INRODUCTION

I am happy to be here on behalf of the New Democratic Party caucus to present our concerns regarding the current *Access to Information and Protection of Privacy Act*, as amended in June 2012 by government's Bill 29. I also want to congratulate the Committee on its commitment to openness and transparency. It is always a better environment to work in.

Access to information and the protection of privacy legislation must balance two often conflicting rights — the public's right to government information versus the right of individuals, and sometimes government and businesses, to privacy. Working towards establishing that balance is why we are all here today.

There were problems with the province's *Access to Information and Protection of Privacy Act* (ATIPPA) before government introduced Bill 29 in June of 2012. But Bill 29 destroyed any balance the original legislation may have had.

With Bill 29 government damaged its own credibility and undermined public trust.

In our opinion, this is legislation in need of redrafting. The egregious and restrictive amendments brought forward by Bill 29 must be removed, and other changes must be made to make this legislation more balanced. We hope this Committee will consider our suggestions on redrafting the ATIPP legislation to better serve the people of the province. This is an opportunity to get things right.

We will outline our concerns with the *Act* as it now stands, illustrate those concerns with practical examples of unwarranted government secrecy we have encountered, and offer recommendations on how to strengthen the *Act*.

Our main objections to amendments included in Bill 29, and in some cases, existing sections of the *Act,* were the following:

1. Amendments specifically making ministerial briefing papers secret (Section 7.(4)).

2. Expanding the definition of cabinet confidences to cover practically any information government decides must be kept secret (Section 18).
3. Permitting a cabinet minister to keep formal research and audit reports secret for up to three years. (Section 20 (1) (b)).
4. Enabling bureaucrats to block the release of anything they want to keep secret (Section 20 (1) (c)).
5. Increasing secrecy for businesses that deal with government and that are contracted to provide goods or services paid for by tax dollars (Section 27).
6. Barring the publication of natural resource royalty information specifically, except when "that information is non-identifying aggregate royalty information." (Section 27 (2)).
7. Introducing a "frivolous or vexatious" clause (Section 43.1 (b)) which allows government to reject any ATIPP request so deemed without any guidance as to what the term encompasses.
8. Weakening the powers of the Information and Privacy Commissioner.
9. Maintaining the two-year term of the Information and Privacy Commissioner.

These issues have seriously hampered our ability as opposition MHAs, to perform our roles in the House of Assembly as critics, and have interfered with our role to debate public policy, and have even curtailed our ability to perform our duties as MHAs on behalf of constituents.

The point of this exercise is to make recommendations that will make public bodies accountable to the people they serve, allowing the public all information except that which would affect individual, or in some limited cases, government, or business, right to privacy.

Privacy, once breached, can never be restored. It is important that it is protected. The challenge is to decide where the balance lies.

We will discuss each of these issues in turn, but first I would like to make a quick comment on the introduction of Bill 29 for debate in the House.

Bill 29

When government tabled Bill 29 in June 2012, we were shocked. The reaction from the opposition parties, the media and the general public was immediate, and strongly negative.

With this Bill, Government granted itself the ability to keep secret practically any information it wanted to keep secret. Government reduced the power of the Information and Privacy Commissioner. Government paved the way for businesses who deal with government to keep more information about their dealings secret. Government reversed court cases it had lost.

As this province is the only jurisdiction in North America lacking a properly functioning legislative committee structure, the legislation came as a complete surprise. We were given this substantive and sweeping Bill only days before debate in the House.

There was little doubt that, as an opposition party, the only option left to us was to try and stop this legislation from being passed. And that meant conducting a filibuster.

The implications for the people of Newfoundland and Labrador of these regressive amendments were profound.

With Bill 29 the Progressive Conservative government broke its own commitment for greater transparency, accountability and freedom of information, which it once claimed was the hallmark of its government.

Government also damaged the public's trust. "Repeal Bill 29" became a popular rallying cry and focal point for people's anger at what they saw as an arrogant, out-of-touch and secretive government.

Government Secrecy

We would like to outline some of the objections we have with the *Access to Information and Protection of Privacy Act* as it is currently written. We will list them numerically as they appear in the current ATIPP *Act*.

While doing this I will offer practical situations where we, as opposition MHAs and as people elected to represent our constituents, have been stopped from performing our duties by the increased secrecy government has granted itself with the amendments contained in Bill 29.

1. **Amendments specifically making ministerial briefing papers secret (Section 7.(4)).**

The then Minister of Justice said in June of 2012, when Bill 29 was introduced to the House, that part of the reason government brought in this amendment was to address the "chill" that releasing such notes would create for officials advising their ministers.

Ministerial briefings are designed to be a thorough and frank assessment of a government department at a particular period in time. They provide invaluable information to opposition members, the media and the general public. It is a chance to see how government is performing.

Review Commissioner John Cummings said in his 2010 report the purpose of the *Act* is not to make things easier for civil servants. He also noted that providing

information to the public is as much a part of a civil servant's responsibility as everything else they do.

Most other jurisdictions in Canada manage to operate without the restrictions outlined in the current iteration of the ATIPP *Act.*

Recommendations

Section (Section 7.(4)) should be repealed.

The section could also be redrafted with provisions to protect sensitive information contained in briefing papers, while allowing the bulk of the information to be released.

The power to decide what constitutes sensitive information, when there is a disagreement, should be placed in the hands of the Information and Privacy Commissioner.

2. Expanding the definition of cabinet confidences to cover practically any information government decides must be kept secret (Section 18).

The expansion of the definition of cabinet confidence was problematic *before* the introduction of Bill 29, as was witnessed by the Auditor General Wayne Loveys frustration in accessing infrastructure spending information.

Auditor General's Investigation of Infrastructure Spending

In January 2012, Mr. Wayne Loveys submitted his annual report on departments and crown agencies focusing on government's $5-billion infrastructure strategy. He noted in his report that government would not provide the information he requested to conduct his review of how those billions of dollars were spent. Mr. Loveys filed a formal complaint with the House of Assembly, citing a "denial of

access" to information. He noted government was using a definition of cabinet secrecy wider "than has been seen in recent memory."

Less than six months later government would enshrine this expansive definition of cabinet secrecy in legislation with Bill 29.

With the passing of Bill 29 *anything* government deemed a cabinet confidence became a cabinet confidence.

The principle of cabinet confidence is an important one which has evolved in line with our form of parliamentary democracy. While it must be preserved, it should not be abused.

Family Violence Intervention Court

Government decided to cancel an innovative and progressive new court system — the Family Violence Intervention Court — which was one of the most effective programs that dealt with the root problems of domestic violence.

This court was praised by everyone involved and was doing a great deal to address a serious public problem in this province, the high incidence of domestic violence, which is almost exclusively perpetrated on vulnerable women and children.

We asked government to provide information on why it cancelled this new court, which was doing such important work. We requested a copy of a departmental assessment we understood had been written on how the court was functioning. Our ATIPP requests were refused on the grounds of cabinet secrecy. We were informed by several stakeholders that the Family Violence Intervention Court was operating fully, achieving its goals, and was ready to expand. Why were we refused this information? It is these reports that government supposedly uses as a basis for their decisions.

The definition of what constitutes cabinet confidentiality must be clearly defined. Government's reach should not extend to withholding information which may embarrass it.

Muskrat Falls

Perhaps one of the most outrageous results of the amendments brought in by Bill 29 was the cloak of secrecy the Progressive Conservative government has been able to throw over all parts of their Muskrat Falls hydroelectric project.

Without question this is the single biggest investment in the history of the province. In our opinion, Government passed Bill 29 to ensure no substantive information regarding this project can be released without its permission. In effect, people who are locked into paying off this project over the next 50 years will be kept in the dark regarding anything about the project which government doesn't want them to know.

While Nalcor is specifically excluded from ATIPP by provisions in the *Energy Corporation Act*, we did attempt to get information on what $664 million government granted Nalcor in 2012 by way of the Department of Natural Resources, would be used for. We were refused under section 18, Cabinet confidences and Section 20, Policy Advice or Recommendations.

Recommendations

The Committee should make recommendations to repeal this amendment as appears in Bill 29, and return to the original draft extant before Bill 29.

Cabinet confidentiality is well protected by case law and parliamentary practice.

When there is a disagreement, we recommend the Information and Privacy Commissioner be given the authority to rule on whether information falls under

the definition of cabinet confidentiality. This would remove the risk of undue political interference from the decision to deny the release of information.

3. Permitting a cabinet minister to keep formal research and audit reports secret for up to three years. (Section 20 (1) (b.))

The Section states the head of a public body may refuse to disclose to an applicant information that would reveal the contents of a formal research report or audit report *that in the opinion of the head of the public body* is incomplete unless no progress has been made on it for more than 3 years.

Formal research and audit reports are done to review government operations and make recommendations for improvement of services. Their contents can inform public debate.

It is the duty of every opposition MHA to keep government accountable for its actions. To deny opposition MHAs the information they need, specifically in the form of formal research and audit reports paid with public funds, is to deny them the ability to debate public policy effectively. Without this information meaningful public debate is hindered.

Leaving the release of a report up to the head of a public body allows too much latitude for political manipulation.

Recommendations

Section 20 (1) (b).should be repealed.

The entire Section 20 should be redrafted to better clarify what information should be exempt from access and why.

Any disagreements should be decided by the Information and Privacy Commissioner.

4. Enabling bureaucrats to block the release of anything they want to keep secret (Section 20 (1) (c)).

The section allows the head of a public body to "refuse to disclose to an applicant information that would reveal (c) consultations or deliberations involving officers or employees of a public body, a minister or the staff of a minister;"

As if the expansion of the definition of cabinet confidence was not bad enough, this amendment allows a sweeping definition of what can be kept secret. A consultation or a deliberation could constitute anything.

This section alone allows government sweeping powers to keep any information they may find inconvenient or embarrassing secret from the public.

Recommendations

This clause should be repealed, and replaced with a more narrow exception to access of policy advice or recommendations.

We further recommend that in the event of a dispute, the Information and Privacy Commissioner be authorized to rule on whether or not the contested information should be kept secret.

5. Increasing secrecy for businesses that deal with government and that are contracted to provide goods or services paid for by tax dollars (Section 27).

With Bill 29 government permits businesses to be more secretive about their dealings with government.

The "commercially sensitive information" of businesses was already well protected in the original ATIPP legislation.

The Supreme Court of Canada issued a ruling on exemptions in the federal access to information act protecting third-party commercial information in the possession of a government institution from disclosure. Referred to as the "harms test" the Supreme Court provided guidelines for exemptions from disclosure where such disclosure could cause material financial loss to the third party, prejudice its competitive position or interfere with its negotiations. These guidelines are perfectly adaptable to the provincial ATIPP legislation, as the original legislation reflected.

There is a balance between the right of a business to protect its interests and the right for the public to know about how businesses conduct themselves.

A clear example of the importance of ensuring this balance is in place in legislation is the fracking debate in western Newfoundland.

Our caucus has serious concerns the current access to information and protection of privacy laws will allow government to block public knowledge of the chemicals that will be used should hydraulic fracturing go ahead in the province.

If the definition of proprietary information includes fracking chemicals used by oil companies, then the public would be denied information on what chemicals were being injected into the ground where they live. This is a serious public health issue as these chemicals can find their way into the groundwater.

From an occupational health perspective, were an accident to happen without this information, emergency responders would not know how to respond in a manner that protects the health and safety of workers.

This could also hamper disaster response.

The decision regarding whether to allow fracking can only occur after an informed public debate. This cannot occur without knowing exactly the implications of hydraulic fracking, which includes knowing what chemicals will be used in the process.

Any issues concerning public, occupational or environmental health cannot be kept secret to protect so-called third-party proprietary interests.

In another example, the Newfoundland and Labrador Supreme Court is currently considering whether the price of office supplies bought by Memorial University is off-limits for public scrutiny. The business that was successful in winning the contract is attempting to argue this information is proprietary. We see no reason why the cost of items purchased with public funds should remain secret.

The cost of doing business with government should include having to accept the fact that the public has a right to know how its money is being spent.

Recommendations

We want to see the imbalance in this legislation as it currently exists fixed. The Supreme Court of Canada offers excellent guidelines and should provide an excellent starting point.

This could be remedied by repealing the amendment made under Bill 29 and returning to the original wording of the Act.

6. Barring the publication of natural resource royalty information specifically, except when "that information is non-identifying aggregate royalty information." (Section 27 (2)).

The public has the right to know what value they are deriving from contracts government makes on their behalf with companies that profit from the extraction of publicly owned resources. It is outrageous that the public is denied knowledge of what value they are receiving for their resources — especially in the case where those resources are non-renewable.

Recommendations

Section 27 (2) be repealed and the original section 27 (2) be re-introduced.

7. Introducing a "frivolous or vexatious" clause (Section 43.1 (b)) allowing government to reject any ATIPP request so deemed without any guidance as to what the term encompasses.

There is no definition as to what constitutes a "frivolous" or a "vexatious" request. The language of this clause is vague and permits great latitude in interpretation. What would be the legal definition of a "vexatious" request for information?

Recommendations

This clause (Section 43.1 (b)) must be repealed or strong definitions of how the words "frivolous and vexatious" apply must be added, with the power to decide on the issue given to the Information and Privacy Commissioner.

8. Weakening the Powers of the Information and Privacy Commissioner

The Information and Privacy Commissioner's power to control how information is released was curtailed by Bill 29.

Solicitor/ Client Privilege

The Commissioner took the provincial government to court for the right to *view* documents government said were protected by solicitor-client privilege. He won the case on appeal.

Bill 29 in effect reversed that decision (Section 52 (2)). The concept of solicitor-client privilege — the right of a lawyer to keep any information given to him/her by a client strictly confidential — is a cornerstone of our legal system, but like cabinet confidences — a cornerstone of parliamentary democracy — it must be clearly defined to prevent the possibility of abuse.

The legislation as currently written opens the possibility for an abuse of this privilege.

Recommendation

Section 52 (2) be repealed and the original Section 52 (2), which was in the Act before the Bill 29 amendment, be replaced.

Power to Order the Release of Information

When a disagreement arises between an applicant and government regarding access to information, the decision of what information can be made public should be made by the Information and Privacy Commissioner.

As the legislation now stands, the Commissioner can work to resolve a contested information request informally. If that fails, the Commissioner may issue a report with recommendations. If that fails, the Commissioner may try going to court.

We believe the Commissioner should have a larger and more powerful role in handling requests for information.

In our view, the Information and Privacy Commissioner is the best person to arbitrate contested access to information issues. We recommend strengthening the Commissioner's powers, including his ability to issue directives rather than to only recommend the of release information.

Recommendations

The Commissioner should be given the authority to rule on whether information falls under the definition of cabinet confidentiality.

The Information and Privacy Commissioner should be given the power to order the release of information.

9. Maintaining the Two-Year Term of the Information and Privacy Commissioner

The current Commissioner, Mr. Ed Ring, has in our opinion done exceptional work during his tenure. Section 42.2 (1) provides for a two year term for the commissioner. This is an exceptionally "short leash" for a person in his position. Other equivalent positions, such as the Citizens Representative (6 years) or the Auditor General (10 years), have longer terms. There is no reason for this short term and this section should be amended to extend the term of the Information and Privacy Commissioner for a period of at least five years.

Conclusion

We would like to conclude with a few practical observations regarding the access to information and protection of privacy.

Political control of information

Earlier this year the newly minted Progressive Conservative Premier Tom Marshall decided to address the overwhelmingly negative public opinion about the Bill 29 amendments brought in by his government. His strategy was to strike this committee a year ahead of the legislated five year review. This is why we are here today.

Clearly Bill 29 was a political misstep.

Government is now working hard to project the image of openness and accountability, but achieving a balance between access to information and the protection of privacy is not a public relations exercise. There is a difference between the *volume* of information made available by government and the *quality* of that information.

Government may make available reams of reports and statistics on a wide variety of issues, but using an expanded definition of cabinet confidence to hide from public eyes information regarding matters of important public policy is neither open nor accountable.

There is a difference between *appearing* open and accountable and actually *being* open and accountable.

Our hope is this committee, understanding this difference, will make recommendations to amend the legislation to better establish the balance between openness and the protection of privacy. Making government accountable is part of the point of the legislation.

Privacy Concerns

Our success as an opposition party in getting information from government since the passing of Bill 29 has been uneven. We have seen government responses to our requests for information run from the petty (six pages of toner) to prompt and professional responses, with many responses falling anywhere in that spectrum.

While not directly related to the legislation, we would like to offer examples that speak to the culture of secrecy and control of the current government.

In making ATIPP requests we have experienced frivolous procedural delays, outlandish expense quotes for the gathering of data, and illegal delays in response (the legislated 30 day requirement for response by government is sometimes ignored). When we do get a successful reply, it is always on the last day of the required 30-day or 60-day requirement.

Another barrier to our ability to work on behalf of our constituents is government's unwritten policy dictating all requests for assistance or information go through the Minister's political staff.

We believe this compromises the inherent right to privacy of our constituents. Front line workers are properly trained to deal with many constituent complaints. Political staff is often not.

Although government denies this policy exists, in practice this is the case.

While you cannot legislate a change in culture, we hope the Committee will see our point and make recommendations that would promote the prompt and professional response to requests for information.

Thank you so much for listening to our concerns. We look forward to your report and recommendations.

I would be happy to answer any questions you may have.