



CENTRE FOR LAW
AND DEMOCRACY

Nova Scotia, Canada

Submission to the Review of Nova Scotia's Freedom of Information and Protection of Privacy Legislation

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Introduction¹

The Centre for Law and Democracy (CLD) welcomes the fact that the Government of Nova Scotia is conducting a review of the legal framework for access to information,² which is centred around the Freedom of Information and Protection of Privacy Act (FOIPOP Act).³ The Act was originally adopted in 1993 (and repealed the earlier access to information legislation) and has not been substantially amended since then, although a number of minor changes have been introduced. The information environment has been revolutionised since then, 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, as well as comparative national practice, has evolved very significantly since the early 1990s. While some of the practical systems operating under the Act have been modernised, including through the introduction of the central Information Access and Privacy (IAP) Services at Service Nova Scotia, the legal framework remains largely unchanged.

CLD works internationally to promote those human rights which it deems to be 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 – whether they are 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 this

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² See <https://novascotia.ca/information-access-and-privacy-engagement/>.

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 to 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>.

review will become. As part of this, we have produced numerous analyses of existing or draft RTI legislation.⁴

A very significant contribution CLD has made to advancing RTI globally is its RTI Rating,⁵ 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.⁶ 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,⁷ while CLD also maintains a separate Canadian rating, where all 14 Canadian jurisdictions are assessed.⁸

This Submission sets out CLD's assessment of the strengths and weaknesses of the FOIPOP Act, 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 Nova Scotia, and a summary of the results are set out in the table below.⁹

Section	Max Points	Score - current	Percentage
1. Right of Access	6	4	67%
2. Scope	30	21	70%
3. Requesting Procedures	30	14	47%
4. Exceptions and Refusals	30	15	50%
5. Appeals	30	21	70%
6. Sanctions and Protections	8	4	50%
7. Promotional Measures	16	7	44%
Total score	150	86	57%

⁴ These are all available on our website at this page: <https://www.law-democracy.org/live/legal-work/legal-analyses/>. The most recent analysis listed there is of the Maldivian Right to Information Act, published in October 2023.

⁵ See <https://www.rti-rating.org>.

⁶ 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>.

⁷ The results of this are available at: <https://www.rti-rating.org/country-data/>.

⁸ Available at: <https://www.law-democracy.org/live/rti-rating/canada/>.

⁹ The detailed results are available avia the Canadian Rating page at: <https://www.law-democracy.org/live/rti-rating/canada/>.



The final score of 86 points out of a possible 150 puts Nova Scotia in 8th place from among the 14 jurisdictions in Canada, or just below the middle of the pack, and would put Nova Scotia in 69th place from among the 138 countries listed on the RTI Rating, if it were a national framework. Neither of these are very impressive positions. In contrast, Newfoundland and Labrador sits at the top of the Canadian Rating, with 111 points, and would rank in 24th position globally if it were a country.

1. Right of Access and Scope

All Canadian jurisdictions lose one point on the first indicator on the RTI Rating, which looks at whether there is a fundamental (or human) right to information. In the case of *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,¹⁰ the Supreme Court of Canada did find a partial or derivative right to information where the information was needed for an expressive purpose. A large number of countries do have strong constitutional guarantees for this right, and Canada should consider this as well, but this is clearly beyond the scope of the present review.

Better practice is both to set out the external benefits of the right to information – which the FOIPOP Act does in section 2 – and to require decision-makers to interpret its provisions, insofar as this is reasonable, so as best to give effect to those benefits – which the FOIPOP Act fails to do. Given the quasi-constitutional nature of this right, one might expect decision-makers to interpret it expansively, as should be done with all rights guarantees. Unfortunately, the experience across Canada, including in Nova Scotia, does not support that conclusion, pointing to the importance of adding a specific interpretive clause into the law.

The FOIPOP Act does comparatively well in terms of scope and, indeed, this is, alongside Appeals, its highest-scoring category on the RTI Rating, although the score is still only 70%. On the positive side, the approach to coverage of public bodies is to apply a general definition of which bodies are covered, which is broad in scope, and then also to have a specific list of included bodies in the Schedule, which creates certainty. On the other hand, the general approach taken has some limitations, which are mostly consistent with the date of the Act (i.e. these earlier enactments tended to be less comprehensive in terms of bodies covered).

In terms of “core” executive bodies, the modern approach is to cover all bodies which are part of the executive or are owned or controlled by such bodies. Section 3(1)(j)(i) specifically excludes the Office of the Legislative Council and only covers other bodies if all of the members are appointed by the government or the staff are civil servants (or the body is listed in the Schedule). This does not refer to ownership and obviously control can exist even where not all of the members are appointed by government.

¹⁰ 2010 SCC 23, [2010] 1 S.C.R. 815.

Beyond this, bodies can, in accordance with section 49(1)(f), be added by regulation where some members are appointed by government, a controlling interest is held by government or the body performs a public function pursuant to a law. While this is a good list of grounds for inclusion, better practice would be for this to be mandatory rather than discretionary. In addition, the notion of a public function should be expanded so that any body which performed such a function was covered, regardless of whether or not this was pursuant to a law. Better practice is also to cover bodies which receive significant public funding or, as an alternative, which receive part of their core funding from public sources.

Looking beyond the executive, it is positive that the legislature is covered in Nova Scotia, something which is not always the case in Canada. On the other hand, coverage of the judicial branch of government is limited with not only judicial records being excluded by virtue of sections 4(2)(c) and (d), but also “judicial administration records”, which cover records containing information relating to a judge, defined quite broadly to include even training programmes and “statistics of judicial activity” (section 3(1)(d)).

Positively, the Act does not only confer rights on citizens and those physically present in Canada, as is the case federally, but applies to everyone (see section 5(1), for example). A record is also defined broadly in section 3(1)(k), although section 4(2)(e) excludes records held by the Conflict of Interest Commissioner, the Ombudsman and the Information and Privacy Commissioner which relate to the exercise of their legally mandated functions. There would appear to be no justification for this exclusion, which is not found in most other RTI laws.

Again positively, the Act applies not only to records which are already held by public bodies, but it also requires them to create records where this can be done using available “computer hardware and software and technical expertise” and would not “unreasonably interfere with the operations of the public body” (section 8(3)). Ideally, this should be expanded both to modernise the language to refer to more generally to information technologies (i.e. not just computers) and to cover information which can be extracted from records via non-automated means (again subject to the caveat of not unduly interfering with operations).

Recommendations

- Consideration should be given to adding a requirement into the law that its provisions be interpreted so as best to give effect to the purposes set out in section 2, including to make this clear to all of those who are tasked with making decisions under it.
- The scope of public bodies covered by the law should be expanded by:
 - Including the Office of the Legislative Council;
 - Covering all bodies which are owned or controlled by other public bodies, regardless of the number of members who are appointed;

- Covering all bodies which undertake public functions, to the extent of those functions;
- Covering all bodies which receive significant public funding; and
- Covering all both administrative and judicial functions of the judiciary.
- The exclusions for records held by the Conflict of Interest Commissioner, the Ombudsman and the Information and Privacy Commissioner in section 4(2)(e) should be removed.
- The language of section 8(3) should be modernised to cover any form of information technology which is accessible to the public body, and expanded to cover non-automated means of extracting information from records (formally to create new records).

2. Proactive Disclosure

The FOIPOP Act does not address the issue of proactive disclosure, in common with much legislation of its era. However, this should be considered as part of the review. Proactive publication regimes are found in most modern RTI laws, for example. Among others, the 2019 changes that were introduced to the federal Access to Information Act by Bill C-58 included the addition of a whole new Part 2 focusing entirely on proactive publication.

On the one hand, although CLD has not researched this specifically, we expect that a lot of public bodies in Nova Scotia are making quite a lot of effort in the area of proactive publication and that the scope of this has expanded quite significantly in recent years. In addition, this might be something that is more amenable to being addressed via policy than through the rigidities of legislation.

On the other hand, setting out minimum standards for proactive publication across the public sector in legislation has potential advantages. It would help ensure that all public bodies meet those minimum standards, as opposed to just strong performers or larger bodies. It would signal the intentions of the government more clearly in this area. It would help ensure that proactive publication covers all areas of public interest information, and not just information public bodies wish or are happy to communicate. And it could set standards beyond just what information needs to be published, such as accessibility standards and standards around ensuring that information of particular interest to specific communities reaches those communities (for example via social media and media promotion, rather than just putting information on websites).

As part of the system of proactive publication, we commend the government for establishing a portal whereby information which has been disclosed via an information request is released to the public generally after 14 days.¹¹ This is good practice and the two-week delay following disclosure to the requester is adequate to protect any special interests the requester may have

¹¹ See <https://beta.novascotia.ca/search-previously-released-disclosed-information-freedom-information-and-protection-privacy-foipop-request>.

in accessing the information earlier than others. This system should be formalised via legislation regardless of whether or not the government otherwise seeks to introduce standards on proactive publication into the FOIPOP Act.

Recommendations

- As part of the current review, the government should look more closely into the pros and cons of integrating proactive publication requirements – both as to the minimum content of information which is subject to publication and as to standards regarding the nature and promotion of that information – into the law.
- The system for disclosing publicly via a dedicated portal information which has been released via an access to information request should be formalised in a revised RTI law.

3. Requesting Procedures

The procedures for making and processing or responding to requests for information are crucial for the proper operation of an RTI system. If the procedures are practical and user-friendly for both requesters and officials, this will be invaluable in making the system do what it is supposed to do, i.e. deliver information to the public efficiently. On the other hand, if the procedures are impractical or excessively exigent, requesters will be discouraged from making requests and, potentially, officials will be unduly burdened by the process.

While many tweaks and improvements are possible to any requesting system, the basics of what works is well-established and reflected in many laws around the world. And, in most cases, this part of the law is not that controversial as compared, for example, to its scope, the exceptions and the system of appeals. Despite that, the FOIPOP Act does poorly in this area, receiving a failing grade of 47% (or just 14 out of a possible 30 points) on the RTI Rating, Nova Scotia's second lowest-scoring category. In some cases, this is due to failures of the Act to set out clear rules, while in others it is due to rules that fail to make the grade.

A first issue falling into the former category is the failure of the Act to set out explicitly that requesters may not be required to provide reasons for their requests. Requesters are not (at least generally) asked for these in practice, and Form 1 in the Regulations does not ask for this information, but there is no specific prohibition on a public body asking for it. We note that this information may be needed to establish either grounds for applying the public interest override pursuant to section 31(1) of the Act (see below, under Exceptions) or for a public interest few waiver pursuant to section 11(7)(b), but in both cases it should be up to the requester, in his or her sole discretion, to decide whether to provide this information.



A second rather technical issue is that section 3(1)(a) of the Regulations requires requesters to indicate that their request is being made pursuant to the Act. Given that a \$5 fee needs to accompany a request under the present arrangements, that is hardly controversial. However, better practice is both not to charge a fee (on which see below) and not to require requesters to stipulate that their requests are pursuant to the RTI law. For example, section 8(1) of the United Kingdom Freedom of Information Act 2000 stipulates that any request for information which is in writing and which meets other basic conditions is to be treated as a request under the Act. Formally, all this means is that no request for information may be accorded less status than the law provides for.

Better practice is to provide requesters with a receipt upon lodging a request, which gives them evidence of the fact that they have made a request. This is automatic with online requests but it should be incorporated as a legal requirement into the law. Section 10 provides for the transfer of requests from one public body to another, within ten days, if the request is for a record which was produced by or for the other public body, the other public body was the first to obtain the record or “the record is in the custody or under the control of the other public body”.

In practice, with the IAP Services system, transfers essentially operate internally within the system, at least among executive public bodies, rendering this system largely moot for those bodies. However, there are problems with this system which still need to be addressed. First, ten days is too long simply for a public body to determine that it either does not hold a record or the other conditions apply. Second, the grounds for transfer are too broad. It is not clear from the law whether the last condition applies only if the first body does not have custody of the record, which should be made explicit. Third, better practice is for any public body which holds the requested record to process the request, where necessary after obtaining the views of any other public body which has a specific interest in the disclosure or otherwise of the record (or has better knowledge about the record).

Better practice is to allow requesters to indicate how they would like to access records. The FOIPOP Act complies partially with this by indicating, at section 8(1), that requesters may get access either via a copy or by examining (or inspecting) the record. Section 8(2) addresses records stored in other formats with a number of options, all of which are at the discretion of the public body. A first point to note here is that section 8 does not reflect modern communications realities, which are that it is normally (albeit not always) possible to provide a requester with an electronic version of a record in a format in which he or she can view on any modern communications device (such as a computer or phone). This needs to be updated. Equally importantly, apart from the basic forms of copies and examination, the former of which does not distinguish between physical and electronic copies, options as to format of providing access are at the discretion of the public body. Better practice is to reverse this and mandate provision of access in the format preferred by the requester, subject to some conditions (such as protection of the record and not unduly burdening the public body).



In terms of time limits, Nova Scotia is recognised for having one of the more progressive systems in Canada. However, it still only scores two of the possible six points here, reflecting the fact that Canada, overall, is very far behind other countries in this area. Like most Canadian jurisdictions, Nova Scotia sets 30 calendar days as the initial time limit for responding to requests. While this is not unreasonable, better practice is to reduce this, ideally to ten working days. Nova Scotia then allows public bodies to extend this by another 30 calendar days where this is needed because the requester failed to describe the information sufficiently clearly, a large number of records is requested or needs to be searched, or consultations with other actors are needed. This is not unreasonable.

Any extension beyond this period requires the permission of the Commissioner, which is what positively distinguishes the Nova Scotian system among its Canadian peers. However, in many countries around the world, hard overall time limits for responding to requests are imposed and CLD recommends this as best practice. As an alternative, language should be added to the Act indicating that extensions beyond 60 days are to be considered highly exceptional and, in addition to requiring the permission of the Commissioner, additional conditions should be placed on such extensions. This would also help the Commissioner to perform her oversight role since, otherwise, it is not easy for her to determine how long public bodies might in fact need to process requests.

In addition, better practice is to require requests to be responded to as soon as possible, so that the initial 30 calendar day time limit is understood as a presumptive maximum and not as the appropriate or proper time to respond to a request.

Seven, or one-half of the jurisdictions in Canada do not charge any fee for making requests,¹² in line with better international practice, but Nova Scotia is not among them, currently charging \$5 to lodge a request, as set out in Section 6(1) of the Regulations. Not only is this not better practice, but section 11(1) of the Act, which authorises the application fee, does not set any limit on what this might be.

Better practice is also to limit fees for responding to requests to the market costs of copying and sending the record(s), 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 paid. The right to information is a human right and individuals should not have to pay for the time spent by public officials in protecting 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 Canada, with the federal government not charging any fees other than the initial \$5 application fee.

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



Nova Scotia largely fails to conform to these standards. Fees may be charged for a number of actions, including locating, retrieving and producing a record, preparing a record for disclosure, and shipping, handling and copying a record (section 11(1) of the Act). No fees are to be charged for the first two hours of locating and retrieving a record, and where the fee is less than \$5 it may be waived, but otherwise requesters are charged \$15/one-half-hour of time and 20¢ per page of photocopies.

Nova Scotia does have a basic system of fee waivers for requesters who cannot afford to pay or where the record “relates to a matter of public interest, including the environment or public health or safety” (section 11(7)). However, such waivers are discretionary rather than mandatory and anecdotal evidence suggests that fees are rarely waived, at least for public interest requests.

Finally, in this category, Nova Scotia does have a rudimentary system for licensing the reuse of public information pursuant to its Open Government Licence.¹³ We are not aware of any study that indicates how commonly open licences are applied to public information in Nova Scotia. However, these licences do not appear to be attached on a regular basis to information that is released in response to access to information requests.

In addition, it is a fairly rudimentary system, with only one fairly basic licence option, as compared to the range of options which are available in this space, and consideration should be given to expanding and deepening it. In particular, it would be useful to develop at least two different licences, one for information which may be adapted and one for information which may not (such as laws, government policies or court decisions), and to have a policy on when and how these licences should be attached to public records.

Recommendations

- The law should indicate explicitly that requesters do not need to provide reasons for their requests.
- If our recommendation that the application fee for requests under the law be dropped is accepted, requesters should not have to stipulate that their requests are being made under the law.
- Public bodies should be required to provide a receipt to requesters upon lodging a request, automatically for electronic requests but within a set period of time, say three to five days, for physical requests.
- The system of transfers should be amended by shortening the time period for making a transfer and by only allowing transfers where the public body which originally receives the request does not hold the record(s) in question.
- Section 8 should be updated to reflect modern communications realities and it should also give the requester the power to decide on the form of access, subject only to limited conditions.

¹³ See <https://novascotia.ca/opendata/licence.asp>.

- Public bodies should be required to respond to requests as soon as possible and consideration should be given to reducing the initial time limit to 10 or 15 working days. Consideration should be given to limiting extensions to a maximum of another 30 days. If the possibility of extensions beyond another 30 calendar (or 20 working) days is retained, language should be added to the law making it clear that this is deemed to be highly exceptional and additional conditions for triggering such an exceptional delay should also be added.
- It should be free simply to lodge a request for information. If an application fee is retained, at a minimum the primary legislation should set a maximum fee, ideally of \$5.
- No fee should be charged for staff time spent responding to a request or, as an alternative, such fees should be charged only for requests which take at least 20 or 30 hours of staff time. Photocopying costs should be reduced to something like 10¢/page, with the first 20 pages being given for free.
- The fee waiver system set out in section 11(7) of the Act should be mandatory rather than discretionary.
- Consideration should be given to substantially developing the open reuse system that currently applies in Nova Scotia.

4. The Regime of Exceptions

The regime of exceptions is at the heart of any right to information system as it defines the line between what information is accessible and what is not. If the regime is drafted too narrowly, it will fail to protect important confidentiality interests whereas if it is drafted too broadly, which is a far more common problem, it will obstruct the achievement of the main objectives of the system, namely to open up government.

At the heart of a proper regime of exceptions is a core three-part test for withholding information. First, the information should fall within the scope of a precise list of which interests may justify non-disclosure – such as national security, privacy, public order and so on – which should align with international standards. Second, access should be denied only if disclosing the information would pose a real risk of harm to one of those interests, the so-called “harm test”. Third, where the public interest in accessing the information is greater than the risk of harm from disclosure, the information should still be released, the so-called “public interest override”.

Nova Scotia earns just 50% on this category of the RTI Rating, demonstrating a significant need for improvement. A first problem is that although section 4A of the Act states that it overrides secrecy provisions in other laws, unless those other laws state explicitly that they override the FOIPOP Act, the same section also provides a list of 25 provisions in other laws to which this does not apply (i.e. they continue to have force even if they are otherwise inconsistent with the FOIPOP Act). In many cases, these provisions fail to conform to the

three-part test outlined above (or to the general standards on secrecy set out in the FOIPOP Act). For example, section 19 of the Consumer Reporting Act, preserved via section 4A(2)(b) of the FOIPOP Act, casts a broad veil of secrecy over people who apply the Act, which does not incorporate a harm test or public interest override.

The main exceptions are set out in sections 12-23, as supplemented by section 4(2). Several of these fail to conform to the first part of the three-part test (i.e. by referring to narrowly drawn interests which it is legitimate to protect through confidentiality). These include:

- Section 12(1)(a) covers all information the disclosure of which could be expected to harm the conduct of relations between Nova Scotia and various other official bodies. 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. As such, for these governments, the exception should be cast more narrowly to cover only harm to negotiations.
- Section 12(1)(b) covers all information which has been provided in confidence from an entity listed in section 12(1)(a). This is not needed beyond the scope of protecting relations with such entities. In any case, classification is in many jurisdictions, including Canadian jurisdictions, engaged in far too broadly and, as such and quite properly, is not determinative when it comes to a request for information. This provision effectively provides a run-around of that approach for information which has been shared by another government entity.
- Section 13(1) properly exempts information which would reveal the substance of cabinet deliberations, but then goes on to provide a list of categories of records, such as advice or recommendations to cabinet, that are included here. In practice, this list is treated *prima facie* as being confidential, subject to the exceptions that are listed in section 13(2). Without the list, the exception is legitimate but the list itself is simply too broad and results in information which would not reveal the substance of cabinet deliberations being withheld.
- Section 15((2)(b) refers to information which, if disclosed, could expose the author of the record to civil liability. This exception is not reflected in other RTI laws and yet that does not appear to have caused problems, suggesting this is not necessary. In any case, this would appear to suggest, as an example, that an individual may defame a third party to an official, and yet not bear responsibility for that act of defamation, which cannot be supported.
- Section 16 renders secret information which is subject to solicitor-client privilege. In the ordinary course of events that is certainly legitimate. It becomes problematical, though, when applied to lawyers who are retained by government as employees, when the boundaries between proper solicitor-client privilege and merely providing policy or even general legal advice to government become blurred. For such lawyers, the exception should be narrowed to cover only litigation privilege and other



occasions where the individual is providing formal legal advice to government (i.e. for which solicitor-client secrecy is needed).

- Several aspects of section 17, which covers financial and economic interests, are too broad. For example, it covers all information the disclosure of which could be expected to harm the economic interests of a public body but this would cover such cases as information revealing the fact that the Ministry of Finance had invested the provinces debt poorly or even predictions of poor weather one summer, which might undermine tourism in the province. Section 17(1)(c), which covers all plans to manage personnel or the administration of a public body, section 17(1)(d), which covers the premature disclosure of a proposal or project, and section 17(1)(e), which covers information about negotiations, are all clearly too broad and should, at least, have harm tests integrated into them.

The issue of a lack of harm tests in some exceptions has already been raised above, but the following provisions also suffer from this problem:

- Sections 4(2)(i) and 15, which cover law enforcement, are not harm tested in all respects. The former covers all records related to a prosecution which has not been completed, which is fairly obviously far too broad but would be rendered legitimate if it were limited to cases where disclosure would undermine the prosecution. The same applies to section 15(1)(f), which covers any information relating to the exercise of prosecutorial discretion.
- Section 14(1) covers any advice or recommendations made to a minister. Exempting this information, without linking it to the protection of a legitimate interest – such as maintaining the free and frank provision of advice within government – strikes at the very heart of the core purposes of an access to information regime.
- Section 19A covers information relating to closed meetings. Section 19A(a) covers draft resolutions, by-laws or other legal instruments which were considered at the meeting, subject to certain exceptions, while Section 19A(b) covers information which would reveal the substance of the deliberations of the meeting. Neither of these are appropriate. Instead, only information which falls within the scope of the reasons why the meeting was closed in the first place should be kept secret. A meeting may be closed, for example, because the debate about a draft resolution cannot be held without revealing personal information about one or more individuals. It is unlikely that the disclosure of the resolution itself would reveal such information and it is only where it would that it should be able to be withheld.
- Section 19E relates to labour conciliation boards and provides for very broad exceptions for all information obtained by a range of actors who run or participate in such boards. This provision should instead focus on the actual interests that need to be protected here, such as the need for open disclosures to such boards, and protect them against harm.

Generally speaking, the system of protection for personal privacy in the FOIPOP is exemplary. Instead of protecting all private information, it covers only disclosures which would represent an “unreasonable invasion of a third party’s personal privacy” (section 20(1)). It then lists factors to take into account when assessing this (section 20(2)), cases which are presumed to involve an unreasonable invasion (section 20(3)), and cases which do not involve an unreasonable invasion (section 20(4)). Given the increasing tendency of officials around the world to interpret privacy significantly overbroadly in the context of requests for information, and to fail to take into account countervailing interests, this sophisticated and balanced regime is to be welcomed.

At the same time, a couple of minor comments are relevant, as follows:

- Section 20(3)(b) creates a presumption of unreasonable invasion whenever the personal information was compiled as part of an investigation into a violation of the law. This is not necessarily inappropriate, given that it is just a presumption, but any tendency to treat this list of presumptions as more than that needs to be avoided, especially in relation to this one.
- While not formally part of the privacy regime, section 21(2) establishes a blanket exemption for information obtained on a tax return or for purposes of determining tax liability. This should instead be integrated into the list of subjects which are merely presumed to be unreasonable invasions of privacy in section 20(3).

The public interest override is set out in section 31 of the Act. This allows a public body to disclose information, whether or not a request for that information has been made, notwithstanding any other provision of the Act, where the information is about a “risk of significant harm to the environment or to the health or safety of the public or a group of people” or the disclosure of the information is “clearly in the public interest”. This is welcome, including because it sets out specific grounds for applying the public interest override – namely the environment and health and safety – as well as a general public interest override.

At the same time, it suffers from two key flaws. First, and most importantly, at least in the context of a request for information, it is discretionary rather than mandatory. The public interest override should be mandatory and it is in the large majority of all RTI laws globally. And, in Canada, the Supreme Court of Canada decision *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*¹⁴ also stands for the proposition that a public interest assessment must be applied to non-mandatory exceptions, at least as applied in the context of requests which involve freedom of expression, which covers most of the exceptions in the FOIPOP. Second, it applies only in the context of a risk of “significant harm” to the environment, health or safety, or where disclosure is “clearly in the public interest”. Better practice, which is again

¹⁴ See note 10.

reflected in a majority of RTI laws globally, is to apply this override whenever, on balance, the public interest benefits of disclosure outweigh the envisaged harm from disclosure.

It is better practice to apply sunset clauses or overall time limits to all exceptions which protect public interests. At present, such clauses only apply to a small number of such exceptions in the FOIPOP Act (such as section 12, on intergovernmental affairs, and section 13 on cabinet deliberations). Positively, some of the sunset clauses, for example for cabinet deliberations and advice to ministers, are quite short. But sunset clauses should be extended to cover all exceptions protecting public interests. If there is concern that information may remain sensitive beyond the duration of the sunset clause, 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).

Section 22 provides for consultation with third parties, allowing such parties either to consent to disclosure of the information or to give reasons as to why the information should not be disclosed. This is appropriate. However, Section 22(1A)(a) provides that this does not apply if the public body decides to refuse to disclose the record. This is unhelpful, in particular because it then fails to give third parties the opportunity to consent to disclosure, even if the record is otherwise covered by an exception in their favour. Giving them such an opportunity clearly does no harm and can serve the interests of transparency which is the underlying purpose of the Act.

The other problem with the system of consultations with third parties is that sections 23(3) and 41(6) effectively delay disclosure of the information to the requester until all appeal options in favour of the third party, both before the Commissioner and before the courts, have been exhausted. 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, even if such an application has no merit whatsoever, before whom such reviews currently take approximately four years to complete. 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. 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, disclosure of information. For those very rare cases where a court decides, upon an appeal 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

- Consideration should be given to removing section 4A(2) entirely from the FOIPOP Act. If it is retained, the RTI law should set out overriding standards for exceptions, including the harm test and public interest override, which should then apply to the secrecy provisions listed there.
- The specific exceptions in sections 12-23 and 4(2) should be revised so as to remove the limitations outlined above, both as to the scope of the primary exception and as to the lack of a proper harm test.
- The public interest override should be amended so that it applies mandatorily rather than on a discretionary basis, and whenever the benefits of disclosure simply outweigh the risk of harm.
- Sunset clauses should apply to all exceptions which protect public interests.
- Third parties should be consulted whenever requests are made for information which was provided on a confidential basis by them or which involves their privacy, and given an opportunity either to consent to the disclosure of the information or to object to its disclosure.
- Disclosure of information should not be delayed until a third party has exhausted all of his or her appeal rights. Instead, should a third party eventually obtain a court ruling that he or she has suffered a detriment due to the wrongful disclosure of information, compensation may be awarded.

5. Appeals

It is of the essence that requesters have the opportunity to lodge appeals in case their requests for information are not dealt with in accordance with the rules. In many systems, the opportunity to lodge an internal appeal with the public body which originally dealt with the request 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. In Nova Scotia, however, decisions to refuse to disclose, in particular, are often made at a very senior level to begin with, and this is promoted by the nature of the FOIPOP Act, which places primary responsibility for implementation at each phase on the “head” of the public body. As such, it may not make a lot of sense and instead just create delay to provide for an internal appeal.

It is important, ultimately, to provide for an appeal to the courts. These are complex legal matters and there should at least be an opportunity for them to be appealed to the courts. This is provided for in sections 32(3) and 41. Under this scheme, an appeal to the courts may be lodged either after going through the review procedure before the Commissioner or directly upon receiving the relevant original decision (or failure to act) by the public body. Given that the Commissioner presently only has powers to recommend action by public bodies, this is not inappropriate. Should the Commissioner be given binding order-making

powers, as we recommend, this approach should be amended and requesters should then be required to go first to the Commissioner for a decision.

It is also crucially important to offer requesters the opportunity to lodge appeals with independent administrative oversight bodies, such as information commissioners, and such bodies are in place in all 14 jurisdictions in Canada. In Nova Scotia, this role is played by the Information and Privacy Commissioner, who is a dedicated information officer, albeit she deals with both access and privacy issues, as is the case in all Canadian jurisdictions apart from at the federal level, where there are separate commissioners for access and privacy, respectively.

Independence, of both a formal and structural nature, is essential to the successful operation of these offices. In Nova Scotia, the Commissioner is appointed by the government (section 33(1)). Although in practice commissioners have generally demonstrated robust independence, this is not an ideal appointments model. It would be preferable to have commissioners appointed, or at least nominated, by the legislature, ideally after a process which allowed for public comment on a shortlist of nominees. More positively, tenure is guaranteed for at least five years, and removal is possible only upon a resolution to this effect being passed by a majority of the members of the House of Assembly (section 33(2)).

Better practice is for the RTI law to include formal prohibitions on individuals with political connections from being appointed to the oversight body, and formal requirements of expertise for individuals to be appointed. Neither of these is present in the FOIPOP Act.

Beyond just appointments, the salary of the Commissioner, as well as her rank as a civil servant, is set by the government (section 33(4)). And, although independent in her own office for day-to-day matters, as it were, she otherwise reports to the Minister of Justice as if she were an employee. In addition, a special report by the Commissioner on updating the FOIPOP suggests that she lacks the control over her staff that would be attributed with an independent office.¹⁵ These attributes substantially undermine the independence of her office.

In terms of funding, the budget of the office of the Commissioner is formally approved by the legislature (section 33(6)). However, the amount is decided upon functionally by the government, and the current Commissioner has voiced her concerns publicly about a lack of funding.¹⁶

¹⁵ See Information and Privacy Commissioner for Nova Scotia, *Accountability for the Digital Age: Modernizing Nova Scotia's Access & Privacy Laws*, June 2017, Recommendation 24, <https://oipc.novascotia.ca/sites/default/files/publications/annual-reports/Accountability%20for%20the%20Digital%20Age%20%28June%202017%29%20.pdf>.

¹⁶ 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>.

In terms of powers, the Commissioner can order the production of documents and inspect the premises of any public body. Unlike commissioners in some other jurisdictions in Canada, however, she cannot compel witnesses to appear before her and to provide testimony. In terms of remedies, the Nova Scotian Commissioner does not have order-making power (i.e. she can only recommend that a public body release information). Canada is fairly evenly split on this issue, with all of the larger jurisdictions providing for order-making power and the smaller jurisdictions being divided on this issue. Following a long and deep debate about this issue at the federal level, the Canadian Information Commissioner was given order-making powers in 2019.

International standards are fairly clear on this issue, calling for order-making power. In theory, if public bodies largely comply with decisions of the oversight body, order-making powers may not be needed. However, in Nova Scotia, the compliance rate is apparently not that high. We also note that order-making powers tend to support more rapid decision-making, as public bodies are more likely to comply with various procedural timelines if failing to do so may eventually result in a decision against them. We strongly support the allocation of order-making powers to the Commissioner.

Section 39(1)(a) of the FOIPOP Act appears to give the Commissioner broad powers to make recommendations and this is sometimes reflected in her decisions. This would appear to cover recommendations directed both at restoring requesters' rights and at addressing structural problems within a public body which undermines the ability of that body to meet its obligations under the Act. At the same time, it would be useful for the law to set out at least an indicative (non-exclusive) list of possible remedies, which should include both remedial remedies and more structural remedies.

In terms of the burden of proof, this generally lies on the public body in cases where it has refused to provide access to a record (section 45). This is positive but it is limited to those cases, so that it does not formally apply to appeals about time limits or fees. Also, where the refusal involves personal information, the burden falls on the applicant. This is unreasonable both because of the human rights nature of access to information and because, taking into account the complex nature of the test for release of personal information, the public body is in a far better position to bear the burden of proof (including because it knows what exactly the information consists of, whereas the applicant can only guess at this).

Finally, the Act sets out reasonably clear procedures for the processing of review applications. In practice, these are free and do not require a lawyer. However, it would be useful to make that explicit in the law. Also, one aspect that is not present in the procedures are overall time limits for deciding on reviews which, as already noted, are currently taking up to four years to complete. We recommend establishing "soft" timelines for completing reviews, for example of three months for procedural issues and six months for substantive refusals, while giving the Commissioner fairly broad powers to extend them. This would



provide a benchmark both for assessing the performance of the Commissioner and for determining whether the resources made available to that office were sufficient.

Recommendations

- If, as we recommend, the Commissioner is given binding order-making power, requesters should be required to go through the review procedure with the Commissioner before lodging a court appeal in relation to requests for information.
- A number of measures are needed to increase the independence of the Commissioner. Her office should be transformed into a proper legislative office, including that she is appointed by the legislature, reports to the legislature and has her budget actually functionally approved by the legislature. She should also not report to the Minister of Justice or any other governmental actor for employment purposes. These features should be set out clearly in the law.
- We strongly recommend that the Commissioner be given order-making power. In addition, the Commissioner should have the power to compel witnesses to appear and give testimony. Consideration should be given to providing an indicative list of possible remedies that fall within the mandate of the Commissioner.
- The burden of proof should be placed on the public body in all cases where the requester is the applicant.
- Consideration should be given to making it explicit in the law that review applications are free and do not require a lawyer.
- Consideration should also be given to imposing soft overall time limits for completing reviews, as suggested above.

6. Sanctions and Protections

It is important to provide for sanctions for those who flout the law, while also providing protections for those who release information in good faith. Although this is a relatively easy area to do well, Nova Scotia only earns four out of eight points in this category, or a 50% score. Section 47(1A) creates an offence for officials who knowingly alter a record which is the subject of a request. This is useful but it is far too limited in scope. Instead, anyone who wilfully obstructs access, regardless of how, precisely, they do this, should be subject to sanctions. However, the criminal nature of section 47, with sanctions including a fine and the possibility of imprisonment, may make it inappropriate for such a broadened definition of sanctionable behaviour. The possibility of more administrative sanctions – i.e. just fines – along with the option of disciplinary measures for this sort of behaviour should be considered instead.



Better practice is to provide for sanctions for public bodies which systematically fail to meet their obligations under RTI laws. It is often both unfair and ineffective simply to sanction an information officer, given that the problem is often systemic in nature within a public body. As such, in these cases the solution also needs to be systemic.

In terms of protections, section 46(1) provides for protection against damage claims for the good faith disclosure of information pursuant to the Act or for the failure to give notice if reasonable care is taken. This is positive but this protection should be extended to cover any legal consequences, including under secrecy laws, as well as measures of an employment nature.

Recommendations

- The scope of sanctionable behaviour should be extended beyond just altering a record which is the subject of a request to cover all behaviour which wilfully aims to obstruct access, regardless of whether there is a request for the information in question. At the same time, the options of administrative penalties and disciplinary measures should be considered here instead of or in addition to criminal penalties.
- In addition to sanctions for individuals, the law should provide for sanctions for public bodies which are systematically failing to meet their obligations under it.
- The protection provided for in section 46(1) should be extended to cover all legal consequences as well as measures of an employment nature.

7. Promotional Measures

Promotional measures is the category on the RTI Rating where Nova Scotia actually does the worst, earning only 7 out of a possible 16 points, or 44%. This is in part due to the fact that no central body, whether the Ministry of Justice or the Office of the Commissioner, has a mandate to promote access to information, but several other issues also contribute to this score.

Under the FOIPOP Act, the burden consistently lies on the head of each public body to discharge responsibilities under the Act. The head may then delegate powers to one or more other officers (see section 44). While this vests responsibility for implementation of the Act at the highest level within each public body, it also tends to drive decision-making upwards as well with the result, in practice, that such decision-making is more likely to be influenced by political agendas. Within the executive, although the core work on processing requests is done by IAP Services, ultimately decisions on whether or not to release information are still normally made by senior officials in the relevant public body. We believe that centralising



the processing of information requests within IAP Services is an efficiency for a smaller jurisdiction like Nova Scotia. But it would be helpful to try to promote the recommendations made by officials working within that group, given that they are relatively expert on right to information issues and do not have a vested interest in the information being requested.

As noted, no central body in Nova Scotia is tasked with promoting the right to information, including by promoting awareness about it. This is an issue across much of Canada but many other jurisdictions have found good ways to address it. For example, in the UK, the Secretary of State is tasked with issuing a code of practice to guide public bodies in implementing their Freedom of Information Act obligations (see section 45), while the Commissioner has a broad mandate including to provide advice and support to public bodies and to raise public awareness about the rights the Act confers (see section 47).

The FOIPOP Act does not place an obligation on public bodies to train their staff, and especially information officers, on how to implement it. While the centralisation of request processing for the executive in IAP Services largely mitigates the need for this, that is not necessarily the case for other public bodies and it would be useful to address this shortcoming in the Act.

Finally, although the Commissioner is required to produce an annual report on the exercise of her functions and to lay this before the House of Assembly (section 33(7)), there is no corresponding requirement on public bodies to prepare their own annual reports, which could be part of a wider annual report, on their RTI performance. Requiring public bodies to report on this would provide a strong base of information about how the system is working, overall, rather than just the far more limited information that is found in the Commissioner's report. Indeed, if each public body did report on this annually, the report by the Commissioner could provide an overview of how the whole system was working, which would then substantially facilitate the identification of both strengths and weakness, and then measures to address the later. Any such requirement should place an obligation on public bodies to provide fairly detailed statistical information about the processing of requests. For the executive, IAP Services could potentially produce a combined report as long as information within it was broken down by each public body.

Recommendations

- The system of processing and then deciding upon requests should be reconsidered to see whether a model can be developed which has less of a tendency to push final decision-making towards senior officials.
- A central body or bodies should be tasked with promoting proper implementation of the RTI law, including by raising public awareness about it.



- Public bodies should be under a legal obligation to provide appropriate training to their staff about the law.
- All public bodies should be required to report annually, potentially as part of a wider obligation to report annually, on what they have done to implement the law.

