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Barry Cahill*

Ministerial Mifeasance: *R. v. Morris*
and a Unique Early Privacy Breach

According to Klein & Kratchanov (Government Information: The Right to Information and Protection of Privacy in Canada, 2nd ed., 2009), "there is one reported case of a successful private prosecution for violation of an access statute through the unauthorized release of personal information. The matter arose under a former Nova Scotia Act and resulted in a modest fine being imposed against a Minister of the Crown who had disclosed information about the complainant." What follows is a close, contextual study of a case unique in the short history of privacy law in Canada, from the perspective of the thirty-year development of information access and privacy law in Nova Scotia.

Selon Klein & Kratchanov (Government Information: The Right to Information and Protection of Privacy in Canada, 2^e éd., 2009), on ne relève qu'un seul cas où une poursuite privée pour infraction aux lois sur l'accès à l'information par la divulgation non autorisée de renseignements personnels a été accueillie. La poursuite a été intentée sous le régime d'une ancienne loi de la Nouvelle-Écosse, et un ministre de la Couronne qui avait divulgué des renseignements sur le plaignant a été condamné à payer une amende peu élevée. Le texte qui suit est une étude rigoureuse et contextuelle d'une affaire unique dans la courte histoire du droit sur le respect de la vie privée au Canada, de la perspective des développements, au cours des trent dernières années, du droit sur l'accès à l'information et le respect de la vie privée en Nouvelle-Écosse.

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It seems an Orwellian bizarrerie that a minister of the crown should intentionally commit a privacy breach in order to counter media criticism of his department.¹ Yet in May 1987 Nova Scotia's Minister of Social Services publicly disclosed sensitive personal information from the family benefits application file of a client of his department who had written a newspaper article denouncing Social Services and its minister. Today such a disclosure would be, in the language of current law, "an unreasonable invasion of a third party's personal privacy"² and would necessarily expose the minister to fine or imprisonment or both. Then, however, Nova Scotians trying to obtain services from their government had a right to privacy of personal information but no legally enforceable protection of that right. The unfortunate individual whose privacy was breached was a young single mother who responded by initiating a private prosecution of the minister when the attorney general declined to act.³ The minister was tried in Provincial Court for a summary conviction offence, found guilty and fined \$100.⁴ What follows is an analysis of *R. v. Morris*⁵ from the perspective of the origin and development of information access and privacy law in Nova Scotia.

According to the leading Canadian text in the field, *R. v. Morris* is the "only reported case of a successful private prosecution for violation of an access statute through the unauthorized release of personal information."⁶ Though not of high precedential value, the case made history and it certainly made news. The access statute concerned was Canada's first⁷

1. The Nova Scotia Government Privacy Policy, approved by Cabinet in 2008, defines "privacy breach" as "Unauthorized collection, access, use, disclosure, storage or alteration of personal information": Management Manual #300 Common Services, Chapter 4.11.

2. *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, s. 20(1).

3. At the time there was no independent crown prosecution service separate from the Department of the Attorney General (since 1993 Department of Justice).

4. Except where otherwise indicated, this article is based on news reports in Halifax's daily newspapers, *Chronicle-Herald*, *Daily News* and *Mail-Star*, May 1987 through January 1988.

5. (1988), 85 N.S.R. (2nd) 200, 216 A.P.R. 200 (N.S. Prov. Ct.); see "Unreported Decisions," (1988) 15:2 *Nova Scotia Law News* at 18, s.v. Administrative Law.

6. C. McNair & C. Woodbury, *Government Information: Access and Privacy*, §6.6 ("Civil and Criminal Liability for the Improper Release of Information") (Toronto: Carswell, 1989-2010) at 35. See also K. Klein & D. Kratchanov, *Government Information: The Right to Information and Protection of Privacy in Canada*, 2d ed., (Toronto: Carswell, 2009) at 3-31.

7. *Freedom of Information Act*, S.N.S. 1977, c. 10 (R.S.N.S., 1989, c. 180). Enacted in May 1977, *An Act respecting access by the public to information on file with the Government* came into force by proclamation on 1 Nov. 1977. It remained unamended until its repeal thirteen years later. A second FOIA (Bill No. 40, 1981) died on the order paper when the provincial election was called. If enacted, it would have made significant procedural changes to decision, review and appeal and would have entrenched privacy protection as an intrinsic value in both preamble and purpose. It is unclear why the bill was not reintroduced after the Buchanan government was handily re-elected in October 1981. Nine more years were to elapse before FOIA was replaced.

and the first of three such acts passed in Nova Scotia between 1977 and 1993.⁸ The four-point preamble to the *Freedom of Information Act, 1977* (hereafter, FOIA) linked protecting the public from government secrecy to the 1848 achievement of democratically accountable government. According to FOIA, government was to operate “openly and by providing to the people access to as much information in the hands of Government as possible without impeding the operation of Government or disclosing personal information pertaining to persons or matters other than the person desiring the information.”⁹

Despite offering privacy protection, FOIA was in no sense a Privacy Act. The concept is implicit in “personal information,” but the term “privacy” itself is absent. If there was a focus, it was not on third-party privacy protection but on persons’ gaining access to personal information about themselves.¹⁰ The very existence and presence of personal information, however, necessitated a limitation on access to information. Persons whose information was on file with government exercised “rights” respecting it, while departments as personal information custodians incurred corresponding “obligations.”¹¹ The former included access and correction, the latter privacy protection. The framers of FOIA could scarcely have imagined that the operations of government would be impeded by privacy protection, or, worse, advanced by privacy breaches. Such was the anomaly of *R. v. Morris*, which Heather Mitchell, the Toronto lawyer who authored the first Canadian text on access to information law, pronounced “a first in Canadian jurisprudence.”¹² Twenty years after, the case remains a one-off; it made an example of a senior cabinet minister and, as such, has proved a highly effective deterrent to ministerial irresponsibility.

Though FOIA entrenched a specific right of access to personal information about the person making the request, otherwise departments exercised wide discretion over access to information. The ruling principle seemed to be not good stewardship or public trusteeship but feudal lordship. Government was obliged to disclose very little government information, and departments as a rule disclosed no more than they had

8. The others are the *Freedom of Information Act*, S.N.S. 1990, c. 11 and the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5.

9. FOIA, Preamble, paragraph 4.

10. Historically, government secrecy was so excessive and pervasive that persons had difficulty gaining access to information about themselves even for purposes of correction or other legitimate administrative uses. Access therefore had a double aspect: personal access to personal information and public access to government information. In *Morris* we detect the tendency to conflate the two aspects of access/disclosure.

11. FOIA ss. 6(1) and 6(2).

12. “Cabinet minister convicted, fined in privacy case” *Toronto Star* (16 January 1988).

to or wanted to. Access to information was more narrowly construed than privacy protection, which, though incidental to FOIA, was a basic expectation of citizenship and civic life. Privacy protection was a factor and function of personal information given effect as a necessary exemption of personal information from disclosure. Since personal information was a class of government information to which FOIA applied, there could not be freedom of information without privacy protection. At a time when privacy was taken as read and access to information the exception rather than the rule, critics of FOIA were less concerned with privacy protection than with government secrecy.¹³ Secrecy, not privacy, was the bigger challenge because invasions of privacy were unlikely to occur if nothing other than what would now be regarded as routine or public-record was disclosed. Nor was personal information by any means the only exception to disclosure.

FOIA was ten years old when the notorious privacy breach occurred, and though it had been judicially considered from time to time, it had never been the subject of an adjudication. Just as it had not occurred to anyone that government would unlawfully disclose personal information, nor did anyone think that an access to information act could be used to protect the right to privacy of personal information. The victim, Brenda Thompson, afterwards wrote about her experience in the "brief autobiography" appended to her 1992 master's thesis in sociology:

In less than a month after becoming involved with the group [Mothers United For Metro Shelter – MUMS], I was embroiled in a legal battle with the provincial Social Services Minister. In my capacity as welfare mother activist, I had written an opinion piece for a local newspaper on the regressive and sexist welfare policies which our Minister of Social Services had implemented in his five years in office. His response to my public criticism was to retaliate by revealing extremely personal information from my welfare file to the news media. I demanded a public apology. I hired a lawyer¹⁴ and laid charges against him with the help of another single mothers group, Legal Action for Women on Welfare (LAWW).

The ensuing battle received attention in the provincial legislature and

13. FOIA was not in good odour among informed critics, one of whom alleged that the Liberal government of Premier Gerald Regan which introduced it had "acted less out of devotion to open government than out of embarrassment at having been caught laundering a report on the environmental impact of the Wreck Cove [Victoria County] hydroelectric project": Parker Barss Donham, "Freedom law returns to the back burner" *Globe and Mail* (27 February 1982). The report referred to was *Environmental Assessment and Management Strategy: Wreck Cove Hydroelectric Project* (1976).

14. Anne S. Derrick, now Her Honour Judge Derrick of the Provincial Court.

in the local and national press.¹⁵ The court case went on for several months¹⁶ with the outcome being in my favour. This drew a tremendous amount of attention and debate on the issue of single motherhood in Nova Scotia.¹⁷

The 21 May 1987 issue of Halifax's *Daily News* carried a lengthy op-ed by Thompson entitled, "Social Services a system of frustration." In it she severely criticized both the Department of Social Services and its minister, a post which Edmund Morris, the former MP and mayor of Halifax, had held in the Progressive Conservative Government of Premier John Buchanan since 1981. Six days after the article appeared Morris reacted by disclosing sensitive personal information about its author in the House of Assembly, where his remarks were protected by legislative privilege.¹⁸ Once outside the House, however, he pursued the same line with reporters. A few weeks later, during an interview for CTV's nationally telecast public affairs program, *W5*, Morris acknowledged and defended the action he had taken and indicated he might do so again if circumstances warranted.

Morris's action seemed a variation on the theme of eminent domain, if not *droit de seigneur*: the minister exercised sovereign personal control over all information in his department, with the right of disclosure.¹⁹ He did not distinguish between "internal use only" and public disclosure as fair use serving a legitimate operational purpose. It was one thing for Morris to access Thompson's file in order to brief himself on the substance of her allegations; quite another for him publicly to disclose personal information about Thompson in order to abuse, discredit, embarrass, intimidate, punish or silence her. By exercising her right of free speech Thompson found her right to privacy sacrificed.²⁰ Professor Wayne MacKay of Dalhousie Law School was quick to observe that the minister's "pre-emptive strike on

15. The case was densely covered in both the Toronto *Globe and Mail* and *Star* after charges were laid.

16. November 1987 through January 1988.

17. Brenda Juanita Thompson, *Single Mother Activists on Welfare: An Examination of Social Roots of Collective Action in Nova Scotia* (M.A. thesis, Acadia University, 1992) at 107-8 [unpublished].

18. For obvious reasons they were not recorded in Assembly Debates.

19. Morris may have seen this disclosure of personal information as disclosure in the public interest—though FOIA contained no such override. The *Freedom of Information Act, 1990* provided for limited and qualified public-interest disclosure of personal information; S.N.S., 1990, c. 11, s. 6.

20. On May 29th the *Daily News* published a sequel, "Welfare moms scorned for being poor," which, according to the byline, had been "written before [Thompson] became the subject of debate at Province House this week." See also "Brenda Thompson's story: Why does Mr. Morris infuriate her so much?" *Pandora* (Halifax) (September-December 1987).

free speech” was an “outrageous invasion of privacy” which appeared clearly to violate FOIA.²¹

The interpretation section of FOIA defined personal information as “information respecting a person’s identity, residence, dependants, marital status, employment, borrowing and repayment history, income, assets and liabilities, creditworthiness, education, character, reputation, health, physical or personal characteristics or mode of living”²² – many if not most of which would necessarily figure in any application under the *Family Benefits Act*.²³ FOIA also provided that “a person in respect of whom personal information is contained [maintained?] in a file by a department may...request that the information contained in the file not be used or made available for any purpose other than the purpose for which it was provided without...consent.”²⁴ Thompson, of course, had made no such request, never anticipating that the personal information contained in her family benefits application file would be used or disclosed for any purpose other than the purpose for which it was provided, without her consent.

By June 1987 Thompson was considering the possibility of taking legal action against the Minister of Social Services. On 4 October the *W5* feature (“a single mother’s battle over the release of confidential information”), for which both Thompson and Morris were interviewed, was broadcast. So unrepentant was the minister (“Morris offered a fiery defence on the show”)²⁵ that Thompson’s lawyer began to explore and explain the legal options available to her. On 31 October Thompson made the decision to prosecute Morris. Two weeks later, Brenda Thompson went before a justice of the peace to swear out an information charging Edmund Morris under Section 4 of the *Summary Proceedings Act*, offence and penalty not being provided for in FOIA.²⁶ The charge alleged that by disclosing personal information about Thompson without her consent, the minister had contravened subsection 6(2)(a) of FOIA: “A department maintaining personal information files shall not make the personal information contained therein available to another department or person

21. “Single mom outraged after her file released” *Toronto Star* (12 June 1987).

22. FOIA s. 2(g).

23. R.S.N.S. 1989, c. 158 (repealed 2000). It was enacted in 1977, the same year as FOIA.

24. FOIA ss. 6(1)(b).

25. “Brenda’s on TV” *Daily News* (5 October 1987). No transcript of the *W5* feature exists.

26. “Every one who, without lawful excuse, contravenes an enactment by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an offence punishable on summary conviction and liable to a fine of not more than five hundred dollars or to imprisonment for six months or to both.”

for another purpose without the person's consent." Thompson, of course, had not given her consent, nor had it been asked for, nor would it have been given if it had been.

The same day the charge was laid, Thompson's lawyer wrote the attorney general²⁷ asking that an independent special prosecutor be appointed to act for the crown, in order to preclude a looming conflict of interest: Morris's son was a crown attorney in the Department of the Attorney General. The attorney general replied that he would not agree to counsel's request unless Thompson stayed the private prosecution, thus allowing for a police investigation to proceed and charges to be laid by the provincial crown. Understandably Thompson's lawyer, faced with an imminent filing deadline, declined to risk abandoning the private prosecution. Then, in a surprise move, on the very eve of Morris's scheduled arraignment Premier Buchanan shuffled his cabinet and reorganized the government. Morris found himself demoted from Social Services but retained as a minister. His former department was discreetly renamed "Community Services."

On 25 November Morris appeared before Judge William J.C. Atton of the Provincial Court, which had jurisdiction over offences against provincial statutes. Morris's lawyer²⁸ moved to have the information quashed on two grounds, one procedural the other substantive: first, that the information lacked sufficient particulars to show that an offence existed or had been committed and secondly, that "a minister could not commit an offence under the act."²⁹ As minister Morris was presumed immune from prosecution; above a law which applied to his department but not, a fortiori, to himself. In one sense, counsel's point was well-taken. The minister had no express standing under FOIA except on appeal from decisions of the deputy minister. It was as if Morris could be minister of social services without being accountable head of the department of that name and assuming responsibility for its actions even when taken personally by himself on its behalf and on his own authority as minister.

Despite being a convenient legal fiction, the argument was also reflected in the information, which specified "Edmund Morris" not "minister of social services." Had Morris not been minister, of course, he would not have enjoyed the privilege of unfettered access to Thompson's family benefits application file which enabled him to disclose personal information from it. Minister and department were integrated and inseparable. Though FOIA

27. Correspondence with the late Terence R.B. Donahoe Q.C. is in the solicitor's file; courtesy Brenda Thompson.

28. A. Lloyd Caldwell Q.C. The late Mr. Caldwell was a Conservative senior lawyer in private practice.

29. "Morris to stand trial" *Chronicle-Herald* (23 December 1987).

did not define the term “department” as including the minister thereof, it equated Department with “Government,” in other words Cabinet ministers collectively or individually. Morris was ex officio head of the department maintaining the personal information which was disclosed regardless of the only condition, other than consent, which authorized disclosure: “Every person shall be permitted access to information respecting... personal information contained in files pertaining to the person making the request.”³⁰ Moreover, as minister of social services Morris was the designated minister responsible not only for specific legislation like the *Family Benefits Act*, but also for the operation within his own department of legislation of general applicability like FOIA. The *Family Benefits Act* did not make any provision for securing the privacy protection of client case files because it did not need to. FOIA applied to *all* information “on file with the government” unless another enactment took precedence. There was no question that the privacy of personal information contained in family benefits application case files was fully protected. Ironically, FOIA seemed to offer more in the way of protection of privacy than it did freedom of information.

That personal information was mandatorily exempt from disclosure unless the requester was the subject of it, or had given consent, did not mean that a minister was powerless to disclose it. On the contrary, ministerial privilege was interpreted to mean that disclosure could be presumed authorized if the minister did the disclosing. Due process could safely be disregarded because the minister was somehow outside and beyond the reach of statute law governing his own department. Yet a minister with departmental responsibilities could scarcely waive his department’s obligations respecting personal information. The minister’s responsibility for ensuring that the department complied with its obligations was increased, not reduced by his standing at arm’s length from first-instance decision-making on FOIA requests. Morris’s action amounted to trespass against his prescribed role as reviewer of decisions made under the act.

Morris, for his part, seems to have taken the view that ministerial powers in relation to FOIA were residual and supererogatory. Not only could he hear appeals from decisions of the deputy minister; he could also treat, handle and dispose of information in any manner he saw fit – including arbitrary, ex parte, public disclosure of personal information. On the face of it, since FOIA conferred on the minister a power of independent review, he could not, for the purposes of FOIA, be a member or agent of the department. By the same token, however, the minister would have been

30. FOIA s. 3(g).

precluded from taking any action whatsoever beyond reviewing decisions on access requests, and then only at the request of the applicant. FOIA did not contemplate disclosure decisions without access requests, much less unilateral external disclosure for a non-administrative purpose. There was no ministerial override.

Judge Atton reserved decision on the defence motion. Each counsel having submitted memoranda of law to supplement oral argument – Thompson’s lawyer’s ran to nine densely-written pages³¹ – on 4 December Judge Atton dismissed the motion to quash and ordered Morris arraigned. He also recused himself, citing conflict of interest. The matter of a trial judge had been referred to Harry How, Chief Judge of the Provincial Court, who decided that a judge of the Provincial Court should not preside lest the independence of the judiciary be seen to be compromised. Judge Atton’s highly unusual recusal was due to the accused’s being a member of the Cabinet, which appointed Provincial Court judges. Worse still, Judge Atton was chair and Morris a member of the tribunal which determined the salaries and benefits for judges of the Provincial Court. The case was thereupon adjourned until 18 December for arraignment and plea. A federally-appointed judge to preside was found. Mr Justice K. Peter Richard of the Supreme Court, Trial Division, accepted the invitation to sit as a judge extraordinary of the Provincial Court, which the *Judicature Act* permitted him to do. It is unclear why none of the three judges of the County Court for District Number One (Halifax County) was called upon to preside.

Morris was arraigned a week before Christmas and pleaded not guilty. Defence counsel announced that he would be making pre-trial the same motion to quash the information as had already been argued and dismissed pre-arraignment. The rehearing and prosecution objections thereto were set down for 22 December. In the event, Justice Richard declined to rehear the application, sustaining the prosecution objection that the motion to quash had already been considered and disposed of by the court. He also remarked by way of obiter dictum that he would probably have made the

31. Of Derrick’s 53 points, the 37th was the most telling: “If Mr. Morris as an individual is not within the meaning of department in Section 6(2)(a) [of FOIA], then one result of this would be that no individual could be brought within this definition and the section would be rendered meaningless. Another possible result would be that a department would be prohibited from releasing personal information but a Minister would be able to do so with impunity. It was surely not the legislative intent to exclude a Minister from the prohibition against release of information, The former result is patently absurd and the latter would place the Minister above the law”: Derrick to Atton, 2 December 1987; *supra* note 27.

same ruling as Judge Atton had he been required to consider the original question on its merits.³²

The case came to trial on 15 January 1988. A packed courtroom and full day's hearing of evidence featured a parade of witnesses, among them the complainant, who was cross-examined at length by counsel for the accused.³³ Morris did not testify in his own defence, thus avoiding what would surely have been a rigorous cross-examination by counsel for the prosecution. Three reporters testified that the minister had disclosed Thompson's personal information to them in interviews. Two audiovideotapes made 27 and 28 May 1987 by reporters who had interviewed Morris outside the legislature were replayed, as was the *W5* segment. The defence went so far as to contend not only that the identity of the putative father of Thompson's child was not personal information as defined in FOIA, but also that the *ad hominem* character of Thompson's op-ed in the *Daily News* amounted to implied consent to the release of personal information about her; that she had in effect waived her right to privacy by volunteering personal information about herself in a public forum.

On request of counsel, Justice Richard allowed Morris to move from prisoner's bench to counsel table, as if to suggest he were the defendant in a civil suit rather than the accused in a prosecution. Counsel also made two further unsuccessful efforts to have the case dismissed. The court found Morris guilty as charged, the judge making clear in his decision that the minister was an agent of the department more so than any employee. Defence moved for an absolute discharge, but the motion was successfully opposed on the grounds of case law. Another substantive legal point addressed was whether Thompson's opinion piece constituted provocation amounting to "lawful excuse," which would have vacated the charge. Thompson, who was prepared to carry the case to a higher court if the accused were acquitted, did not appeal the nominal fine of \$100,³⁴ nor did Morris his conviction.³⁵ Bruce MacKinnon's cartoon in the *Herald* of 19 January 1988 ("Item: Morris Found Guilty Of Exposing Confidential Information") depicted Thompson as a smiling Salome bearing away on a platter the severed head of Morris's decapitated John the Baptist.

32. Derrick to Thompson, 23 December 1987; *supra* note 27.

33. The trial transcript has not survived.

34. Counsel for accused proposed \$300 while counsel for informant sought four times the maximum then allowable under the act: \$2000.

35. The Canadian Press reported that an appeal on Morris's behalf was under consideration; "Buchanan backs convicted minister" *Globe and Mail* (20 January 1988).

Even before it became clear that the trial would proceed, Government had announced its decision to pay Morris's legal expenses.³⁶ Once the accused was convicted, government had little choice but to agree to the request to pay Thompson's as well.³⁷ Morris retained his seat in Cabinet, despite Opposition calls for his sacking. Premier Buchanan predicted that Morris's conviction would result in a review of FOIA, lest the act have a chilling effect on ministers doing their jobs by speaking their minds. Morris resigned from Cabinet in July 1988 and from the Legislature in September; the case had put a shabby end to his long and otherwise distinguished political career. Thompson, for her part, repaid the staunch support she had received both inside and outside the Legislature from Alexa McDonough (party leader) and Robert Levy (MLA, Kings South) by standing for the New Democratic Party in the 1988 provincial election. Though unsuccessful, her candidacy and vigorous campaign helped ensure the defeat of the Conservative incumbent in Dartmouth North, the Reverend Laird Stirling, Morris's predecessor as Minister of Social Services, who was the only Cabinet minister defeated in the Buchanan government's return to power. *R. v. Morris* also helped launch a Halifax journalistic institution. The first issue of *Frank*, a biweekly satirical magazine, appeared between charge and arraignment and featured on its cover Edmund Morris descending the main staircase at Province House.

FOIA was neither reviewed, nor revised and amended in response to the *Morris* decision. In June 1990, however, near the end of the Buchanan premiership, it was repealed and replaced. The new *Freedom of Information Act* was in part reactive but also a constructive response to *Morris*. It substantially redefined "personal information," enlarging its scope to include the very sort of information which had been unlawfully disclosed.³⁸ For greater certainty, it spelled out that "A department *and the minister thereof* shall not disclose information that is personal information,"³⁹ and it defined "minister" as a member of the cabinet.⁴⁰ Significantly, it also introduced a privative clause barring the prosecution of anyone

36. "Province will pay for Morris's lawyer - premier" *Chronicle-Herald* (24 November 1987). However, the Cabinet stopped short of appointing a government lawyer to defend Morris, which would have put paid to the argument that he was being prosecuted in his private rather than his ministerial capacity.

37. They amounted to some \$14,000.

38. S.N.S. 1990, c. 11, s.3(e)(v): "correspondence sent to a department by the person that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence."

39. Emphasis added.

40. The *Executive Council Act* identifies ministers by their departmental responsibility.

who in good faith disclosed information subject to the act.⁴¹ Finally, it made abundantly clear, as its predecessor had not, that the act imposed obligations on ministers of the crown (“Act binds Her Majesty”).

To paraphrase the long title of FOIA, an act respecting access by the public to information on file with government did not authorize ministers publicly to disclose personal information on file with government. If citizens had the right to information access, then they also had the right to information privacy – and government the corresponding duty to protect the privacy of citizens. Under FOIA a cabinet minister was successfully prosecuted for failing to comply with his department’s obligations respecting personal information. Under Nova Scotia’s second *Freedom of Information Act*, the minister probably could not have been prosecuted at all. The third and current *Freedom of Information and Protection of Privacy Act*, which came into force on Canada Day 1994, created the summary offence of maliciously disclosing personal information.⁴² It also makes clear that disclosure of personal information is “presumed to be an unreasonable invasion of a third party’s personal privacy if the personal information relates to eligibility for income assistance or social-service benefits or to the determination of benefit levels.”⁴³ Both provisions were a resonant reminder of the 1987 breach of Brenda Thompson’s privacy.⁴⁴

Twenty years ago, the people of Nova Scotia needed protecting from an abuse of state power quite different from denying access to government information. However incompatible government secrecy may be with democratic accountability, government negligence in the matter of privacy protection is no less incompatible with fundamental rights. The more absolute the privilege of administrative access to personal information, the heavier the burden of responsibility on public servants to protect it from disclosure. An unlawful disclosure of personal information could not be presumed authorized on any grounds, nor did ministerial fiat amount to authorization. As minister, Morris was uniquely positioned to exercise *force majeure* and did not hesitate to do so. That the deed was intentionally done by him, rather than accidentally by an ordinary employee of the department, only aggravated the assault on privacy. Deliberate unlawful

41. S.N.S. 1990, c. 11, s. 14 (“No prosecution lies”).

42. *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, s. 47(1).

43. *Ibid.*, s. 20(3)(c).

44. The *Privacy Review Officer Act* (S.N.S. 2008, c. 42), as recently proclaimed, enables the Review Officer under the *Freedom of Information and Protection of Privacy Act* to “initiate an investigation of privacy compliance if there are reasonable grounds to believe that a person has contravened or is about to contravene the privacy provisions and the subject-matter of the review relates to the contravention” [s. 5(1)(b)]; this refers to a privacy breach.

disclosure of personal information was not a ministerial perquisite. The king can do *some* wrong.

