Submission on Prince Edward Island's Freedom of Information and Protection of Privacy Act

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Overview

The Centre for Law and Democracy (CLD) has prepared this Submission[1] in response to the Prince Edward Island (PEI) Legislative Assembly's Standing Committee on Health and Social Development's call for public input into the review of the Freedom of Information and Protection of Privacy Act (FOIPP).[2]

The FOIPP was originally adopted in 1988, albeit with some changes having been introduced since then. However, the information environment has been revolutionised since that time, with the advent of the digital communications era, and people's expectations around government openness have also changed dramatically. Equally importantly, international standards in this area and national practices have evolved significantly since the late 1980s.

CLD works internationally to promote those human rights which are foundational for democracy, including access to information (or the right to information, RTI, as we call it, in light of the fact that it has been recognised as a human right under international law and, indirectly, under the Canadian Charter of Rights and Freedoms). As part of this, we work extensively with reform actors – including intergovernmental organisations, national or sub-national governments, parliaments, oversight bodies such as information commissions and civil society actors – to support law reform efforts, such as we hope will result from this

[2] Under section 79 of the FOIPP, such reviews are to be held every six years by a committee of the Legislative Assembly.

review. As part of this, we have produced numerous analyses of existing or draft RTI legislation.[3]

A very significant contribution CLD has made to advancing RTI globally is its RTI Rating,[4] a globally recognised methodology for assessing the strength of legal frameworks for RTI, which has been recognised and relied upon by actors such as UNESCO, the World Bank and the United States Millennium Challenge Corporation.[5] The RTI Rating relies on 61 discrete indicators, grouped into seven categories, to assess how strong the legal framework for RTI is in any jurisdiction. Every national RTI law is assessed on the RTI Rating,[6] while CLD also maintains a separate Canadian rating, where all 14 Canadian jurisdictions are assessed.[7]

This Submission sets out CLD's assessment of the strengths and weaknesses of the FOIPP, with a focus on access to information (and not on those parts of the Act which deal with privacy and personal data protection). As part of the preparation of this Submission, CLD has updated its RTI Rating of PEI,[8] and a summary of the results are set out in the table below:

Section	Max Points	Score
1. Right of Access	6	3
2. Scope	30	16
3. Requesting Procedures	30	20
4. Exceptions and Refusals	30	18
5. Appeals	30	24
6. Sanctions and Protections	8	4
7. Promotional Measures	16	9
Total score	**150**	**94**

PEI thus earns a score of 94 out of 150 possible points. Were PEI a country, this would mean that it would rank 50th out of the 140 countries which are assessed on the RTI Rating. This is not a very impressive showing and places PEI well behind the leading Canadian jurisdiction,

[3] These are all available at: https://www.law-democracy.org/legal-work/legal-analyses.
[4] See https://www.rti-rating.org.
[5] For a formal statement about how the MCC uses our RTI Rating to assess countries' eligibility for development aid, see https://www.mcc.gov/who-we-select/indicator/freedom-of-information-indicator.
[6] The results of this are available at: https://www.rti-rating.org/country-data.
[7] These results are available via the Canadian Rating page at: https://www.law-democracy.org/rti-rating/canada.
[8] See https://www.law-democracy.org/rti-rating/canada.

Newfoundland and Labrador, which at 111 points would rank 24th out of 140 countries were it a country. This indicates that there is still much room for improvement in PEI's legal framework for RTI.

Right of Access

On the Right of Access, PEI's legal framework scores only three out of six possible points on the RTI Rating. All jurisdictions in Canada lose a point here because, in terms of human rights, Canada only recognises the right to information as a contingent right derived from freedom of expression.[9] PEI's legal framework loses further points due to its failure to detail the external benefits of the right to information, such as combatting corruption and supporting participation, or to require officials to give effect to those principles as far as possible when interpreting the law.

Recommendation

- Consideration should be given to amending the FOIPP to outline the benefits of the right to information and to introduce a requirement to require officials to interpret the law in the manner which best gives effect to those principles.

Scope

Under the Scope category of the RTI Rating, the FOIPP achieved a middling score of 16 out 30 possible points. There are a number of limitations on the scope of information covered by the act. Thus, section 3(b) indicates that the act does not "affect" access to records deposited in the archives before the Act came into force, presumably leaving them subject to the regime of access in the laws governing those bodies, while section 4(1)(e.1) excludes various teaching materials, section 4(1)(e.2) excludes "research information of an employee of a designated educational body" and section 4(1)(f.1) excludes works collected by a public body's library. Instead of taking this exclusionary approach, all information should be covered but then subjected to the regime of exceptions.

[9] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

The FOIPP loses points due to the limited range of authorities it covers. Under international standards, all branches of government should be fully covered by the law. However, in PEI, there are several carve-outs for parts of the executive branch. Specifically, section 4(1)(k) excludes any record created by or for a member of the Executive Council. In addition, sections 4(1)(h), 4(1)(h.1) and 4(1)(h.2) exclude records held by a number of other public authorities, including those in a registry of documents relating to personal property, those in the office of the Director of Corporations and the office of the Register of Deeds, those in the Office of the Director as defined in the Vital Statistics Act, and personal and constituency records of appointed members of public bodies. Here again, the better approach is to cover all information held by all pubic bodies and then to protect certain information via the regime of exceptions.

Section 1(k)(iv) of the FOIPP includes offices of officers of the Legislative Assembly under the definition of "public body", although section 1(k)(v) excludes the office of the Speaker of the Legislative Assembly and the members of the Legislative Assembly's offices. Moreover, the law does not apply to "a record that is created by or for or is in the custody or under the control of an officer of the Legislative Assembly and relates to the exercise of that officer's functions under an enactment" (section 4(1)(c)), or to a record created by or for a member of the Legislative Assembly (section 4(1)(k)(ii)). Taken together, these provisions largely exclude the legislative branch from the FOIPP.

Courts are also largely excluded from the definition of "public body" (section 1(k)(vi)). While section 4(1) provides that the law applies to court administration records, sections 4(1)(a) and 4(1)(b) exclude various categories of information from this, including information in court files, records of judges and judicial administration records.

The FOIPP lost a point on the indicator assessing whether it applies to other public authorities, including constitutional, statutory and oversight bodies because there is an exclusion for "a record that is created by or for or is in the custody or under the control of the Conflict of Interest Commissioner and relates to any advice relating to conflicts of interest whether or not the advice was given under the Conflict of Interest Act" (section 4(1)(d)). The FOIPP received full points for its application to State-owned enterprises due to the designation of crown corporations as public bodies under the Regulations.[10] However, the

[10] Freedom of Information and Protection of Privacy Act General Regulations (current through 19 September 2020).

law lost points for its failure to apply to private bodies which perform a public function or those that receive significant public funding.

Recommendations

- Consideration should be given to amending the FOIPP so that it covers all information held by the executive, legislative and judicial branches, as well as private bodies which perform a public function or receive significant public funding, to the extent of that funding, with no exclusions for any categories of information or any bodies.
- Consideration should be given to removing the exclusion relating to the Conflict of Interest Commissioner.

Requesting Procedures

PEI receives 20 out of 30 possible points for the category relating to requesting procedures. Some of the stronger aspects here include the lack of requirements for requesters to provide excessive information when making requests. In addition, it is positive that reasons for making a request are not listed among the information to be included, although it would be better if reasons were explicitly not required.[11]

PEI lost points, however, for its failure to require explicitly that receipts be issued to requesters confirming that their requests have been lodged. Better practice is to require such receipts to be provided within a reasonable timeframe after the request was lodged, for example within five working days. Another weakness is the overbroad provisions for transfers of requests, under section 13(1). Better practice is to allow such transfers only where the public body does not have the information requested and it is held by another public body. The FOIPP unnecessarily also allows transfers where a record was "produced by or for the other public body" (section

[11] This is particularly important because the list of requirements for requests, namely that requesters provide enough detail to identify requested records (section 7(2)), is incomplete since it does not mention a means for delivering information, such as an address, which in practice is necessary. This therefore leaves more room for officials to introduce requirements which are not explicitly listed under the law.

13(1)(a)) or where the "other public body was the first to obtain the record" (section 13(1)(b)).

Further weaknesses include that, while the law allows for requesters to examine records which cannot be "reasonably produced" (section 11(4)), there is no general requirement to respect requesters' preferences regarding the format in which information is provided. Better practice is to require public bodies to respect these preferences other than in the limited circumstances where this would impose a significant burden or a risk of damage to the record.

Section 9(1) of the FOIPP requires responses "without undue delay" and in any event not later than 30 days unless the timeline has been extended or the request transferred. This would be stronger if it required requests to be processed as soon as possible and if the timeframe were shortened so as to be consistent with better practice laws which require responses in just 15 days or fewer. Public authorities may extend the 30-day timeframe for an additional 30 days under certain limited circumstances or, with the permission of the Information and Privacy Commissioner (Commissioner), for a longer period (section 12(1)). Better practice is to cap extensions at 30 days although, absent this, the requirement for Commissioner approvals for longer extensions is a positive feature of the law. Sections 11(2)(b) and 11(3) require requesters to be notified about delays in providing copies of documents where this has been requested, which implies that unspecified delays may be allowed where copies are requested, which is problematic.

Seven, or one-half, of the jurisdictions in Canada do not charge any fee for making requests in line with better practice.[12] Contrary to this better practice, in PEI, section 9(2) of the Regulations require a $5 fee to file a request. As for processing requests, better practice is also to limit fees for responding to requests to the market costs of copying and sending copies, where relevant (which would not apply to electronic requests sent by email). Even then, a number of pages of photocopies, say up to 20, should be provided for free, taking into account that the cost of receiving this money would exceed the amount collected. The right to information is a human right and individuals should not have to pay for the time spent by public officials in delivering human rights. At a minimum, fees should be limited to very large requests, such as those which take over 20 or 30 hours to process. Here again, practice varies across

[12] In Saskatchewan, this depends on the type of public body to which the request is made.

Canada, with the federal government not charging any fees other than the initial $5 application fee.

In PEI, fees for processing the request cannot exceed the actual cost of the services (section 76(5)) and may be waived for applicants who cannot afford them or for records relating to a matter of public interest (section 76(4)). However, contrary to better practice, fees are not limited to costs of reproducing and delivering information. Section 9(5) of the Regulations provides that a fee may not be charged for reviewing a record but the Regulations' Schedule 2 allows for other services to be charged, specifically "Locating and retrieving a record", "Preparing and handling a record for disclosure" and "Supervising the examination of a record", although section 9(4) of the Regulations exempts from this the first three hours. Schedule 2 also includes "Computer processing and related charges" as a category whereas normally providing information in an electronic format should be free.

Although PEI has an open government licensing policy,[13] it is limited in scope, notably having an exemption for all information which is subject to intellectual property, which is appropriate for intellectual property of third parties but not that of public bodies.

Recommendations

- Consideration should be given to specifying explicitly that requesters do not need to justify or provide reasons for their requests.
- The FOIPP should be amended to require public bodies to issue receipts confirming that a request was received within a reasonable timeframe (of up to five working days).
- The superfluous grounds for transfers in sections 13(1)(a) and 13(1)(b) should be removed.
- Consideration should be given to requiring public bodies to respect requesters' preferences as to the format in which information shall be disclosed, with limited overrides where the preferred format constitutes a significant burden or would pose a risk of damage to the record.
- Consideration should be given to amending sections 9(1) and 9(2) of the FOIPP to require requests to be processed as soon as possible and within 15 days, absent an extension or transfer.
- Consideration should be given to amending section 12(1) to cap extensions at 30 days.

[13] "Open Government Licence - Prince Edward Island, 30 May 2018, https://www.princeedwardisland.ca/en/information/finance/open-government-licence-prince-edward-island.

- Sections 11(2)(b) and 11(3) should be amended so as not to imply that providing copies of information might justify delays in providing access.
- Consideration should be given to eliminating the $5 application fee for making a request.
- Consideration should be given to limiting processing fees to the actual costs of reproducing and delivering information and to providing for up to 20 pages of free photocopies. In the alternative, fees should be limited to very large requests, such as those which take over 20 or 30 hours to process.
- Consideration should be given to revising the Open Government Licensing Policy to provide for broader re-use rights, notably so as not to exclude the intellectual property of public bodies from this.

Exceptions and Refusals

In the RTI Rating category on Exceptions and Refusals, PEI earned only 18 out of 30 possible points. While there are some positive elements, such as the inclusion of a requirement for public authorities to state the exact reasons for refusing requests, many aspects of the FOIPP should be strengthened to conform to international standards and better practice in this area.

As laws which give effect to a fundamental human right, RTI laws should take priority over conflicting legislation, which imposes inappropriate confidentiality obligations. Best practice is thus to protect all relevant secrecy interests in the RTI legislation and then not to allow other laws to extend this. While section 5(2) of the FOIPP provides that the law overrides other legislation or regulations unless those instruments expressly provide that they take precedence over the FOIPP, section 14 of the Regulations explicitly preserves provisions from nine other pieces of legislation. While this is an improvement over the twelve pieces of legislation originally listed there, it still falls short of best practice.

Certain other parts of the regime of exceptions are problematic. Under section 10(2), the head of a public body may refuse to confirm or deny the existence of a record containing information described in sections 16 or 18, covering exceptions relating to individual or public safety and law enforcement. While this may be legitimate where revealing the mere existence of a record would pose a risk of harm to the protected

interest, section 10(2) does not limit the exercise of this discretion to such cases. Section 17 of the FOIPP contains an overbroad exception for:

> evaluative or opinion material compiled solely for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.

While some information covered by this rule may legitimately be confidential, this can be adequately covered by other exceptions, such as those protecting trade secrets or privacy rights.

Section 19(1) has a broad exception for information which can harm inter-governmental relations, including with the federal government, another province or territory and a municipality. While this may be legitimate vis-à-vis foreign governments and intergovernmental organisations, governments within Canada should understand that they have to operate within the framework of a robust RTI regime.

The exception for cabinet confidences in section 20 is overbroad. It applies to information "that would reveal the substance of deliberations of the Executive Council or any of its committees", and then goes on to specify that this includes "any advice, recommendations, policy considerations or draft legislation regulations submitted or prepared for submission to the Executive Council or any of its committees". This is subject to a sunset clause of 15 years (see section 20(2)). But it is not limited to the protection of a legitimate interest – such as the protection of deliberations – and, as such, also does not include a harm test. Similarly, section 21(1)(a) has an overbroad exception for "a draft of a resolution, bylaw or other legal instrument by which the public body acts", which again should be limited to cases where disclosure of the information would disrupt the deliberative process. The exception for solicitor-client privilege is also overbroad in that it goes beyond information subject to legal privilege (covered under section 25(1)(a)) to include any information prepared by or for the Minister of Justice and Public Safety and Attorney General, an agent or lawyer of the Department of Justice and Public Safety or an agent or lawyer of a public body, as well correspondence between these parties and any other person, "in relation to a matter involving the provision of legal services" (25(1)(b)-25(1)(c)). There is also an unnecessary exception for information which is subject to parliamentary privilege (section 25(1)(a)), something which is simply not found in most right to information laws globally.

Under international standards, every exception should be subject to a harm test, meaning that information may only be withheld where its disclosure would be likely to cause harm to a specific interest. The FOIPP contains several exceptions which are not subject to a harm test. These include the exception for records relating to completed prosecutions (section 4(1)(g)); some of the other law enforcement-related exceptions, such as section 18(1)(e.1) on the exercise of prosecutorial discretion and section 15(4)(b) on identifiable personal information in law enforcement matters; the exception for information "supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute" (section 14(1)(c)(iv)); and the taxation information exception (14(2)).

Under international standards, all exceptions should also be subject to a public interest override, whereby even if an exception applies, information should be released if the harm to the interest protected by the exception is outweighed by the public interest in disclosing the information. Section 30(1)(a) lists certain categories of information which should automatically be released (while section 30(2) specifies that this applies notwithstanding contrary other provisions in the Act). The categories listed are where there is "a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant", while section 30(1)(b) extends this to include other information that is "clearly" in the public interest. While it is positive that a public interest override is included in the FOIPP, the limitation that this be "clearly" in the public interest, as opposed to applying where the public interest outweighs the harm, is an unnecessary limitation.

Better practice RTI laws subject all exceptions which protect public interests to sunset clauses whereby the exceptions no longer apply after a reasonable amount of time, such as 15 or 20 years, in recognition of the rapidly decreasing sensitivity of most information. If there is concern that information may remain sensitive beyond this period, a special mechanism can be put in place to extend the period (for example, a procedure could be provided for whereby the respective minister could sign off on a longer period of secrecy). While the FOIPP contains sunset clauses for some exceptions (specifically sections 18 (1.1), 19(4), 20(2)(a), 21(2)(b), which are exceptions for prosecutorial discretion, inter-governmental relations, cabinet confidences and public body confidences), not all exceptions are subject to such clauses.

Another weakness of the FOIPP is that, when consultation with third parties is needed, the timeframe for deciding on a request is extended to thirty days from the

time that notice is given to the third party (section 29(1)), whereas better practice is to not delay the time frame for processing requests in such cases. In addition, while third parties have only 20 days from being notified of a decision to request a review (sections 29(3) and 61(2)(b)) instead of the 60 days which applies to requesters (section 61(2)(a)), even this review process can still slow down the disclosure of information considerably because information may be withheld while the review is pending.[14]

While this may, superficially, appear reasonable, in fact this approach operates to the serious detriment of transparency. It is very simple for a third party to lodge an application for review with the Commissioner, whose review system is considerably backlogged (see below), even if such an application has no merit. In practice, as is reflected in the outcomes of appeal decisions by commissioners across Canada, such applications have a small chance of success. This is because public bodies are very deferential to third parties, especially where they lodge vigorous objections to disclosure at the initial decision-making phase. Indeed, in the large majority of such cases, public bodies defer to the arguments of third parties. Taken together, these facts militate strongly against giving third parties an extremely easy route to delay, significantly, disclosures of information. For those very rare cases where a court later decides, following an application for judicial review by a third party, that that party has actually suffered a detriment due to the wrongful disclosure of information, compensation can be provided to cover this.

Recommendations

- The regime of exceptions should be revised to remove the problematic elements noted above both in respect to problematic underlying exceptions and the absence of a harm test for some exceptions.
- Consideration should be given to revising the public interest override in section 30(1) to make it mandatory to release information where the public interest in doing so is greater (and not "clearly" greater) than the likely harm to the interest protected by the exception.

[14] This is implied by section 29(3): "If the head of a public body decides to give access to the record or part of the record, the notice under subsection (2) shall state that the applicant will be given access unless the third party asks for a review under Part IV within 20 days after that notice is given."

- Consideration should be given to subjecting all exceptions which protect public interests to sunset clauses while potentially providing for a procedure to extend these periods in exceptional cases.
- Consideration should be given to amending the approach to third-party consultations so that the original timeframe for releasing information applies and not to allow third-party requests for reviews to suspend the release of information.

Appeals

PEI's legal regime for appeals is, on paper, a stronger part of the its RTI framework, earning 24 out of 30 possible points. However, there are certain areas where this regime could be strengthened.

Better practice laws prohibit individuals with strong political connections from being appointed to the RTI oversight body and also impose requirements of professional expertise for these appointees. Section 42(3) of the FOIPP prohibits members of the Legislative Assembly from being appointed as commissioners but this is not a very strong prohibition on political connections, and there is no requirement of specific expertise for appointees.

The grounds for appeals to the Commissioner are quite broad, which is a positive feature of the FOIPP. However, a weakness here is the inability of the Commissioner to review decisions by the Speaker of the Legislative Assembly that a document is subject to parliamentary privilege (section 60(5)).

Better practice laws place the burden of proof on the public body in appeals, so as to reflect the fact that they have access to the information in question while the appellant does not, as well as the fact that this is a human right, such that the State should justify any limitations. A weakness of the FOIPP is that the burden of proof lies with the public body only in reviews of decisions to refuse access to all or part of records (section 65(1)). This should be extended to all reviews, considering that other kinds of reviews, such as of decisions to extend timelines, involve similar epistemic and evidentiary challenges for appellants.

It should be noted that one of the points lost in this area was for the failure to provide for an internal appeal, although this is more of a reflection of the fact that the Rating

is primarily applied to larger jurisdictions. Generally, it is considered to be better practice for there to be a simple and free internal appeal, meaning an appeal decided upon within the same public body. This can provide a useful second opportunity for that body to reconsider, via a higher-level official, its original decision and to sort out problems internally. PEI lost a point for this not being present in its law. However, considering the relatively small size of the jurisdiction, an internal appeal may not in fact be realistic – in the sense of offering a proper reconsideration of the matter – and may be overly burdensome for public authorities.[15] At the same time, as discussed below, delays in the Commissioner's reviews are a significant concern in PEI. As such, some thought should be given as to whether instituting a proper system of internal review might lead to more concerns being addressed at the level of public bodies, thereby reducing the number of reviews being lodged with the Commission.

The Information Commissioner is required to complete reviews within 90 days (section 64(6)). However, the FOIPP allows the Commissioner to extend this period as long as notification is provided and an anticipated due date offered (sections 64(6)(a)-64(6)(b)). A PEI-based journalist has informed CLD that delays in the appeal process are one of the most significant weaknesses in PEI's RTI system in practice, with the Commissioner sometimes not even providing exact dates for the completion of reviews. Public reporting has also highlighted delays in the review system as a recurring problem.[16] In the Commissioner's last annual report, published in 2023, she noted that certain measures had been taken to try to address the backlog of cases, such as "routinely assessing new requests for review to identify and narrow issues, attempting mediation and early resolutions when appropriate, and only conducting full inquiries when there are potentially arguable issues".[17] However, she also noted

[15] Notably, in a paper outlining how to adapt international standards on RTI to small island developing States, the Centre for Law and Democracy recommends eschewing such appeals, given the small size of these jurisdictions. See "Principles on Right to Information for Small Island Developing States: The Case of the Pacific", September 2024, p.5, https://www.law-democracy.org/wp-content/uploads/2024/09/ATI-Principles-for-the-Pacific.final_.pdf.

[16] See Kerry Campbell, "The yawning black hole that can be P.E.I.'s access to information system", 31 January 2023, CBC News, https://www.cbc.ca/news/canada/prince-edward-island/pei-analysis-access-information-reviews-1.6731017.

[17] P. 1, https://www.assembly.pe.ca/sites/test.assembly.pe.ca/files/OIPC%20NEws/2023%20Annual%20Report%20OIPC.pdf.

that there continued to be a backlog and that in 2023 more files were opened than were closed (89 versus 71).[18]

Consideration should be given to providing for stricter legislated timelines for the completion of reviews by either making the 90-review period a fixed upper limit or by providing a limit to the permissible length of extensions to this period. However, if a stricter timeline is imposed, this could only realistically be adhered to if proper resources were also devoted to reducing the Commissioner's backlog and other implementation challenges were addressed. The Standing Committee is responsible for reviewing the estimated budget of the Commissioner (section 49(2)) and it should examine whether budgetary constraints are responsible for delays in processing reviews or whether other factors are at play. The Commissioner's 2023 report noted that expenditures for salaries and benefits was less than had been budged due to vacancies and that they had had difficulties filling vacant posts, with one remaining vacant as of the time of that annual report,[19] which suggests, at least for that year, that staff vacancies as opposed to insufficient funding might have been responsible.

Recommendations

- Consideration should be given to amending section 65(1) to place the burden of proof on public bodies for all reviews.
- Research should be conducted to determine whether introducing a system of internal reviews by public bodies would be practicable in PEI.
- Consideration should be given to not allowing extensions beyond 90 days for reviews by the Commissioner or at least providing some reasonable limit as the length of extensions.
- Care should be given to ensuring that the Commissioner's office is adequately staffed and resourced, so as to be able to eliminate its backlog and complete reviews in a timely manner.

Sanctions and Protections

In order to ensure the proper functioning of an RTI regime, it is important to provide for sanctions for those who flout the law, while also providing protections for those

[18] *Ibid*.
[19] *Ibid*., pp. 1 and 11.

who release information in good faith. This is an area where it is relatively easy to do well, but PEI scores only 4 out of a total of 8 possible points in this area.

A weakness in the sanctions regime is that, although section 75 of the FOIPP outlines a number of offences, including for obstructing the Commissioner or other people in fulfilling their duties under the law ((section 75(1)(c)), destroying records or directing others to do so (section 75(1)(e)) or altering, falsifying or concealing any record or directing someone else to do so (section 75(1)(f)), some actions which undermine the right to information are not covered, such as unjustifiably delaying in releasing information. News reports have highlighted the failure to meet statutory time limits or even apparently losing track of requests as a recurring problem.[20] Another concern here is that there are no sanctions for public bodies as such which consistently flout the law.

In terms of protections, section 57 grants immunity to the Commissioner and her staff for the good faith performance or intended exercise of duties. Similar protection for good faith disclosures of information is provided for employees of public bodies, but this applies only to disclosures to the Commissioner (section 69(1)) and not to disclosures directly to members of the public (including requesters). Section 74.1(1) provides protection against any "adverse employment action" for employees who disclose information "in accordance with this Act or the regulations". But this is weak considering that it does not apply to situations where an employee acts diligently and in good faith but still releases information which should not in fact have been disclosed (i.e. makes an honest error). In addition, it only protects against adverse employment actions, as opposed to other forms of liability, including legal liability. In the absence of stronger protections, this incentivises employees to err on the side of caution by not releasing information.

A key issue here is the existence of protections for those who in good faith release information about wrongdoing (i.e. whistleblowers). The FOIPP does not establish a proper whistleblowing regime, just providing for immunity for disclosures to the Information and Privacy Commissioner. However, PEI has adopted a dedicated whistleblowing law, the Public Interest Disclosure and Whistleblowing Protection

[20] Kerry Campbell, "Access delayed, access denied: Here's why P.E.I's information system is broken", 16 October 2021, CBC News, https://www.cbc.ca/news/canada/prince-edward-island/pei-freedom-of-information-1.6210749.

Act.[21] Although full points have been awarded under the relevant indicator here, it should be noted that concerns have been raised as to the effectiveness of this law due to the ability of the Public Interest Disclosure Commissioner to refer investigations to the deputy minister or chief executive officer of a public entity (effectively allowing for matters to be referred back to the whistleblower's supervisor).[22] While that law is beyond the scope of the instant Committee review, consideration should be given to evaluating PEI's whistleblower regime separately, with the goal of strengthening protection of whistleblowers.

Recommendations

- Consideration should be given to broadening the sanctions in section 75 of the FOIPP to capture all wilful acts which undermine the right to information.
- Consideration should be given to expanding the section 74.1(1) protections to provide for broad immunity for good faith disclosures of information.
- Consideration should be given to holding a dedicated review of the Public Interest Disclosure and Whistleblowing Protection Act with a view to strengthening its whistleblower protections.

Promotional Measures

Promotional Measures are another category of the RTI Rating where PEI receives only a middling score, namely 9 out of 16 points. Among the weaknesses in this area is the failure to require public bodies to designate a unit or official (information officer) to ensure that they comply with their disclosure obligations. Instead, section 2(1)(a) of the Regulations just requires public bodies to publicise the addresses of all offices which are authorised to receive requests, which was insufficient to be awarded full credit for the RTI Rating's relevant indicator.

[21] RSPEI 1988, Chapter P-31.01 (version current to 2 October 2021), https://www.princeedwardisland.ca/sites/default/files/legislation/p-31-01-public_interest_disclosure_and_whistleblower_protection_act.pdf.

[22] *Ibid*., section 13(2). See Kerry Campbell, "Whistleblower and lobbyist acts not arm's-length enough, critics suggest", 9 January 2018, CBC News, https://www.cbc.ca/news/canada/prince-edward-island/pei-whistleblower-lobbyist-act-1.4478985.

An alternative to having a designated information officer in each public authority is to have a centralised processing system for RTI requests. Under such a system, a designated unit receives requests on behalf of all public authorities which form part of the executive branch of government and takes charge of processing those requests, in discussion with the public authority which has custody over the information which has been requested. For this to work properly, such a central service would need to have the power to compel all public authorities to provide them with records which are responsive to a request, as well as the power to process and disclose those records, where appropriate. A centralised system can be effective for small jurisdictions and one has successfully been implemented in Nova Scotia.[23]

PEI also lost a point for not mandating specific public awareness raising efforts, such as producing a guide for requesters or introducing RTI awareness into school curricula. While the Information Commissioner may "inform the public about this Act" (section 50(1)(c)), the discretionary and unspecific nature of this falls short of better practice in this area.

Better practice RTI laws require public bodies to create and update lists or registers of the documents in their possession and to make these public. Under section 73 of the FOIPP, public bodies "may" specify categories of information in their custody or under their control and render this information public, but this is not an obligation. Further weaknesses in terms of promotional measures include the failure to require public bodies to ensure that their officials receive adequate training on RTI or to require public bodies to report annually on what they have done to implement the law, including detailed statistics on requests received and how they were dealt with.

Recommendations

- Consideration should be given to strengthening PEI's regime for promoting RTI by requiring public bodies to appoint a designated individual to handle requests. As an alternative to this, PEI could consider setting up a central unit to handle RTI requests, at least for the executive branch of government.
- The FOIPP should be amended to provide for mandatory and clear duties, whether for the Commissioner or another body, to raise public awareness about this right and how to exercise it.

[23] See "Principles on Right to Information for Small Island Developing States: The Case of the Pacific", note 15, pp. 7-8.

- Section 73 of the FOIPP should be amended to make it mandatory for public bodies to maintain up-to-date and public registers of the documents in their possession.
- Public bodies should be required to provide adequate training to their staff.
- Public bodies should be required to report annually on their implementation of the law, including by providing statistics on requests received and how they were dealt with.