Submission to
Independent Statutory Review Committee on
Access to Information and Protection of Privacy Act

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"Nothing could be more axiomatic for a democracy than the principle of exposing the process of government to relentless public criticism and scrutiny." (Francis E. Rourke, US author and political science professor, 1960.)

Introduction

I welcome and appreciate this opportunity to make a submission and present to this Independent Statutory Review of the Access to Information and Protection of Privacy Act.

I want to thank all the individuals and organizations for their submissions to this Review Panel. In preparing for my own submission I have read and/or heard several of the submissions/presentations and found them all to be instructional, informative and insightful. I shall return to some of those submissions later.

Let me also take this opportunity to thank all three of you on this Review Panel. Your collective background, knowledge and experience allows for an expert, thorough and comprehensive review of this Province`s access to information legislation and framework with a view to making it the best in the world.

You have an important task ahead of you. I am hopeful. Newfoundlanders and Labradoreans are hopeful. I will anxiously await your report.

The Reasons for and Nature of My Submission

When this Independent review Panel was announced in March of this year, I immediately committed to making a submission with respect to my views on **Bill 29** and the resulting amendments to the **Access to Information and Protection of Privacy Act (ATIPPA)**.

My reasons for coming forward as an ordinary citizen to make a contribution to this review are the following:

1. I am an ordinary citizen who believes that the very essence of true democracy is an informed, engaged and participatory citizenry;
2. I believe that the highest degree of 'access to information' is an essential and fundamental element of such a democracy;
3. As an ordinary citizen, I am extremely concerned and upset at this government, both for the process and intent of Bill 29 and for its stance and attitude towards true openness, transparency and accountability;
4. As a parent, a former educator and a community leader, I have been and will continue to be a generally informed and engaged citizen in the democracy of my province and my country, and feel I must lead by example and stand and be heard on Bill 29, on the Access to Information and Protection of Privacy Act and on the general state of the 'right to information' under which we presently exist.

At that time, I had envisioned my submission focusing on the specific regressive aspects of Bill 29 and the overall loopholes and deficiencies in the legislation along with recommendations and suggestions for change.

Luckily and thankfully, I have been relieved of that worry and responsibility but only because of some excellent submissions already made.

In terms of expert, comprehensive analysis and specific, cogent recommendations, I believe the submissions by Mr. E.P. Ring of the Office of the Information and Privacy Commissioner and the Centre of Law and Democracy (presented by Mr. Michael Karanicolas) were superb. I also wish to note that the submissions by both opposition parties provide much by way of analysis and recommendations.

Admittedly, their analyses and recommendations go way beyond the core group of issues I would have raised but I am more than pleased and confident that my issues are reflected by them and on the record.

Let me also say, unequivocally, that I support and endorse the general thrust of all their recommendations to strengthen our Access to Information and Protection of Privacy Act.

My submission then is somewhat general in nature. While a major focus is my absolute anger and frustration with this present government's attitude towards the very principle of the right to information (RTI), I hope to comment generally on the importance of real openness, transparency and accountability and RTI in a true democracy. I also hope to comment on some general principles of effective RTI legislation and then raise two specific concerns I have not seen reflected in submissions to this panel.

Scepticism about Government's Motivation for Review

I think it is important to note that this Act (***Access to Information and Protection of Privacy Act*, SNL2002, c. A-1.1**) first came into force on January 17, 2005 (with the exception of the Protection of Privacy provisions in Part IV). The Act did provide for a statutory review to take place not more than 5 years after coming into force and every 5 years thereafter.

The first review took place in 2010 and the resulting amendments came into force via the infamous Bill 29 on June 27, 2012. In a press release dated March 18, 2014 and under the title of "*Open and Accountable*," the Honourable Premier Tom Marshall ordered this present review.

This review, then, is essentially happening almost two (2) years earlier than statutorily required.

This fact along with various other actions and attitudes of this present government prompts me to express my views on its intent and motivation to suddenly embark on this review process. My comments on this matter may seem to some as being irrelevant or superfluous to the intent and purpose of this Review. I disagree.

Access to information is important. The ATIPPA is important. This statutory review is important. I have every faith in the expertise and integrity of this review panel to fulfill its obligation to complete an independent and comprehensive review of the Act and the amendments arising out of Bill 29. I have no doubt with respect to the legitimacy, sincerity and the intent of the many individuals and organizations that have made some very cogent and insightful presentations to this Panel.

This Review is not simply some scheduled, perfunctory, isolated event. It was precipitated by our present government as a response to the backlash from citizens to Bill 29 and the resulting amendments. The report this distinguished panel will write will go back to this government. While the writing of the report will not be affected by whatever the real or perceived motivations of government or by my comments relative to those motivations, nevertheless, public discourse about government`s motivations and intentions are necessary in terms of the broader and ultimate goal of improving and enhancing the 'access to information' framework in this province.

I have commented on this matter before this Review was established. I will comment on it after your work is done. I choose to use this forum to comment now.

In the first instance, Bill 29 was rammed through the people's House of Assembly. It was unexpectedly introduced on June 11, 2012. The Bill was debated (a debate the present Premier referred to as "*a waste of time*") in the longest filibuster in the history of the House of Assembly. Despite assurances to the contrary, on June 14th the Government House Leader invoked closure and the Bill was passed. It received Royal Assent on June 27, 2012.

When Bill 29 was first unexpectedly introduced, it was done so ostensibly under the guise to "*enhance*" and "*strengthen*" the legislation in the public interest. To quote the Minister of Justice and Attorney General of the day, Felix Collins, in his news release announcing the Bill: *"The cornerstone of the Access to Information and Protection of Privacy Act is openness, transparency and accountability and our government is committed to this important piece of legislation."*

However, the government's view of its intent and content with Bill 29 did not coincide at all with the public view. In fact, the Bill was met with immediate and visceral opposition from many quarters.

Individuals, opposition parties, local and national media and journalists, and well-respected civil society organizations (such as Democracy Watch and Centre for Law and Democracy) were all quick to condemn Bill 29 as regressive and a weakening of the 'access to information' framework in the province. The following is a sample of some of those expressions of condemnation:

> *"I think it is the biggest step backward in access in recent memory."* [Fred Vallence-Jones, journalism professor, University of King's College and lead for the Canadian Newspaper Association's Freedom of Information Audit.]
>
> *"This government has finally tipped its hand. It wants to restrict the flow of information to the opposition, the media and the public, so as to avoid political embarrassment or let anything slip about Muskrat Falls."*[Pam Frampton, Telegram Reporter, June 23, 2012]
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> *"The proposed amendments to Newfoundland's Access to Information and Protection of Privacy Act contained in Bill 29 significantly weaken the legal framework by extending the exception regime, limiting the power and efficacy of the Information and Privacy Commissioner, and excluding practically all cabinet documents from disclosure. At a time when the right to information is on the march around the world, Newfoundland's proposed legislative changes present a dramatic step backwards for that jurisdiction. "*[Michael Karanicolas, Centre for law and Democracy, June 2012.]
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> *"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, June 2012.]
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> *"It [Bill 29] goes against what the trend is across the country which is towards more openness. Instead this is towards more excessive unjustifiable and undemocratic secrecy." "There are more loopholes, more exemptions to disclosure of information and they are weakening enforcement as well. When you do this, it's a double whammy that*

leads to excessive, unjustifiable secrecy at a greater level."[Duff Conacher, Democracy Watch, as reported by CBC News, June 12, 2012.]

Even former members of the governing party have come clean and publicly stated their difficulties with and opposition to Bill 29. Tom Osborne was the first:

"The party has a very well-oiled machine and any time something happens that the premier or the government need to be defended, we would all get pins and e-mails telling us what to say and how to say it and how to defend the premier." "....chafed under the government's centralized control and regrets voting for contentious Bill 29 last June." [Tom Osborne, former PC caucus member, as reported in Globe and Mail, September 13, 2012.]

Paul Lane was the second and said the following with respect to his new-found understanding of the definition of a secret cabinet document:

"I am big enough to stand here today and say a mistake was made and that part should be changed." [Paul Lane, former PC caucus member, as said on NTV interview, January 20, 2014.]

One of the early benefits of this Review is that it has provided some detailed, expert and objective corroboration of, not just the hidden flaws, but the hidden intent of this government with respect to Bill 29. The submissions of the Office of the Information and Privacy Commissioner, the Centre of Law and Democracy, the two Opposition Parties, James McLeod of the Telegram, Ashley Fitzpatrick of the Telegram contain some pretty relevant and factual information that counter this government's claim and spin on Bill 29 and substantiate the concerns and claims of its many detractors.

Here are but two examples from the Office of the Information and Privacy Commissioner's submission:

"Despite Mr. Cummings' recommendation, the Bill 29 amendment expanded the cabinet confidences provision to a degree of breadth unprecedented in Canada. The list of cabinet records was expanded to match the Management of Information Act as per his recommendation, but the substance of deliberations test was omitted entirely, and the language of the exception changed from withholding information within a record to withholding an entire record." [Page 15]

"We are not aware of any incidents which may have led to the decision by government to pursue this whittling away of the Commissioner's jurisdiction. We know of no rationale as to why the government chose to work through the courts and the legislature to ensure that the Commissioner's oversight role was removed in relation to these provisions." [Page 15]

> *"Of the 14 jurisdictions in Canada with access to information legislation, only in this Province and New Brunswick does the Information and Privacy Commissioner not have the power to review claims of solicitor-client privilege."* [Page 52]

> *"One of the notable features of the post-Bill 29 version of section 18 is the unique role of the Clerk. Section 18(3) and (4) gives the Clerk a final decision-making role – the Clerk's certificate stating that a record is an official cabinet record is "conclusive of the question." The Clerk is given tremendous authority to make such a determination, and his or her role in this access to information provision is unprecedented in any jurisdiction of which we are aware. "*[Page 57]

So, what was Bill 29 all about? What was government's real motivation and intent in passing Bill 29 and then suddenly establishing this Review?

Perhaps unintentionally and inadvertently, the Information and Privacy Commissioner, Mr. Ring, somewhat broached these questions. On page 2 of his submission, he comments as follows:

> *"In 2014, we received a strong and unambiguous message from this government that they were listening. After the dramatic misstep of Bill 29, both in process and in substance, it seems that government realized its mistake, and they are now taking tangible steps to increase transparency and accountability through efforts like the Open Government initiative, as well as this ATIPPA review process."*

Mr. Ring is partially correct on one point. Bill 29 was a mistake in both process and substance.

However, it was not a misstep (which implies an innocent, unintentional error) but a calculated, intentional, and purposeful attempt to hide information and weaken the people's right to information. And it is not a coincidence that this attempt to reframe ATIPPA to give more latitude and control to government in denying information to MHAs, media and citizens is happening in the context of Nalcor and the Muskrat Falls project.

In as much as the establishment of this Review is the correct and proper decision, it was not made because government 'realized its mistake' or is 'listening.' It is not the result of some real, genuine, 'on the road to Damascus' change of heart on Bill 29. It is more like a crass, self-serving, hypocritical political decision made 'on the road to low polling numbers.'

Despite this government's intentions and motivations, this Review is legitimate and important. Because of those intentions, though, it is even more critical that this Panel complete its thorough and independent review of ATIPPA, including the amendments resulting from Bill 29

and make recommendations that will truly make this province's access to information legislation rank among the best in the world.

Should this or any other government not respond properly and adequately to your final report, then you will have provided the 'rod to beat the back' of that government.

Openness, Transparency and Accountability and the Right to Information

"The overarching purpose of access to information legislation … is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry." [Gerard LaForest, former Supreme Court of Canada Justice, in Dagg vs. Canada (1997).]

Openness, transparency and accountability are democratic values held in high regard by all citizens. They are also values supposedly espoused and promised by politicians who seek to be elected and political parties who seek to become government. You will find platitudes and promises of openness, transparency and accountability in most, if not all 'blue,' 'red,' or 'orange' books.

But something happens on the way to power and the fervour and zeal expressed for these values before attaining power never seems to be matched in practice after. In this regard, Newfoundlanders and Labradoreans have been victimized twice in recent years as both this present federal and provincial governments subject us to regressive and restrictive access to information practices. This would all seem to give rise to a new pejorative acronym, **NIMG or Not In My Government**, to describe a political party`s false promise of an open, transparent and accountable government until it actually forms government and then reneges on that promise!

Open, transparent and accountable government is not possible unless citizens have the fullest possible right to access to information. Not having that fullest possible information renders our public discourse and our participation in democracy meaningless and ineffective and, thereby, prevents citizens from holding their governments to account.

Thomas Jefferson said that *"information is the currency of democracy."* If this is true, then we must ensure that a citizen's right to access to information is defined, assigned and enshrined.

I know that other submissions have addressed the matter of the nature of the right of citizens to access to information held by governments. In fact, I watched a very spirited debate between Mr. Wells and Mr. Karanicolas of the Centre of Law and Democracy on the matter of the right to access to information was a 'human right.'

Not that I necessarily want to revisit that debate but while I might agree that the right to access to information may not be quite the same priority or stature as certain legal and/or personal security human rights, I support the view that access to information is a human right.

Research shows that, increasingly, more and more entities are referring to access to information rights as 'human rights.'

> *"Recognizing the fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency, [we declare that]...the right to access information held by public authorities is a fundamental* ***human*** *[writer's emphasis] right which should be given effect at the national level through comprehensive legislation (for example, Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions."*[UN Special Rapporteur on Freedom of Expression, 2004.]

The United Nations is the pre-eminent global body that would maintain that access to information is an integral component of the general category of human rights. In the view of the United Nations, all these rights are *"all related, interdependent and indivisible."* That view is not only expressed in Article 19 of the UN Universal Declaration of Human Rights but in other conventions and instruments such as the Convention Against Corruption, General Comment 34, and the International Convention on Civil and Political Rights.

As well, there are other global regional bodies, such as the European Union which has various conventions and charters that proclaim the right to information as a fundamental human right.

At the very least, the right to access to information should be considered as a fundamental 'constitutional' right. According to Right2Info (http://www.right2info.org/), some 59 countries now have the right of access to information protected by their constitutions. According to this group, 53 and arguably all 59 provide an 'express' right to information and documents while the top courts for some additional countries (including Canada) have interpreted their constitutions as providing an 'implicit' constitutional right to such information.

A 2009, as part of Right to Know Week, a Legal Panel: Democracy, the Right to Information and the Role of Legislation, saw a paper presented by Vincent Kazmierski, Assistant Professor and Undergraduate Supervisor of Carleton University's Department of Law, which provides some interesting information on Canada's constitutional relationship to the right to access to information.

His article is titled: "Something to Talk About; Is There a Charter Right to Access Government Information?" and makes a strong argument that sections 2(b) and 3 of the Charter of Rights and Freedoms can be interpreted to protect such a right.

His paper can be found at:
file:///C:/Users/Ken/Downloads/Vincent_Kazmierski_Something%20to%20Talk%20About.pdf

I was intrigued to read in this paper of the historical fact that the Special Joint Committee of the Senate and the House of Commons charged with considering the draft provisions of the *Constitution Act, 1982* actually considered a motion to enshrine such a right in the Charter. The actual wording of such a motion was:

> *"Everyone has a right to have reasonable access to information under the control of any institution of any government."*

In his article, Kazmierski noted that this motion was defeated by a Committee vote of 14 to 10. But he quickly went on to say that this rejection to the inclusion of the right to access government information in the Constitution was not absolute and provided the following quote from the Acting Minister of Justice, Robert Kaplan:

> *"… I want in closing to concede that at some point in our history when this is legislated, when some other piece of legislation is legislated, it might very well be down the road in the development of our constitution, once the basic concept of freedom of information is developed, as they are in the process of being developed now, to talk about entrenchment…"*

Whether we consider the right to access to government information as a human right, a constitutional right or a statutory right, it is clearly a right very highly valued by all citizens and one that is fundamental to a truly participatory democracy. The following quote from the Organization of American States general Assembly resolution in 2003 best sums up the importance of this right to the proper functioning of democracy:

> *"Access to public information is a requisite for the very functioning of democracy, greater transparency, and good governance and that, in a representative and participatory democratic system, the citizenry exercises its constitutional rights, inter alia, the rights to political participation, the vote, education, and association, by means of broad freedom of expression and free access to information."*

Fundamental Principles of Access to Information Legislation

While I stated that I had relieved myself of the dual responsibility and task of commenting specifically on the flaws and shortcomings of Bill 29 and recommending amendments to ATIPPA, I do want to make reference to some general principles with respect to access to information legislation. Once again, I am not re-inventing the wheel here but merely referring to three (3) particular expert and reputable sources that I think reflect the best in such legislation.

The first comes from the Commonwealth Human Rights Initiative (CHRI), an independent international NGO dedicated to the practical realization of human rights in countries of the Commonwealth.

The source can be found at the website pasted below and suggests the following principles:
http://www.humanrightsinitiative.org/programs/ai/rti/articles/RTI%20Paper%20-%202005%20Ombuds%20Conf.pdf

- Maximum Disclosure
- Minimum Exemptions
- Independent Appeals
- Strong Penalties
- Proactive Disclosure
- Simple, Cheap Access
- Effective Monitoring & Implementation
- Meaningful Power and Role of an Ombudsman/Commissioner

The second source is another NGO called Article XIX (after Article 19 of the UDHR) registered in the UK and dedicated to defending the right to freedom of expression. In a background paper on Freedom of Information, dated December 2007, nine (9) principles were enunciated. The entire paper can be found at the website pasted below with the following principles:
http://www.article19.org/data/files/pdfs/publications/nepal-foi-background.pdf

- Maximum Disclosure
- Obligation to Publish
- Promotion of Open Government
- Limited Scope of Exceptions
- Costs
- Open Meetings
- Disclosure Takes Precedence
- Protection of Whistleblowers

The third and final source is a resolution put forward by Canada's information and privacy guardians in October of 2013. This source should be quite familiar to Ms Stoddart as she is one of several signatories to the resolution along with NL present Information and Privacy Commissioner. The information can be found at the website pasted below and I will not bother to repeat here the text of the resolution that speaks to the right to information.
http://www.article19.org/data/files/pdfs/publications/nepal-foi-background.pdf

Two Remaining Issues

There are two (2) issues that I have not heard or read about in any of the submissions to date. To be honest, I am not sure if either is presently covered in the ATIPPA or some other Act or whether it either is an issue that can even be addressed in ATIPPA or other Act. Consequently, I simply want to raise them in the hope that this panel will consider them. These issues are:

1. Information contained in out-of-court settlements that may have non-disclosure provisions. I am thinking here of some out-of-court settlements in the late 1990s where the government was negligent in renewing contracts and/or applying the Public Tendering Act. I recall the Telegram looking for information in the public interest and being denied because of the non-disclosure provisions. I am not sure if the information was ever released. I may be wrong here but if a government can hide information with respect to the negligent manner in which it conducted the people`s business and/or the resulting payout of taxpayer's money in an out-of-court settlement, then that seems to me to be an affront to right to access to information.
2. Duty or requirement to document. I am thinking here of recent situations of cabinet shuffles where Ministers took charge of new departments without the usual practice of producing 'briefing notes.' Then there was the more recent controversial Trans-Labrador paving contract where the Minister responsible claimed there was no paper trail with respect to the releasing of the contract and the bond. No matter how strong access to information legislation is, if Ministers and other government officials can simply avoid creating documentation, then any legislation can be rendered meaningless.