FOIPP Act review, a committee member raised such an issue. This committee member, an independent MLA, expressed concern about the release of a person's address. She framed the concern in terms of an individual moving to escape an abusive relationship, yet having to comply with the law and register a change of address with the motor vehicle registry. If MVR data were sold, it would be a way for the abusive partner to discover the individual's new location. The solution proposed by the administrator responsible for the MVR was stunning. The committee member was told that in a serious situation an individual could arrange to have their address suppressed so that even the police could not get it. In such situations individuals might also be advised to use a post office box to shield their actual street address (Alberta Legislature 1998b, p. 10).

Yet, most people do not know that this information is being sold. Even if they had that knowledge, it is difficult to imagine that people facing serious personal situations would be willing to plead those circumstances to strangers, assuming that they knew who to approach. The use of a post office box might alleviate the second concern, but it is an expense foisted on individuals by a system over which they have had little influence and possess no knowledge about the potential need for this action. Unfortunately, this comment was unchallenged.

In both the AIAC and MVR cases, non-legislative actors created specific public policies. The senior management group of the AIAC decided that transparency and openness of the appeal process requires baring the lives of appellants to the world. The judges decided that an unknown history should be granted a substance and legitimacy that it had never earned in practice. Yet we have privacy legislation as the counter-weight in both controversies. We have to address the question then, “What does privacy mean, in practice?”

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21The Alberta FOIPP Act came into effect in 1995. The legislation mandated that the act be reviewed within three years of coming into effect. The Saskatchewan FOIPP Act has been in existence since 1990-1991 without a review.
Privacy in Practice

Privacy has many potential meanings. Privacy could be defined as the right of an individual to control access to and knowledge about their bodies (Cavoukian et al. 1995) (Finestone 1997, p. 6); the right to the sanctity of one’s home and personal space (Schwartz 1968); the right to communication without monitoring (Introna 1997, p. 261); the right to think without being censored (Schoeman 1984, p. 10); the right to be free from the noise and amusements of others (Marcuse 1968, p. 245); the space necessary for individual accountability and responsibility to develop (Introna 1997, p. 274); or, a cornerstone of a free society (Westin 1967).

Yet, the most common definition of privacy, in practice, is that privacy refers to the right to control the collection, use, and disclosure of personal information, where personal information is any information that is identifiable with an individual. Legislation and organizational practices employ this conception of privacy and rules surrounding the use and disclosure of personal data, electronic or otherwise. It could have been otherwise but is not and this requires an explanation in order to understand its manifestation as a counter weight to AIAC and MVR practices.

The seeds of the modern constitution of privacy, modern in the sense that it is narrowly centred on personal information, are a product of the 1950s, 1960s and early 1970s.22 This predates any Canadian privacy legislation by decades, but it is in this time period that the modern meaning of privacy was shaped. During this time the computer emerged as a sign of progress and of a new age. Utopian visions of the modern computer aside (and there were plenty, see Martin, 1993), as computer technology emerged from military uses to non-military uses, through the 1960s and 1970s, it came to be seen as presenting two separate and distinct faces.

One face presented a powerful administrative tool capable of processing raw data at speeds far in excess of manual labour-intensive clerical processes existing at the time. This face suggested that not only would the computer process the data faster, it would enable the processing and collating of data in ways that had previously been prohibitively expensive and time-consuming. For most government departments dealing with vast volumes of information about citizens and finances, and industries such as banking, insurance, credit agencies, and others, the computer appeared to offer incredible potential.23

The other face seen to exist in the computer garnered much less enthusiasm. For those seeing this face, they saw a potential enabler of the “big brother” or dossier society, where governments could gather, store and make use of a wealth of information about its citizens. The concern about this potential was particularly strong in Europe with its recent memory of war and the consequence of administrative “efficiency” resulting from paper-based files kept on individuals (Flaherty 1989, p. 374). Concern about this possibility was not unique to Europe, as the US government’s plan to build a national database met with protest and the plan was shelved (Commission on Freedom of Information and Individual Privacy Vol. 3 et al. 1980, p. 505).

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22 For a more detailed review of the development of the modern notion of privacy see Bonner and Chiasson (2005).
23 See for instance McKenney et al. (1997) on pre-computer bank cheque processing problems arising from an ever-increasing volume of paper cheques.
Those seeing the potential benefits of the first face of computer technology had every reason to be concerned and take action. Governments in Europe were passing unique pieces of data protection legislation in response to public concerns, which threatened to make it difficult for data to move easily from country to country. These legislative actions threatened to diminish some of the potential envisioned in the modern computer. Together, through the Organisation for Economic Co-Operation and Development (OECD), private organizations and governments sought ways to address the tensions over the two faces of the new technology.

Their efforts produced two critical ideas that have shaped our current conception of privacy. The first was that the core issue involved a trade-off between privacy and freedom of information. The second was that privacy was defined in terms of the object that was generating the controversy, the modern computer. That is, that the root problem was defined as concern about data; the thing that computers manipulate (see Niblett 1971).

The OECD produced a document entitled Guidelines: On the Protection of Privacy and Transborder of Personal Data (Organisation for Economic Co-Operation and Development 1980). The title contains the tradeoffs considered, privacy and the freedom of information. The details of these guidelines, known as fair information principles (FIP), reflect the translation of the notion of privacy into a narrow focus on data. The document contains eight principles, which are reproduced in Table 1, Appendix 1, to emphasize their focus on data. Each of the eight principles refers to data; the word privacy does not appear at all.

The subsequent adoption of the OECD principles has been impressive, evolving from an idea put forward by a single organization and its networks into an international standard. “Virtually all American and European privacy legislation is based on a regulatory regime called Fair Information Practices” (Laudon 1986, p. 96). Canada is no different. “Much of the public sector privacy legislation in Canada is based on the principles in the OECD guidelines” (Akay Information Consulting Inc. 1995, p. 9). This is echoed in a review of the development of federal privacy legislation, “These international standards generated privacy principles that had a considerable impact on the current provisions of the Privacy Act” [Canadian federal act] (Gillis 1987).

Thus privacy, and its protection in legislation and in practice, is limited to concerns about personal data.

The Canadian Privacy Regime

Canadian jurisdictions, starting with the federal government, linked privacy legislation to access to government information legislation. Federally, these acts exist separately, but they were written together, debated as one act, and passed at the same time. Provincially, these are single pieces of legislation. For example, Saskatchewan and Alberta privacy legislation are both entitled, The Freedom of Information and Protection of Privacy Act.

As discussed earlier, Canadian legislation was driven by a focus on access to information possessed by the government. Privacy arose as an issue in the debates over the access to information legislation, as personal citizen information might be included in government documents (Gillis 1987). FIP were seen as a tool for addressing this privacy

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The term “freedom of information”, as used in the OECD Guidelines, refers to the free movement of data.
Canadian legislation was driven by a focus on access to information possessed by the government. Privacy arose as an issue in the debates over the access to information legislation, as personal citizen information might be included in government documents. (Gillis 1987)

The final point to be made in the discussion of Canadian privacy legislation is the exemptions created for access to MVR data, referred to earlier. Motor vehicle registration is a provincial matter in Canada. The legislation for Saskatchewan and Alberta was written with the intention of gaining an exemption for the MVR. Reasons given for this are varied and inconclusive. Whatever the reason or reasons, the wording in the legislation was a deliberate attempt by the writers of the legislation to exempt MVR data from the legislation.

Section 4(f) of the Saskatchewan FOIPP Act (1990-1991) entitled *Existing Rights Preserved*, states that the FOIPP Act “does not prevent access to a registry operated by a government institution where access to the registry is normally allowed to the public.” The wording in the Alberta Act, written a few years later, was based on existing Ontario, Saskatchewan and British Columbia legislation. Through interviews, it is clear that writers of Alberta legislation were uncomfortable relying on the wording of Saskatchewan’s legislation for exempting the MVR. They felt that the MVR might not fall into the category of “access normally allowed the public”, since the public did not have access to MVR data. Alberta’s legislation (Section 4(1)(h) of the Act (Statutes of Alberta, 1994, Chapter F-18.5), section 4(1)(h)(ii) drops reference to the word “public” and grants outright exemption for a “record made from information in the office of the Registrar of Motor Vehicles Services.” This section of the legislation was never discussed in the Legislature.

While this seemed to have the desired result, the MVR was exempted from the FOIPP Act, the Alberta privacy audit conducted on the MVR in 1997-1998 raised the longstanding issue, that the legislation governing motor vehicle registrations does not authorize the sale of MVR data. What specifically happened in the writing of Saskatchewan legislation is unknown, but the section that exempts the MVR from the FOIPP Act bear a strong resemblance to exemptions in previously passed Ontario FOIPP legislation.

Privacy Commentary

Privacy in practice is a limited conception of its potential. It has been reduced to a set of rules about the handling of personal data. The creation of rules around privacy has two consequences. The first is that rules tend to be interpreted in the minimum. That is, if rules are seen as an obstacle to action then considerable effort is expended seeking ways to limit the obstacle, by meeting the minimum requirements of the rules. Thus, areas of legislation open to interpretation are interpreted in favour of the desired action. A former provincial cabinet minister and leader of a political party expressed it this way.

“That happens so often. The minimum becomes the maximum. … When you get bureaucrats wanting to do something or being asked to do

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25For example, arguments were made in interviews that the MVR was exempted in Alberta to avoid having private registry agents ensnared in the access to government documents part of FOIPP. This is an incomplete explanation as other provinces, without private registry agents, contain similar exemptions in their legislation.
something, they go and interpret the law. That’s what they have to do. Any thought of more protection is pretty foreign. Quite often they’re being pressured to [discover], ‘How are we going to get around this?’”

The second consequence is that, with a focus on rules, questions of ethical or moral behaviour become foreign to the exercise. Rules and arguments about interpretation become the subject of discussion. Lost in this focus is that one can be in strict compliance with legislation and still offend senses of decency and propriety. Thus when AIAC spokespersons present arguments and interpretation of rules contained in various pieces of legislation, as justification for publishing personal information on the Internet, questions of ethics and moral behaviour are not raised or addressed. This contrasts sharply with the way that the issue was framed in the 1960s and 1970s, before the creation of any Canadian privacy legislation. Questions about selling MVR data in Alberta, at that time, were phrased in terms of the propriety of selling MVR data. The existence of this same pre-rule based concern is still evident today, in the media’s sense of the impropriety of coldly approaching SGI appellants through the information readily available on the AIAC web page. There is no rule against approaching appellants this way, but it is somehow not right.

The practical counterweight to the organizational practices of the AIAC and the selling of MVR data is interpretation about rules governing data.

Discussion

In these two cases we see public policy emerging as though from nowhere in the sense that it cannot be traced to an accountable and responsible entity, a Legislature. The AIAC case came closest with the issue being directed to the Minister of Justice, but he avoided the question by either not understanding it or translating it into something else. As a consequence, the expected network and links leading to an accountable entity, the legislature and citizen representatives, is not present. The senior management group of the AIAC created public policy without accountability.

In the case of the sale of MVR data, judges took the most recent action, legitimating a practice that has been searching for legitimacy for many decades. Judges created public policy and they too are not accountable for that action. Public policy made in this way, has no checks and balances. Citizens have no avenue to complain and exert their rights and their responsibilities as active citizens.

At the same time we see that privacy in practice has a very limited meaning, having been translated from a potentially very broad concept into a very narrow one focussed on data. Renaming Canadian legislation with the title “protection of privacy” has the unfortunate consequence of granting it a status that it does possess. It can reasonably be argued that this status potentially creates a sense of complacency on the part of legislators, the media, organizations and the public, that privacy in a broad sense is being protected. A sharp divide has been inserted between the potential meanings of privacy and its actual meaning in practice. It’s potential has been left behind.

It is privacy in practice that sits in opposition to organizational practices in both cases. Privacy in practice is represented by the OIPC and FOIPP legislation. The OIPC’s ability to act is constrained by the limited conception of privacy embedded in the legislation and the ombudsman nature of the Saskatchewan OIPC, whereby the OIPC’s recommendations can be ignored. SGI’s attempt to enlist privacy as the basis for restricting access to MVR data was doomed for failure from the start as FOIPP legislation was deliberately written to avoid ensnaring the MVR (SGI in Saskatchewan and Alberta Registries
in Alberta). Only the broadest interpretation of the legislation would have supported SGI’s efforts. In the case of the AIAC, lack of action in the Legislature helped trump privacy concerns, but so too did the fact that the legislation governing the OIPC provides no subsequent recourse. The decision makers at the AIAC rejected the OIPC’s conclusions and recommendations and the OIPC has done all that the FOIPP Act permits.

Both the federal privacy commissioner and the OIPC in Saskatchewan have argued that their respective acts are in need of review. They argue that existing legislation is “first generation” legislation that has “gaps” or “holes” that require filling, as existing legislation is seriously challenged by subsequent technological changes and their impact on privacy rights (Office of the Information and Privacy Commissioner of Saskatchewan 2005b; Privacy Commissioner of Canada 2005). The federal privacy commissioner summed the limits of the legislation this way, “More than age enfeebles the Privacy Act. Perhaps the most critical flaw is the law’s function as a data protection statute, not a true privacy law. While not toothless, the best the law can manage in some circumstances is to “gum vigorously”” (Privacy Commissioner of Canada 2005, p. 21). These comments are understandable when the genesis of privacy legislation in Canada is understood; when the past embedded in the present is revealed. The central issue is that they are not privacy acts in any broad sense of the term privacy. They are acts created to protect citizen information in government documents based on principles (FIP) that are, at their core, rules designed to limit restrictions on the free movement of data. The practical potential of those principles to protect privacy, in any broad sense of the term, are further weakened by the exemptions embedded in the legislation.26

It is worth noting that both of these commissioners are ombudspersons, they can investigate and advise, but they have no power to order compliance. This contrasts with the commissioners in Ontario, British Columbia and Alberta, where the commissioners have the power to order organizations to comply with their rulings and if organizations disagree with their decisions, these organizations must take the decisions to court. It is not clear that the power model is necessarily better than the ombudsperson model. First, the two models deal with weak legislation. In the case of the MVR, the commissioners in B.C., Alberta and Ontario are as powerless as the commissioner in Saskatchewan. The sale of MVR data is exempted from their respective pieces of legislation.

Second, there are tradeoffs involved. An ombudsperson is less threatening than a power based commissioner and this may result in a less adversarial relationship and facilitate resolution through dialogue, persuasion and negotiation. This outcome is not guaranteed. In the case of the AIAC a simple resolution to many of the privacy issues would be to remove names from published cases and substitute some sort of numbering system. The decision makers at the AIAC rejected this alternative. The advantage of a power based model is that it would be up to the administrative leadership of the AIAC to challenge the OIPC’s decision and justify its actions in open court, a much more open process than the actions have been exposed to at the present time. With the current ombudsman model in Saskatchewan, the senior management of the AIAC is free to ignore the OIPC’s opinion, without having to engage the issue in a public forum. Theoretically it might be possible to strengthen the ombudsman-type model by permitting the OIPC to take an issue such as this to court.

26Recent health information and private sector privacy legislation do not have this access to information component to them. But the principles underlying this type of legislation are the same.
Yet, the question of the order making authority of the OIPC avoids the central issue of accountability and responsibility. Granting the OIPC, another non-elected actor, the same sort of political autonomy assumed by the AIAC is difficult to justify on that basis alone. As an officer of the legislature reporting to the legislature, the logical place for the resolution of disputes between the OIPC and government bodies would appear to be within the Legislature itself. This is not happening here and changing the power model underlying privacy legislation will not address this abdication of responsibility and accountability on the part of the Legislature.

Even recognizing those limits of privacy as defined in legislation, there is something even more fundamental at play, a lack of a culture of respect for citizens. In the case of MVR data it is hard to argue that a culture of respect for citizens exists when the government mandates that citizens provide information when registering their motor vehicles and then turns around and sells it. The failure of elected officials to raise the issue, when the Alberta FOIPP Act was debated in the Legislature, through inadvertent omission or deliberate intent, also suggests the absence of a culture of respect. Even if the practice were publicly justified, which has not been done, the failure to provide citizens with details about who is buying the information and what is being done with it is hardly respectful of the citizenry. In addition, through the decades there has been an aura of secrecy around the sale of MVR data. This secrecy around a practice that has nothing to do with national security is difficult to reconcile with a culture of respect. With regards to the AIAC, granting individuals the right to appeal lower level bureaucratic decisions but exacting the price of baring their lives to the world to exercise that right cannot be considered an act of respect. The failure on the part of actors in the Legislature to challenge the administrative practices of non-elected administrators also demonstrates the absence of a culture of respect for citizens.27

If this conclusion seems harsh, consider another government program being created that demonstrates the same absence of a culture of respect. The Pharmaceutical Information Program (PIP) is currently being piloted across Saskatchewan. The goal of the program is to create a prescription drug database that, once the program is fully implemented, will receive and store a record of every prescription that is filled in the province. The data will be collected by pharmacists, third parties and largely private sector organizations, and fed to the government database. Whatever the merits of the program, to this point there is a startling omission. What information must citizens provide to a pharmacist that is absolutely required by the PIP program? This information has not been provided and without it, how can citizens critically assess requests for information? How can the public discern the difference between information a pharmacist needs for PIP versus information the pharmacy or the pharmacy’s parent organization wants for other purposes? In the absence of making this information available to the public, what is developing with the PIP is a situation similar to the AIAC example, the extortion of consent. The public is in no position to challenge the extent of the information requested, to distinguish between what is needed and what is being collected because the opportunity makes it possible. As it stands, if you want the prescription filled, answer the questions presented.

The media’s role in these cases deserves reflection, but is difficult to characterize. In the case of the AIAC, but for a brief appearance, the media has deemed the story and its issues...27

27Again, the actual appeal decisions of the AIAC and the process employed should be exempt from political interference. Administrative decisions, such as posting full decisions on the Internet with names attached, should not be granted that same exemption.
to be non-newsworthy. The OIPC report was issued in January 2005 and the media reported on it briefly in March 2005, only after the issue was raised in the Legislature. The issue disappeared just as quickly. With respect to the sale of MVR data, media coverage is strangely ahistorical. Over the decades, articles, opinions and editorials have appeared with tones of indignation and outrage over the government’s sale of MVR data, similar to those cited earlier. Each time, though, the issue is reported as though it were newly discovered, thus fracturing a continuous story.

This is an area that warrants additional research both with respect to media reporting on privacy issues and the media’s actual role and ability (as opposed to theoretical) to inform the public on matters of public interest. An impression created, through years of study in the area of privacy, is that the media rarely probes beyond the surface of a story and the story disappears as quickly as it appears. Future research would seek to substantiate this impression and its consequences, in the area of privacy and, potentially, other areas of public policy as well.

While perhaps an unorthodox methodology, ANT and its focus on controversy have enabled a view of these two cases and privacy generally that may aid in promoting public debate, through the addition of context tied directly to actual action rather than theoretical constructs. By focusing on action, the issues involved are far less mysterious than they appear without this context. The outcomes of the two cases discussed are not the direct product of legislative action; they are the indirect product of a host of varied actors in action. In fact it may be reasonably argued that these outcomes are unintended outcomes of legislative action. The construction of these outcomes was set in motion by legislation, legislation creating the AIAC and requiring that automobiles be registered, but these specific outcomes were never authorized or sanctioned by legislation.

The insertion of the FOIPP Act in both disputes adds to the mystery of public policy from nowhere, in part, as the FOIPP Act appears to represent much more (privacy) than it actually does (data). Also, it inserts an historical divide. In the case of the MVR, the basic issue is the same as it has been for the last nine decades. The insertion of the FOIPP Act and interpretations of its wording severs and leaves behind the basic and historically continuous question. Should the government sell information collected from citizens under force of law? In the case of the AIAC, the insertion of the FOIPP Act and disputes over its interpretation also obscures a more fundamental question. Is the baring of the lives of Saskatchewan citizens (mothers, fathers, brothers, sisters, grandparents, neighbours and friends) to the world, the best that we can do?

While revising privacy legislation may strengthen the voice of privacy, it would only be a partial solution. Legislation leads to the creation of expertise and techniques and the production of facts around legislation and its interpretation that become, “... at once completely mute and so talkative that, as the saying goes, ‘they speak for themselves’ - thus providing the political advantage of shutting down human babble with a voice from nowhere that renders political speech forever empty” (Latour 1999c, p. 140). In the competition of expertise and facts something is lost, a culture of respect. The only ones who can force this are citizens through their elected politicians. It is clear that citizens are not involved enough at this level. It is not clear whether this lack of involvement is due to an outright lack of interest that cannot be kindled, or that the public is perplexed by the babble of voices from nowhere that makes the issues appear mysterious.

What information must citizens provide to a pharmacist that is absolutely required by the PIP program?...The public is in no position to challenge the extent of the information requested, to distinguish between what is needed and what is being collected because the opportunity makes it possible. As it stands, if you want the prescription filled, answer the questions presented.
Concluding Comments

The paper concluded on the issue of public interest and involvement in public policy. If the public is not interested under any circumstances then the game is over, public policy will continue to emerge from nowhere with limited opposition. Public inaction is public non-opposition and in the face of non-opposition those acting will carry the day. Networks do not have to be strong; they only have to be stronger than the actual opposition. This is particularly troublesome in the area of privacy.

If we view governments as networks of actors, each heavily engaged in local programs, even with the best of intentions thinking beyond the details of those programs is difficult for local actors. Privacy does not belong to any particular local program, it transverses programs. Overseers, such as Ministers and legislators, are the logical choice for assuming responsibility for privacy, but they are torn between their constant contact with the needs and issues of in-government actors and the needs and desires of their constituents. They are engaged in a balance of tensions. Failure on the part of public actors to act on issues of privacy reduces overall tension within government and the level of oversight on the topic. When this happens the weights granted privacy, in the act of balancing it against other interests, would be whatever local actors decide to use. A potential consequence is that the practices established by existing non-accountable public policy will cascade; will become the black boxes on which future decisions will be made. That is, the AIAC decision may become justification for similar actions by other actors in the future. Similarly, since the actors in charge of the PIP did not advise citizens as to what specific information is required for that program, future actors implementing other programs may deem it unnecessary as well.

Against this dire assumption regarding public interest and involvement in public policy is the possibility that it is the mystery of the ‘facts’ and ‘noise’ of experts and actions surrounding privacy issues that creates an inability to act. In the confusion of expert crosstalk and action, issues appear out of context, make little sense and appear irrelevant or fragmented beyond the public’s ability to participate. I sincerely hope that the latter assumption regarding public interest and involvement is true. This research and paper is an attempt to reduce the mystery surrounding these particular cases involving privacy, keeping the threads of action that connect them visible while minimizing the divides and distractions that are inclined to obscure and sever them. If privacy is important to the public, as is suggested by the passage of privacy legislation, then it is important to understand how privacy issues play out in practice, to provide insights into the source and nature of gaps that emerge between practice and intention. With visibility comes the potential for informed action.
Appendix 1

Table 1. Basic Principles of National Application

1. **Collection Limitation Principle**
   Personal data collection should be limited and collected by fair and lawful means, preferably directly from the data subject.

2. **Data Quality Principle**
   Personal data should be relevant for the purpose for which it is to be used and should be accurate, complete and up-to-date.

3. **Purpose Specification Principle**
   The purpose for data collection should be specified no later than at the time of collection and that subsequent usage of the data should be compatible with those purposes.

4. **Use Limitation Principle**
   Personal data should not be disclosed or used for other purposes unless required by law or with the data subject’s permission.

5. **Security Safeguards Principle**
   Personal data should be protected against loss, unauthorised access, destruction, use, modification or disclosure.

6. **Openness Principle**
   The existence of the possession of personal data should be transparent and the person responsible for that set of data should be made known.

7. **Individual Participation Principle**
   An individual should be able to see and contest data that exists and be able to challenge the possession of some aspect of the information possessed and if successful have it altered or removed.

8. **Accountability Principle**
   A person who has responsibility for a collection of data must be accountable for instituting practices and procedures to enact principles 1 through 7.

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Appendix 2

Figure 1

<table>
<thead>
<tr>
<th>Department of Revenue, Secretary, Motor License Branch</th>
<th>1928</th>
<th>1929</th>
<th>1930</th>
</tr>
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<tbody>
<tr>
<td>Real Estate Revenue</td>
<td>1,397,250.10</td>
<td>1,510.66</td>
<td>1,501.92</td>
</tr>
<tr>
<td>Cash Collections on Account</td>
<td>2,969,400.92</td>
<td>2,969,400.92</td>
<td>2,969,400.92</td>
</tr>
<tr>
<td>Less: Disbursed Change of Account</td>
<td>322,15</td>
<td>322,15</td>
<td>322,15</td>
</tr>
<tr>
<td>Current Revenue for Fiscal Year</td>
<td>2,645,234.34</td>
<td>2,645,234.34</td>
<td>2,645,234.34</td>
</tr>
<tr>
<td>Disbursements against Account</td>
<td>322,15</td>
<td>322,15</td>
<td>322,15</td>
</tr>
<tr>
<td>Outstanding Disbursements against Account</td>
<td>1,061,428</td>
<td>1,061,428</td>
<td>1,061,428</td>
</tr>
<tr>
<td>Counter Cash Must May 1, 1929, Deposited:</td>
<td>322,15</td>
<td>322,15</td>
<td>322,15</td>
</tr>
<tr>
<td>Outstanding Disbursements against Account</td>
<td>1,061,428</td>
<td>1,061,428</td>
<td>1,061,428</td>
</tr>
</tbody>
</table>
Appendix 3

Figure 2

MAKE GOOD USE OF YOUR Mailing Lists
IT WILL Push Up YOUR Sales

Wiggins Systems Limited
MAILING LIST

DATE January 23, 1952

Customer's Order No.

Our Order No. 1502

List of Numerical List for the City of Regina

(PASSENGER)

Supplied to Financial Agencies Limited

201 Westman Chambers

Regina, Saskatchewan
About the Author

Bill Bonner earned his Ph.D., in 2002, from the University of Calgary, Faculty of Management. He joined the Faculty of Business Administration at the University of Regina in 2004.

Bill has conducted extensive research in the area of information technology and privacy with a particular emphasis on how privacy issues play out in practice. The variety and complexity of interacting influences that shape practice has led Bill to expand the scope of his research to include history, ethics and public policy.
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