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

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Introduction:

The context of my experience informs my comments to follow.

I served as ministerial staff until 2003 in several department in the Grimes administration while ATIPPA was originally drafted and passed in the House. As part of my position, I received training as an ATIPPA coordinator although the legislation had not yet been proclaimed in anticipation of fulfilling that position when the legislation was proclaimed.

In 2007 I was again involved in ATIPPA but this time from the other side. I became a staffer with the Opposition Office and FOIs became a key tool in obtaining information. On behalf of MHAs and outside organisations upon request, I have issued too many FOIs to count.

I was also the lead Opposition Office staff analyst for the debate and filibuster surrounding Bill 29. I drafted the amendments which drove the filibuster until government finally forced a close to the debate.

Outside of my service with Premier Wells, I consider that work to be of the work I am most proud of in terms of serving the broader public interest.

While I'm no longer employed by any government agency, I continue to consult on FOIs by private agencies, primarily medical patient groups, seeking government information.

I have seen the evolution of ATIPPA administration over time from inception to present day. It is those experiences and observations on which I base my opinions and my conclusions. Keep in mind that I am not a lawyer so my perspective tends to be from an operational point of view. I have experience but I'm not a legal expert.

I'm going to divide my comments into sections:

1) How We Arrived Here
2) Government culture respecting ATIPPA
3) Specific recommendations
4) General recommendations

I will try to avoid repetition with prior presenters although I will point out where I support their conclusions

Section 1 – How We Arrived

There is no doubt in my mind that we are here because of the public controversy surrounding Bill 29. And the roots of that controversy has to do with the botched consultations roughly 5 years ago.

There were several reasons why those consultations and successive events became problematic. And I mention these so that we can learn from that and avoid making the same mistakes.

As far as the public was concerned, there were no problems with the ATIPPA regime at that time. So when Commissioner Cummings announced his hearings, there was little interest and very little public input was offered. This was interpreted as the public "didn't care". Later events showed that this was not the case. The non-controversial nature of ATTIPPA at the time combined with a low-aggression consultative process meant the whole issue largely flew under the radar. Public discontent came later.

It is my view that the previous consultative process, subsequent recommendations and the resulting Bill 29 was driven by bureaucratic interests rather than the public interest.

The selection of a former Deputy Minister of the Department of Justice was significant as that particular department has been demonstrated to be an extreme example of a black hole of information where documents seldom see the light of day. To engage a former deputy minister of the department of Justice as a sole commissioner was going to lead to difficulties.

The OIPC was restricted and largely eliminated from meaningful participation in the review and the Commissioner has already covered that issue.

Once the report was completed, then the real work began. Over a period of approximately 18 months, it was reported to me that the Cummings report was shopped though the senior bureaucracy for several rounds. Each round, departments added more and more information restrictions on top of the already substantial information restrictions included in the original report.

It was the aggregate of the original report recommendations along with the information restrictions wish list of public bodies that led to Bill 29.

I will not get into a discussion the critical issue of balance of the public's right to information on government administration and government expenditures against government's right to hold confidential the essential information of cabinet's decision making processes, personal information and critical third party information. You know and understand that issue much fuller in legal detail that than I ever could.

But I would argue that the previous consultative process disrupted that balance. Rather than respecting the onus to provide information unless there is a good and sufficient reason to hold it confidential, the burden was shifted to holding it confidential unless the consequences of release were effectively trivial as decided by the public body representative.

The consultation process was flawed from the beginning. Recommendations were presented as a fait accompli seemingly out of the blue except in retorspect. Then these recommendations were reinforced by a second set of secret consultations within the senior bureaucracy. In the end, Bill 29 was a product into which there was little, if any, input from anyone but those who held a direct interest in the way information news released or retained.

Section 2 – Government culture respecting ATIPPA

There has been a significant and substantive evolution since 2002 in the way that public bodies view ATIPPA and how they administer it.

This province is not different from most Canadian jurisdictions in gradually evolving from a paternalistic view of information to a more open view. Premier Peckford brought in the first modern access to information legislation in 1981. Since that time we have seen several iterations and reviews, generally creating a more open environment each time.

Until Bill 29, that is.

It's considered as given among political scientists that Canada and provinces have seen a steady erosion of public accountability and responsibility by elected officials. It used to be said that we had a system of **responsible** government where ministers were **responsible** for the actions of their departments and were **held accountable** for them.

Frankly, those days are gone. In general, the House of Assembly has been reduced to an exchange of talking points concluding with a legislative rubber stamp.

Where political responsibility fails, legal and legislative responsibilities to fill the role of managing responsible information release. One is the ATIPPA legislation.

In 2002, I took the training provided to prospective ATIPPA coordinators within government. At that time the basic principles and intention of the legislation were made clear to us:

- All information requests were to be dealt with expeditiously and informally where at all possible

- The FOI process was a second choice option where the information provided was not satisfactory to the requestor

From that time in 2003 to when I reacquainted myself with the FOI process in 2007, I saw a sea change in approach to the treatment and administration of FOIs.

There were growing numbers of cases where routine information requests were no longer dealt with informally and expeditiously. Instead, routine requests were increasingly referred to the FOI process.

FOIs were no longer the last resort for provision of information; instead they became government's preferred means of information provision regardless of the originating request. That applied to private persons, organisations, the media and especially anyone perceived as a critic of government.

I can't speak with certainty to why this happened. I'm not sure if it was a result of the particular character of that government of the day or if the same would have happened to any government. But I can say that I found the trend was unmistakable.

Provisions of the ATIPPA legislation was increasingly used to prevent or delay the provision of information rather than facilitating it.

For some people a "question chill" developed where it was simply not worth making routine requests because there was too much paperwork and it took too long. The *Duty to Assist* an applicant specified in the legislation became a meaningless statement. Instead, information requests were viewed as threatening.

Access to information legislation has little value unless there is a culture which values information access and release. Bureaucratic organisations have a reflexive instinct which values information retention over information release. Events celebrating *Right To Know Week* is woefully inadequate in changing that culture.

Political embarrassment should never be an excuse to hold information but there are too many cases where it is.

For insight into the culture of secrecy which prevails in government, you need look no further than the House debate on Bill 29. A common theme from minister after minister was umbrage that the people of the province, or the Opposition MHAs elected to serve them, sought access to information which Ministers thought belonged to them. Hansard is full of remarks along the vein of "keep your hands off our information, get your own". You can't escape the impression that they have no idea that this information was

produced at government expense and is owned by the public; they are mere custodians.

I believe that the low point was one day in Question Period when the Premier of the day in refusing to answer yet another question from the Opposition, suggested that the Opposition should submit an FOI instead.

Part of the culture of secrecy is the culture of delay. I will deal with that issue in my specific recommendations.

Specific provisions to address:

Definitions

2.(q) "record" means a record of information in any form, and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium;

- This has become a problematic clause as government has refused access to computer data on the grounds that it is a computer program. I'm sorry to say that the Information Commissioners has frequently accepted the government position.

- The issue is that the distinction between data and program is blurry. Spreadsheets and databases can be defined as programs or data or both. This is an example where the legislation does not reflect principles of computer science even as it tries to define them.

- This clause needs to be clarified to distinguish between computer programs and computer data.

Right of Access

7.(4) The right of access does not extend

(a) to a record created solely for the purpose of briefing a member of the Executive Council with respect to assuming responsibility for a department, secretariat or agency; or

(b) to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the House of Assembly.

(5) Paragraph (4)(a) does not apply to a record described in that paragraph if 5 years or more have elapsed since the member of the Executive Council was appointed as the minister responsible for the department, secretariat or agency.

- Mr. Sean Murray dealt with this matter in detail yesterday and I fully agree. The briefing notes in question are generally contains facts, backgrounds and identify questions and answers. They are not direct decision-facilitating documents nor do they relate to cabinet decision processes.
- This provision should be dropped or limited

Access to records in different or electronic form

10. (1) Where the requested information is in electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant where

(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and

(b) producing it would not interfere unreasonably with the operations of the public body.

(2) Where a record exists, but not in the form requested by the applicant, the head of the public body may create a record in the form requested where the head is of the opinion that it would be simpler or less costly for the public body to do so.

- Major issue for release of information with the provision frequently ignored or abused. Again, legislation behind times with respect to information/database technologies

- This is an obstructive provision with cases of deliberate efforts to make information useless. Electronic records are printed, scanned as image PDFs, then released likely as printed documents such that they cannot be analysed or evaluated with modern technological methods

Section 18 – Exceptions to Access

- Agree with OIPC that this clause is overly broad by far compared to previous definitions. It's one thing to protect "Substance of Cabinet deliberations" but it's excessive to provide a blanket cover to any possible kind of document, or facts or polls or reports or media transcripts which may or may not have fed into the cabinet process.

- At a minimum, the records should be reviewed for confidentiality by OIPC rather than simply accepting the decision of an interested body.

Section 20 - Policy advice or recommendations

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

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;

(b) the contents of a formal research report or audit report that in the opinion of the head of the public body is incomplete unless no progress has been made on it for more than 3 years;

(c) consultations or deliberations involving officers or employees of a public body, a minister or the staff of a minister; or

- Another obstructive clause. Clause 20.(1)(b) Provides for the "forever draft" effect. As long as a document is labelled "draft" it can be excluded from release for up to 3 years even while government may use it as the basis for policy and expenditure decisions. There is no clear public policy justification for this arbitrary 3 year retention

- Clause should be limited or dropped

Section 42.2 – Term of Office

- Current Term of Office of the Commissioner is 2 years. This stands in contrast with other House Officer positions:
  - Auditor General is 10 years
  - Chief Electoral Officer has no term specified
  - Child and Youth Advocate is 6 years with possibility of second 6 years
  - Citizen's Representative is 6 years with possibility of second 6 years
  - Commissioner for Legislative Standards is 5 years (renewable)
- I recommend that the Commissioner have a term length and conditions similar to the Auditor General (10 years)

General matters

Time limits

There are several provisions addressing the matter of time limits. These are mostly observed but often disregarded for no obvious reasons. A 30 day limit for response means you receive the response in 30 days. A 60 day limit for return of information means you receive the information on the 60th day. In too many cases, the limits simply blow by with no response, no information and reason for the violation of statutory limits. That is a problem which must be addressed.

Depoliticisation of the FOI system

There has been an overt and counter-productive politicisation of the process. It should not matter if a request for information to the Department of Health comes from a patient, a patient organisation or from the Opposition health critic. And yet the evidence is that these are treated differently.

My understanding is that under the federal system, they can be no interference with FOIs from ministers or their political staff. In this province, that kind of interference is standard operating procedure.

I'm not sure what the exact solution should be. However I can see a structure where FOIs are submitted to a central office where identifying marks are removed and then forwarded to the record-holding public body for processing. This need not add undue delay or complexity to the process but it should eliminate the differing levels of treatment and care which are currently endemic to the system.

Review of Public Body Decisions

I see three classes of information:

- Information that can be released routinely as a matter of course
- Information that cannot be released
- Information that may not be released due to a decision made by the public body.

Under Bill 29, there are new classes of circumstances where the public body can summarily dismiss information requests. One example is "frivolous and vexatious", currently decided by the head of the public body without possibility of review.

I believe, on principle, that there should be no case where a public body can decide to retain information based on a test without independent review. There have been too many cases where information has been withheld based on arbitrary decisions. The one that springs to mind is the issue of solicitor-client privilege where the commissioner disclosed that 75-80% of information claimed by the Department of Justice to be withheld because of client-solicitor privilege was nothing of the kind.

This underscores the importance of ensuring there are checks and balances in the system. In an ideal world, we could trust the judgement of government officials to decide what can be released in the public interest. In fact, we are a long way from that day.

As President Ronald Regan said about arms negotiations with the USSR, "Trust, but verify"

Commission Recommendation Format

One of the profound problematic issues of the last set of consultations has been the drift of the substance of consultations from inputs to final report to legislation. Government always has the right and obligation to review recommendations and accept only the ones it see fit. However it is in this Commission's interest to ensure that your recommendations are as clear as they can possibly be to eliminate, as much as possible, the drift or reinterpretation of your substantive recommendations.

Therefore I suggest that rather than presenting your recommendations in standard prose form, you present your recommendations in the form of actual legislative language amending specific parts of the legislation or in the form of completed amended legislation.

I know this is unusual for commission reports but I would point to the report of Justice Greene (Rebuilding Confidence: Report of the Review Commission on Constituency Allowances and Related Matters , Hon. J. Derek Green, Commissioner, May 2007). In that report, he not only generated an exhaustive set of recommendations, he also produced model legislation to implement them.

You should consider this approach.