Canada: Submission on New Brunswick's Right to Information and Protection of Privacy Act

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September 2025

Overview

The Centre for Law and Democracy (CLD) has prepared this Submission[1] in response to New Brunswick's call for public input[2] into the review of the Right to Information and Protection of Privacy Act (RTIPPA).[3] The RTIPPA was originally adopted in 2009, albeit with some amendments having been introduced since then.

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).[4] As part of this, we work extensively with reform actors – including intergovernmental organisations, national and 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] See Government of New Brunswick, "Review of the Right to Information and Protection of Privacy Act", https://www.gnb.ca/en/gov/engagement-consultation/review-rtippa.html.

[3] Chapter R-10.6, Assented to 19 June 2009, with amendments through 1 January 2024, https://laws.gnb.ca/en/pdf/cs/R-10.6.pdf. Under section 86.1 of the RTIPPA, the Minister is mandated to undertake a "comprehensive" review of the Act every four years and to submit a report on the review to the Legislative Assembly.

[4] We take it as positive that New Brunswick, uniquely among Canadian jurisdictions, includes the term RTI in the title of its law.

review. As part of this, we have produced numerous analyses of existing or draft RTI legislation around the world.[5]

A very significant contribution CLD has made to advancing RTI globally is its RTI Rating,[6] 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.[7] 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,[8] while CLD also maintains a separate Canadian rating, where all 14 Canadian jurisdictions are assessed.[9]

This Submission sets out CLD's assessment of the strengths and weaknesses of the RTIPPA, with a focus on access to information (and not on those parts of the Act which deal with privacy and personal data protection). This Submission should be read in conjunction with CLD's RTI Rating of New Brunswick, which was updated as part of the process of preparing this Submission.[10] A summary of the results of the RTI Rating are set out in the table below:

Section	Max Points	Score	Percentage
1. Right of Access	6	3	50%
2. Scope	30	12	40%
3. Requesting Procedures	30	15	50%
4. Exceptions and Refusals	30	13	43%
5. Appeals	30	21	70%
6. Sanctions and Protections	8	5	63%
7. Promotional Measures	16	6	38%
Total score	**150**	**75**	**50%**

[5] Many of these are available under Legal Analyses on our website, at https://www.law-democracy.org/legal-work/legal-analyses/.

[6] See https://www.rti-rating.org. Note that the RTI Rating only assesses the legal framework for RTI. CLD has a companion methodology, the RTI Evaluation, which looks at implementation, available at https://www.rti-evaluation.org/methodology/.

[7] For a formal statement about how the Millennium Challenge Corporation uses our RTI Rating to assess countries' eligibility for development aid, see https://www.mcc.gov/who-we-select/indicator/freedom-of-information-indicator.

[8] The results of this are available at: https://www.rti-rating.org/country-data.

[9] These results are available via the Canadian Rating page at: https://www.law-democracy.org/rti-rating/canada.

[10] This is available at: https://www.law-democracy.org/rti-rating/canada/.

New Brunswick earns a score of 75 out of 150 possible points, or 50%. Were New Brunswick a country, it would rank in 89th place out of the 140 countries which are assessed on the RTI Rating, or nearly in the bottom one-third. This is a weak showing and puts New Brunswick well behind the leading Canadian jurisdiction, Newfoundland and Labrador, which at 111 points would rank 24th out of 140 countries were it a country. This indicates that there is still significant room for improvement in New Brunswick's legal framework for RTI.

The weakest category on the RTI Rating for New Brunswick is promotional measures, with a score of just 38%, followed by Scope at 40%, and Exceptions and Refusals at 43%, all clearly failing grades. Right of Access and Requesting Procedures are scored at a poor 50%, while Sanctions and Protections does better, at 63%. The strongest scoring category for New Brunswick is Appeals, at 70%. This Submission is arranged in sections, aligned with the categories on the RTI Rating.

Right of Access

On the Right of Access category, New Brunswick'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 recognition as a human right, Canada only recognises the right to information as a contingent right derived from freedom of expression.[11] In contrast to better practice, New Brunswick's legal framework fails 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 RTIPPA to refer to 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.

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

Scope

In the Scope category of the RTI Rating, the RTIPPA achieves a weak score of 12 out 30 possible points or just 40%.

Positively, a "record" is defined broadly in section 1 of the Act as including information in any form. However, section 7(1) limits the right to access to information "relating to the public business of a public body". Although it does define this idea broadly by stipulating that it includes "any activity or function carried on or performed by any public body to which this Act applies", this can nonetheless cause confusion, creates additional work for information officers (as they would need to assess whether a request fell within its scope) and is also unnecessary, as reflected by the fact that it is not included in the large majority of RTI laws. Better practice is for a record to including all information which is held by public bodies.

More problematically, section 4(h) contains a carve out for "teaching materials of an employee of an educational institution or other research information of an employee of an educational institution". This is unnecessary since research and related interests are already covered by the exceptions (see, for example, section 30(1)(d)), while excluding a category of information entirely from the scope of the RTIPPA precludes the operation of balancing rules such as severability, the harm test and the public interest override.

Section 4(k) is also problematical. It excludes not only private archival collections but any record which is transferred to the archives of a public body by any body, including another public body. Thus, if a public body were to be decommissioned and its responsibilities and archival information transferred to another public body, that information would then fall outside of the scope of the Act.

We did not deduct points from New Brunswick under Indicator 6, which calls for a right to access both information and records, but we note that the RTIPPA is not very clear in the way it refers to these (different) notions. Thus, the definitions of "information" and "record" are circular, with each relying on the other, and section 8(1), setting out the procedural right to access information, indicates, confusingly, that if a person wants information, they shall make a request "for access to the record". Section 10(1) calls for the production of records containing information where the information is in electronic form (subject to certain conditions), while section 10(2) calls for a record in the form requested to be created, where this would be "would be simpler and less costly" for the public body. Better practice here is to create a right to access both information and records (and to amend the definitions to remove circularity).

The RTIPPA loses quite a lot of points due to the limited range of authorities it covers. International standards call for all branches of government to be fully covered by the law, and for the legitimate secrecy interests of different branches to be protected via the regime of exceptions. We note, as a general point, that the approach to defining the bodies which are covered is unnecessarily convoluted, with the definition of the key notion of "public body" including "a government body", which is then defined separately, and with duplicated references, for example to Crown corporations.

For the executive branch, while the section 1 definition of "public body" includes provincial departments, ministers and local public bodies, as well as government bodies, ministers' and local elected officials' constituency records are excluded (sections 4(e) and 4(g)), along with the public archives (section 4(j)). Section 4(b) also largely excludes the Office of the Attorney General (as part of the Department of Justice and Public Safety). Government bodies include a range of other bodies where all of the members of the board are appointed by an Act or the Lieutenant-Governor in Council, as well as bodies designated in Schedule A (to which the Lieutenant-Governor in Council may add, but not remove, bodies). We note that while this is positive, control over a body may exist well short of being able to appoint all of the members of the board. Schedule A currently lists just six bodies (some of which are categories, such as "school"). The definition of "public body" also includes the bodies listed in Part I of the First Schedule of the Public Service Labour Relations Act,[12] which lists a number of departments, along with some 15 other bodies. Overall, this falls short of better practice, which is to include all bodies which are owned or controlled by public bodies, however that control is manifested.

As for the legislative branch, the section 1 definition of "public body" does not cover elected bodies. It also explicitly excludes members of the legislative assembly (section 1(b)(i)), while records of members of the legislative assembly are also excluded by section 4(d). The definition of "public body" also excludes "the office of an officer of the Legislative Assembly" (section 1(b)(ii)), which is defined to include the Speaker and Clerk of the Legislative Assembly.

The section 1 definition of "public body" also excludes courts (section 1(b)(iii)), while section 4(a) excludes "information in a court record, a record of a judge, a judicial administration record or a record relating to support services provided to a judge or to a court official".

[12] See https://laws.gnb.ca/en/document/cs/P-25.

The definition of "public body" includes Crown corporations listed in Part I of the First Schedule of the Public Service Labour Relations Act, while the definition of "government body" includes Crown corporations where all of the members of the board are appointed by an Act or the Lieutenant-Governor in Council. Both categories of Crown corporation fall well short of capturing all commercial entities which are owned or controlled by the State.

The definition of "officer of the Legislative Assembly" (excluded by virtue of section 1(b)(ii)), includes "the Chief Electoral Officer, the Ombud, the Child, Youth and Senior Advocate, the Consumer Advocate for Insurance, the Integrity Commissioner, the Commissioner of Official Languages for New Brunswick and the Auditor General". Section 4(f) further excludes any "record made by or for an officer of the Legislative Assembly". All of these oversight bodies, as well as records prepared for them, should be included under the RTI law. While commissions for which all members of the board are appointed by government are included in the definition of a "government body", it is not clear to us whether oversight bodies exist which are included, but we gave no points under Indicator 11 due to these exclusions.

Finally, the RTIPPA does not apply to private bodies which perform public functions or which receive significant public funding, contrary to better practice.

Recommendations

- The limitation of the RTIPPA to information "relating to the public business of a public body", for example in sections 7(1) and 8(1), should be removed and the Act should apply simply to all information held by a public body.
- The exclusion relating to teaching material (section 4(h)) should be removed, while the exclusion relating to transferred archives should be limited to private archives.
- The idea of a right to access both information and records should be set out clearly in the RTIPPA and any circularity or confusion in the definitions and operative provisions relating to this should be removed.
- Consideration should be given to simplifying the approach towards defining public bodies, by bringing together definitions and excluding repetition.
- The exclusions in sections 4(e) and (g) for constituency records should be removed, along with the exclusions relating to the Attorney General (section 4(b)) and the Provincial Archives (section 4(j)).

- The RTIPPA should cover all three branches of government – i.e. the executive, legislative and judicial branches – as well as all bodies which are owned or controlled by those branches, including all such private corporates (State-owned enterprises).
- The exclusion relating to an "officer of the Legislative Assembly", as well as for records prepared for these bodies, should be removed and, instead, the Act should apply to all public oversight bodies.
- The access provisions in the RTIPPA should also apply to any private body which performs a public function or receives significant public funding, to the extent of that funding.

Requesting Procedures

New Brunswick receives 15 out of 30 possible points for the RTI Rating category of Requesting Procedures, or 50%. Some positive elements here include a broad duty to assist applicants and the fact that the regulations do not provide for fees to be charged, although it would be better if this were incorporated into the primary legislation. Otherwise, this is a weak score for a category where it is normally fairly easy to do well.

It is positive that section 3 of Regulation 2010-111 under the RTIPPA (Regulation),[13] which lists the information which needs to be provided on a request for information, does not include reasons for the request. However, it would be preferable if asking for reasons were explicitly excluded (i.e. prohibited from being asked), ideally in the primary legislation.

Section 3(a) of the Regulation requires applicants to provide both their name and mailing address on a request, contrary to better practice which just requires the provision of a description of the information sought and an address for delivery of that information (for which an email would be sufficient if the information is to be delivered electronically). Positively, individuals may opt to receive information electronically, as is countenanced by section 3(b) of the Regulation, which lists "the applicant's e-mail address, if any" as further information on a request. Then, section 3(f) provides, where applicable, for the name of the business or organisation on whose behalf the request is being made to be listed, suggesting that this cannot be listed as the primary "name" of the applicant (i.e. that the system for business requests is not really a proper one).

[13] O.C. 2010-386, 5 August 2010, https://laws.gnb.ca/en/pdf/cr/2010-111.pdf.

It is also unfortunate that applicants are required, by virtue of section 3(e) of the Regulation, to state explicitly that a request is being made under the RTIPPA. Better practice is not to require this but to require any request for information to be processed at least as favourably as the conditions in the RTIPPA provide for.

In terms of assistance, section 9 of the RTIPPA contains a strong general obligation to assist applicants. It is also positive that section 8(3) allows for applicants to make oral requests where they have limited reading or writing skills or a disability. However, it would be preferable if the Act set out clear requirements for information officers to reduce requests to writing in such cases.

The New Brunswick RTI system does not require public bodies to issue receipts to applicants 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. Section 13 of the RTIPPA allows for transfers of requests on unduly broad grounds, such as if the record was produced by another body, another body was the first to obtain the record or the record is in the custody of another body. Better practice is to allow such transfers only where the original public body does not hold the information requested and it is held by another public body. Where necessary, the original public body can consult with other public bodies if they have an interest in or knowledge about the information requested. The time allocated for transfers – 10 business days – is also too long.

The RTIPPA lacks a strong system for respecting applicants' preferences regarding the format in which information is provided to them. Section 10(2) allows (but does not require) public bodies to create a new record where "a record exists but is not in the form requested by the applicant" but only in the narrow situation where "the head is of the opinion that it would be simpler and less costly for the public body to do so". Section 16(1) sets out just two formats for receipt of information, namely via a copy or via direct examination. Better practice is to require public bodies to respect applicants' format preferences other than in the limited circumstances where this would impose a significant burden on the public body or create a risk of damage to the record. Section 16(1.1) also allows for redaction of information if, in the opinion of the head, it is not "relevant to the request". Formally, this is unnecessary, since the law only requires public bodies to provide requested information (see, for example, sections 7.1 and 8.1). And it is also unfortunate since it may lead to unnecessary redactions, while redacting information which is not sensitive is a waste of time for a public body. Finally, section 16(3) provides for release of information in the language "in which the record was

made". Instead, applicants should be able to get information in any language version which the public body holds.

Section 11(1) provides for responses to requests within 30 business days. Better practice is to require requests to be processed as soon as possible. Then, best practice is to set a 10-working day timeframe for responding but this should at least not be longer than 20 working days. Section 11(3) allows public bodies to extend requests, with reason, for an additional 30 business days, and this may be extended further (with no maximum set) with permission of the Ombud. While the requirement of Ombud approval for extensions beyond 30 days is positive, better practice laws have a hard cap on extensions, ideally of not more than 20 days. The law also fails to require notice of extensions, with reasons, to be provided to the applicant within the original response timeframe. We also note that two of the grounds for extensions in section 11(3) – namely section 11(3)(a), relating to insufficient detail about requested information, and section 11(3)(b), about not responding promptly to requests for clarification – do not really fit here. Instead, the time taken between requesting clarification and receiving it should not be counted towards the time limit for responding to requests.

Section 80(1) authorises public bodies to require the payment of "fair and reasonable fees for making an application and for search, preparation, copying and delivery services as provided for in the regulations". This includes application fees, as well as fees for searching and preparing records (in addition to copying and delivery of records). Better practice is for there to be no fees simply for making a request and for fees for providing access to be limited to the reasonable costs of reproducing documents (i.e. photocopies) and their delivery (normally postage costs). However, the Regulation does not provide for any fees and in practice apparently none are charged. As a result, New Brunswick did not lose any points for its fee regime. However, it would be better if the primary legislation ruled out application fees and fees for searching and preparing records.

New Brunswick does have an open government licensing policy,[14] but it is limited in scope, notably due to its exemption for all information which is subject to intellectual property. This is largely appropriate for intellectual property rights held by private third parties, but not for such rights as may be vested in public bodies.

[14] Province of New Brunswick, "Open Government Licence", https://www.snb.ca/e/2000/data-E.html.

Recommendations

- Consideration should be given to ruling out in the primary legislation asking applicants for their reasons for making requests.
- Section 3 of the Regulation should be revised so as not to require applicants to provide their name, name of the relevant businesses or organisation, or mailing address, , or to state formally that the request is under the Act, and instead just require an address for delivering the information.
- An explicit, legal requirement for public bodies to issue receipts to applicants promptly (within five calendar days or fewer) should be introduced.
- The overbroad grounds for transfers in sections 13(1)(a) and 13(1)(b) should be removed and the time limit for transfers shortened.
- The 30 business-day timeline in section 11(1) should be shortened, ideally to 10 business days but not more than 20 days, while public bodies should be required to respond to requests as soon as possible.
- The time limit for extensions should be shortened to 20 business days or less, with this being set as a hard cap, and notice of the extension should be required to be provided within the initial time limit. In addition, the grounds for extension in sections 11(3)(a) and (b) should be dealt with via a pause in the counting of response days rather than via an extension.
- Section 80(1) of the RTIPPA should be amended to allow for fees to be charged only for reproducing and sending documents (and not for lodging requests or for searching and preparing records).
- The Open Government Licensing Policy should be amended so as not to exclude information in which public bodies hold intellectual property rights.

Exceptions and Refusals

In the RTI Rating category of Exceptions and Refusals, New Brunswick earned only 13 out of 30 possible points, or 43%. While there are some positive elements, such as the requirement for public bodies to state the exact reasons for refusing requests and a severability clause, whereby when only part of a record is covered by an exception, the remainder should still be disclosed, many aspects of the regime of exceptions in the RTIPPA should be strengthened to bring it into line with international standards and better practice in this area.

As laws which give effect to a fundamental human right, RTI laws should take priority over provisions in other legislation which conflict with them, including confidentiality provisions, which are often overbroad. Best practice is for the RTI law to protect all relevant secrecy interests and then not to allow other laws to extend this. A positive aspect of the RTIPPA is the inclusion of a broad paramountcy clause in section 5. However, the law provides for a carve-out from this for the Security of Information Act (Canada), in section 4(i), and there is another carve-out in section 18.2 for laws with confidentiality clauses which cover law enforcement records. Also, the section 5 paramountcy clause allows for the RTIPPA to be overridden when this is stated explicitly in other laws. One statute cannot, by its own terms, prohibit other statutes from overriding it, even if this might ultimately be the constitutional verdict, as it were, but it is distinctly unhelpful for the Act to provide explicitly for such overrides. In principle, if the RTIPPA sets out a constitutionally aligned regime of exceptions, other laws should not be able to override it.

Much of the rest of the regime of exceptions in the RTIPPA is problematical. A number of the exceptions are overbroad or otherwise illegitimate, several are not subject to a harm test whereby the exception applies only if release of the information would harm a protected interest, and there are problems with the public interest override.

As noted, there are primary problems with a number of the exceptions, as follows:

- Section 17(1) applies to information which would reveal the substance of deliberations of the Executive Council, specifying five broad categories of documents, including things like agendas and minutes of deliberations and decisions (section 17(1)(a)) and "discussion papers, policy analyses, proposals, memorandums, advice or similar briefing material submitted or prepared for submission to the Executive Council" (section 17(1)(b)). Section 25(1), pertaining to local public body confidences, is also overbroad, applying to all draft resolutions, bylaws or other legal instruments (section 25(1)(a)). Section 26(1) also covers, in a significantly and unnecessarily broad manner, the provision of advice. It covers, among other things, all "advice, opinions, proposals or recommendations" developed by or for a public body (section 26(1)(a)), as well as all draft legislation. It is legitimate to protect free and frank debate inside government, the premature disclosure of policy positions where that would undermine the success of the policy, and collective cabinet responsibility for decisions. However, these provisions go well beyond that.
- Section 18 protects information provided in confidence by other government bodies in Canada or internationally, and section 19 extends this to band councils. This is

simply not legitimate, subject to the comment below. Over-classification of records is a rampant practice in most jurisdictions and, in many cases, there is no risk of harm, including to relations with the originally classifying government body, from disclosing such records.

- Like other RTI laws in Canada, the RTIPPA contains broad exceptions for intergovernmental relations, which includes information which can harm relations with the government of Canada (section 18.1(1)(a)), the government of another province or territory (section 18.1(1)(b)) and a local public body (section 18.1(1)(c)), while section 24 extends this to band councils. Governments within Canada should understand that they have to operate within the framework of a robust RTI regime and they should not be able to hold up good relations with other such governments, *per se*, as a bar to transparency. That said, legitimate interests protected by the RTIPPA can legitimately be extended to other governments (such as to protect the free and frank provision of advice). It is more complicated with other States and inter-governmental bodies, such that the protection of good relations in those contexts is accepted as an exception to the right of access.
- Section 20(1) contains an overbroad and not harm-tested exception for information from harassment or personnel investigations, or disciplinary proceedings. This is not legitimate beyond cases where this information is covered by the privacy exception (or potentially another exception). Bizarrely, section 20(2) even allows public bodies to refuse to provide copies of this information to parties to the relevant proceedings (instead only allowing them to inspect the records). Similarly, Section 22(1)(c)(v) contains an unnecessary and not harm-tested exception for information supplied to individuals responsible for investigating or resolving a labour relations dispute.
- Section 27 covers not only solicitor-client privilege but also a much wider range of legal advice. It is not legitimate to extend legal privilege beyond the already broad scope of solicitor-client privilege, unless the information falls within the scope of another legitimate exception. Section 29(1)(n) has an unnecessary exception for exposing to civil liability "the author of a law enforcement record or a person who has been quoted or paraphrased in the record". This would shield from public scrutiny otherwise illegal statements in a law enforcement record. It may be noted that properly crafted civil rules, such as in the area of defamation, already protect from liability such communications as the reporting of suspected crimes.
- It is legitimate to protect the ability of the government to manage the economy, for example by preventing the premature release of major economic programmes, such as the budget. But section 30(1) goes far beyond this, protecting all economic or

financial interests of New Brunswick. This is also reflected in the list of specific categories here, which includes "scientific or technical information obtained through research by an employee", regardless of whether the release would cause any particular harm (section 30(1)(d)).

- Section 32(a), covering information provided in confidence for determining eligibility for a contract or honour or award, is also unnecessary, especially given that privacy and other legitimate third-party interests are already protected.
- Section 33(2)(b) covers information which is due to be published within 65 days, which is an unnecessarily long period.
- Section 14(2)(a) allows public bodies to refuse to disclose whether information exists if it is exempt pursuant to section 28 (public safety or health) or 29 (law enforcement, security and other issues). This is problematic because it does not limit the application of this to situations where merely acknowledging the existence of the record would itself harm the underlying interest.

Section 21 sets out the exception for private information. The initial phrasing of this, in section 21(1), is legitimate (and refers to disclosures which would be "an unreasonable invasion of a third party's privacy"). However, the mandatory list of types of private information in section 21(2) is problematical because it covers broad categories and does not allow for contextualisation. We recommend, instead, the approach taken in section 20 of the Nova Scotian Freedom of Information and Protection of Privacy Act (FOIPOP Act).[15] Section 20(1) is very similar to section 21(1) of the RTIPPA. Section 20(3) of the FOIPOP Act sets out factors which create a presumption that a disclosure would be an unreasonable invasion of privacy, while section 20(2) sets out factors to be considered, which trend in both directions (i.e. supporting and opposing disclosure). Finally, section 20(4), like section 20(3) of the RTIPPA, sets out circumstances where a disclosure is not an unreasonable invasion of privacy. By relying on factors and presumptions, rather than a hard list of categories, the FOIPOP Act allows for a proper balancing of all of the relevant issues and circumstances, thereby allowing for far more subtle and tailored results.

We also note that the list in section 20(3) of the RTIPPA, setting out cases where information shall not be withheld under this section, somehow illustrates that the rest of the regime is unnecessarily broad, inasmuch as it was deemed to be necessary to carve out all of these categories of information. A particularly notable example in section 20(3)(h), relating to

[15] S.N.S. 1993, c. 5, https://nslegislature.ca/sites/default/files/legc/statutes/freedom%20of%20information%20and%20protection%20of%20privacy.pdf.

discretionary benefits, such as licences or permits, which under better practice RTI laws are required to be disclosed proactively. Section 21(4)(b) is also somewhat bizarre, allowing public bodies, where consent is provided, to provide access via the third party (whose privacy is engaged), rather than directly to the applicant. Among other problems with this, it might involve an invasion of the privacy of the applicant (since the third party would need to be provided with the contact details of the applicant to be able to pass on the information).

Then, the whole approach taken in section 21 is completely undercut by section 46(1), which provides that public bodies may only disclose personal information if one or more of a list of conditions is met. This is much broader than section 21 inasmuch as personal information is defined far more broadly than information the disclosure of which would involve an unreasonable invasion of a third party's privacy. And the conditions in section 46(1) do not cover all of those found in section 21(4). Section 46 should be amended to align with the primary regime for protecting privacy (i.e. in section 21), which already takes personal data protection rules into account.

Section 15 sets out a number of circumstances in which a public body may disregard a request for information. These include, in addition to repetitive and vexatious requests, cases where requests which are repetitious or systematic would interfere with the operations of a public body, and frivolous requests. We welcome the fact that this section requires the authorisation of the Ombud. However, it would be preferable to tighten up the language. The double reference to repetitive (in sections 15(a) and (c)) is unnecessary, so the first one should be removed. The notion of a "systematic" request is unclear. A request for a lot of data by a researcher may well be systematic in the ordinary sense of that word, but that might simply signal that it is a well-formulated request. If there is a desire to address very large requests, this is not the right approach for that. Instead, a system for charging for time for very complex, time-consuming requests could be put in place. The notion of a "frivolous" request is highly subjective and clearly open to abuse. Finally, the notion of a "vexatious" request should be defined to cover only cases where the real purpose of the request is not to obtain information but to waste the time of the public body or to pursue some other purpose.

Several exceptions in the RTIIPPA are not subject to a harm test, contrary to international standards. These include sections 18(1) and 19(1), covering information provided in confidence by various levels of governments, other States and international organisations, and band councils; exceptions covering law enforcement records, including sections 18.2 and 29(1)(g); section 22(1)(b), covering commercial information provided in confidence (but not otherwise subject to a harm test); sections 27 (b) and (c), relating to legal information; sections

29(1)(d), (g), (h), (k) and (m), relating to various law enforcement issues; sections 30(1)(b), (d), (e) and (f), relating to economic interests of public bodies; and section 92, which contains an amendment to the Historic Sites Protection Act allowing for the refusal to disclose information about sites of potential historical/archaeological significance

According to international standards, all exceptions should be subject to a public interest override, whereby even if an exception applies, information should still be released if the harm to the interest protected by the exception does not outweigh the public interest in disclosing the information. The primary public interest override is found in section 33.1(1), which provides for the mandatory release, without delay and whether or not a request has been made for it, to an "affected group of people or to an applicant" of information about "a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest".

There are some positive features of this rule. First, it applies without delay. Second, it applies even where no request has been made, where the threats covered apply to a group of people. Third, it is mandatory in nature. But it also incorporates some important limitations. First, it only applies to threats to the environment or health or safety. Better practice is for the public interest override to apply whenever any public interest is engaged, including, for example, such things as the exposure of corruption, human rights abuse or maladministration or the facilitation of public participation or holding government to account. Second, it only applies when disclosure is "clearly in the public interest" and in the contexts of a risk of "significant harm" rather than whenever the secrecy interest (or harm from disclosure) outweighs the interest in disclosure.

Sections 22(4) and (5) contain additional, discretionary public interest overrides for third party commercial information, where the protected interests are "clearly outweighed" by, respectively, the public interest in improved competition or government regulation of undesirable trade, on the one hand, and public health or safety or protection of the environment, on the other. It is unclear what the additional benefit of section 22(5) is, since it largely overlaps with section 31.1(1). In any case, both sections suffer from being discretionary, being limited to cases where an exception protecting private interests is involved, being limited to a narrow band of public interests, and requiring the public interest to "clearly outweigh" the private interest.

Better practice is to subject all exceptions which protect public interests to sunset clauses whereby there is a presumption that the exceptions no longer apply after a set period of time, such as 15 or 20 years, in recognition of the rapidly decreasing sensitivity of most information.

Where there are concerns that information may remain sensitive beyond this period, a special procedure can be put in place to extend the period (for example by empowering a minister to sign off on this). The RTIPPA contains sunset clauses for only a few exceptions, namely for 15 years for Executive Council confidences, but only with the approval of the Executive Council (section 17(2)); for 20 years for local public body confidences (25(2)(c)) and advice to a public body (section 26(2)(a)); and for 100 years for personal information (section 48). However, most of the exceptions for public interests are not subject to such clauses, while the Executive Council sunset clause provides for the reverse of a presumption (i.e. the need for specific approval even after that time).

The RTIPPA creates a regime for consulting with third parties where requests are made which engage their private or commercial interests, in sections 34-36. This is broadly in line with international standards except for the fact that when this procedure is engaged the timeframe for deciding on a request is extended to 20 business days from the date the third party is notified (sections 35(2(c)) and 36(1)), whereas better practice is to not delay the timeframe for processing requests in such cases.

Another concern with this regime is that, pursuant to section 36(4), where a public body has decided to release information involving third party interests, the release of that information appears to be delayed until after a final decision if the third party applies for review by the Ombud or a court. 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 Ombud, 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 very small chance of success. This is because public bodies are very deferential to third parties, especially where they lodge 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, a system can be set up to provide compensation.

Recommendations

- Consideration should be given to repealing sections 4(i) and 18.2, providing for hard overrides of the RTI PPA, and to amending section 5 so that it no longer refers to overrides.
- The problematical exceptions described above, including the rules on protecting privacy and personal information, should be revised to bring them into line with international standards, including by including a harm test for all exceptions.
- Consideration should be given to amending the conditions for disregarding requests, in section 15, so that it only applies to vexatious or repetitive requests, and to defining "vexatious" narrowly, as suggested above.
- The public interest test in section 33.1(1) should be revised to cover all public interests and to apply whenever the harm to the interest protected by the exception does not outweigh the public interest in accessing the information. If that is done, sections 22(4) and (5) can be repealed because they would no longer be relevant.
- All exceptions which protect public interests should be subject to sunset clauses, while a procedure to extend this in exceptional cases should be added.
- The approach to third-party consultations should be amended to align with the original timeframe for deciding on requests and not to provide for appeals by third parties to suspend the release of information.

Appeals

New Brunswick's legal regime for appeals is the strongest part of its RTI framework, earning 21 out of 30 possible points or 70%. However, there are a number of areas where this regime could be strengthened.

It is generally considered to be good practice for there to be a simple and free internal appeal process within the same public body which originally decided on a request for information. This allows for a cost effective and expeditious way to resolve errors without burdening the independent oversight body. On the other hand, where the likelihood of internal appeals resulting in additional information being released is low, they can simply contribute to delays in the processing of requests and appeals. The RTIPPA does not provide for an internal appeal.

The existence of an independent, administrative level of appeal is essential for the effective functioning of an RTI system. It subjects decisions on requests to a system of independent oversight which should be free for applicants and hopefully far more rapid than the courts.

Previously, from 2010 to 2017, New Brunswick had a dedicated information and privacy commissioner, like most provinces and territories in Canada, but oversight of the RTI law is now done by the office of the Ombud.

CLD generally advocates for a dedicated information (or information and privacy) commissioner, especially for relatively large jurisdictions such as New Brunswick. This concentrates expertise on a small selection of issues and also normally results in powers being allocated to the office which are tailored to the needs of information oversight. An important example of this is the need for oversight bodies to have binding order-making power in relation to information appeals, something which human rights commissions and ombuds offices (the other likely locations for information appeals) normally do not have (as is the case in New Brunswick). We have not been able to study the operations of the New Brunswick Ombud in relation to information oversight carefully or to assess them against the practice during the period of the information commissioner, but we reiterate here our general preference for a dedicated body in this space.

It is essential for oversight bodies, regardless of the form they take, to be robustly independent of the government and public bodies they oversee (as it is for courts). Better practice here is to prohibit individuals with strong political connections from being appointed to the oversight body and also to impose requirements of professional expertise for these appointees. Section 5(1) of the Ombud Act[16] prohibits the Ombud from being a member of the Legislative Assembly or from holding "any other office of trust or profit or engage in any occupation for reward outside the duties of the office of Ombud" absent prior approval by the Legislative Assembly or, outside of legislative sessions, by the Lieutenant-Governor in Council. However, this is a relatively weak prohibition on political connections. Moreover, there is no requirement of specific expertise for appointees.

While the Ombud reports annually to the Legislative Assembly (section 25(1)) and has his or her salary and benefits package tethered to those of a deputy head (section 2.1), there is nothing in the Ombud Act regarding the budget of the office.

The powers of the Ombud are relatively robust. Section 64.2 of the RTIPPA grants the Ombud a right of entry to examine and copy records. Section 10 of the Ombud Act grants the Ombud all powers of a commissioner under the Inquiries Act, which includes the power to enforce summons and order production of documents, while 18(2) of the Ombud Act also provides for the power to summon witnesses. However, sections 19.1(3) of the Ombud Act and 70(1)

[16] 2017, c.1, s.2, https://laws.gnb.ca/en/document/cs/O-5.

of the RTIPPA bar the Ombud from accessing documents protected by solicitor-client privilege, as well as deliberations and proceedings of Executive Council.[17]

As noted above, very broad experience globally indicates that RTI oversight bodies need to have binding order-making powers, at least in relation to the disclosure of information. In common with most ombuds, the New Brunswick Ombud can only make recommendations (see sections 73 and 74 of RTIPPA).

In terms of procedures, the system of appeals (to court) and complaints (to the Ombud) lacks proper procedural protections for cases in which third parties are involved. In such cases, both the applicant and the third party should at least receive notice about the progress of the case, and likely have the right to intervene as parties. But the RTIPPA affords these rights only to the party who brought the proceeding (see, for example, section 66(2)). It is also unclear why public bodies should be given ten business days to provide records to the Ombud (section 70(3)).

Section 21 of the Ombud Act gives the Ombud broad powers to recommend remedial actions for public bodies in certain circumstances. This is positive but better practice is for the system to provide for specific remedial actions in the context of information requests, such as to appoint or train an information officer or manage records better. This is likely another casualty of the fact that there is no dedicated office for dealing with access to information in New Brunswick.

Recommendations

- Consideration should be given to whether it would be beneficial to provide for a simple internal appeal process in New Brunswick.
- Consideration should be given to whether it would be more effective for New Brunswick to revert to the dedicated information and privacy commissioner model, in line with CLD's experience in jurisdictions around the world.
- Consideration should be given to introducing expertise requirements relevant to RTI for appointments under the Ombud Act and stronger prohibitions on political connections for appointees.

[17] For an example of records withheld from the Ombud due to the alleged application of the cabinet confidentiality exception, see Karissa Donkin, "Province withholding records about proposed Fredericton jail from ombud", 12 April 2023, CBC News, https://www.cbc.ca/news/canada/new-brunswick/ombud-new-jail-records-1.6803955.

- The restrictions on the Ombud accessing documents protected by solicitor-client privilege, and deliberations and proceedings of Executive Council should be removed.
- The Ombud should be given binding order-making power for reviews of RTI complaints.
- The procedures for appeals and complaints should be reviewed to ensure that the rights of all interested parties, including applicants and third parties, are protected, while consideration should be given to reducing the time limit of 10 days for public bodies to provide records to the Ombud.
- The Ombud should be given clearer, more precisely delineated remedial powers to address the problem of public bodies which are structurally failing to implement the RTIPPA.

Sanctions and Protections

The proper functioning of an RTI regime depends on the existence of sanctions for those who flout the law, along with protections for those who release information in good faith. This is an area where it is relatively easy to do well, and New Brunswick scores 5 out of a total of 8 possible points in this category, or 63%.

Section 82 of the RTIPPA provides for sanctions for obstructing the work of the Ombud or for destroying, erasing, altering, falsifying or concealing a record, with the intent to deny access. This is positive but it is a rather narrow selection from among all of the actions which may be taken to obstruct access to information. Better practice is to provide for sanctions for all wilful actions which are undertaken to obstruct or deny access.

Better practice is to provide for sanctions for public bodies which systematically fail to disclose information or otherwise underperform. The importance of such systems is underscored by concerns that have been raised about the implementation of RTI in the province, with a national audit conducted in 2021 by the Globe and Mail having found New Brunswick to have the second slowest response time of all jurisdictions in Canada, behind only the federal government.[18]

A key issue here is the existence of protections for those who in good faith release information about wrongdoing (i.e. whistleblowers). New Brunswick has adopted a dedicated

[18] Robyn Doolitle and Tom Cardoso, "New Brunswick's access regime among the most restrictive in Canada, Globe audit finds", 11 December 2023, Globe and Mail, http://theglobeandmail.com/canada/article-new-brunswick-access-records.

whistleblowing law, the Public Interest Disclosure Act.[19] 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.[20] While that law is beyond the scope of the present review, consideration should be given to evaluating the province's whistleblower regime separately, with the goal of strengthening protection of whistleblowers.

Recommendations

- The sanctions provided for in section 82 should be expanded to cover all cases of wilful obstruction of access to information.
- Consideration should be given to introducing a system of sanctions for public bodies which systematically fail to disclose information or underperform.
- Consideration should be given to conducting a dedicated review of the Public Interest Disclosure Act, with a view to strengthening its whistleblower protections.

Promotional Measures

Promotional Measures is the category of the RTI Rating where New Brunswick receives the lowest score, namely 6 out of 16 points or just 38%. 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, the RTIPPA generally imposes obligations on the heads of public bodies, while section 6(1) gives them broad powers to delegate those obligations, without providing any specific requirements in this regard. In practice, this may largely amount to the same thing, but it is preferable for the appointment of information officers with responsibility for, among other things, receiving and processing requests for information to be set out directly in the primary RTI legislation.

An alternative to having a designated information officer in each public body is to have a centralised processing unit to deal with RTI requests. Under such a system, the central unit receives requests on behalf of all public bodies, or at least those which form part of the executive branch of government, and leads in terms of the processing those requests, in

[19] C. 122, 13 December 2012, https://laws.gnb.ca/en/document/cs/2012,%20c.112.
[20] See, for example, Jacques Poitras, "Why it's hard to blow the whistle under New Brunswick's whistleblower law", 31 January 2024, CBC News, http://cbc.ca/news/canada/new-brunswick/nb-whistleblower-law-onb-fired-employee-1.7099438.

collaboration with the public body which holds the information which has been requested. For this to work properly, all public bodies need to be required to provide the central service with records which are responsive to a request, and the central unit should ideally have the power to process and disclose records, as relevant. A centralised system can be effective for smaller jurisdictions and one has successfully been implemented in Nova Scotia.[21]

The RTIPPA does not provide for a robust system regarding public awareness raising, such as by requiring a guide for applicants to be produced and disseminated, or by introducing RTI awareness into school curricula. The Ombud may "inform the public about this Act" (section 64.1(1)(b)), but the discretionary and unspecific nature of this provision falls short of better practice in this area.

Better practice laws impose requirements on public bodies to disclose certain categories of information proactively, as well as to regularly ensure that this information is up-to-date and complete.[22] The RTIPPA lacks any such proactive disclosure requirements.

Better practice RTI laws also require public bodies to create and update lists or registers of the records in their possession, or at least the categories of records they hold, and to make these public, something which is missing from the RTIPPA. The RTIPPA also fails to require public bodies to provide training for their information officers (perhaps partly a consequence of the fact that the Act does not actually require the appointment of information officers). It also fails to require public bodies to report annually on the actions they have taken to implement their disclosure obligations, including by providing statistics on requests received and how they were dealt with. Such information is essential if the government and public are to have a proper sense of how well implementation of the Act is going.

The Ombud is required to report annually to the Legislative Assembly, pursuant to section 64.3 of the RTIPPA, on "the exercise of his or her functions" under the law. However, better practice here is to require oversight bodies not only to report on their own actions but also to prepare a consolidated report on the overall implementation of the RTI in the jurisdiction (i.e. by all public bodies). In order for this to happen, the Act needs to require all public bodies to report on their own implementation efforts, as outlined above.

[21] See Toby Mendel, "Principles on Right to Information for Small Island Developing States: The Case of the Pacific" (2024, Centre for Law and Democracy), pp. 7-8, https://www.law-democracy.org/wp-content/uploads/2024/09/ATI-Principles-for-the-Pacific.final_.pdf.
[22] Note that this issue is not addressed by the RTI Rating.

Recommendations

- Consideration should be given to requiring public bodies to appoint a designated individual or individuals to handle requests, instead of vesting obligations in the head of the public body. As an alternative, New Brunswick could consider setting up a central unit to handle RTI requests, at least for the executive branch of government.
- The RTIPPA should be amended to provide for mandatory and clear duties, whether for the Ombud or another body, to raise public awareness about RTI and how to exercise the rights it guarantees.
- It should be mandatory for public bodies to maintain up-to-date and public registers of the records in their possession.
- Public bodies should be required to disclose proactively certain key categories of information and to ensure that this information is regularly updated.
- Public bodies should be required to provide adequate training to their staff and, in particular, their information officer(s).
- Public bodies should be required to report annually on the efforts they have undertaken to implement the RTIPPA, including by providing statistics on requests received and how they were dealt with.
- The Ombud should be required to report on overall implementation of RTI in New Brunswick, in addition to on the implementation of his or her own functions under the law.