A Bold Step Forward: CLD Welcomes ATIPPA Review Committee Recommendations[1]

Information is the lifeblood of democracy. Representative government ultimately relies on citizens to make important decisions on matters of public policy, and to hold governments accountable for their successes and failures. A strong right to information (RTI) system, which allows people to obtain accurate, timely and comprehensive information about information held by government, is essential to the ability of members of the public to play this oversight role.

In 2012, the government of Newfoundland and Labrador faced sharp criticism for its passage of Bill 29, which significantly curtailed the strength of the provincial Access to Information and Protection of Privacy Act (ATIPPA). The Centre for Law and Democracy (CLD) was among the critics. We assessed the changes using the RTI Rating, a comparative tool developed by CLD and Access Info Europe to measure the strength of RTI legislation based on 61 indicators of a strong law.[2] The RTI Rating is continuously applied to all national-level laws on a comparative basis, but it is equally appropriate as a tool for assessing provincial legislation. According to CLD's assessment, after the passage of Bill 29, Newfoundland and Labrador scored just 93 points, out of a possible 150, down from the score of 101 before the adoption of Bill 29:[3]

Section	Max Points	Score
1. Right of Access	6	4
2. Scope	30	20
3. Requesting Procedures	30	21
4. Exceptions and Refusals	30	14
5. Appeals	30	20
6. Sanctions and Protections	8	4
7. Promotional Measures	16	10
Total Score	**150**	**93**

[2] More information about the RTI Rating is available at www.RTI-Rating.org.

[3] The full scoring results, including all 61 indicators, are available at: www.law-democracy.org/live/bold-steps-to-improve-the-right-to-information-in-newfoundland-and-labrador.

This left Newfoundland and Labrador tied for 38th place, if compared against the 102 national-level laws that are currently scored on the RTI Rating.

Although Bill 29 had a significant detrimental impact on the right to information in Newfoundland and Labrador, the controversy it aroused drew public attention to the importance of RTI, and the need to modernise and improve ATIPPA. The outcry led to an announcement by the government of Newfoundland, in 2014, that it was forming a Review Committee to consider changes to Newfoundland and Labrador's RTI framework. CLD welcomed the decision, in particular the government's stated desire to foster reforms which would create "a strong statutory framework for access to information and protection of privacy, which when measured against international standards, will rank among the best."[4]

As the ATIPPA Review Committee moved forward with its work, we provided a detailed written submission setting out our recommendations for reform.[5] We were also granted an opportunity to present our suggestions in person to the ATIPPA Review Committee, which facilitated a robust and free-flowing dialogue on international standards regarding RTI.

The Review Committee released their Report, including a draft Bill to reform ATIPPA, in March 2015.[6] Having thoroughly reviewed their recommendations, and in particular the draft Bill, we are pleased to see that the proposed reforms would dramatically improve ATIPPA, such that the law would indeed rank among the top tier of global RTI laws. If the draft Bill were passed unchanged, Newfoundland and Labrador's score on the RTI Rating would be as follows:[7]

Section	Max Points	Score
1. Right of Access	6	5
2. Scope	30	23
3. Requesting Procedures	30	23
4. Exceptions and Refusals	30	17
5. Appeals	30	25
6. Sanctions and Protections	8	6
7. Promotional Measures	16	12
Total Score	**150**	**111**

As compared with national laws around the world, this would raise Newfoundland and Labrador to 15th place globally. Compared with other Canadian laws, the reforms would place Newfoundland and Labrador head-and-shoulders above the rest:

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[4] The announcement is available at: www.releases.gov.nl.ca/releases/2014/exec/0318n05.htm.
[5] Available at: www.law-democracy.org/live/cld-calls-for-bold-improvements-to-newfoundland-access-law/.
[6] The full report is available at: www.parcnl.ca/news/committeereport.
[7] The full results of our analysis are available at: www.law-democracy.org/live/bold-steps-to-improve-the-right-to-information-in-newfoundland-and-labrador.

Jurisdiction	Total Score (out of 150)
1. Newfoundland and Labrador	111
2. British Columbia	97
3. Manitoba	94
4. Yukon	91
5. Prince Edward Island	90
6. Ontario	89
7. Nova Scotia	85
8. Northwest Territories	82
8. Nunavut	82
10. Quebec	81
11. Saskatchewan	80
12. Alberta	79
12. Canada (national law)	79
12. New Brunswick	79

Although the increase in score demonstrates clearly the progressive nature of the recommendations, there are a few aspects of the reform package that are particularly noteworthy. First and foremost is the expanded role suggested for Newfoundland and Labrador's oversight body, the Office of the Information and Privacy Commissioner (OIPC). Globally, experience suggests that one of the most important factors promoting effective implementation of a right to information system is a robust oversight body and system. Moves to vest the OIPC with greater powers to compel compliance with their recommendations are particularly important. The reforms would also expand the OIPC's mandate, allowing it to carry out its own investigations and to take proactive measures to promote implementation. These changes would provide a strong mechanism to help ensure that the legislative reforms result in real improvements in practice.

Recommendations to reduce the costs and expedite the procedures around filing and processing requests for information are also welcome. We welcome the fact that the government has already moved to implement some of the recommendations by removing the $5 fee for filing requests for information. While $5 may not seem like much, it represents an important psychological barrier for a majority of citizens who have never lodged a request for information and it can add up for high volume requesters, such as journalists. Moreover, the principle underlying the change, that requesting information is a right which people should not have to pay to exercise, is of cardinal importance. Removing requesting fees sends a strong message about an evolving official attitude towards access as a form of political participation which should be encouraged. In addition to eliminating the up-front fee, the recommendations would also substantially reduce the fees for locating, reproducing and delivering the information, another important improvement. These progressive changes can be contrasted with the tenor of discussions at the federal

level, where some Members of Parliament have proposed a massive increase in requesting fees, with the explicit aim of deterring requesters.[8]

In terms of timelines, the recommendations would require OIPC approval for any extensions beyond 20 business days. This is a major improvement, although we note that best practice is to put in place even shorter initial time limits and simply to impose an overall cap on extensions of 20 business days.

We also welcome moves to tighten the regime of exceptions. However, on this issue it is important to note that there remain areas where the reform proposals fail to meet international standards. In particular, the class exclusion of Cabinet records remains problematical. CLD's position, based on international standards, is that all exceptions should protect specified interests against harm that would result from disclosure of requested information rather than classes of information (which is what Cabinet records represents). In this regard, we note the following from a Joint Declaration issued by the (then) three special international mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression:

> Exceptions [to the right of access to information] should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information.[9]

In terms of Cabinet records, the underlying purpose of this exception is to protect four basic categories of legitimate interests against harm:

A. Preventing harm to the effective formulation or development of government policy.
B. Preventing the disclosure of policies whose premature release would jeopardise their success.
C. Protecting the free and frank exchange of advice or views, with its inherent importance to the deliberative process.
D. Protecting the efficacy of testing or auditing procedures.

To respect the internationally established principle of maximum disclosure, instead of prohibiting the release of a long list of types of Cabinet records, as is the case with s. 27 of the draft Bill, the law should instead protect these specific interests and should require public officials to consider the potential for harm to those interests on a case-by-case basis in response to any request for information. We note that there are other problems with s. 27, namely the facts that the public interest test in s. 27 is discretionary, rather than mandatory, and that the time limit for the exception's applicability, 20 years, is far longer

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[8] Dean Beeby, "Information commissioner pleads poverty, Tory MPs say raise fees", CBC, 4 December 2014. Available at: www.cbc.ca/news/politics/information-commissioner-pleads-poverty-tory-mps-say-raise-fees-1.2861052.

[9] Adopted on 6 December 2004. Available at: www.osce.org/fom/66176.

than necessary (20 years ago, Clyde Wells, the Chair of the Review Committee, was Premier of Newfoundland).

Other ways in which the draft Bill fails to conform fully to international standards are provided via the RTI Rating of the draft Bill, available on the CLD website.[10]

The recommendations would not create a perfect law, but they would represent a huge step forward. For years, the right to information has been stagnating across Canada. Most of the weaknesses which we pointed to in our submission to the Review Committee in relation to Newfoundland and Labrador's ATIPPA are common to most of the RTI laws across the country. CLD has been active in several provinces, and at the federal level, in calling for root and branch reform of RTI legislation. We have been hoping for a breakthrough jurisdiction to serve as an example to the rest of the country that bold reforms in this area are not only possible, but a democratic imperative. Newfoundland and Labrador now has the opportunity to be the province that will lead the way forward.

It has become something of a cliché to note that a crisis is also an opportunity. Nonetheless, we are pleased to see that the furore over Bill 29 appears to have set the stage for the boldest step forward in terms of the right to information in Canada since RTI laws first started to be adopted nearly 40 years ago. We congratulate the government for recognising the misstep with Bill 29 and putting in place a highly qualified Review Committee, with a broad and ambitious mandate. Congratulations are also in order to the Review Committee for having drafted these progressive and forward looking proposals.

The early indications are that the government plans to enact the ATIPPA Review Committee's recommendations in full.[11] We congratulate Premier Davis for committing to all of the Review Committee's recommendations and urge Newfoundland and Labrador's government to follow through by enacting the draft Bill into law. If it does, this has the potential to have a transformative impact on transparency and good governance in Newfoundland and Labrador. We look forward to further engagement with the government, and with the OIPC, as these exciting reforms take shape.

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[10] *Supra* Note 7.

[11] James McLeod, "Kent lays out ATIPPA reform roadmap", *The Telegram*, 17 March 2015. Available at: www.thetelegram.com/section/2015-03-17/article-4080580/Kent-lays-out-ATIPPA-reform-roadmap/1.