Written Submission

to

the Statutory Review Committee

on Access to Information and Protection of Privacy Act

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For your consideration:

During the debate around Bill 29 in the House of Assembly, provincial Liberal leader Dwight Ball quoted former U.S. President John Kennedy, saying: “The very word ‘secrecy’ is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings.”

Yes, I’d say we are opposed to the idea of government secrecy and corruption as base concepts. But we seem to have a hard time as individuals identifying them in practice, and calling them out.

As individuals, if anything, we are predisposed to the path of least resistance, comfort and self-preservation. The same goes for those people working within government, as civil servants.

Whatever might be said to this committee, or ultimately put to the lawmakers, the Access to Information and Protection of Privacy Act (ATIPPA) settled on for the province of Newfoundland and Labrador should be written to reflect the fact there has been, at times, a push for secrecy and even corruption within our own province.

The Act must also reflect the fact the smallest and most innocent of actions – delayed responses to access to information requests or overreaching redactions within responses, as two examples — are able to produce and foster a culture of secrecy, with or without there being any intent to create one.

To all of that, I submit we need an ATIPPA with greater strength, specifically greater ability to have documents reviewed and released, to the fullest extent, without forcing the paycheque-to-paycheque public to court.

It is also time for the provincial government and municipalities to make it clear to businesses: the public has a right to know when and how public money is being spent. There must be an acceptance that business with government is not the same as private business.

And the Act must provide for real response in cases wherein the law has been clearly breached – with intent or not — by civil servants and the government of the day.

Timeliness of response

I have been working as a journalist long enough to have experienced the response to Access requests both before and after the changes brought in with Bill 29.

My main concern around the ATIPPA, before and after, remains the timeliness of response to access requests.

In one case I faced, I was forced to wait nearly seven months, calling and emailing, before receiving documentation. I filed a request with the Department of Natural Resources on May 16, 2012. I received about 50 pages of responsive documents on Nov. 9, 2012 – but only after contacting the Office of the Information and Privacy Commissioner (OIPC) about a lack of response.

The case report emerged, after I insisted on some kind of explanation. It is available on the OIPC site: Report A-2013-001. It includes what I believe to be an essential section for your consideration — in the provincial government's response (on Jan. 9, 2013) to some of the OIPC questions.

The Department of Natural Resources took issue when, at one point, the OIPC representative referred to section 64(1) of the Act on "…a decision to refuse access to a record." The department, in turn, argued: "at no time did the department decide to refuse access to the records associated with this request."

While acknowledging a failure to respond within 30 days is considered a refusal of access, the government representative went on to argue: "even though there was a delay in responding to the applicant, the department's intent throughout the entire response period was to provide the applicant with the records requested."

I accept and I firmly believe there was no intent to withhold information in that case. What I do not believe is a lack of intent makes a lack of response OK.

And it is why I believe there should be some mechanism that triggers independent review and automatic penalty for an unexplained delay in response to a request filed under the ATIPPA.

As for the OIPC, my dealings with that office were less than satisfying. Even months after the legislated deadline for a response in my case, there was a feeling I needed to bargain or negotiate for information, when what I was seeking was a more forceful hand, without having to go to court.

I felt – on all sides — there was little appreciation for the fact I was placed in a position where the government had clearly broken the law, to the point where no one could deny it, and yet the onus was being placed on me to address it.

And I was not the only one in that position at the time. The OIPC issued a news release pointing to a collection of case files with applicants — individuals similarly left without response beyond the legislated timelines.

I have not faced the same wait since the OIPC report was published. And yet, I've still come to not expect any response before at least 30 days' time, as a manner of standard practice.

Whatever timelines are set on access to information requests, I have no sympathy for complaints around meeting the deadlines, or the excuses offered when breaches of the Act have taken place in regards to response timelines. And I would like for the access co-ordinators to not come looking for it.

"It is not the purpose of the Act to make things easier for civil servants," stated the John Cummings Report, so often referenced by government members in defending greater restrictions on access. "Government departments must remember that providing information to the public under the ATIPPA is just as much a part of their responsibilities as the many other things they are called upon to do. Some civil servants have not accepted this fact and regard access requests

as a secondary responsibility. Public bodies must be prepared to accept the administration of access to information and protection of privacy legislation as a part of their normal business."

If it is a case where more resources are needed to cover off the required business of government — say, providing a number of full-time co-ordinators to cover ATIPPA requests for all departments — that should be done.

I am not one for bloating the system, but whatever is required to cover legislated standards, let's make it happen.

Consultant reports

Apart from response timelines, there are two words that spring to mind: independent consultant.

While consultants have always had a place, anecdotally it feels like there is a greater use of them in recent years. Their reports vary in scope, detail and therefore cost, but overall we are paying a great deal for the work.

I expect to be able to see what we have purchased. I expect to know how much we've paid.

I also expect to be able to see the actual information produced without waiting months and months for government to decide when it would like to take the report out of "draft form."

There should be a prohibition on the province holding the work of independent consultants in drafts. Submissions to government should be considered complete reports — final products in response to payment.

If a government minister wants more information, they can seek that in the form of a supplementary report. That report can then be clearly scoped and costed, with information made public on all counts.

If the government wants to add responses, it can do so prior to a repackaged, public release — the kind of glossy thing they seem to love so much. But if the original submission is requested and is in government hands, there should be no hesitation in handing it over upon request.

If the reason a report remains in a "draft form" is government has found inaccuracies, mark them and release what you have. Those inaccuracies should fall to the consultants and we will know to take it into consideration the next time they come up for hire.

I see no excuse to withhold a purportedly factual report, particularly given most consultant reviews include an element of time sensitivity – cost numbers, regulatory frameworks and project timelines can all change over time and affect the ultimate use of the consultant's work when left for too long.

To illustrate: the province hired Dillon Consulting to complete a piece of work around composting in the province, looking at the feasibility for the composting of organic waste to be added to the current waste management strategy, particularly on the Avalon Peninsula. They announced a contract, a set cost and an estimated completion date of December 2013.

I went looking for the report and was told the province had received it, in a draft form, and sent it back. They asked for more work to be completed by the consultant and a new report to be produced, at a greater and as yet unknown (at least to the public) cost.

The province announced the original initiative with a public news release. And yet, if I had not gone looking, I firmly believe the public would never have been notified with any kind of similar release that at least two reports will have been produced by this consultant, and at a cost quite different from what was originally announced for the piece of work.

I have filed an access to information request seeking the original Dillon report, given it has apparently been widely shared at the municipal level to members of

the province's regional waste management boards, some of whom have since made decisions based on what they have seen.

An additional 30 days was "requested" prior to a response being issued. The reasoning involved a required notification of a third party – the government's own hired consultant.

Ministerial briefings

In terms of access to ministerial briefing books, I think Mr. Clyde Wells has raised the argument that information from these documents might be used by opposition parties seeking a political advantage.

I submit almost anything reported to, within and from government can be used in seeking a political advantage in one way or another.

It is not reason to withhold documents.

Ministerial briefing books gather a great deal of factual, background information in a single place. They can also be of great public benefit in terms of showing what facts are first being placed in front of a minister, given that numbers and facts can be easily skewed.

Ask the CNLOPB for a number on the total recoverable reserves left at a specific oilfield offshore of the province. Then ask the operating company — you'll get a different figure.

Now, say there's a new minister of Natural Resources. What number was first put in front of him or her? As a result, what are their first impressions? What are they using in their speeches? Do the numbers we hear and see reflect the regulator's evaluations, the company's, or something from the department or minister?

It can all play into what the public is being presented with and ultimately discussing as fact.

I have not made a practice of requesting briefing books, but have come across briefing notes, at least prior to the last change in the legislation. I find it interesting there has been less attention paid to the topic of briefing notes, given they act in very much the same way as the briefing books for new ministers.

In September 2011, I requested: “Any and all ministerial communications with regards to the sale of the ferries MV Hamilton Sound and MV Island Joiner from the period April 1, 2011 to the present (Sept. 12, 2011), specifically any email communications to and from the Minister’s office.”

In response, I received a note dated March 8, 2011. It was titled “Disposal of the MV Hamilton Sound and the MV Island Joiner.” It included redactions with notes provided to say the information was considered to fall under Section 18(1) of the Act and a cabinet confidence.

Those redactions were limited to the name(s) of whoever had authorized the Department of Transportation and Works to go ahead with construction of new ferries at a set cost.

The cost was shown, as were the names of the companies involved. The briefing note similarly revealed: cost estimates on the refit and continued use of two of the department’s oldest ferries, a statement that a substantial refit was not considered a viable option given their age, the monthly cost for keeping each of the ferries operational, the fact the department did not have the money within its existing budget to keep the older vessels on standby and the names of the senior government staff who prepared and approved the briefing note.

In a word, it offered details.

I see no reason why this type of briefing information should not be released. And if the argument is this is a poor example and there are other cases where the information needs protecting (leading to the wording we now have in the legislation), the challenge I issue is to produce something ordering only what must be withheld from release within those documents to be withheld.

Third-party considerations

Dealing with business stories and stories around large-scale natural resource developments, I have regularly come across arguments around the protection of third-party interests.

I have produced stories on at least one case where a company, a seismic data company, has taken the provincial government to court over the release and use of information, given the sale of the information — its data — is how the company survives.

The case is still before the court, in fact there's more than one, but it illustrates the importance of clear and clearly communicated legislation.

That said, in the broad case of quantifiably valuable data like all of the offshore seismic, access has prevailed, with the data made available through the joint provincial-federal Canada-Newfoundland and Labrador Offshore Petroleum Board (CNLOPB) after a 10-year grace period.

The case of seismic data companies and how they are dealt with by the CNLOPB is why I feel completely mystified by the stance taken in some cases where requests to the provincial government are met with flat refusals due to an, typically undefined, potential damage to a third-party.

And so here is where I raise the latest report from the OIPC: A-2014-008.

In the case described in this report, dating to 2013, the focus is third-party considerations. And I appreciated the statement within the report's conclusion: "Each request for information must be considered on its own merits."

More importantly, the next line: "Submissions with respect to harm [to a third party] should comment specifically on the harm that disclosure of the requested information would cause."

Communication of a specific reasoning is key and, if difficult to discuss directly with the applicant, may be facilitated by the OIPC. At present, the case-specific reasons behind a claimed inability to release information are rarely given.

Let's shift gears a bit and look at another specific case where third-party interests were clearly at play.

I began to look at the presence of chromium at the GC Reiber Carino seal tanning operation. The concern being – Erin-Brockovich style – toxic hexavalent chromium, present at the operation, has the potential to be released into the surrounding environment without proper safeguards and diligence on the part of the operator.

The tanning process produces a wastewater that is treated before being run out into the adjacent bay. It is not unlike what you see with some mines in the province. And I was aware the provincial government requires companies with these wastewater-producing operations to provide information from scheduled testing, monitoring, compiled and then summarized in regular, public reports, to assure compliance with environmental regulations.

And so I asked for that information.

I was lucky. GC Reiber Carino did not fight release of the detailed documentation and was completely open to questions. But what would have been the case with a company with less consideration for the public interest?

As it was put to me in this case, when I was sent a letter saying consultations with an undefined third party were required before any release of documentation, the company could have objected, despite the fact the very intention of that documentation was to provide for oversight on behalf of the public.

And while the current legislation provides for release when there is clearly a threat to the environment or health and safety, I ask you: when is something "clearly" a threat?

Powers of the OIPC

I know the idea has been bounced around, but pressing for the OIPC as a required or first-stop go-between is a terrible idea to bring into practice.

Consider how many requests being dealt with today do not go through the commissioner and the associated workload if that were required.

The current process is meant to be blind and can operate blind if properly followed. An individual should be able to approach their government as an individual and never be filtered.

Let us try on our own and, if there's an issue, let us be presented with the option to take it to the next level.

It has been said in the hearings for this review: "Most people involved in government are like all of us, ordinary humans." Well, the same is true of the individuals within the Commissioner's office.

And let's ask ourselves — why should it be speedier for response to a Commissioner's request compared to my own? Why should that be the standard?

I like to always say I am a reporter, but as a reporter my requests are being dealt with in the same way and under the same laws as any member of the public. There is not, and nor should there be, special treatment for the requests for information of one individual over another. Certainly there should not be a legislated difference in how we are all treated.

Open Government

The idea of open government is something tied to the ATIPPA but not confined by it. I think there is real potential to reduce the number of formal requests currently being dealt with under the Act.

It is something that perhaps could be contributed to by full-time access to information co-ordinators.

Many access requests are being made for documentation created with the intent of oversight, for the public good. Regular disclosure on a public platform of the most requested of that information could reduce the number of access requests being filed by members of the public.

For example, when government members and employees travel outside of the province, they file claims for their expenses with receipts. What if expense reports for travel outside of the country were automatically posted by the given department within even three months of the return date?

These cases of international travel are often touted in press releases prior to their taking place. If there is time to make the expected benefits clear, why not also the costs?

Standing barriers to access can be sometimes torn down with open government initiatives. This includes the barrier of processing costs on access to information requests.

As an example, earlier this year I went looking for all of the election contribution records from the City of St. John's dating back to the early 2000s. While more recent years have seen information posted online, not all were available.

When the information was originally being accepted from candidates, it was provided in handwritten documents, with contributor names scrawled in pen on form sheets. Now, in some cases the names and information were difficult to read, but the city did not waste time trying to transfer and interpret the data and then charge me for that. They produced all of the documentation, at least 100 pages, free of charge and within a week's time.

That's access.

Even if I had paid for the photocopies, let me have the option to do as much of my own work as I can. Let me put in a little sweat equity and if I need clarification or have further questions, I will come back to you.

That information was used for a recent series of stories, looking at contributions to campaigns from a specific company. They will be used again soon, in another project. And, as I have digitized them — thrown them into an Excel spreadsheet- they are now available at The Telegram for any and all other investigations we may undertake going forward.

Posting responses online

I should say I believe that I, as a journalist, have greater access to information on the activities and business dealings of the Newfoundland and Labrador government than I did even a year ago. And the posting of completed requests online is the reason.

And as with all information, you never know when and how that posted information might become relevant.

When I went looking at how the provincial Department of Transportation and Works handled paving contracts, generally speaking, in the past few years, I spoke with a contractor who was actually able to direct me to communications between himself and department representatives. The communications had been posted in response to an access request. He was not identified in the posting. His name was blacked out. But he could quite easily direct me to it and felt comfortable doing so.

And it helped, as I sought to learn more.

However, while more information is being posted online than ever before, the hunt for a specific piece of relevant information can still be a challenge. Try pulling up the previously mentioned OIPC news release on delays in responses to access to information requests, without having the date of that release in hand.

In his book “Informing the News” (2013), Thomas Patterson writes about the importance of the public having basic facts in hand. He uses the topic of the fallout from a 2004 report of the discovery of bovine spongiform encephalopathy, mad cow disease, in Washington State.

“Mad cow is a horrific disease,” he writes. “It eats away at the human brain, as reporters regularly reminded their audience. But what kind of risk does it pose? According to the Centers for Disease Control and Prevention, a total of three Americans have died from the disease during the past decade – one each in 2003, 2004 and 2006. Each week, 15 times as many Americans choke to death on food particles. The chances of dying from plain old food poisoning are about 10,000 times greater than the odds of dying from mad cow disease.”

Such basic facts can be produced through access to information requests. And if a minister — now often said to be the sole spokesperson for a given department — is new, or uninformed on a given topic, it is only through documentation that these basic facts are conveyed.

On privacy

Too often there is talk of freedom of the press, of freedom of information, of open access and transparency and too little there is practice of the same.

Cummings stated: “I am convinced that public bodies are forced to contend with requests that are made in bad faith; have no legitimate value; are confusing, repetitive or constitute an abuse of process.”

Well you know what? I believe, for the most part, the same thing. And those requests will always come around.

But I do not believe a decision as to whether or not there is an abuse of process should lie with the individuals being asked to fulfil them.

I also do not believe it is any of the government's business as to the purpose of my request. And you have no idea as to the value.

I recently contacted a federal government agency, the Office of the Superintendent of Bankruptcy, in regards to a local bankruptcy case ongoing for a decade now. I was told a complaint in regards to that case was under investigation by the Office. I wanted to know if a complaint had indeed been filed and if the Office was responding with an investigation.

I was directed to a general contact line. There, I was asked by a nameless person for my name and contact information. I was asked if I was a reporter. I was asked for the name of my publication. Then, I was asked if I was writing a story on the subject. I was asked when it was expected to be published. I was asked what the story was about and why I was looking for response from the Office.

I was asked who I had spoken to for the story.

I refused to respond to the latter questions.

I was ultimately told, days later, investigations by the Office are not a matter of public record.

Why that response required the time and the many earlier questions as to my intent, I couldn't tell you.

Just some food for thought.

The independent irritant

In his book "A History of Investigative Journalism in Canada," Cecil Rosner, a Michener and Gemini Award winner, provides some background on the access legislation at the federal level. He tells the story of Ken Rubin, who is the kind of person I believe was targeted with some of the last changes to access and privacy legislation here.

Rubin is described as a researcher acting in the public interest, citizen's advocate and civil libertarian. He was filing access requests before the federal legislation was even enacted and, Rosner writes, has filed more than 20,000 formal requests for documentation held by government. Every time he finds something of interest, he gives it up to interested individuals and public interest groups, or sells it.

He sent more than 400 Access files to the Information Commissioner in the first 10 years of the Act and took part in 30 federal court actions to challenge refusals.

Surely Rubin was nothing but an irritant, a drag on the system and someone properly written legislation and regulations could have dealt with, so as not to cost the public purse precious time and money.

But what was the result of the work?

As Rosner states: "If a startling story based on Access documents appeared in the media, more often than not the request had originated with Rubin. Among his favourite discoveries in his first decade were the following:

- Proof that pressure from lobby groups and industry was involved changing nutritional recommendations in Canada's Food Guide.
- Documentation showing how the Canadian government, in an effort to protect the domestic asbestos industry, tried to dissuade the U.S. Environmental Protection Agency from a ban on asbestos products.
- A ministerial briefing note showing the Pentagon had approached Ottawa to test an advanced version of the nuclear cruise missile in Canada, at a time the proposal was unknown in the country.
- Disclosure of a Transport Canada audit of Air Canada in 1988 revealing serious concerns, including careless maintenance.
- Documentation showing the federal Health Department ignored warnings about potential dangers of Meme breast implants, which were finally withdrawn from the market in 1992."

The man worked with reporters at times. Over decades, he fought for access to meat inspection reports from Agriculture Canada and pried free executive committee meeting minutes of the Canada Mortgage and Housing Corporation board.

People like Rubin, paired with strong access legislation, advance the public's insight into, and understanding of, government activities.

In my opinion, the door should never be slammed in their faces.

The why

And then there are the reporters. Ask any working journalist — they've at some point been faced with that question: why do you want to know anyway?

In the discussion around ATIPPA, I think it's important to make the point most of us are not very interested in the ebbs and flows of political parties. We place no stock in the successes and failures of well-known individuals, but are instead fuelled at the heart of it by a concern for the public good.

For me, it has always been about avoiding disaster. Anyone who has read a final report from an official Commission of Inquiry or an accident report from the Transportation Safety Board will know there are usually many causes when a tragedy strikes. The combination of a dozen different things came together to cause the event, and any one of them might have been spotted beforehand, potentially avoiding the end result.

Here's a more concrete example.

At one point in "The Human Factor" (2004), engineer, professor and consultant Kim Vincente looks at the E. Coli outbreak in Walkerton, Ont. The outbreak in May 2000 was rooted in contaminated wells and, through the water supply, hit a town with a population of about 4,800.

Seven people died and an estimated 2,300 became ill.

The town water system was the direct responsibility of the Walkerton Public Utilities Commission (WPUC) under general manager Stan Koebel, who reported to the provincial Environment and Health ministries. His brother was the foreman. The WPUC staff were required to take daily chlorine measurements. An independent lab completed more detailed water testing.

In some cases, the WPUC failed to take measurements as required. In others, tests were completed but not at the designated testing spots or labelled as required. On some days, reports from the independent lab testing were not read right away, including the first days of the E. Coli contamination. After reading the lab report showing contaminated water, Koebel did not immediately disclose the contamination.

The affected wells were operated, at times, in violation of government policy. One affected well in the outbreak did not have a chlorinator running. The wells were shallower than they should have been. The Koebels had not received any specialized training before being certified as water system operators.

Problems had been discovered in the past by provincial-level overseers, but left without direct action, on the reassurances from the Koebels they would be addressed.

The earlier discovery by the provincial Ministry of the Environment at the WPUC was surprising, given the affect of budget cutbacks dating to the mid-to-late 1990s, Vincente writes. “In a two-year period between 1996 and 1998 alone, the [overseer’s] budget was cut by over $200 million, with a consequent staff reduction of over 30 per cent (more than 750 employees).”

It meant fewer employees and site inspections of communal water resources.

Beyond all of this, the provincial ministry was criticized for not getting a boil-water advisory out fast enough or widespread enough when the outbreak hit. And the mayor did not immediately take direct action, with their role somewhat uncertain.

SO- what does all this have to do with anything here? Well, I wonder if the outbreak would have occurred if a local reporter had taken an interest in town water systems and checked in at Walkerton. What if a Joe Public, irritated by the change in taste of their water as the chlorine came and went, requested more information? What if an Opposition member delved into frontline changes at the Environment ministry as a result of budget cuts?

What if anyone had asked for more information?

As a side note, the inquiry launched to determine what happened in Walkerton involved as many as one million pages of documentation from the Ontario government alone, scanning 200,000 pages into an online database.

Why was it done? Because it was the public's right to know.

Bringing it all back home, I have nightmares over the many, many things being missed within this province on a daily basis.

I think more eyeballs on what might be considered standard, factual information can only be a good thing.