

Nova Scotia, Canada: Note on An Act Respecting Government Organization and Administration

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On 18 February 2025, the Government of Nova Scotia tabled the omnibus Bill No. 1, An Act Respecting Government Organization and Administration (Bill)¹ which, among many other things, proposes some important changes to the way access to information will work in Nova Scotia, Canada. In a news release, the Executive Council Office described the amendments in respect of access to information as follows:

Amendments to the Freedom of Information and Protection of Privacy Act (FOIPOP) address long-standing inefficiencies while awaiting the outcome of comprehensive review of the entire Act.²

No public consultation was conducted prior to these amendments being introduced. However, in the fall of 2023, the Government of Nova Scotia invited written submissions to its review of Nova Scotia's Freedom of Information and Protection of Privacy Act (FOIPOP Act)³ and related legislation.⁴ In November, the Centre for Law and Democracy (CLD)

¹ Available at https://nslegislature.ca/legc/bills/65th_1st/1st_read/b001.htm.

² Province Introduces Changes to Government Organization, Administration, 18 February 2025, <https://news.novascotia.ca/en/2025/02/18/province-introduces-changes-government-organization-administration-0>.

³ S.N.S. 1993, c. 5,

<https://nslegislature.ca/sites/default/files/legc/statutes/freedom%20of%20information%20and%20protection%20of%20privacy.pdf>. This should be read in conjunction with the Freedom of Information and Protection of Privacy Regulations, O.I.C. 94-537 (June 28, 1994, effective July 1, 1994), N.S. Reg. 105/94 as amended by O.I.C. 2015-102 (March 31, 2015, effective April 1, 2015), N.S. Reg. 185/2015 (Regulations), <https://novascotia.ca/just/regulations/regs/foiregs.htm>.

⁴ The invitation is available at <https://novascotia.ca/information-access-and-privacy-engagement/>.

provided its *Submission to the Review of Nova Scotia's Freedom of Information and Protection of Privacy Legislation*,⁵ setting out numerous recommendations for reform of the Act. None of those recommendations are reflected in the Bill. And neither has the government responded to the many submissions which were made to it, a process which concluded over a year ago.

It is not at all clear what the Government means when it refers to the Bill addressing “long-standing inefficiencies”. The proposed changes do not address what advocates have consistently identified as long-standing issues with the FOIPOP Act and neither do they create efficiencies in any proper sense of that word. Instead, the proposed amendments appear to be designed largely to give the government greater control over requests for information. That is only an “efficiency” in the sense of saving the government time and money, while at the same time undermining the whole purpose of the legislation, namely to facilitate access to information.

CLD has produced this Note⁶ to highlight the actual implications of the Bill, as broken down into its component parts. The Note is based on international standards in this area as well as better practice approaches adopted in other Canadian and international jurisdictions.

Amendments to the FOIPOP and Municipal Government Act

Sections 16-21 of the Bill propose amendments to the FOIPOP Act and Sections 29-33 introduce similar amendments to those found in Sections 16-19 of the Bill to the Municipal Government Act⁷ (MG Act), which essentially provides for a parallel system of access to information held by municipalities.

New Sections 6, 6A, 6B and 6C

Section 16 of the Bill repeals existing Section 6 of the FOIPOP Act and replaces it with new Sections 6, 6A, 6B and 6C. The main import of the new Section 6 is to place more onerous obligations on applicants (those who make requests for information) as to the detail with

⁵ Available at https://www.law-democracy.org/live/wp-content/uploads/2023/11/Canada.Nova-Scotia.RTI_Nov23.pdf.

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⁷ S.N.S. 1998, c. 18, <https://nslegislature.ca/sites/default/files/legc/statutes/municipal%20government.pdf>.

which they must describe the record (information) they are seeking. The existing Section 6(1)(b) provides, simply:

A person may obtain access to a record by

- (b) specifying the subject-matter of the record requested with sufficient particulars to enable an individual familiar with the subject-matter to identify the record;

This or very similar language is found in a number of access to information laws around the world, it is clear and understandable, it is fit for purpose, and it does not appear to have caused problems in other contexts. This is particularly the case given that Section 7(1)(a) requires public bodies to assist applicants such that, where it is not clear what they are requesting, this can be clarified via such assistance.

The new Section 6 requires applicants to provide “sufficient particulars as to time, place and event” to enable identification of the record. It is not clear how this adds anything to the current version of the Act while, at the same time, it could be abused to refuse a request, for example where applicant is not aware of the “time” or “place” of the information they are seeking.

The new Section 6, perhaps by mistake, also eliminates existing Section 6(2), which allows applicants to access information either by examining the record or by obtaining a copy (which is further elaborated upon in Section 8).

New Section 6A is far more concerning. New Section 6A(1) allows a public body to “disregard” a request if it does not contain sufficient particulars, but only after assistance has been offered pursuant to Section 7(1)(a). This is not inappropriate, although it is already implicit in the existing Section 6(1).

New Section 6A(2) provides four additional grounds for a public body to “disregard” a request, namely where the head of the public body is of the opinion that:

1. The request is “trivial, frivolous or vexatious”.
2. The information has already been provided to the applicant.
3. The request is “an abuse of the right to make a request” because it is “unduly repetitive or systematic”, “excessively broad or incomprehensible” or “otherwise not made in good faith”.
4. Responding to the request would “unreasonably interfere with the operations of the public body”.

Some of these grounds are simply not necessary. For example, a request which is “incomprehensible” would already fall foul of existing and certainly new Section 6. If information has already been provided to an applicant or a request is repetitive, the request would clearly be vexatious.

Some of these grounds are excessively vague and thus open to abuse. Grounds which fall into this category include the notion of a request being “trivial” or “frivolous”, which is ultimately very paternalistic, a request being not “repetitive” but “unduly repetitive”, a request being unduly systematic, whatever that might mean, or a request not being made in good faith. In assessing this, it is important to take into account the unfortunate but well-established fact that public bodies are not infrequently negatively disposed towards providing information in response to requests. Thus, frequent applicants in Nova Scotia all have stories of at least mildly obstructionist responses from public bodies when it comes to requests, for example of excessive delays or opportunistic use of exceptions. This is not a particular feature of the Nova Scotian access system but is a characteristic which is manifested almost universally in access systems. Flexible or discretionary language in access to information acts, including the FOIPOP Act, has to be assessed in light of this fact.

At the same time, there is some justification for allowing requests not to be processed where they are vexatious, as some requesters truly do fall into the trap of making vexatious requests, not because they actually want or need the information but because they are upset with a public body for one reason or another. However, taking into account the unfortunate fact noted above, it is important to put up guardrails to prevent the abuse of any language which creates discretion to refuse requests, including any power to disregard vexatious requests. The federal Access to Information Act provides for exactly such guardrails by allowing public bodies to decline to process a request which is vexatious (or also “made in bad faith or is otherwise an abuse of the right to make a request for access to records”, although we view this additional language as unnecessary), but only if the Information Commissioner provides written approval for this.⁸ This is a practical and reasonable approach and we recommend that it be followed in Nova Scotia.

There is also some justification for instituting special measures in relation to requests which are so large that to process them would place a significant burden on a public body. Given

⁸ R.S.C., 1985, c. A-1, section 6.1(1), <https://laws-lois.justice.gc.ca/eng/ACTS/A-1/FullText.html>. A similar approach is in place in Newfoundland. See Access to Information and Protection of Privacy Act, 2015, Chapter A-1.2, section 21(1).

that access to information is a quasi-constitutional right in Canada,⁹ it is not legitimate to block entirely requests simply on the basis that they are large. However, there are other ways to limit such requests and to ensure that they do not actually interfere with the operations of public bodies, and these are already built into the FOIPOP Act. Section 11 of the FOIPOP Act allows applicants to be charged for the time spent on processing requests, with the first two hours of time being free. Furthermore, Section 11(6) of the Act allows public bodies to bill for this time in advance. CLD generally opposes charging applicants for the time spent on processing requests for information. However, we do not necessarily oppose the imposition of fees to offset costs for very large and complex requests, although we recommend substantially increasing the amount of processing time to be provided for free, for example to something closer to 30 hours, and subjecting requests to fee waivers, including for public interest requests, as is provided for in Section 11(7)(b) of the Act, albeit these should be mandatory instead of discretionary. We believe that such a fee structure is sufficient deterrence to prevent all but the most serious very large requests. We also note that Section 9(1) of the Act already allows for essentially unlimited time extensions for responding to requests, with the approval of the Review Officer being required for time limits beyond a total of 60 days. A combination of recouping the staff time costs and extending the time limit for responding is sufficient to prevent any interference by a request with the operations of a public body.

It is positive that new Section 6C requires public bodies to provide notice to applicants in case Section 6A is applied, including of their right to ask for a review of the decision by the Review Officer (i.e. the Information and Privacy Commissioner for Nova Scotia).

Other Changes

Section 17 of the Bill inserts a new Section 9A into the FOIPOP Act providing that the time limits set out in Sections 6A, 7, 9 and 25A are suspended for any period during which a review before the Review Officer or appeal before the Supreme Court of Nova Scotia is pending. We have some difficulty understanding the logic of this provision. New Section 6A, as noted above, provides for disregarding a request and, subject to Section 6B, a decision under Section 6A must be provided within 14 days of the receipt of the request. New Section 25A, pursuant to Section 18 of the Bill, is largely the same as new Section 6A, albeit for requests to correct

⁹ See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (2010), SCC 23 (CanLII), [2010] 1 SCR 815, [https://www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html?autocompleteStr=Ontario%20\(Public%20Safety&autocompletePos=1](https://www.canlii.org/en/ca/scc/doc/2010/2010scc23/2010scc23.html?autocompleteStr=Ontario%20(Public%20Safety&autocompletePos=1).

personal information. It is thus not possible for a review or appeal based on new Sections 6A or 25A to be lodged before their internal time limits have expired. The nature of Section 7, which sets an initial time limit of 30 days for responding to requests and other rules relating to such responses, is also such that it is not possible for a review or appeal to be lodged during this time. Section 9 provides for extensions to the time limit. A public body may take a 30-day extension on its own or apply to the Review Officer for a longer extension. It is not impossible that a decision here might be the subject of a review application or potentially even a court appeal, but this would surely be extremely rare, given that the Review Officer will already have approved any extension beyond a total of 60 days (and taking into account the time the Review Officer will take to decide on any such review). As such, we do not see any need for Section 17.

We note that, in the federal system, the time taken for the Information Commissioner to approve or deny the non-processing of a request for being vexatious is not counted towards the time limit for responding to requests. Obviously this is not analogous to the new Section 9A proposal for Nova Scotia, but perhaps the inspiration for new Section 9A was somehow erroneously drawn from that.

Section 19 of the Bill provides for a separate, rapid review process for decisions under new Sections 6A and 25A, and then appeals to the Supreme Court. This is positive, subject to it being realistic for the Review Officer to process these review applications within the 14-day period provided for, which is largely a function of the resources allocated to her office. The current Commissioner has voiced her concerns publicly about a lack of funding for her office and allocating additional roles such as this would clearly require additional funding.¹⁰

Section 20 of the Bill adds a new Section 37A to the FOIPOP Act, giving the Review Officer fairly broad powers to refuse to conduct a review or discontinue a review, at any stage of a review, subject to an appeal to the Supreme Court. Most of the grounds for this are reasonable, such as that the public body has already responded adequately to the matter, there is insufficient evidence for the review, or the matter is already being or has already been considered. Another ground for this is that the review is “trivial, frivolous or vexatious or is made in bad faith”. This is highly discretionary language but it may, at least in relation to vexatious requests for reviews, as for requests, be needed. It is not easy to establish guardrails here, as we propose above for initial requests, but the fact that the Review Officer generally

¹⁰ See, for example, CBC, “N.S. privacy commissioner calls for more staff, more authority”, 21 June 2023, <https://www.cbc.ca/news/canada/nova-scotia/n-s-privacy-commissioner-calls-for-more-staff-more-authority-1.6884229>.

does not have any direct relationship with the matter under review, along with the right to appeal to the Supreme Court, should be enough.

Another ground, in new Section 37A(b), is that the matter “has been or could be more appropriately dealt with” through another procedure. It is not clear to us what problem this seeks to address. Other access to information regimes do not normally include this as a basis for not proceeding with a review. And, normally, reviews of requests for information are highly specific in nature, even if the information in question may relate to another proceeding. Absent a clear justification for this ground for not proceeding with a review, we recommend that it be dropped.

As noted, Sections 29-33 of the Bill introduce almost identical changes to the Municipal Government Act as Sections 16-19 of the Bill do to the FOIPOP Act. As such, the relevant recommendations below apply equally to the corresponding changes being proposed for the Municipal Government Act.

Recommendations

- The replacement of existing Section 6 with new Section 6 should be reconsidered as the proposed amendments do not appear to respond to any actual need and could be abused to create unnecessary obstacles for applicants. In addition, existing Section 6(2) should be retained in any amendments.
- New Sections 6A(2)(a)-(c) should be limited to requests which are vexatious and should be allowed to be invoked only with the written permission of the Review Officer.
- The part of Section 16 of the Bill adding new Section 6A(2)(d) should be removed, given that public bodies already have the discretion to charge fees for processing time for large requests and to claim extensions to the time for processing them.
- Section 17 of the Bill, adding new Section 9A, should be removed.
- Consideration should be given to removing Section 20 of the Bill, adding new Section 37A(b).

Other Issues

Section 2 of the Bill repeals Sections 14(6) and (7) of the Auditor General Act¹¹ and adds a new Section 14A. The existing Sections 14(6) and (7) provide that, where the Auditor General

¹¹ S.N.S. 2010, c. 33, <https://oag-ns.ca/about-us/who-we-are/auditor-general-act>.

and the entity being audited could not agree on whether records were privileged, including on the basis of solicitor-client privilege, litigation privilege or settlement privilege, either party could apply to the Supreme Court to determine the matter. The new Section 14A now gives the Attorney General the sole power to make this determination, which shall be “conclusive proof” of that fact, subject to judicial review.

This means that such decisions about privilege may involve political overtones, since the Attorney General of Nova Scotia is also the Minister of Justice. Otherwise, it is not immediately clear how this will impact the exception found at Section 16 of the FOIPOP Act in favour of solicitor-client privilege. One consequence may be to remove the power of the Review Officer to question claims of solicitor-client privilege in relation to such information. This would mean that the only independent route to challenge this would be via an appeal to the Supreme Court, which is not practically accessible to the vast majority of information applicants.

Far more serious is Section 6 of the Bill, which adds a new Section 21A to the Auditor General Act. This concerns reports by the Auditor General to the House of Assembly on performance audits which the Auditor General has carried out. Specifically, it gives the member of the Executive Council (cabinet) who is responsible for the matter addressed in such a report (i.e. the minister responsible for the ministry or other body which has been audited) the power to throw a veil of secrecy over such a report, “in the interests of public safety or otherwise in the public interest”. The report would still go to members of the House, but they would be precluded from sharing it with others.

It is immediately obvious that the grounds for secrecy here, and particularly the reference to “the public interest”, are highly discretionary, such that any minister will effectively be able to block the public release of reports by the Auditor General which are embarrassing or uncomplimentary. There is a procedure whereby the Public Accounts Committee can authorise the release of this information, but that Committee, is normally dominated by members from the governing party and such a procedure would in any case take some time. There is simply no warrant for granting such a power to ministers in the first place.

Recommendations

- Section 2 of the Bill, repealing old Sections 14(6) and (7) of the Auditor General Act and adding a new Section 14A, should be removed.
- Section 6 of the Bill, adding a new Section 21A to the Auditor General Act, should be removed.

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