HOUSE OF ASSEMBLY

NEWFOUNDLAND AND LABRADOR

Office of the Official Opposition

Official Opposition Leader Dwight Ball

Presentation to the Independent Statutory Review Committee on

The Access to Information and Protection of Privacy Act (ATIPPA)

July 22, 2014

Official Opposition Leader Dwight Ball
Presentation to the Independent Statutory Review Committee on
The Access to Information and Protection of Privacy Act (ATIPPA)

INTRODUCTION

The role of opposition is critical to parliamentary democracy. The dialectical tension between government and opposition is fundamental to our political system. The opposition's right to dissent from ill-advised and pernicious policies is crucial in holding government accountable. As elected representatives, members of the opposition have a duty to represent their constituents, to bring their concerns to the forefront – whether that platform is the floor of the House of Assembly, the media, or in our daily conversations with people.

Bills of all sorts are debated and passed into law in the House of Assembly. What is exceptional about the Access to Information and Protection of Privacy Act (or 'ATIPPA') is the role it plays in the democratic process. The ATIPPA is a *means* to a well-functioning democracy. The ATIPPA facilitates the critical roles that the opposition, the media, as well as the general public, play in a democracy. In order to be effective in *our* role as the opposition, as MHAs representing the people who elected us, access to information is essential.

The latest amendments to the ATIPPA were debated in the House of Assembly in June 2012 under Bill 29 – An Act to Amend the Access to Information and Protection of Privacy Act. What set Bill 29 apart from most other bills is the impact its passage has on all future bills debated in the House of Assembly as the flow of information upon which we base our debate is now heavily restricted.

The same is true for its impact on the role of the media – *all* media. From public broadcasters to newspapers to social media, we are *all* working with less information because of these amendments.

As the Official Opposition, we led a marathon filibuster that lasted over 80 hours. We proposed eight amendments, all of which were voted down. We felt a filibuster was necessary to draw public attention to legislation that is now widely recognized as a step backwards in access to information.

And draw attention it did. When the Bill passed in the House of Assembly at roughly 1:30 in the morning, we were encouraged by the presence of the general public in the gallery, shaking their heads as government voted in favour. With a majority government, there was little we could do to prevent its passage. We

could only delay the inevitable; but in the very least, we helped extend this critical debate inside and outside the House. Ironically, government invoked closure during Section 18 – Cabinet Confidences, shutting down debate and forcing a vote on legislation meant to facilitate government accountability. All government members voted in favour of the legislation. All opposition members voted against it.

The Independent Statutory Review Committee on the Access to Information and Protection of Privacy Act has been tasked with a tremendous responsibility given the implications outlined above. We have no doubt you are up to the task as your respective careers have given each of you an exceptional appreciation for the balance between access to information and the protection of privacy.

While characterized as a scheduled review called early, this Independent Statutory Review was called by government in response to mounting public pressure to revisit the changes to the Act through Bill 29. The work of this committee in conducting an independent and comprehensive review is a worthwhile endeavor. Certainly, this committee can only make recommendations; it is for government to decide whether or not to accept them.

We do not know when the next provincial election will be called, but in the interests of transparency, we feel it is imperative that government make their intentions known with respect to the recommendations coming out of this review *prior* to the election. In practice, government has abandoned its election commitment to *"Release to the public every government-commissioned report within 30 days of receiving it, [and] indicate the action government will take on a report's recommendations within 60 days."* The success of this review process depends on whether or not the public's confidence in the Act is restored.

We have made our position on Bill 29 very clear. Should we form government, we intend to repeal Bill 29.

Today, I will speak to several sections of the Act, focusing on four in particular: Sections 18, 20, 27 and 30. The bulk of my presentation will focus on these sections as their 2012 amendments are particularly troubling. These four sections happen to be the most frequently cited reasons for denying information requested by the Opposition Office.

Since July 2012, the Opposition Office has submitted over 130 ATIPPA requests to government, of which 46 were denied in full or part. The four sections our

submission focuses on are cited 88 times in these 46 access to information denials. This submission outlines some of these access to information requests as examples of excessively restricted information post Bill 29. These requests span a time period of July 2012 to April 2014.

We have also included response times to demonstrate public bodies are not consistently adhering to the 30-day time limit dictated by the ATIPPA. While some responses may be a few days late, others have taken as long as six months to respond. The adage 'access delayed is access denied' applies here.

The passage of Bill 29 severely limited access to government documents, blocked the release of factual information prepared for ministers and increased the extent of cabinet secrecy. Changes to fees made information even less accessible, particularly for those unable to pay for it. Should the public's right to know be limited by one's ability to afford it? The amendments in Bill 29 fly in the face of transparency and accountability, and the following submission will outline how.

The presentation structure will be to discuss each of these sections, introduce examples of requests from the Opposition Office, and provide recommendations.

SECTION 18 Cabinet Confidences

Section 18 of the Act deems cabinet confidences an exception to access. Of the 46 access to information requests denied under the post Bill 29 version of ATIPPA, Section 18 was cited 30 times. It is the most common section cited in all of the access to information requests that we have had denied. Thirty-seven per cent (37%) of our denied requests cite Cabinet Confidences.

The post Bill 29 Section 18 outlines a lengthy definition of cabinet record.

As of June 2012, with the passing of Bill 29, Section 18 of ATIPPA has:

- expanded the scope of documents deemed cabinet records, as found in the Province's Management of Information Act;
- added three other types of cabinet records: discontinued, official and supporting cabinet records; and
- removed the substance of deliberations test

The opposition expressed serious concerns over government's move to make such significant changes to Section 18 during the Bill 29 debate.

Cabinet Confidences: Definition

Section 18, pre Bill 29, was as follows:

18. (1) The head of a public body shall refuse to disclose to an applicant information that would reveal the substance of deliberations of Cabinet, including advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Cabinet.

(2) Subsection (1) does not apply to

(a) information in a record that has been in existence for 20 years or more; or

(b) information in a record of a decision made by the Cabinet on an appeal under an Act.

By comparison, the post Bill 29 Section 18 detailed an exhaustive list of what could potentially be considered a cabinet record, and therefore, off limits to the public.

In the January 2011 Review of the Access to Information and Protection of Privacy Act by Review Commissioner John Cummings (referred to herein as the 'Cummings Review'), John Cummings recommended that Section 18 be extended to include the list of cabinet documents found in the Province's Management of Information Act. This recommendation was accepted, and moreover, discontinued, official and supporting cabinet records were also added. The expansion of Section 18 raised flags with the Official Opposition, and with others.

Toby Mendel, executive director of the Centre for Law and Democracy, described the expanded scope of cabinet confidences as 'breathtaking'. Mendel went on to say that the expanded definition was *"one of the widest exceptions of that sort that [he has] seen anywhere."* According to Mendel, the amendment to Section 18 would allow cabinet ministers to keep practically anything they want secret, opening the Section up to abuse. Mr. Mendel summarized:

> *To present such a major backsliding on such an important human rights and governance issue as acceptable, indeed progressive, suggests an arrogance and lack of respect for the people of Newfoundland [and Labrador].*
>
> *(Toby Mendel, executive director, Centre for Law and Democracy)*

Fred-Vallance Jones, a journalism professor at the University of King's College and lead author of last year's Canadian Newspaper Association's Freedom of Information Audit, said of the changes, *"I think it's the biggest step backward in access in Canada in recent memory."* Vallance-Jones also said he felt government had gone well beyond what was suggested in the 2011 Cummings Review.

Bill 29 expanded Section 18 to categorically exclude entire documents as opposed to some specific content in such documents.

Substance of Deliberations Test

A submission by the Information and Privacy Commissioner to the Cummings Review in 2010 stated, *"[Cabinet confidences] is not simply a list of categories of records which must not be disclosed. The substance of deliberations test must be met in order to refuse disclosure*." Cummings himself echoed this sentiment in his Review, stating *"Severance of cabinet records to determine the substance of cabinet deliberations should continue."* His recommendation was very clear.

The Information and Privacy Commissioner pointed out that any record, once deemed a cabinet record, would not necessarily harm or threaten the principle of cabinet confidences if it were to be released.

> *Rather, government is urged to take a balanced view of this exception which maximizes the public right of access to information with the need for cabinet to deliberate without fear that the differing views expressed at the Cabinet table will be revealed.*
>
> *(Office of the Information and Privacy Commissioner's (OIPC) Submission to the Cummings Review)*

Bill 29 removed the substance of deliberations test from Section 18. Members of the opposition spoke at length during the Bill 29 debate in the House of Assembly on the implications of removing this test as it pertains to cabinet confidences. In fact, the phrase "substance of deliberations" was uttered over 200 times during the course of the debate.

The Minister of Natural Resources at the time stated during the Bill 29 debate:

> *Commissioner Cummings certainly recognized and accepted the importance of Cabinet confidentiality. Mr. Chair, he did, as suggested by the member opposite, propose a substance of deliberations test, which has been rejected.*
>
> *(Minister of Natural Resources, Hansard, June 12, 2012)*

The Minister of Justice at the time said in debate:

> *Mr. Chair, standing alone, the substance of deliberations test does not give the protection necessary for Cabinet documents, so [Mr. Cummings] suggested putting in the list of Cabinet documents under the Management of Information Act. That is what we have done.*
>
> *(Minister of Justice, Hansard, June 12, 2012)*

In fact, that is not what they did. While government *did* expand the list of documents considered a cabinet record under Section 18 to reflect the Management of Information Act (and expanded the list even further to include discontinued, official and supporting cabinet records), they did *not* retain the substance of deliberations test. These two statements from ministers articulated how government selectively accepted and dismissed recommendations from Commissioner Cummings so as to protect Cabinet, their innermost circle, at the expense of the public's right to know.

The Official Opposition proposed a total of six amendments around Section 18, including one to retain the substance of deliberations test under Section 18. All amendments were voted down.

To be clear, the Official Opposition appreciates the role of Cabinet and the need to protect the deliberations of Cabinet as they make critical decisions on how our province is governed. However, it is our view that the intent of government in amending Section 18 and removing the substance of deliberations test was to deny the public any and all information respecting Cabinet. Despite tremendous opposition expressed during the debate around Section 18, government refused to budge on making themselves more transparent.

Examples of Records Denied in Part or in Whole under Section 18

ATIPPA Request to Department of Environment and Conservation
Dated: February 20, 2014
ATIPPA File #: ENV/011/2014

Response time:
- Received March 3, 2014
- Responded April 11, 2014 (39 days)

REQUESTED:
- Copy of the draft Natural Areas System Plan
- Copy of the final Natural Areas System Plan and implementation strategy
- Update on the Natural Areas System Plan
- Details on the public consultations on the draft Natural Areas System Plan

REASON REQUESTED: The Natural Areas System Plan has been promised by government for many years. The plan was an election promise of the PC party in 2011, and as per the 2008-2011 Strategic Plan for the Department of Environment and Conservation:

"By March 31, 2011, the Department of Environment and Conservation will have released a Natural Areas System Plan and an Implementation Strategy."

DECISION: While a vague one-paragraph update was provided on the activities of the Department, no information on planning or consultations was provided.

"The Department of Environment and Conservation has no records responsive to provide regarding public consultations as identified in the 2008-2011 Strategic Plan…Draft and final versions of the Natural Areas System Plan have not yet been developed. As all working documents are still under deliberation, they cannot be released under Section 18 of the Act."

COMMENTARY: The Department of Environment and Conservation committed to releasing a Natural Areas System Plan *and* an Implementation Strategy March 31, 2011. Three years later, to have no records responsive to our request, and to protect what are still working documents under Section 18, raises questions.

ATIPPA Request to Executive Council
Dated: January 16, 2014
ATIPPA File #: EC/001/2014

RESPONSE TIME:
- Received January 27, 2014
- Responded February 26, 2014 (31 days)
- No extension granted

REQUESTED:
- A list of the people currently working with the Red Tape Reduction and their positions
- The Minister Responsible for Red Tape Reduction today and when s/he took responsibility for it
- The Minister/Department that took care of Red Tape Reduction prior to the current Minister and
- A copy of all reports created by the Red Tape Reduction Initiative in the last 2 years

REASON FOR REQUEST: In 2011, government stated that regulatory reform (otherwise known as 'Red Tape Reduction') was a permanent function and regulatory processes would be continuously reviewed and improved. In 2014, business groups, communities, and individuals expressed concern about the lack of work on this initiative over the previous two years. It was unclear who was responsible for regulatory reform or what staff were committed to the initiative.

DECISION: The names of the Minister and staff working on the initiative were provided as well as a regulatory count for each department. However, select reports were denied because 'similar' reports were prepared for Cabinet.

"Over the last two years, the Regulatory Reform Office also created similar reports for the information of Cabinet. We are unable to provide you with a copy of these reports as these reports were prepared to update Cabinet and therefore are withheld in accordance with Section 18."

COMMENTARY: The Red Tape Reduction Initiative has seen little progress since 2009 when baselines and a dedicated office were established. A failure of a Government program is of significant concern for all elected officials and the public. Any materials prepared with information on the reasons for that failure should be granted as requested. It is ironic that because redundant reports were

drafted for Cabinet, we were denied access to information around an initiative designed to reduce red tape.

ATIPPA Request to Department of Finance
Dated: July 24, 2012
ATIPPA File #: None Provided

Response time:
- Received August 6, 2012
- Responded February 8, 2013 (186 days)
- No extension granted

REQUESTED: Copy of briefing notes and financial analysis completed on the Lower Churchill project since September 2010

REASON REQUESTED: The Muskrat Falls project was scheduled to be debated in the fall sitting of the House of Assembly. To better inform the debate, the Opposition Office was attempting to access information from the Department of Finance.

DECISION: The Opposition Office received a three page letter stating that all information, outside of what was already publicly available, had been denied. The letter cited Sections 18, 20 and 24.

COMMENTARY: Government acknowledged receipt of the request in early August, but made no further communication until February 8, 2013, six months later. Government waited six months to inform the Opposition Office that no information would be released.

Within that six month window, the fall sitting of the House of Assembly had come and gone, the debate on Muskrat Falls was over, and government formally sanctioned the Muskrat Falls project.

ATIPPA Request to Department of Child, Youth and Family Services (CYFS)
Dated: February 12, 2013
ATIPPA File #: CYFS/001/2013

RESPONSE TIME:

- Received March 4, 2013
- Responded May 3, 2013 (60 days)
- Extension requested

REQUESTED: Briefing notes compiled/updated on or after October 1, 2012 to February 2013, excluding draft copies

REASON REQUESTED: The Department of Child, Youth and Family Services was formed in 2009 to focus solely of the needs of children, youth and their families. As part of establishing the new department, all staff and programs that previously were the responsibility of the Regional Health Authorities (RHAs) were transitioned to government. The Opposition Office requested updated information on how the transition was progressing, as well as how the department was meeting the needs of the populations it was created to serve.

DECISION: Government stated that there were 67 pages responsive to the request, but completely removed 35 of them, citing Section 18. Of the records that *were* made available, redactions were present, citing Sections 18, 20, 27 and 30.

COMMENTARY: The department was in the middle of significant changes during the period of the request with over 700 staff being transitioned into the department. Yet, Section 18 was used to deny the Opposition access to essentially any information outside of funding arrangements.

Recommendations

- Section 18 should be replaced with a version similar to Section 18 pre Bill 29.
- The Information and Privacy Commissioner, together with government, should agree upon a clear interpretation of the substance of deliberations test.
- The Information and Privacy Commissioner should have the power to subject an access to information denial that cites Section 18 to a substance of deliberations test.

SECTION 20 Policy advice or recommendations

Section 20 sets out the types of information the head of a public body may and may not refuse to disclose.

Section 20 (1) (a) of the original legislation stated:

20. (1) The head of a public body may refuse to disclose to an applicant information that would reveal

(a) advice or recommendations developed by or for a public body or a minister; or

(b) draft legislation or regulations.

Bill 29 added three types of information the head of a public body may refuse to disclose under Section 20 (1) (a) of the legislation:

- proposals
- analyses, and
- policy options.

This broadening of Section 20 (1) (a) gives public bodies a wider range in the types of information they may refuse to disclose.

In the 46 post Bill 29 access to information requests submitted by the Official Opposition Office and denied by government, Section 20 was referenced 26 times. It is the second most commonly cited section of the Act based on the requests the Opposition Office have submitted and had denied.

In the Cummings Review, Mr. Cummings did recommend the addition of proposals, analysis, consultations and deliberations, and government accepted this recommendation. He cited the 'chilling effect' Section 20 of the original Act was having on the preparation of briefing materials, referencing anecdotal evidence that fewer briefing materials were being drafted following the introduction of the original ATIPPA. Cummings' concern was that ministers may not be properly advised, which could lead to improper functioning of government.

> *A major part of the concern is the widespread uncertainty associated with determining what constitutes "advice or recommendations developed by or for a public body or minister". Officials reported*

> *encountering difficulty when determining what information should be severed.*
>
> *(Cummings Review, 2011)*

It is our contention that expanding Section 20 because officials were struggling with its application would not address overarching issues of interpretation. By that logic, officials should still struggle with determining what constitutes "advice or recommendations" as this language remains in Section 20.

Government is free to seek guidance from the Office of the Information and Privacy Commissioner. The Department of Justice provides legal advice to government on a regular basis. In addition, many departments have their own legal counsel. If there is confusion or uncertainty around the interpretation of sections such as Section 20, departmental officials have no shortage of experts to consult.

While the Cummings' Review points to several jurisdictions that have changed the wording of ATIPPA to include proposals, analyses and policy options, provinces such as Nova Scotia, Ontario and British Columbia maintain wording similar to the pre Bill 29 version of our Section 20, despite these provinces having amended their legislation on several occasions.

Example of Records Denied in Part or in Whole under Section 20

ATIPPA Request to Department of Advanced Education and Skills
Dated: November 30, 2012
ATIPPA File #: AES/032/2012

RESPONSE TIME:

- Received December 5, 2012
- Responded January 25, 2013 (52 days)
- No extension granted

REQUESTED: The new Poverty Reduction Strategy/Action Plan as well as the Progress Report on Poverty Reduction

DECISION:
"The new Poverty Strategy/Action Plan as well as the Progress Report on Poverty Reduction is currently under review, therefore access to this information is exempted from disclosure in accordance with Section 20 (1) (a) (b) (c) of the Act…The Poverty Reduction Strategy/Action Plan, as well as the Progress Report on Poverty is currently in draft and not finalized, and therefore incomplete. It would therefore meet the criteria of the sections above."

COMMENTARY: The Poverty Reduction Progress Report was released to the public on June 4, 2014 – 18 months after this request was submitted and two-and-a-half years after it was due.

The updated Poverty Reduction Strategy - now three years late – remains in draft form and is therefore unavailable to the public.

Recommendation

- Section 20 should revert to the version of Section 20 that existed prior to Bill 29.

SECTION 27 - Disclosure harmful to business interests of a third party

Since Bill 29 passed in the House of Assembly in June 2012, we have been denied information under Section 27 15 times. It is the fourth most common section cited in all of the access to information requests that we have had denied.

Pre Bill 29, the legislation required that exceptions to access under Section 27 employ a three-part test wherein all three conditions had to be met in order for access to be denied. Post Bill 29, only one of the three conditions has to be met in order for government to deny access to information.

The three conditions outlined under Section 27 (1) remain the same post Bill 29. The crucial difference is the head of a public body needs only to meet *one* of these conditions to deny access.

27. (1) The head of a public body shall refuse to disclose to an applicant information that would reveal

(a) trade secrets of a third party;

(b) commercial, financial, labour relations, scientific or technical information of a third party, that is supplied, implicitly or explicitly, in confidence and is treated consistently as confidential information by the third party; or

(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to

(i) harm the competitive position of a third party or interfere with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in significant financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

Alberta, British Columbia, Nova Scotia, Ontario and Prince Edward Island all require a three-part test in order to deny access to information.

While the Cummings Review deemed the three-part test an unreasonably high standard for government to meet, it is our belief that it is a *necessarily* high standard that ensures appropriate access to information.

It is important to note that no Section 27 court cases have ever been brought to court prior to Bill 29, either by the OIPC, an applicant or a third party. Clearly, no one expended any effort to challenge the information being released by government.

It is noteworthy that the Information and Privacy Commissioner's submission to the Cummings Review did not address any issues with the three-part test under Section 27 of the pre Bill 29 ATIPPA. One could therefore surmise the Information and Privacy Commissioner himself had no issue with the three-part test pre Bill 29.

It is important to review the reports completed by the Office of the Information and Privacy Commissioner concerning complaints made to his office regarding information requests after Bill 29. In 2013 and 2014, the following reports concern exceptions to access citing Section 27:

Report: A-2014-008
Report Date: July 11, 2014
Public Body: Department of Transportation and Works

Report: A-2014-006
Report Date: March 5, 2014
Public Body: Department of Justice

Report: A-2014-002
Report Date: February 5, 2014
Public Body: Eastern Health

Report: A-2013-017
Report Date: October 29, 2013
Public Body: Eastern Health

Report: A-2013-012
Report Date: August 19, 2013
Public Body: Eastern Health

Report: A-2013-009
Report Date: June 4, 2013
Public Body: Memorial University of Newfoundland

Report: A-2013-008
Report Date: May 17, 2013
Public Body: Government Purchasing Agency

Most of the above complaints concern contracts awarded to provide goods and services to public bodies. In all of the above reviews, Section 27 was cited to deny access to information. In six of the seven above reviews, the Commissioner found the burden of proof to withhold information under Section 27 had not been met. The seventh review concerning the Department of Justice saw the issues resolved as the Department subsequently released information it had withheld under Section 27 when challenged during the informal resolution process and the formal investigation stage.

The OIPC pointed out in their presentation to the Independent Statutory Review Committee that they believe that Section 27 is now being used by public bodies and third parties to protect the prices paid by public bodies for goods and services. This should not be the purpose of the ATIPPA. Public disclosure of the cost of goods and services should be regarded as a cost of doing business with government. Reverting back to the pre-Bill 29 version of Section 27 would ensure more transparency in how public funds are being spent.

Example of Records Denied in Part or in Whole under Section 27

ATIPPA Request to Department of Transportation and Works
Dated: May 1, 2014
ATIPPA File #: TW/010/2014

RESPONSE TIME:

- Received May 6, 2014
- Responded June 26, 2014 (51 days)
- Extension requested

REQUESTED: Copies of all information relating to Humber Valley Paving and their dealings with government from January 15, 2014 to May 1, 2014

DECISION: The department provided a response stating there were 39 pages responsive to our request. Pages 2-24, 26, 27 and pages 31-33 were absent in the response. In total, 28 of the 39 pages were completely removed, citing Sections 24 and 27.

COMMENTARY: Earlier this spring, government and Humber Valley Paving came to a mutual agreement to cancel a paving contract in Labrador, and two bonds totaling $19 million were released to the company despite 60 kilometers of the paving contract not having been completed.

The cancellation of this contract and subsequent bond release was an exceptional situation that raised questions for us as the opposition. Given the ties of the then incoming premier to this company and the personal involvement of the Minister of Transportation and Works in this decision, a conflict of interest involving taxpayer dollars and sub-contractors left without recourse with the bond cancellation, it was our duty as the opposition to question the process and decision. In making this access to information request, the Official Opposition was attempting to construct a timeline of events and better understand the substance of discussions regarding this contract cancellation.

Ultimately, 72 per cent of government's records on this file were completely redacted based on Sections 24 and 27. It is therefore impossible, given the information provided, to determine the full story behind the cancellation of this contract.

Recommendation:

- Section 27 should be repealed, reverting back to the Section 27 that was in place prior to Bill 29 wherein the three-part test ensures appropriate access to information.

SECTION 30 Disclosure harmful to personal privacy

Section 30 of the Access to Information and Protection of Privacy Act (ATIPPA) was significantly changed by Bill 29, namely through the implementation of a 'harms test' to determine if personal information should be released. While the current legislation provides greater flexibility in Section 30 than pre Bill 29, the Section still needs improvement.

In the 46 post Bill 29 access to information requests submitted by the Official Opposition Office and denied by government, Section 30 was referenced 17 times. It is the third most commonly cited section in all of the access to information requests that we have had denied.

Legislation such as our ATIPPA should strive to maintain a balance between the public's right to access information and their right to privacy. Consideration must be given to how any disclosure could impact individuals. However, there are instances where withholding such information doesn't make sense.

Most notably is a request to the Department of Natural Resources - ATIPPA File #: NR/011/2012 requesting feedback provided by school children in Labrador regarding the Department's educational Rocks and Minerals Initiative. In that access to information response, all feedback provided by the students regarding the workshops was redacted. This ATIPPA response is a clear example of why Section 30 should be improved.

Example of Records Denied in Part or in Whole under Section 30

ATIPPA Request to Department of Natural Resources
Dated: August 17, 2012
ATIPPA File #: NR/011/2012

RESPONSE TIME:

- Received August 27, 2012
- Responded October 15, 2012 (49 days)
- No extension granted

REQUESTED:

- Copy of materials used in initiative on Rocks and Minerals offered by Geological Survey Division in Labrador April 20-27, 2012
- Copy of the resource tool kit provided to teachers, any feedback, evaluation, and backgrounder

DECISION: The feedback tally report was almost entirely redacted under Section 30. Every response to a question posed in the Student Evaluation Summary containing responses from 83 students in grades 4-11 was completely redacted. The questions posed in the Student Evaluation Summary were:

- What was your favorite part of the workshop?
- What was your least favorite part of the workshop?
- How would you rate the workshop?
- What did you know about rocks and minerals before today?
- What did you learn about rocks and minerals today?
- Anything else that you would like to tell us?

The excessive redactions cited Section 30 of the Act.

A review of the Office of the Information and Privacy Commissioner's reports also reveals inappropriate use of Section 30. The following reports determined that some information had been improperly withheld under this section.

Report: A-2014-006
Report Date: March 5, 2014
Public Body: Department of Justice

Report: A-2013-018
Report Date: November 28, 2013
Public Body: Royal Newfoundland Constabulary

Report: A-2013-016
Report Date: October 21, 2013
Public Body: College of the North Atlantic

In the above reports, the Commissioner recommended the release of all information that had been improperly withheld by the public bodies.

Section 30 Remuneration versus Salary

Prior to Bill 29, Section 30 (2) (f) of the Act stated:

30. (1) The head of a public body shall refuse to disclose personal information to an applicant.

(2) Subsection (1) does not apply where

(f) the information is about a third party's position, functions or ***remuneration*** *as an officer, employee or member of a public body or as a member of a minister's staff;*

Bill 29 replaced 'remuneration' with 'salary range' so that Section 30 (2) (f) now reads:

30. (1) The head of a public body shall refuse to disclose personal information to an applicant where the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy where

> *(f) the information is about a third party's position, functions or* ***salary range*** *as an officer, employee or member of a public body or as a member of a minister's staff;*

The revised language denies the public access to information regarding the remuneration many senior officials or public employees receive *in addition to* their base salary. It also provides a range of salary only, as opposed to a specific base salary amount. The public is no longer privy to the full picture of the amount of public funds paid to an employee.

It is our belief that the language of Section 30 requires a more thorough review. As stated previously, citing the excessively redacted Department of Natural Resources response to what was an innocuous access to information request, as well as the above reports of the Office of the Information and Privacy Commissioner, access to information that is *not* harmful to personal privacy is commonly being withheld.

The Official Opposition respectfully requests the Committee consider revised language under Section 30 with an eye to how other jurisdictions maintain this crucial balance between access to information and protection of personal privacy.

Recommendations:

- Consider revised language under Section 30 to clarify what is considered personal information.
- Repeal section 30 (2) (f), reverting the language to the pre Bill 29 version of the ATIPPA, which allowed for the disclosure of remuneration, not just salary range.

OTHER SECTIONS AND ISSUES

SECTION 68 and the Schedule of Fees

Section 68 of the Act makes provisions for the public body processing an access to information request to charge a fee for the *"search, preparation, copying and delivery services in accordance with a fee schedule set by the minister".*

While the language of Section 68 itself was not changed with Bill 29, the schedule of fees was amended.

Prior to the fee schedule amendments, the cost to locate, retrieve and manually produce a record was $15.00 for each hour of person time. The first two hours of labour were 'free' in that they were not charged to the applicant.

The fee schedule was then amended in 2012. While the number of so-called 'free' hours doubled from two to four hours per request, the labour cost for every hour thereafter increased from $15.00 to $25.00. Government also expanded the list of what they could charge for under the new schedule to include severing and redacting documents, and reviewing records.

The table below summarizes these costs:

	Pre Fee Schedule Amendments	**Post Fee Schedule Amendments**
Cost per hour	$15.00/hour, after the first **two** hours	$25.00/hour after the first **four** hours
WHAT IS INCLUDED FOR THE COST PER HOUR?		
Locate record	**X**	**X**
Retrieve record	**X**	**X**
Manually produce record	**X**	**X**
Produce record	**X**	**X**
Sever/Redact record		**X**
Review records to determine whether or not any of the exceptions to disclosure apply		**X**

Fees associated with ATIPPA requests were discussed in the Cummings Report, which noted there was no consensus surrounding the purpose of fees, or lack thereof, in administering ATIPPA. Cummings reflected the concerns of some public bodies, whose stance was that fees helped deter unreasonable requests,

and that fee estimates lead applicants to narrow the scope of their requests. Cummings also pointed out that other public bodies felt that fees are inconsistently applied, that cost recovery was not possible and that fees did not deter applicants from making unreasonable requests. Cummings did recommend that fees associated with access to information requests *not* be increased.

The increase in the per hour fee, as well as the expansion of the list of activities now factored into the labour associated with completing requests, has restricted access to information even further. ATIPPA fees are rather arbitrary, subject to the discretion of the person processing the request, and dependent upon any number of factors, including their experience level, their familiarity with the Act, or the information management capabilities of that particular department. While some public bodies may maintain their records electronically via databases and the like, others may have to pore over hard copy files in search of the information requested. Regardless, changes to the fee schedule, which coincided with the 2012 amendments to the Act, have also made information more cost-prohibitive, and thus, less accessible.

Example of Cost-Prohibitive Fees Charged in Accordance with Section 68

ATIPPA REQUEST TO ALL DEPARTMENTS
Dated: January 28, 2014
ATIPPA File #: FIN-2 2014

RESPONSE TIME:

- Received: February 14, 2014 (all files were transferred to Department of Finance from other departments)
- Responded: February 26, 2014 (12 days)

REQUESTED: Amount of money spent on marketing and advertising in fiscal years 2012-13 and 2013-14

REASON REQUESTED: We requested this information to determine how much public money was being spent on marketing and advertising.

RESPONSE: The original request was sent to individual departments, but forwarded on to the Department of Finance so as to streamline the process.

The Department of Finance responded with a fee estimate of $1662.50, estimating 66.5 hours of labour.

In an email from the ATIPPA coordinator for the Department, he confirmed that *"The first four hours per department were credited to you at no charge to ensure no additional fees accrued due to the consolidation."*

Government therefore estimated it would take roughly 126 hours, or four work weeks, to determine what they spent in two fiscal years on marketing and advertising. We decided the fee was cost prohibitive and therefore decided not to proceed with the request.

Recommendation:

- Revert to the fee schedule that existed prior to the 2012 amendments.

SECTION 7 (4) (a) (b) Right of access (Ministers' Briefing Material)

A briefing book comprises materials typically compiled to brief a minister assuming a new portfolio or to prepare a minister for a sitting in the House of Assembly.

Prior to the 2012 amendments to the Act, the factual information contained in these briefing books was made available upon an access to information request. Policy advice or suggested speaking points were typically, and understandably, redacted.

The 2012 amendments, however, denied the public access to *all* information contained in briefing books.

The opposition, as well as the general public, have a right to know the facts upon which a minister makes a decision. The disclosure of these facts allows the opposition to compare their research findings with that of the public service. This right to access helps maintains a system of checks and balances as facts are found by people, and people make mistakes. Granting access to the factual materials of ministers' briefing books is therefore in the best interest of the public.

It is also important to remember that the materials in these briefing books are prepared by the public service, not by political staff or political parties.

Recommendation:

- Revert Section 7 to the pre Bill 29 version and make the factual information in briefing books publically available.

SECTION 42.2 Term of office

The Information and Privacy Commissioner is an independent Officer of the House of Assembly in Newfoundland and Labrador. The Commissioner provides independent oversight and enforcement of our provincial access and privacy laws:

- The Access to Information and Protection of Privacy Act (ATIPPA)
- Personal Health Information Act (PHIA)

The role of the Commissioner is an important one. Among other things, the Commissioner conducts investigations, reviews decisions, and resolves complaints involving public bodies governed by both pieces of legislation. In order to carry out the role effectively and efficiently, the position requires the individual to become an expert in both pieces of legislation.

The current term in office for the Information and Privacy Commissioner is only two years. This is in contrast to the terms for other officers of the House of Assembly.

- Citizens' Representative - 6 years
- Child and Youth Advocate - 6 years
- Auditor General -10 years

We believe the term of the Information and Privacy Commissioner should be reflective of the terms of office of other Officers of the House of Assembly.

Newfoundland and Labrador by far, has the shortest term of any Information and Privacy Commissioner in Canada. All provinces have a minimum five year appointment. The Commissioner stated:

> *A Commissioner appointed by a government for 6 years knows that his/her re-appointment will not be made by the same government but rather by the government elected in the next provincial election. The Commissioner's Office is of the position that this amendment will enhance the perceived independence of the Commissioner.*
>
> *(Office of the Information and Privacy Commissioner's Submission to the Cummings Review, 2010)*

In his submission to the Cummings Review, the Information and Privacy Commissioner recommended that the term should be a six year appointment. The Cummings Review recommended a five year term.

Recommendation:

- Extend the term of office for the Information and Privacy Commissioner to a minimum five-year term to provide stability and consistency to the role.

Constituency Issues Routed through Political Staff

In recent years, opposition MHAs have found it increasingly difficult to access information through various government departments. No longer can members of our caucus go directly to department staff for information. Policy now dictates that the opposition must contact the minister's Executive Assistant instead.

Government is using their political staff as gatekeepers on constituency issues. This new policy creates a bureaucratic bottleneck and convolutes the transmission of information. For example, whereas in the past, opposition staff could contact Newfoundland and Labrador Housing to inquire about an individual's housing issue, staff now have to contact the minister's EA, who contacts Housing and then transmits the information back to opposition staff. There is no longer a direct route to the information; instead, the minister's office reviews all requests whether or not they require action from the minister.

Aside from the additional time this policy requires, routing constituency issues through political staff raises concerns around privacy. In many cases, these requests involve personal information entrusted to the MHA by the constituent. By being forced to involve the minister's political staff in these issues, it increases the likelihood of privacy breaches.

Recommendation:

- Although this policy falls outside the current ATIPPA, going forward, all MHAs should be able to work on behalf of their constituents without the involvement of political staff in the minister's office.

CONCLUSION

In closing, we would like to thank you, the Independent Statutory Review Committee, for the opportunity to present to you today on behalf of the Official Opposition.

At the opening of our submission, we talked about the role of the Opposition in a democratic system. The opposition's dissent is pivotal to our system of checks and balances. It is essential to maintaining the trust of the people who elected us. As mentioned, the media, including social media, are part of that system of checks and balances, and access to information is vital to this process working effectively.

The state of democracy in our province is in the balance. This committee must consider not only what legislative changes are needed to maintain a balance between ensuring access to information and protecting personal privacy, but also how this legislation can facilitate or hinder our system of checks and balances. We are hopeful this review helps restore the public's confidence by recommending much needed changes to the Access to Information and Protection of Privacy Act.

It is our contention that Bill 29 is the most regressive piece of legislation introduced into our House of Assembly in recent memory.

Our submission focused primarily on the four sections most compromised by the 2012 ATIPPA amendments, and most commonly cited in exceptions to access.

- **Section 18** – Cabinet confidences
- **Section 20** – Policy advice or recommendations
- **Section 27** – Disclosure harmful to business interests of a third party
- **Section 30** – Disclosure harmful to personal privacy

We have also addressed fees associated with ATIPPA requests to demonstrate how the amended schedule of fees further restricted access to information, and made information less accessible, particularly to those lacking the financial means to afford it.

We have also touched on the importance of ministers' briefing books to the work we do in the opposition, as well as the precarious nature of the current term length of the Information and Privacy Commissioner.

Finally, we felt it would be remiss of us not to address in this submission the policy of routing constituency issues through the minister's office. While not *in* the legislation, this policy change coincided with the introduction of Bill 29 and speaks to an overarching climate of secrecy under which we, as the opposition, are forced to operate.

We thank the committee for your work and look forward to your report and recommendations.

RECOMMENDATIONS

1. Section 18 should be replaced with a version similar to Section 18 pre Bill 29.

2. The Information and Privacy Commissioner, together with government, should agree upon a clear interpretation of the substance of deliberations test.

3. The Information and Privacy Commissioner should have the power to subject an access to information denial that cites Section 18 to a substance of deliberations test.

4. Section 20 should revert to the version of Section 20 that existed prior to Bill 29.

5. Section 27 should be repealed, reverting back to the Section 27 that was in place prior to Bill 29 wherein the three-part test ensures appropriate access to information.

6. Consider revised language under Section 30 to clarify what is considered personal information.

7. Repeal section 30 (2) (f), reverting the language to the pre Bill 29 version of the ATIPPA, which allowed for the disclosure of remuneration, not just salary range.

8. Revert to the fee schedule that existed prior to the 2012 amendments.

9. Revert Section 7 to the pre Bill 29 version and make the factual information in briefing books publically available.

10. Extend the term of office for the Information and Privacy Commissioner to a minimum five-year term to provide stability and consistency to the role.

11. MHAs should be able to work on behalf of their constituents without the involvement of political staff in the minister's office.