



July 23, 2014

Independent Statutory Review Committee
Access to Information and Protection of Privacy Act
Newfoundland and Labrador

Please accept this as my submission to the ATIPPA review committee. I feel strongly that Bill 29 limits the amount of information available to the public and the media and, as well, tethers the information and privacy commissioner with regard to his ability to carry out the duties of his office independently. As a columnist I have often expressed my concerns about the muzzling effect of this amended legislation and, as the associate managing editor of The Telegram, I have seen first-hand how, too often, it curtails journalists' abilities to get the information they need to do their jobs and inform the public.

My Telegram colleague, James McLeod, covered all of my concerns with the legislation as it exists in his recent in-person presentation to the review committee. Accordingly I attach his written document here to act as my representation to the committee, as well.

Thanks for the opportunity to make my views known.

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ATIPPA Statutory Review

By James McLeod

The Telegram

My experience with the ATIPPA system is primarily as a user. My job is to report on government and politics in Newfoundland and Labrador. To do that, I need reliable information about what government is doing. In theory, the most reliable source of information about government activities is the records within government which document day-to-day government operations — what happened, what information was available to decision makers, and what decisions were made. In practice, my experience with the ATIPPA system is more akin to a hide-and-go-seek game, where politicians and bureaucrats try to obfuscate and I try to target my requests in a way that they can't dodge.

By way of an example, in the winter of 2014, I filed an ATIPPA request for all e-mails sent by or received by then-Premier Kathy Dunderdale during the January power outages. In response, I received 46 e-mails sent to Dunderdale from citizens during the one-week period. That's it. Implicit in the response is that the premier of the province, during a crisis situation, sent zero e-mails concerning the most important issue affecting the government during the entirety of that one-week period. The request also included all briefing materials prepared for or provided to Dunderdale during that period. I received zero records in response. I am to believe that not a single piece of paper was given to the premier concerning the power outages. I am to believe every bit of information she got about the blackouts, about the equipment failures, about the government service disruptions, all of it, was delivered to her verbally, and not a single document exists which fits the category of "briefing materials prepared for and/or provided to" Dunderdale.

I don't believe that it's within the mandate of this committee to force the premier of the province to use such a basic 21st century technology as e-mail if he or she decides to eschew it. I understand that ultimately the system is only as good as the people within the system, and even if you recommend a perfect law, and it's enacted word-for-word, it will only do any good if it's faithfully followed.

But my experience with the ATIPPA system as a frequent requester is such that I don't have much faith in the system. I'm repeatedly confronted by people who espouse the language of transparency, but always have a reason handy to withhold the specific piece of information I'm looking for.

I firmly believe that in nearly every possible situation, more information makes the world a better place. If people know more, they make better decisions. I respect that there are certain situations where the government is reticent to disclose information — in the case of cabinet confidences, for example, or policy advice and recommendations. But in the real world, in my experience, these exemptions are often used to protect the interests of individuals or groups at the cost of the greater public good. Yes, access to information policy should be about striking a balance, but I also think that in a democratic society, access to information should be seen as "the cost of doing business."

Of course policy can be developed more smoothly without any public scrutiny. But does that produce better policy? Democracy is messy, and secrecy is expedient, but I don't think that's a reason to keep things secret. The messiness is the cost of doing business in a government that truly believes in transparency. The fact that it costs money for government to fulfill requests is also part of the cost of doing free and transparent business.

With that in mind, here are some specific thoughts on how I believe the system could be improved:

1. The Information and Privacy Commissioner's office should be made much, much stronger.

With all due respect to the good people who work within the Office of the Information and Privacy Commissioner, the legislative framework they work within leaves a lot to be desired. It didn't get much attention during the Bill 29 process, but one of the only recommendations that wasn't accepted from John Cummings' report in 2011 was recommendation 21 to make the commissioner's term five years.

Why stop at five years, though? Why not make the commissioner's term 10 years with no option for re-appointment — on par with the auditor general? Another option would be to go with the Child and Youth Advocate model with a six-year term, and the possibility of one re-appointment, for a total of 12 years maximum.

Along with this, to strengthen the credibility of the commissioner's office, they should be able to review absolutely any documents within the custody of any government department or agency. No exceptions. And that power should be explicitly spelled out in legislation.

2. Further regarding the OIPC, I have had them review several of my ATIPPA requests. I have further reported on several of the reports that they have published. It's an unsatisfying process. In a perfect world, the politicians who run the government would turn over records if the OIPC found that they had improperly withheld information. In a perfect world, the threat of shaming from the commissioner would be enough. Unfortunately, that is not the case.

To make the system truly credible, there must be some mechanism within the system where an independent agent can order documents released if they find that the government has improperly withheld. Maybe that power could be vested with the OIPC. Or maybe the Act could consider a system where if the OIPC found that the government was improperly withholding information, and all other avenues are exhausted, the office is obligated to go to the courts and leave it to a judge to make the final call.

I really don't know how it should work. This is not my area of expertise. I just know that leaving it up to cabinet ministers to have the final say on what documents get released — and even what documents the OIPC can review — is a deeply flawed system, and that needs to be fixed.

3. In the same vein, the role of the courts as it relates to the ATIPPA system is currently very problematic. No citizen should have to go to court to get information from the government. Going to court is such a barrier for regular citizens that it basically puts certain kinds of recourse out of reach.

4. Exceptions need to be much more clearly defined, and much more limited. You're probably going to get an earful about cabinet confidences, and rightly so. The notion of cabinet secrecy is such that it should protect ministers so they can speak freely around the cabinet table without fear of judgement. In that room, they're entitled to say whatever they want, discuss any ideas they want, and expect it all to remain secret for at least a couple decades. But, to bastardize Daniel Patrick Moynihan, cabinet ministers are entitled to their opinions in the cabinet room, but they're not entitled to their facts.

But as problematic as cabinet confidences is, it's some of the other exemptions within the Act that really trouble me more. Currently, most of the refusals I receive relate to cabinet confidences or financially sensitive information, but it's possible to imagine employees using other exemptions as well. Section 20, for example, includes a provision that allows the government to withhold any "consultations or deliberations" conducted by any officer or employee of a public body. Taken to an absurd extreme, if somebody filed an ATIPPA request for this submission, it could be withheld on the grounds that it's part of a consultation.

Similarly, Section 24, especially (g) and (h) can be interpreted so broadly to give discretion to withhold massive amounts of information.

There's obviously a role for protecting some economic and financial information. I don't think anybody is going to argue that a journalist should be allowed to file an ATIPPA request for the budget speech two weeks before its delivered, but based on the sweeping wording of many sections of the legislation, it leaves the very real possibility that politically damaging, or embarrassing documents will be withheld based on imagined financial consequences. Even real financial consequences shouldn't necessarily be a reason to withhold documents. I can imagine a situation where the government is understating the size of the provincial deficit, and a more honest accounting could lead to a credit rating downgrade. In this hypothetical situation, should the government be allowed to block the release of information which would give people an honest picture of the province's finances on the basis that the revelations would likely have negative financial implications for the government?

And in Section 27 and 28, the government allows private corporations to help imagine reasons why information should be withheld.

The provincial government has started using sections of the Act to block access to how much they're paying for goods and services. In the case of ATIPPA file TW/39/2013, the government used the commercially sensitive information provision in the Act to keep secret how much money was paid out on a publicly tendered contract.

It's difficult to imagine which section of the Act will be used next, or how it will be interpreted to withhold information, because every individual comes as a surprise. I never would have imagined that the government would try to use ATIPPA block the public from knowing how tax dollars are being spent. I don't know what they'll block access to next, but I know that there are provisions within the Act worded broadly enough to allow them to do it.

5. Political interference

The Act should explicitly say that political and communications staff are not allowed to be involved in ATIPPA requests.

6. There should be some other way of submitting the \$5 request fee other than by cheque. This is a small point, but it's an example of the bureaucratic barriers that exist which dissuade regular people from filing ATIPPA requests. I order cheques from the bank and I know that literally the only thing I will use them on is ATIPPA requests.

These are the six issues that I hope the ATIPPA review committee will take into consideration during the study of the legislation. I appreciate the time you are taking to examine the system, and I hope that your recommendations will lead to a stronger access to information framework.

