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AND DEMOCRACY

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Review of the Nova Scotia Freedom of Information and Protection of Privacy Act

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Introduction

Transparency is a core prerequisite for responsible government, and an effective system for ensuring the right to access information held by public bodies, or the right to information (RTI) is a key part of this. According to the Supreme Court of Canada, RTI is a constitutional right, flowing from the right to freedom of expression.¹ The Supreme Court's ruling affirmed a development that has been broadly recognised internationally. The right to information is explicitly protected in dozens of the more progressive constitutions around the world.² It is also entrenched in international human rights law, including through decisions of the Inter-American Court of Human Rights³ and the European Court of Human Rights,⁴ as well as the UN Human Rights Committee's 2011 General Comment on Article 19 of the International Covenant on Civil and Political Rights (ICCPR),⁵ to which Canada is a party.

In Nova Scotia, the right to information is implemented through the Freedom of Information and Protection of Privacy Act (FOIPOP).⁶ Although the law has several strengths, it also suffers from key weaknesses which undermine its ability to deliver the right to information effectively, including overly broad exceptions, loose time limits and an insufficiently empowered oversight body. The RTI Rating, a comparative system for assessing right to information laws developed by Centre for Law and Democracy (CLD)⁷ and Access Info Europe,⁸ found that Nova Scotia scored a mediocre 7th among the fourteen access to information laws in Canada (from ten provinces, three territories and the federal government).⁹ Nova Scotia's score of 85 points out of a possible 150 is even less impressive when considered in an international context. Were Nova Scotia a country it would tie for 46th place out of the 93 countries that have been rated, on par with Honduras and Belize.¹⁰

¹ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

² See <http://www.right2info.org/constitutional-protections-of-the-right-to> which lists at least 53 and arguably 60 countries which include this right in their constitutions.

³ *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151.

⁴ *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05.

⁵ General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.

⁶ Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5.

⁷ See www.law-democracy.org.

⁸ See <http://www.access-info.org>.

⁹ The full results are available at <http://www.law-democracy.org/live/global-rti-rating/canadian-rti-rating>.

¹⁰ See www.RTI-rating.org. The RTI Rating was developed by CLD and another international human rights organisation, Access Info Europe.

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This Analysis evaluates the FOIPOP against international human rights standards and provides a summary of the law's main problems, along with targeted recommendations for how to remedy these issues.

1. Exceptions

A major problem with the FOIPOP is its exceptions (i.e. cases where public bodies may refuse to grant access to information). The right to information is not absolute and international standards recognise a limited number of legitimate interests which can be invoked in order to justify withholding information. However, any exceptions which go beyond the strict parameters of the international test for restrictions violate the right to information.

One recurring problem is that exceptions are cast in overly broad terms, and are not limited to information the disclosure of which would be harmful to a legitimate interest. For example, while it is legitimate to exclude information which would harm the deliberative process within government, section 14(1) goes far beyond that, exempting any advice, recommendations or draft regulations developed by or for a public body or a minister. Similarly, while it is legitimate to withhold information that would harm the government's position in an impending negotiation, section 17(1)(e) excludes all information about negotiations carried out by or for a public body. The blanket exclusion for labour conciliation boards under section 19(e) should also be narrowed so that it applies only to information the release of which would pose a risk of harm to the conciliation process.

Section 17(1)(b), which excludes any information which has monetary value, is also overbroad, since enormous quantities of non-sensitive information could potentially have monetary value if placed in the right hands. Traffic statistics or demographic information, for example, might have monetary value to business owners or entrepreneurs. Indeed, a great benefit of the right to information is its potential to unleash the value of the enormous volumes of data which governments hold, a key driver for the open government movement. Section 17(1)(a) already protects trade secrets and this, along with a narrowly worded exception to protect the government's legitimate commercial interests against harm from disclosure, would be sufficient.

Other exceptions are problematic in that they appear to raise multiple lines of defence regarding the same issue. Section 15(1)(h) contains an exception for records that have been confiscated from a person by a peace officer. Given that information that is harmful to privacy is already protected by section 20, and that information harmful to law enforcement is protected by section 15(1)(a), it is difficult to understand the legitimate purpose of this exception. The same argument

could be made about section 15(1)(f), which excludes information relating to or used in the exercise of prosecutorial discretion.

Still other exceptions are wholly inappropriate. Section 18(2) allows for information to be withheld if its disclosure would pose an immediate and grave risk to the applicant's health, a restriction which is paternalistic and unnecessary. Section 12 provides an exception for information that would harm relations between the government and other public bodies, or information received in confidence from another public body. There is no reason why either of these warrants special protection, beyond the specific protection already allocated to various legitimate interests, such as commercial interests which are already covered by section 17.

Section 15(2)(b), which applies to any disclosure which could reasonably be expected to expose to civil liability the author of the record or a person who has been quoted or paraphrased, is also unnecessary, and is likely a reflection of problems in ancillary legislation. Individuals should assume responsibility for their statements to the extent mandated by the laws governing speech. If other laws impose undue limitations on speech, then the solution is to amend those laws, not to extend secrecy.

It may be noted that all of the comments above are widely reflected in the law of better practice States, inasmuch as these types of exceptions are not found in their laws. Given that this has not caused significant problems in those States, there is no reason why Nova Scotian legislation should not follow their progressive lead in this area.

The government should also consider amending the law's treatment of solicitor-client privilege. While solicitor-client privilege is a vital ingredient in enabling effective representation of clients in the private sector, applying this concept to government lawyers ignores the very different dynamic that exists in the public sector. Solicitor-client confidentiality exists for two reasons, to allow lawyers to plan their strategies for upcoming litigation (litigation privilege) and to promote candour between lawyers and their clients. While the first of these is clearly necessary for government lawyers, the second is not, or at least is not over and beyond the protection already provided by other exceptions (for example to preserve the free and frank flow of information inside of government. When public officials deliberate with government lawyers they are not confessing their involvement in criminal enterprises or their infidelities. Moreover, government counsel often play a range of roles in policy development, planning and administration which are functionally similar to those of their non-legally trained colleagues. It is difficult to see why protection should apply to this advice just because it happens to come from a lawyer. Furthermore, the solicitor-client privilege exception as currently worded provides tremendous potential for abuse since, if government officials want

particular discussions to be exempt from disclosure, all they need to do is bring a lawyer into the room. The FOIPOP should be amended to provide an exception only for litigation privilege, namely information which is gathered in anticipation of an impending lawsuit, and not for solicitor-client privilege more broadly.

All exceptions which protect public interests (i.e. as opposed to private ones) should be subjected to a sunset clause, whereby they cease to apply to information after a certain period of time, for example of 15 years. Currently, the FOIPOP only applies a sunset clause to the exceptions for inter-governmental affairs, executive council deliberations, advice to a public body or minister, closed meetings of local public bodies and personal information in the public archives. However, this does not apply to any other exceptions, including for law enforcement information, economic information or environmental information. Given the rapidity at which technology and culture moves, and the speed with which information becomes obsolete in the digital age, it is difficult to fathom how information which was produced 15 years ago could harm any of these legitimate interests.

Recommendations:

- Section 14(1) should be amended to exclude only information the disclosure of which would cause harm to the deliberative or policy development process.
- Section 19(e) should only apply to information the release of which would harm the conciliation process.
- Section 17(1)(e) should be limited to information the disclosure of which would harm the government's negotiating position.
- Sections 12, 15(1)(h), 15(1)(f), 15(2)(b), 17(1)(b) and 18(2) are unnecessary and should be deleted.
- Section 16 should be limited to litigation privilege, namely information which has been shared with a lawyer in anticipation of a pending lawsuit or similar action.
- Exceptions to protect public interests should not apply to information which is more than 15 years old.

2. The Public Interest Test

A core principle of the right to information is that, even where information falls within the scope of a legitimate exception, it should still be released if the public interest in disclosure outweighs the harm to a protected interest that would result. This "public interest test" is a key feature of progressive RTI laws and a recognition

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that exceptions to disclosure should only be exercised to protect and promote the public good.

Although section 31 of the FOIPOP mentions the need to disclose some information in the public interest, the way it is formulated is too narrow and limited to conform with international standards. In the first place, section 31 only applies the override to instances either of “significant harm” or where the disclosure is “clearly in the public interest”. Additionally, the override is discretionary, stating that public bodies “may” disclose information rather than requiring them to do so. International standards call for a mandatory public interest override to apply whenever the balance of interests favours disclosure.

The Supreme Court of Canada has ruled that the type of discretion found in section 31 must be exercised in line with the public interest.¹¹ Moreover, there is evidence that the Review Officer, in her recommendations, generally treats section 31 as a mandatory rather than a discretionary override.¹² However, the weaker language found in section 31 can nonetheless be expected to impact the way that this test is applied within public bodies. Access to information legislation should be designed so as to help counter any natural resistance to disclosure which may permeate public bodies, particularly around sensitive or embarrassing information. As a result, provisions for disclosure should be drafted as clearly and unequivocally as possible. The restrictive wording, coupled with its discretionary nature, undermines the potential of section 31 to serve as an effective public interest override.

Recommendation:

- Section 31 should be revised to make it clear that the public interest test is mandatory in the case of requests and that it applies whenever the potential harm from the release of the information is outweighed by the public interest in disclosure.

3. The Review Officer

No matter how progressive or open a particular government is, experience suggests that there will always be resistance to transparency. Proper oversight, through a

¹¹ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

¹² See Report FI-10-41/FI-10-85/FI-10-86/FI-10-87. Available at: <http://foipop.ns.ca/sites/default/files/reports/FI-10-41%20FI-10-85%20FI-10-86%20FI-10-87%202011%2006%2001%20Review%20Report.pdf>.

strong and independent administrative body, is essential to an effective RTI law. In Nova Scotia, oversight is carried out by the Review Officer. While there is no question about this office's independence or integrity, the FOIPOP should be amended to extend and strengthen the Review Officer's mandate and powers.

A chief weakness in the current system is that the Review Officer does not have order making powers and is instead limited to making recommendations. This is in line with the approach adopted in New Brunswick, Newfoundland, Northwest Territories, Nunavut, Saskatchewan, Yukon and at the federal level. On the other hand, oversight bodies in Alberta, British Columbia, Manitoba,¹³ Ontario, Prince Edward Island and Quebec all have the power to make binding orders.

According to international standards, a properly empowered oversight body should have order-making power. In her annual report for 2012, Nova Scotia's Review Officer was somewhat equivocal on the advantages of order-making powers, noting that the current model emphasises persuasion and informal resolution, and that she has the option of going public if her recommendations are not followed. The Review Officer's report notes that public bodies have previously informed her office that they have no intention of following her recommendations, and in other instances have neglected to respond to her findings at all, but asserts that the practice of posting public bodies' responses online, which began in 2012, has improved the quality of responses.¹⁴

As of August 2013, the responses of seven public bodies have been posted online. Of these, three fully accepted the Review Officer's recommendations while four are listed as having only "partially-accepted" the recommendations.¹⁵ Thus, although the practice of posting these responses publicly has apparently improved the rate of response, the Review Officer's recommendations are still being at least partially rejected more than half the time. This is clearly not an acceptable rate of compliance. As a watchdog organisation, and an independent arbiter, the Review Officer's findings should always be followed. There is, of course, no suggestion order-making power would in any way limit the ability of the Review Officer to name-and-shame non-compliant public bodies.

The Review Officer's 2012 report cites the expense of getting orders enforced as a potential drawback of order-making power. Three key points may be made in response to argument. First, as a human right, the burden should clearly not lie on

¹³ The situation in Manitoba is somewhat unique, since while the Manitoba Ombudsman is only empowered to make recommendations, any failure by the public body to follow these recommendations can be referred to a special adjudicator who does have order-making power.

¹⁴ Available at: <http://foipop.ns.ca/sites/default/files/publications/annual-reports/Annual%20Report-2012%20FOIPOP%20RO-ENGLISH.pdf>.

¹⁵ See <http://foipop.ns.ca/publicly-issued-reports>.

individuals to bring court challenges against public bodies which refuse to comply with decisions of the Review Officer. If this requires more resources to be allocated to the Review Officer, that should be done. Second, while some rate of noncompliance is likely even in the context of binding orders, this would presumably be far lower than the current rate of noncompliance, given the relatively strong respect for the rule of law in Canada and Nova Scotia. It is thus unlikely that the Review Officer would have to resort to litigation to enforce her orders very frequently. Third, a number of alternatives might be explored to shift the burden of enforcement away from the Review Officer. One would be to grant the Review Officer the power to issue judgments which may be directly certified by the prothonotary, and then enforced by sheriffs, removing the need to go to court.

In addition to enhanced powers, the Review Officer's mandate should be expanded to allow the office to initiate its own investigations, rather than having to wait for a complaint from a member of the public, in order to allow for proactive action to improve implementation. The Review Officer should also have a positive mandate to inform and educate the public about the FOIPOP and to promote the right to information, along with resources for this, in order to expand popular understanding of the importance of transparency and to encourage greater use of the FOIPOP. Alongside these enhanced responsibilities, the status and independence of the Review Officer should be raised by making her an Officer of the Legislature, as is already the case in other jurisdictions in Canada.

Recommendations:

- The Review Officer should have the power to make binding orders.
- The Review Officer's mandate should be expanded to allow the office to initiate its own investigations and to promote and educate the public about the right to information.
- The Review Officer should be made an Officer of the Legislature.

4. Time Limits

Justice delayed is justice denied. As a human right and a core principle underlying democratic accountability, information requesters have a right to a prompt response. Long delays can frustrate requesters, discouraging them from making use of the system. Furthermore, information often loses its value over time. This is particularly true of information which is being requested for a commercial purpose or information which has been requested by a journalist for use in a news story. In

both of these cases, a long delay can render the information effectively useless to the requester.

According to section 7(2) of the FOIPOP, public bodies are meant to respond to information requests within 30 days. This timeframe corresponds to the practice of many States, although many also operate with much shorter time limits. Furthermore, section 9(1) of the FOIPOP allows for extensions of thirty days or longer with the permission of the Review Officer, with no absolute limit placed on the amount of time officials can request.

It is reasonable to expect that, in exceptional circumstances, public bodies might need more than 30 days to respond to an access request. However, under no circumstances should requesters have to wait more than 60 days for a response. If public authorities find themselves unable to respond in that time period it is likely that either their data management systems are inadequate or that they are failing to properly prioritise their transparency obligations. Around the world, countries which are far less developed than Canada and whose bureaucracies operate with far less advanced technology have implemented significantly shorter response times. In India, for example, response time limits are capped at 30 days with no extensions.

The Review Officer's 2012 Report states that most requests for extensions are granted at face value, with no investigation into the causes of the delay unless the requester specifically complains. The Report explains this approach by noting that without a complaint they have no way of knowing whether the requester is unhappy with the delay, and that an investigation would divert resources. Once again, we see a lack of adequate resources for the Review Officer leading to substandard implementation of the rules. Granting extensions automatically can be expected to undermine longer-term compliance with the law, and it undermines the system of safeguards that were built into the law. Furthermore, common delays beyond sixty days point to a systemic problem which needs to be addressed. It is significant that, according to the Review Officer's 2012 Report, recent years have seen a large increase in the number of both extension requests and extension-related complaints by requesters, suggesting that these concerns have started to manifest themselves.

In order to bring the FOIPOP into line with international standards, the time limit for responses should be capped at 30 days, extendable once for an additional 30 days, making 60 days the absolute limit. At the very least, extensions beyond 60 days should be the subject of a mandatory investigation by the Review Officer, and these should only be granted in exceptional circumstances. Additionally, the FOIPOP should be amended to say that authorities should respond to requests as soon as possible, to make clear that implementing the right to information should be considered a priority and the 30 days only a maximum time limit.

The time limit for transfers should also be reduced. According to section 10, public bodies have ten days to determine whether a request should be transferred to another public body and, if a request is transferred, the receiving body is required to respond within 30 days of the transfer. These determinations are relatively simple to make and the deadline for transfers should be reduced to five days. In addition, public bodies should be required to meet the original deadline, and so respond within 30 days of when the request was first submitted, to ensure that requesters receive a timely response regardless of whether a transfer is required.

Reasonable fixed time limits, for example of something like 60 days, should also be built into the Review Officer's review process. Delay at this stage is just as problematical as delay earlier on in the process, and yet the Review Officer's website demonstrates that cases can sometimes take years to resolve. This is not necessarily the Review Officer's fault, since a failure to cooperate by the public body can effectively scupper efforts to conduct a review efficiently. The best remedy for this would be to impose a rule whereby non-cooperation gives the Review Officer the power to issue an automatic order for disclosure of the information. This will correctly place an onus on public bodies to justify their refusals or delays.

Recommendations:

- Extensions under section 9(1) should be capped at 30 days.
- If extensions beyond 30 days are permitted, they should be subject to a mandatory investigation by the Review Officer.
- The FOIPOP should be amended to state that public bodies must respond to requests as soon as possible.
- The time limit for transfers should be limited to five days and the public body receiving the request should be required to process it with the original 30-day time limit.
- A reasonable fixed time limit should be applied to reviews by the Review Officer, and failure to cooperate with her office should trigger the possibility of an automatic ruling to disclose the requested information.

5. Scope

According to international standards, the right to information should apply to all public bodies, broadly defined. While the FOIPOP applies relatively broadly, it does not apply to the Office of the Legislative Council or to the Conflict of Interest Commissioner. While both of these organs can be expected to possess some information which could legitimately be withheld, their wholesale exclusion from

the ambit of the FOIPOP cannot be justified, especially since this information is protected through existing exceptions in the Act

The FOIPOP should also be extended to cover private bodies that perform public functions or receive public funding, to the extent of that funding or function. Non-governmental organisations, for example, that have accepted a grant to produce a report should be required to be open about how that public money was spent. A decision to outsource a task or service to an external organisation should not lead to the avoidance of access to information responsibilities about that task or service.¹⁶ Being held accountable for the use of public money is one of the principle tenets of the right to information. It is worth noting here that Nova Scotia's Personal Health Information Act imposes some disclosure obligations on private bodies that hold personal health information.¹⁷

Another problem with the FOIPOP is that it only provides a right of access to records, rather than to information. This means that requesters are limited to making requests for information which is not contained in an existing record, or which would need to be compiled from different records, unless it relates to data in a machine readable format. This is not in line with better practice, which requires public bodies to make a reasonable effort to compile information to respond to a request.

Recommendations:

- The FOIPOP should apply to the Office of the Legislative Council and the Conflict of Interest Commissioner.
- The FOIPOP should apply to private organisations that perform public functions or that receive public funding, to the extent of that funding or function.
- The FOIPOP should be extended to apply to information as well as to specific records.

Conclusion

¹⁶ There may be certain cases, for example for publicly funded media outlets, where special protections are needed, in that case to protect confidential journalistic sources of other activity. These can be dealt with on a case-by-case basis in the legislation, as is the case for the Canadian Broadcasting Corporation in the federal law.

¹⁷ Personal Health Information Act, S.N.S. 2010, c. 41, s. 71.

Although some of the approaches proposed in this Analysis may seem like major reforms, in fact they are only the bare minimum steps that are required to bring the FOIPOP into line with international standards, and to place the law on a similar footing to legislation that has been passed in India, Serbia, Mexico, South Africa and Macedonia.

In Nova Scotia, the evidence of weak protection for the right to information is strong. From expense scandals¹⁸ to obfuscation around the provincial government's business dealings,¹⁹ there is a clear need to enhance openness in government. CLD has long been an advocate for root-and-branch reform to access to information legislation across Canada. In the context of the upcoming provincial election, CLD urges all of the parties to consider our recommendations for reform and to include pledges to improve the right to information in Nova Scotia in their platforms.

¹⁸ "Nova Scotia politician pleads guilty in expense scandal, plans to run again", Global News, 17 June 2013. Available at: <http://globalnews.ca/news/648569/nova-scotia-politician-pleads-guilty-in-expense-scandal/>.

¹⁹ Tim Bousquet, "FOIPOP expert slams Dexter government over IBM deal", The Coast, 19 November 2012. Available at: <http://www.thecoast.ca/RealityBites/archives/2012/11/19/foipop-expert-slams-dexter-government-over-ibm-deal>.